



IAC-AH-KEW-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/04387/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 10 February 2016**

**Decision & Reasons Promulgated  
On 25 February 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW**

**Between**

**THOMAS TANYI AGBOR  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr J Rene of Counsel

For the Respondent: Mr L Tarlow, a Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. This is an appeal by the appellant against a decision of First-tier Tribunal Judge Moxon, promulgated on 19 August 2015, dismissing the appellant's appeal against the respondent's decision of 16 January 2015 refusing the appellant's application for a permanent residence card as confirmation of a right to reside in the UK.

## **Background**

2. The appellant is a citizen of Cameroon and was born on 24 July 1974. He entered the United Kingdom in 2007. He married Alexia Virginie Salome Gillot on 24 October 2008. That relationship ended in July 2012 and the couple divorced on 17 October 2014. On 3 September 2014 the appellant applied for a permanent residence card as a confirmation of a right to reside in the United Kingdom. The respondent refused that application on the basis that the appellant had failed to show that his former partner had been exercising treaty rights for five years and so did not satisfy Regulation 15(1)(b) of the Immigration (European Economic Area) Regulations 2006 (the '2006 Regulations'). The respondent also refused the application stating that the appellant had failed to show that he was divorced as only the decree nisi had been produced. However, by the time of the appeal to the First-tier Tribunal the decree absolute had been disclosed and that did not remain in issue.

## **The Appeal to the First-tier Tribunal**

3. The appellant appealed against the respondent's decision to the First-tier Tribunal. The Tribunal in dismissing the appeal found that the documentation submitted shows significant gaps between employment and self-employment. The Tribunal was therefore not satisfied that the sponsor had provided evidence to explain the gaps and that the appellant had not made any effort to explain those gaps within his statement. The Tribunal found that the appellant's ex-wife had not exercised treaty rights continuously or at the time of their divorce.

## **The Appeal to the Upper Tribunal**

4. The appellant sought permission to appeal against the First-tier Tribunal's decision to the Upper Tribunal. The grounds of appeal assert that the judge erred by considering that under both Regulation 15(1)(b) and 15(1)(f) the appellant had to prove that his wife was exercising treaty rights up until the divorce. The appellant relies on the case of **Amos v Secretary of State for the Home Department [2011] EWCA Civ 55 ('Amos')**. It is asserted that the regulation relied on by the judge to dismiss the appeal is irrelevant to the consideration of the appellant's claim which is based on five years' continuous residence. On 18 December 2015 First-tier Tribunal Judge J M Holmes granted the appellant permission to appeal. The grant of permission sets out that it is arguable that the judge failed to follow the required approach set out in the case of **Amos** and that given the Court of Appeal's decision in **NA [2014] EWCA Civ 995** it is also arguable that the judge's approach was flawed.

## **Summary of Submissions**

### **The Appellant's Submissions**

5. There is one ground of appeal which essentially is that the judge did not consider the appellant's arguments that Regulation 15(1)(f) of the EEA Regulations applied. The appellant relies on the case of **Amos**. It is asserted that the judge failed to follow the step-by-step approach as set out in paragraphs 16, 25 and 33 of **Amos**. It is asserted that the question on the facts of the instant case is which is the relevant Regulation. It is asserted that this issue does not feature at all in the case of **Amos** although the judge was right to remind himself of **Amos** he made a material error of law by failing to engage with the relevant issue which he was expressly invited to decide. It is also submitted that the judge's decision offends the principles set out in the Annex to the judgment of Lord Justice Stanley Burton in the case of **Amos**. The relevant principle is said to be Article 16 general rule for union citizens and their family members.
6. It is asserted that the judge relied on the wrong Regulation to dismiss the appeal. It is also asserted that the judge failed to record the reasons that he was referred to that page, namely Article 16, as the evidence being relied on to support the submission that the appellant is entitled to a grant of permanent residence. The judge did not engage with that submission made to him.

### **The Respondent's Submissions**

7. The Secretary of State served a Rule 24 (of the Tribunal Procedure (Upper Tribunal) Rules 2008) response. The respondent asserts that the First-tier Tribunal's decision is succinct but adequate. It is asserted that the judge identified the relevant issues and notes that the matter proceeded on submissions only and as a result none of the deficiencies in the evidence relied upon to establish the appellant's wife's history of exercising treaty rights could be addressed. It is asserted that there is no material error of law in the First-tier Tribunal's decision.

