Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/22351/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 25th June 2015	**On 29th June 2015**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

SURAJU OLANSILE RAZZAQ
(No anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. c. Avery, Home Office Presenting Officer
For the Respondent: Mr. S. Karim, Counsel, instructed by M.A. Consultants (London)

DECISION AND REASONS

History of Appeal

1. The Respondent, who was born on 2nd February 1982, is a national of Nigeria. He entered the United Kingdom on 3rd January 2009 as a student. He married Diorella Maura Davelaar on 4th December 2009. She is a Dutch national, who was born on 7th July 1977. The Respondent was granted a residence card as her spouse on 13th December 2010, which was valid until 25th March 2015.

2. A decree absolute was granted by Bow County Court in relation to the Respondent's marriage to his former wife on 29th January 2014 and on 25th March

2014 an application for a residence card was made on his behalf on the basis that he had retained a right of residence on his divorce. The Secretary of State for the Home Department refused his application on 2nd May 2014 on the basis that he had not provided any evidence to establish that his former wife was exercising a Treaty right at the time of the decree absolute. She also asserted that he had not continued to be a worker, self-employed or self-sufficient since his divorce. In addition, she said that the residence card which he had provided for his former wife was one which had been reported stolen or lost.

3. The Appellant appealed and his appeal was allowed by First-tier Tribunal Judge Morris in a decision and reasons promulgated on 9th March 2015. She said that she was assisted by the case of *Samsam (EEA: revocation and retained rights) Syria [2011] UKUT 00165* and found that it was more likely than not that the Respondent's ex-wife had been working at the date of their divorce. Therefore, he had retained a right of residence under Regulation 10(5) of the Immigration (European Economic Area) Regulations 2006.

4. The Secretary of State appealed against this decision on 13th March 2015. She submitted that there was no evidence that the Respondent's ex-wife was exercising a Treaty right at the date of their divorce and that the First-tier Tribunal Judge had not given adequate reasons for concluding [on a balance of probabilities] that she was. She also submitted that the case of *Samsam* could not be relied upon to assert that the burden of proof was reversed and that the Secretary of State for the Home Department was required to inquire as to whether the Respondent's ex-wife was exercising a Treaty right at the date of their divorce. She also asserted that the case of *Samsam* should be distinguished as it referred a situation where an applicant's rights under the EEA regulations had been revoked.

5. First-tier Tribunal Judge Pooler granted the Secretary of State for the Home Department permission to appeal on 30th April 2015 on the basis that it was arguable that the First-tier Tribunal Judge had misunderstood the ratio of *Samsam* and had also failed to give adequate reasons for finding that the Respondent's ex-wife was exercising Treaty rights at the time of their divorce.

Error of Law Hearing

6. At the hearing Mr. Avery noted that there was no evidence to show that the Appellant's ex-wife had been exercising a Treaty right at the date of the hearing and that the facts in *Samsam* were very different as the Secretary of State had granted the sponsor in that case. In addition, he noted that in paragraph 13(iii) of her determination the First-tier Tribunal Judge had said that paragraph 26 of *Samsam* related to action taken when considering revocation of a residence card but still relied upon it in her reasoning in the current case. He also relied on the case of *Amos & Anor v Secretary of State for the Home Department [2011] EWCA Civ 552* and submitted that the burden of proof did not lie on the Secretary of State for the Home Department to obtain evidence as to whether the Appellant's wife was still working at the time of their divorce.

7. Mr. Karim then replied. He submitted that *Samsam* was relevant and noted that at paragraphs 9 and 10 of her determination the First-tier Tribunal Judge set out the Respondent and the Appellant's case. He also submitted that the Judge's approach

had mirrored that in paragraph 60 of *Samsam*. In addition, he submitted that the failure by the Secretary of State for the Home Department to obtain further evidence was only one of a number of factors which she had taken into account. He also submitted that at paragraph 59 of *Samsam* the Upper Tribunal had noted that "in marriage breakdown cases, the EEA national spouse may not wish to cooperate with the non-national former family member in providing evidence of the retained right of residence. This may cause problems if the burden lies fully on the applicant in making a first application for a residence document or permanent residence. A material consideration to whether the applicant can discharge the burden of proof is whether the Home Office had previously accepted that the relevant person was working or otherwise exercising Treaty rights". In addition, he submitted that there was nothing in Amos which contradicted *Samsam*.

8. At paragraph 34 of *Amos* Lord Justice Stanley Burnton held that he "would reject Ms Theophilus' contention that the Secretary of State was required to assist her to establish her case [by producing her ex-partner's National Insurance and tax records]. The procedure before the Tribunal is essentially adversarial: the appellant seeks to show that the decision of the Secretary of State was unlawful or otherwise wrong. The Secretary of State must present the facts as known to her fairly, and seek a decision of the Tribunal that accords with the law, but to go beyond those requirements would be irrational. It would be to require the Secretary of State to take steps to prove that her own decision was wrong".

9. Furthermore, in paragraph 59 of *Samsam* the Upper Tribunal noted that an applicant may have difficulty providing sufficient evidence in marriage breakdown cases but went no further than saying that in such cases "a material consideration to whether the applicant can discharge the burden of proof is whether the Home Office had previously accepted that the relevant person was working or otherwise exercising Treaty rights". However, in the case of *Samsam* the facts indicated that the ex-wife had a permanent right of residence in the United Kingdom at the time in question, which meant that the evidential test was slightly different.

10. I also note that the Upper Tribunal referred in paragraph 59 to the applicant discharging the burden of proof and this accords with the head note of the case, which states that:

> "2. Regulation 10 of the Immigration (EEA) Regulations 2006 requires the applicant to demonstrate that: a genuine marriage has lasted three years and the couple have spent one year together in the United Kingdom and that the EEA national spouse was exercising treaty rights at the time he ceased to be a family member".

11. In contrast, at paragraph 13(iii) of her determination in this case the First-tier Tribunal Judge adopts part of the reasoning in *Samsam* which was explicitly related to an example of a case where a right of residence had been revoked and where the Upper Tribunal had found that the Home Office should make further enquires. In paragraph 13(iv) she also asserted that the Secretary of State should have made further enquiries of the HMRC or Social Security agencies. This did not accord with the law as confirmed in *Amos* or *Samsam*.

12. Mr. Karim argued that this was not fatal to the First-tier Tribunal Judge's decision as she had relied on other factors in paragraph 13. However, on closer analysis these factors were that there was a gap between August 2013 and 29th January 2014 when the Appellant did not know whether his wife had been working; he had last seen her in May 2013 and that she was due to give birth in August 2013. The First-tier Tribunal Judge speculated that the baby may not have been born or that the Appellant's ex-wife may have obtained alternative employment when he or she was born. However, these factors taken together do not provide sufficient evidence to suggest that the Appellant's ex-wife was working at the time of their divorce and it was not suggested that she was someone who had acquired a permanent right of residence by then.

13. For all of these reasons I am satisfied that there were material errors of law in the First-tier Tribunal Judge's decision and findings and that it should be set aside in its entirety. I am also satisfied that, as there will need to be a complete re-hearing, this is a proper case for remission to the First-tier Tribunal.

Conclusions:

1. The First-tier Tribunal Judge's decision and findings did include material errors of law.

2. The decision should be set aside in its entirety.

3. The appeal should be listed for a *de novo* hearing before the First-tier Tribunal.

Directions

1. The appeal is remitted to the First-tier Tribunal for a *de novo* hearing.

2. The appeal should not be re-listed before First-tier Tribunal Judge Mrs Morris.

Date 26th June l 2015

Upper Tribunal Judge Finch