Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05725/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26th February 2018	**On 6th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MISS BASHEERAT KEMI MARTINS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Yerokun (Legal Representative)
For the Respondent: Ms A Everett (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Oxlade, promulgated on 29th September 2017, following a hearing at Hatton Cross on 25th September 2017. In the determination, the judge dismissed the appeal of the

Appellant, save on the grounds that the Respondent Secretary of State must issue a residence card to the Appellant under the Immigration (European Economic Area) Regulations 2006 (hereafter "EEA Regulations"). Pursuant to the Appellant's appeal against the decision of IJ Oxlade, the matter now comes before me.

The Appellant

2. The Appellant, a national of Nigeria, was born on 22nd April 1974, and is a female. She was granted a residence card as evidence of her right to live in the UK as the spouse of Mr Rutson Puriel, an EEA Dutch national, from 20th October 2010 to 20th October 2015. On 15th October 2015, she made an application for a permanent residence card, and this was refused on 3rd May 2016, thus leading to the appeal before the Immigration Tribunals under Regulation 26 of the EEA Regulations 2006.

The Appellant's Claim

3. The essence of the Appellant's claim is that, following her divorce from her husband by a decree absolute granted on 10th July 2015, she was able to demonstrate that her EEA national spouse had been exercising treaty rights for a continuous period of five years by being in employment, and that she was a family member of such an EEA national, who had consequently retained rights under Regulation 15(1)(f). She relied upon the payslips issued to her EEA national former spouse, which were issued by Pinpoint World Services Limited. Accordingly, she had retained rights of residence on her divorce in accordance with Regulation 10(5) of the EEA Regulations.

4. The Respondent Secretary of State disagreed that this was the case. The Appellant had only been able to rely upon photocopies of the payslips. The payslips were not in the original. They were not verifiable. The Respondent Secretary of State herself had sought to establish Pinpoint World Services Limited's existence as a company from the internet. However, the only available telephone number was not answered despite multiple attempts to contact them by the Respondent. Although the Appellant had provided HMRC documents, these were not in the originals either, and photocopies were not acceptable evidence in the same way. The only documents that were accepted were the P60 ending April 2012 and the P45 dated 29th September 2014 (see paragraphs 5 to 7 of the determination).

5. In her Notice of Appeal, which was dated 18th May 2016, the Appellant took issue with the points raised by the Respondent Secretary of State, maintaining that the photocopies should be acceptable, and requiring disclosure of the multiple efforts made by the Respondent to contact the EEA national's employer (paragraph 8 of the determination).

The Judge's Determination

6. At the hearing before IJ Oxlade, the arguments were put on behalf of the Appellant both in terms of Regulation 15(1)(b), which had been raised by the Appellant in an application (at page 24); and under Regulation 15(1)(f). The judge observed that in order to establish the EEA national's exercise of treaty rights, the Appellant would

have to rely upon the HMRC letter dated 31st October 2013 (see the Respondent's bundle at page 1), to show employment with Alpha Response from 26th September 2010 to 9th November 2012. She would also need to rely upon the HMRC letter (which appears at page 4 of the Appellant's bundle) to show employment with AEJ Management from 1st November 2012 to 20th November 2014. The Appellant's former EEA national spouse had also claimed to be self-employed for the tax year 2011 to 2012 to at least January 2014, and in this respect reliance would be placed upon other evidence in the Appellant's bundle (at page 16). Also to be taken into account was a self-assessment tax calculation for the year 2014 to 2015 (in the Appellant's bundle at page 18) which showed registration for self-employment, and tax calculation (see page 17 of the Appellant's bundle) for the period 5th October 2014 to 11th April 2015. The income form AEJ showed money paid into the EEA national's bank account (see the Appellant's bundle at pages 21 to 24) from 20th December 2013 (and not from 2014) right through to 26th September 2014 (not 2015) was also referred to (see paragraph 12 of the determination of the judge).

7. In terms of the oral evidence heard by the judge, the Appellant had confirmed that her meetings with her ex-partner every couple of months, had led to his being quite cooperative in furnishing her with information in the exercise of his treaty rights, and he had provided payslips (pages 6 to 11 for the period April to September 2015) and these showed that he was working at the point of divorce. There were some irregularities as observed by the judge. However, it was accepted that the Appellant herself continued to work for the NHS and was in receipt of a salary (determination at paragraph 15).

8. On the basis of such evidence, the judge made the following findings of fact. There was no dispute that the Appellant was married to an EEA Dutch national from 10th April 2010 to 10th July 2015. That was an excess of five years. The couple had also lived together for least three years, one of which was whilst he was in the UK (see paragraph 22). The issue really rested with the Dutch EEA national's exercise of treaty rights during the marriage to the point of divorce (paragraph 23).