### **The Hearing before the Upper Tribunal**

8. Mr Rene referred to the grant of leave to appeal which mentioned the case of **NA [2014] EWCA Civ 995 ('NA')** in which the Court of Appeal referred a question for a preliminary ruling from the Court of Justice of the European Union in 2014. He submitted that this case was pertinent to this appellant as it concerns what the position ought to be regarding the exercise of treaty rights at the date of divorce. He made an application for this case to be stood over pending the outcome of the ruling from the European Court.
9. I indicated to Mr Rene that I had considered the case of **Singh and Others [2015] EUECJ C-218/14** that was recently decided in the European Court which concerned a reference for a preliminary ruling. I indicated that the decision of the court in that case, which might have been in the appellant's favour, concerned the position where a sponsor leaves the host member state prior to commencement of divorce

proceedings. It was decided in that case that where the sponsor left the host member state prior to divorce proceedings being initiated then there was no right of residence on behalf of the partner in existence at the date that divorce proceedings were initiated and therefore no retained right to residence in the host member state. I indicated to Mr Rene that from the file before me I could not find any evidence that the sponsor was exercising treaty rights at the date that the divorce proceedings were initiated. Although the exact date had not been provided it was evident that it must have postdated 31 June 2012 (although I note that June only has 30 days) when the appellant's sponsor has written to the appellant indicating that she intended to initiate divorce proceedings. Mr Rene referred me to the respondent's bundle to a letter from HMRC which refers to '2012 to 2013 the self-assessment returns are not returned'. I referred Mr Rene to the details in that document provided by HMRC which set out that self-employment commenced on 2 March 2011 and ceased on 14 January 2012. That was at least five and a half months before divorce proceedings would have been initiated. Mr Rene took instructions and indicated that he could not advance any arguments. He indicated that it was clear from the records that the EEA sponsor was not exercising treaty rights when the divorce was initiated. He also confirmed that she was not exercising rights when the decree absolute was pronounced in October 2014 as there was no record to show she was exercising treaty rights. He therefore indicated that he could not make any submission. Mr Tarlow had no submissions to make in light of Mr Rene's position.

### **Legislative Provisions**

10. Article 15 of the 2006 Regulations provides:

'Permanent right of residence

**15.—(1)** The following persons shall acquire the right to reside in the United Kingdom permanently—

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

(b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

...

(iii) the worker or self-employed person had resided continuously in the United Kingdom for at least the two years immediately before his death or the death was the result of an accident at work or an occupational disease;

(f) a person who—

- (i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and
- (ii) was, at the end of that period, a family member who has retained the right of residence.

(2) Once acquired, the right of permanent residence under this regulation shall be lost only through absence from the United Kingdom for a period exceeding two consecutive years.

(3) But this regulation is subject to regulation 19(3)(b).'

## **Discussion**

11. It is clear that Regulation 15(1) of the EEA Regulation whether at 15(1)(b) or at 15(1)(f) requires that the appellant has resided in the United Kingdom for a continuous period of five years and at the end of that period has either resided in the United Kingdom with the EEA national in accordance with the regulations throughout that period or under subparagraph (f) had retained the right of residence. In **NA** the court, in setting out its reasons for a reference, considered that it was not clear whether the requirement is that at the date of divorce the applicant must have a subsisting right in order to have retained a right. At paragraph 21:

“...

6) While there is some force in the Respondent's textual analysis of the title of Article 13 - in ordinary language a right is not "retained" on divorce if it does not subsist on that date - there is no less force in the Appellant's submission that the "Gateway" construction accords with the need to interpret Article 13(2) in a purposive manner, so as to avoid potential abuse by Union citizens who are, for example, contesting custody or rights of access to their children in divorce proceedings, or who have inflicted domestic violence upon their third country national spouse.”

