Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07182/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 March 2018	**On 5 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

MS COMFORT SAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Lanlehin, of Counsel instructed by J F Law Solicitors
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Ghana who was born on 11 September 1970. She appeals, with permission, against a decision of Judge of the First-tier Tribunal Mace who, in a determination promulgated on 8 December 2017, dismissed her appeal against a decision of the Secretary of State to refuse to grant her a permanent residence card in Britain.

2. The appellant had entered Britain in 1992. She had married the sponsor in 2009 and in 2011 had been granted a residence card valid for five years until January 2016. The relationship had broken up resulting in the EEA

national leaving the matrimonial home at the end of 2013. The divorce took place on 29th April 2015.

3. The reasons for the refusal were set out in a letter of refusal dated 31 May 2016. The Secretary of State stated that in order to qualify for a retained right of residence following divorce from an EEA national the appellant would, in accordance with Regulation 10(5) of the Immigration (EEA) Regulations 2006, need to provide evidence that her EEA national former spouse was exercising free movement rights in the United Kingdom at the time of the divorce. Although it was accepted by the Secretary of State that the appellant's marriage had lasted for three years and that she and her former spouse had resided in the United Kingdom for at least one year during her marriage and it was also accepted that she had been employed prior to, and since, her divorce there was insufficient evidence to show that the appellant's EEA spouse was a qualifying person. The evidence produced included payslips for the EEA national from June to August 2010 and bank statements for him showing wages paid through March 2011 and February 2012 but there was no evidence provided to show that the EEA sponsor was exercising Treaty rights in the United Kingdom from February 2012 to 29 April 2015 when he and the appellant had been divorced. The letter of refusal stated:

> "The onus is with the applicant to provide evidence that the EEA national former spouse is exercising Treaty rights in the United Kingdom for a continuous period of five years and that they were doing so at the time of divorce. The evidence provided does not demonstrate this as you provided no evidence of employment for your EEA national sponsor, between the period February 2012 and the date of divorce 29 April 2015. No explanation has been given as to why you have been able to obtain employment/bank statements and a copy of your ex-spouse's ID for submission of your application but nothing that covers dates after 2012. Any attempts to obtain or failure to obtain evidence over the latter period has not been evidenced or explained other than your statement that you know he resides in the United Kingdom and was a qualifying person at the time of divorce.
>
> You have failed to provide evidence that you meet the requirements of Regulation 10(5) and you have therefore not retained a right of residence following divorce."

4. Judge of the First-tier Tribunal Mace noted the evidence of the appellant and discrepancies in that evidence as to what work the appellant's husband was undertaking. Indeed he found that she was vague as to details of his work or his hours of work. Judge Mace considered the documentary evidence provided and having commented on the evident discrepancies therein stated that there was no evidence to indicate that the EEA national was a qualified person at the date of divorce on 29th April 2015. The judge wrote:

> "The evidence as far as that date is concerned is that the appellant either had not seen or heard from her ex-spouse since he left in 2013,

> or that she had seen him around in 2013 when he had told her that the company he had been working for had folded and someone else had told her later that he had another job at Retrograde Ltd. She stated herself at the hearing she did not know whether he had been working from 2013 to the date of the divorce in 2015 but she had met people who said they had seen him around. This together with the inconsistencies in the evidence as detailed above does not satisfy me that the EEA national was a qualified person at the date of the termination of the marriage. Home Office Guidance provides for circumstances where the marriage has ended as a result of domestic violence or other difficult circumstances. Although the appellant mentioned her ex-husband drinking excessively and becoming abusive, the guidance also requires that it be shown that evidence has been provided that every effort had been made to obtain the documents, for example making contact during divorce proceedings. There is no evidence the appellant had made any such efforts, despite stating that she sees people who have seen him around. Further while it is acknowledged that it is difficult for victims of domestic violence to produce documentary evidence for violence, there is no supporting evidence on behalf of the appellant."

5. The judge found the requirements of the Regulations were not met and, having noted that both parties stated that Article 8 was not a relevant consideration dismissed the appeal.

6. The grounds of appeal, having set out the terms of Regulations 10 and 15 of the Immigration (EEA) Regulations 2006, asserted that the interpretation of Article 13 of Directive 2004/38 was relevant stating that retention of the right of residence by family members in the event of divorce should not entail the loss of rights of residence of a Union citizen's family members who are not nationals of a Member State where prior to the initiation of the divorce the marriage has lasted at least three years including one year in the Host Member State. They argued that it was wrong for the judge to consider that the appellant had to show that the EEA national was a worker at the date of divorce and could have met the Rules if it was shown that he was a worker at the initiation of the divorce proceedings.