9. In this respect, the judge identified a gap in the EEA national's employment from 20th September 2014 to 5th June 2015. One misapprehension had been in relation to the EEA national's bank statement (at pages 21 to 24 of the Appellant's bundle), which had been thought to run from December 2014 to 1st October 2015, and would therefore would have showed income from employment or self-employment. In fact, the judge found that the bank statements were actually shown to cover the period from 30th November 2013 to 28th November 2015 (see the top of page 21 of the Appellant's bundle).

10. Consideration was given by the judge to Counsel for the Appellant's submissions that there was in fact no break in continuity of employment if regard was had to the EEA national's self-employment period from 20th September 2014 to 5th June 2015. The judge rejected this on the basis that,

> "There was no witness statement submitted by the EEA national as to his activities during that time, and no bank statements showing the receipt of income. Further, there was no set of profit and loss accounts which she may have submitted, and no self-employed tax calculations" (paragraph 26).

11. Such income as there was appeared to come from AEJ Management, according to the HMRC letter dated 19th June 2017 (which appeared at page 4 of the Appellant's bundle), and which referred to his employment ending on 20th September 2014, and his income in the year which ended April 2015 (paragraph 26).

12. The judge went on to conclude that whilst it was the case that the Appellant's EEA – Dutch national "was registered for self-assessment with HMRC during this break in employment, there is no evidence that he was in fact working as a self-employed person, or that he was seeking to obtain work in that time".

13. Accordingly, the judge concluded that it would not be possible to find that the EEA Dutch national would be regarded as "self-employed", and in those circumstances "absent proof of evidence that he was actively seeking to work", the appeal stood to be dismissed (paragraph 27). This was because there was a break in continuity from 20th September 2014 to 5th June 2015 (paragraph 28).

14. On the other hand, the judge did find that at the date of the divorce, the Dutch EEA national was working for Pinpoint. This was because the HMRC document does show payment of tax and national insurance. He also found this employment was from 5th June 2015 to 30th November 2015. The tax authorities had a start date of 5th June 2015 (see paragraph 30). Therefore, the Dutch EEA national was exercising treaty rights at the *date* of divorce. The Appellant would acquire a right of residence under Regulation 10(5). This meant that the Respondent would be required to issue a residence card to her in accordance with Regulation 17(2). The judge so concluded (at paragraph 31). However, this was not the end of the matter.

15. The question, as the judge went on to state, was whether the Appellant could acquire *permanent* rights of residence under Regulation 15(1)(f). Counsel for the Appellant argued that there was no requirement of continuity under Regulation 15(1)(f), because this provision refers to a person "residing in the UK in accordance with these Regulations for a continuous period of five years" at the end of which the Appellant has retained rights. The judge held, however, that under the applicable case law there was no dispensation on applications for a permanent residence card from the requirement of five years' exercise of treaty rights. The case of **Secretary of State for Work & Pensions v Dias (case C-325/09) CJEU (Third Chamber)** did not help because there was no evidence that the EEA national had made up the five years working in some way or another. Therefore, the judge could not be satisfied that the Appellant had established that the EEA national Sponsor did exercise treaty rights for a total of five years. As such she had not established a right to a permanent residence (paragraph 33). The Appellant was only entitled to a residence card under Regulation 17(2) but not to a permanent residence card. The appeal was dismissed.

Grounds of Application

16. The grounds of application, which are clear and comprehensive, make the following points. First, that, although the Secretary of State had taken issue with there being no originals of the documents submitted, and on that basis rejected the Appellant's claim, at the hearing before Judge Oxlade, the originals were produced. Second, the Appellant's date of marriage was 10th April 2010 and right until 20th September 2014, the judge had found the Appellant's Dutch EEA national spouse to have been working. There was then, according to the judge, a gap from 20th September 2014 to 5th June 2015 (at paragraph 28), on the basis of which the judge concluded that there had not been a continuous working period of five years on the part of the Appellant's Dutch EEA national Sponsor. However, the judge had found that at the date of the divorce the Appellant's ex-partner had been working (see paragraphs 30 to 31). Indeed, the date of resumption of the ex-partner's work was 5th June 2015, right down to the date of the Home Office decision. This meant, that since Blake J had already stated (see paragraph 53 of **Samsam [2011] UKUT 165**) that "there is no need to have resided a continuous period of five years in only one category, either as a spouse or a former spouse", that this meant that the Appellant could show five years of residence on the basis of her ex-partner's pre-divorce period of work, and her own period of work post-divorce, because the refusal letter already accepted (see page 2) that the Appellant had been working for the NHS at St Thomas' Hospital for very many years.