12. It is clear from the reasoning of the court in the case of **Singh** that the ECJ found that it was essential for the sponsor to be exercising treaty rights and residing in the host Member State at the time that divorce proceedings were initiated. The court set out the purpose of derived rights:

“50 As regards the right of residence in the host Member State of nationals of third countries who are family members of a Union citizen, attention should be drawn, as a preliminary point, to the settled case-law of the Court which states that the rights conferred on third-country nationals by Directive 2004/38 are not autonomous rights of those nationals but rights derived from the exercise of freedom of movement by a Union citizen. The purpose and justification of those derived rights are based on the fact that a refusal to allow such rights would be liable to interfere with the Union citizen's freedom of movement by discouraging him from exercising his rights of entry into and residence in the host Member State (see, to that effect,

judgment in O and B, C-456/12, EU:C:2014:135, paragraphs 36 and 45 and the case-law cited).

...”

13. Although the question referred concerned the situation where the sponsor left the host Member State the reasoning applies by analogy to the situation where the sponsor does not exercise treaty rights. The court held:

“58 It follows that, where a Union citizen in a situation such as that of the spouses of the applicants in the main proceedings leaves the host Member State and settles in another Member State or in a third country, the spouse of that Union citizen who is a third-country national no longer meets the conditions for enjoying a right of residence in the host Member State under Article 7(2) of Directive 2004/38. It must, however, be examined whether, and under what conditions, that spouse can claim a right of residence on the basis of Article 13(2)(a) of Directive 2004/38 where the departure of the Union citizen is followed by a divorce.

59 In accordance with Article 13(2)(a) of Directive 2004/38, divorce does not entail the loss of the right of residence of a Union citizen’s family members who are not nationals of a Member State ‘where ... prior to initiation of the divorce ... proceedings ... the marriage ... has lasted at least three years, including one year in the host Member State’.

60 That provision thus corresponds to the purpose, stated in recital 15 in the preamble to the directive, of providing legal safeguards for family members in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership, taking measures in that respect to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.

61 The reference in that provision to, first, ‘the host Member State’, which is defined in Article 2(3) of Directive 2004/38 only by reference to the exercise of the Union citizen’s right of free movement and residence, and, secondly, ‘initiation of the divorce ... proceedings’ necessarily implies that the right of residence of the Union citizen’s spouse who is a third-country national can be retained on the basis of Article 13(2)(a) of Directive 2004/38 only if the Member State in which that national resides is the ‘host Member State’ within the meaning of Article 2(3) of Directive 2004/38 on the date of commencement of the divorce proceedings.

62 That is not the case, however, if, before the commencement of those proceedings, the Union citizen leaves the Member State in which his spouse resides for the purpose of settling in another Member State or a third country. **In that event the third-country national’s derived right of residence based on Article 7(2) of Directive 2004/38 has come to an end with the departure of the Union citizen and can therefore no longer be retained** on the basis of Article 13(2)(a) of that directive.’

...

66 Consequently, it is clear that the spouse who is a Union citizen of a third-country national **must reside in the host Member State, in accordance with Article 7(1) of Directive 2004/38**, up to the date of commencement of the divorce proceedings for that third-country national to

be able to claim the retention of his right of residence in that Member State on the basis of Article 13(2) of the directive. [emphasis added]”

14. From the above passages the following principle emerges. The sponsor must at the date of initiation of divorce proceedings be resident in the host Member State and must be residing in accordance with Article 7(1) – that is, exercising treaty rights. By analogy the sponsor in this case has not left the UK but the subsistence of the right of residence is dependent on her exercising treaty rights at the date that divorce proceedings were initiated.
15. As the appellant cannot demonstrate that the sponsor was exercising treaty rights at the time of the initiation of the divorce proceedings the ECJ case of **Singh** does not assist the appellant even though it might cast some doubt on the case of **Amos v Secretary of State for the Home Department; Theophilus and the Secretary of State for the Home Department [2011] EWCA Civ 552** which set out that an appellant must be able to demonstrate in an application for permanent residence that at all times until the date of divorce the spouse must have been exercising treaty rights.
16. The appellant does not meet the requirements of Article 16 as he did not reside as a family member with the sponsor who was exercising treaty rights for a continuous period of five years.

### **Notice of Decision**

17. The decision of the First-tier Tribunal did not contain a material error of law. The decision of the respondent stands.

Signed P M Ramshaw

Date 21 February 2016

Deputy Upper Tribunal Judge Ramshaw