7. The second ground of appeal said that in the Home Office Guidance document headed "Free Movement Rights: Retained Rights of Residence" Version 3 published on 7 February 2017 it was stated that the officer dealing with an application should take a pragmatic approach, considering each case on its merits and if satisfied that an applicant could not get evidence themselves make enquiries on their behalf where possible getting agreement from a senior caseworker before doing so. It was stated that guidance had not been considered by the judge.

8. At the hearing of the appeal before me Ms Lanlehin argued that the judge had misinterpreted Article 13 upon the issue of the retention of rights. Having referred to the Regulations, she asserted that the appellant was not required to show that the EEA national was exercising Treaty rights at the date of the divorce. She also asserted that further enquiries should

have been made given particularly that the appellant had provided a letter from the HMRC which gave details of the EEA national's former employment. Mr Nath, having referred to the letter of refusal stated that there was a requirement that the evidence be provided as is set out in the Regulations and that moreover there was no requirement of the Secretary of State to make enquiries – the burden of proving her claim lay on the appellant.

9. The grounds of appeal before me set out the terms of the Regulations. At 10(1) it is stated that:

> "In these Regulations, 'family member who has retained the right of residence' means subject to paragraph (8) and (9) a person who satisfies the condition in paragraph (2), (3), (4) or (5).
>
> (5) The condition in this paragraph is that the person ("A") –
>
> (a) ceased to be a family member of a qualified person or an EEA national with a right to permanent residence on the termination of the marriage or the civil partnership of (A)
>
> (b) was residing in the United Kingdom in accordance with the Regulations at the date of the termination;
>
> (c) satisfies the condition in paragraph (6); and
>
> (d) either –
>
> (i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or the civil partnership had lasted for at least three years and the parties to the marriage or civil partnership resided in the United Kingdom at least one year during its duration.
>
> (ii) the former spouse or the civil partner of the qualified person or the EEA national with a right of permanent residence has custody of a child and that qualified person or EEA national …
>
> (6) the condition in this paragraph that person –
>
> (a) is not an EEA national but would, if the person were an EEA national would be a worker or self-employed person or self-sufficient person under Regulation 6; or
>
> (b) is the family member of a person who falls within paragraph (a)."

10. The relevant paragraph is that at 10(5)(a) which requires the appellant had ceased to be a family member of a qualified person or an EEA national. The definition of a qualified person under the Regulations are set out in Regulation (6) which reads as follows:

> "Qualified Person"

(6)(i) In these Regulations "qualified person" means a person who is an EEA national and in the United Kingdom as –

(a) a jobseeker;

(b) a worker;

(c) a self-employed person;

(d) a self-sufficient person; or

(e) a student.

11. The reality is that there was no evidence that the appellant's husband was a worker or a jobseeker or in any other way a qualified person under the Regulations at the time of the commencement of the divorce proceedings or when the marriage broke up. The appellant cannot therefore benefit from the provisions of Regulation 10 of the Rules. That therefore leads to the refusal under Regulation 15(1)(f) which requires a person who has resided in the United Kingdom in accordance with the Regulations for a continuous period of five years; and (ii) was at the end of the period, a family member who had retained the right of residence.

12. The judge was therefore correct to find that the appellant did not qualify under the Regulations. Although the grounds of appeal refer to the terms of the Directive it was not argued either in the grounds of appeal or before me that the Regulations are not compatible with the terms of the Directive, and in any event the grounds themselves quote from the judgement of the ECJ in Kuldip Singh C-218/14 which makes it clear that the spouse of the non-EEA national must have resided in the host state in accordance with Article 7 of the Directive – that is as a person exercising Treaty rights -and clearly that was not the case as the appellant has not shown that her former spouse was doing so. Moreover, the reality is that there is no obligation on the Secretary of State to make any further enquiries regarding the work of the EEA national. There is no case law to suggest that is something the Respondent is obliged to do or that it is anything other than something that an official at the Home Office might consider doing.

13. I therefore find that there is no error of law in the determination of the judge. He was entitled to dismiss this appeal under the Regulations.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed:  Date: 4 April 2018

Deputy Upper Tribunal Judge McGeachy