17. On 27th October 2017, permission to appeal was granted by the Tribunal on the basis that the judge wrongly discounted evidence that the Appellant's former husband had been working as a self-employed person, and had a continuous period of employment for five years.

18. On 5th December 2017, a Rule 24 response was entered to the effect that the First-tier Tribunal had directed herself appropriately and that it was clear that the EEA national had not been working for a continuous period of five years.

The Hearing

19. At the hearing before me on 26th January 2018, the Appellant was represented by Mr E Yerokun, a legal representative, and the Respondent was represented by Ms A Everett, a Senior Home Office Presenting Officer. Mr Yerokun made the following submissions.

20. He explained that the Appellant satisfied Regulation 15(1)(f) of the EEA Regulations because she was a person who had resided in the United Kingdom in accordance with these Regulations for a continuous period of five years, and was at the end of that period a family member who had retained the right of residence. The judge below had overlooked the period of right of residence of the Appellant's ex-partner EEA national, prior to the date of her divorce. He drew my attention to the Appellant's bundle. A letter from HMRC, for the tax period 2015 to 2016 (at page 15 of the Appellant's bundle) confirmed his "profit from self-employment" as being £8,783. A self-assessment statement dated 22nd October 2015, from the Appellant's

EEA national ex-partner, for the year 2011 to 2012 (see pages 16 to 17 of the bundle) confirmed that he was owing £770.94, to the HMRC. His self-employed national insurance contributions, in a letter dated 1st October 2015, identified his due payment at the tune of £74.25, which was payable no later than 31st January 2016 (see page 17 of the Appellant's bundle). This was for the period 5th October 2015 to 11th April 2015.

21. Mr Yerokun went on to say that the judge had failed to deal with the fact that under Regulation 6(1) the Appellant's EEA national ex-partner was a "self-employed person" (see Regulation 6(1)(c)). In stating, as the judge did, that the Appellant's ex-partner had to be actively in search of work as a self-employed person for two years before the relevant date of 20th September 2014 to 5th June 2015, the law had been misinterpreted.

22. The judge had stated that, "there is no evidence that he was in fact working as a self-employed person, or that he was seeking to obtain work in that time" (paragraph 27). The evidence from HMRC in a letter dated 29th June 2017 to the Appellant's ex-partner referred to his tax calculation for the year 2015 to 2016 "that you asked for" (see page 14 of the Appellant's bundle). The fact that he had confirmed income from self-employment, as demonstrated in the letter form HMRC of £8,783 (see page 15) fully demonstrated that he was self-employed in the manner stated. The fact was that the Appellant's ex-partner had been a jobseeker, as a self-employed person, notwithstanding a minor gap from September 2014 to June 2015, during which he did not work. Having acquired the status of a self-employed person, he retained that status under Regulations 5 and 6, notwithstanding that he had ceased working for a short gap.

23. From April 2015 he was in any event self-employed (see page 16 of the Appellant's bundle) because there was evidence of his self-assessment form, with respect to a statement due on 22nd October 2015, which showed that he owed an amount of £772.94.

24. If a person is self-employed as a worker (which the judge had accepted) he or she did not immediately cease to be an unqualified person just because there had been gap in their employment, since there was an allowable period of two months.

25. Finally, the case of **Dias [2011] 3 CMLR 40** had confirmed that a break in dependency of less than six months on an EEA national, did not prevent a person from acquiring a permanent right of residence under Regulation 15(1)(b).

26. For her part, Ms Everett submitted that being registered with the HMRC was not adequate evidence of being registered for work and it was not clear that the judge had overlooked the evidence at all. It was being suggested that the Appellant had always been exercising treaty rights, but the judge could not possibly have filled in all the outstanding gaps, with the result that the decision reached was entirely sustainable. The findings made were well-reasoned. The evidence produced fell far

short of showing that the Appellant's ex-partner EEA national had been working for the entire five years as maintained.

Error of Law

27. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.

28. First, there is the witness statement of the Appellant dated 11th September 2007 (see pages 1 to 3 of the bundle). She explains that her ex-partner EEA national had been working for the five years of their marriage from 10th April 2010 until 10th July 2015. This is because he was self-employed as well as being employed. In his self-employed work, he worked as a general handyman, cleaning, gardening and painting. She refers to the evidence from the HMRC detailing his employment history, and this is dated 31st October 2013. She refers to the HMRC employment history dated also 19th June 2017. There are payslips form Pinpoint World Services for April to September 2015 (which covers the period of the divorce). There are two P60s for the year ending April 2016. There is the Companies House documents that show Pinpoint Services as a registered company. There is the HMRC letter of 29th June 2017, which shows her ex-partner's tax calculations for 2015 to 2016. She rejects the contention that the Home Office had difficulty in contacting Pinpoint World Services, who are a registered company, incorporated since March 2013, and her ex-partner's employment history from HMRC shows that he started work with them on 5th June 2015, and ended on 13th November 2015. This covered the date of the divorce, which was 10th July 2015. The same record also shows that her ex-partner worked at Ashley Cleaning Services Limited on 1st December 2015.

29. Second, there is the documentation itself. What is stated in the Appellant's witness statement is corroborated in these documents. A letter from HMRC dated 19th June 2017 confirms that her ex-partner earned from AEJ Management Limited a sum of £8,260 from 1st November 2012 until 20th September 2014. He paid tax of £651.20. Payslips from Pinpoint World Services (pages 6 to 11) confirm his regular earnings from them for the months of April to September 2015, showing net payments of £929.28 every month. There is documentation that Pinpoint World Services are on the register of companies (page 12). A letter from HMRC dated 29th June 2017 provides the Appellant's ex-partner with a "tax calculation for the year 2015 to 2016 that you asked for". His "profit from self-employment" for the tax calculation period of 2015 to 2016, arising from his earnings of £8,783 on a self-employed basis, amount to £507 (see page 15). His own self-assessment form for the HMRC shows that he is due to pay an amount of £772.94, in a statement dated 22nd October 2015. His national insurance contributions due no later than 31st January 2016 amount to £74.25, in a letter dated 1st October 2015. Importantly, for the period 30th November 2013 to 28th November 2014, the bank statement of the Appellant's EEA national ex-partner shows that on 20th December 2013 he received from AEJ Management £150, and for 31st December 2013 he received £1,014.56 into his account. For 2nd January 2014, he received £149.79 and for 31st January he received £1,257.82 (see pages 21 to

22). Further payments are made also (at pages 23 to 24) in the same way. Each of these payments are identified as the ex-partner's "salary" from AEJ Management.

30. On the basis of the above, the judge was in error in stating that, "I find that whilst the Appellant was registered for self-assessment with HMRC during this break in employment, there is no evidence that he was in fact working as a self-employed person, or that he was seeking to obtain work in that time" (paragraph 27). The reference to the break in continuity was for the period 20th September 2014 to 5th June 2015. However, given that the judge had accepted that the Appellant's ex-partner had resumed work from 5th June 2015 to the date of the Home Office decision the judge had fallen into error in so stating.

31. The irony is that the judge did find the Appellant's ex-partner to have been in employment from 5th June 2015 to 30th November 2015, such that at the date of the divorce the EEA national ex-partner was working for Pinpoint (see paragraph 30). The judge held that he was exercising treaty rights at the date of the divorce and therefore acquired a right of residence under Regulation 10(5) such that the Secretary of State would be required to issue the Appellant with a residence card in accordance with Regulation 17(2).

32. However, it was the Appellant's right to a *permanent* right of residence under Regulation 15(1)(f), which the judge found not to have been made out, but this was on the basis that this Regulation clearly referred to the person, "residing in the UK in accordance with these Regulations for a continuous period of five years" (paragraph 32 of the determination). The judge required, on the basis of the interpretation of this provision, from the Appellant, evidence that the EEA national in question was exercising treaty rights for a total of five years.

33. This had not taken into account the decision in **Samsam [2011] UKUT 165** which confirmed that, there is no need to have resided a continuous period of five years in only one category, either as a spouse or a former spouse" (see Blake J at paragraph 53). It also did not take into account the Court of Appeal judgment in **Amos [2011] EWCA Civ 552** that it is not necessary for former spouses to show a continuous period of five years' work prior to their applications for the right of permanent residence (at paragraph 25).

Re-Making the Decision

34. I re-made the decision on the basis of the findings of the original judge, the evidence before her, and the submissions that I have heard today. I am allowing the appeal for the reasons that I have set out above. This appeal is allowed.

Notice of Decision

35. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is allowed and the Appellant is entitled to a permanent residence card under Regulation 15(1)(f).

36. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 5th March 2018

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I make a fee award of any fee which has been paid or may be payable.

Signed Date

Deputy Upper Tribunal Judge Juss 5th March 2018