Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/01995/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 February 2018	**On 29 March 2018**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

MASALU BEATRICE FREE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARYOF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Pipi instructed by Samuel Ross Solicitors
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Tanzania. She appealed to a Judge of the First-tier Tribunal against the respondent's decision on 16 February 2017 refusing to issue her with a residence card.

2. The appellant has been- in the United Kingdom since 3 November 2002. She married Mr Free on 24 April 2004 and was issued with a residence card on 15 July 2004, valid until 9 September 2009. She made an application for a permanent residence card on 16 March 2010 and this was refused by the respondent and a subsequent appeal was dismissed. On 26 October 2010 she was issued with a decree absolute dissolving her

marriage with Mr Free. On 24 September 2013 she applied for leave to remain on the basis of family private life as the partner of Mr Athumani. This was refused on 16 October 2013 with no right of appeal, there was a judicial review and a further decision made on 7 November 2014. The human rights application was refused and an appeal against that was dismissed in 2015 by Judge Cope. A further application for permanent residence on the basis of retained rights under the EEA Regulations was made on 19 October 2015 but refused and not appealed. A further such application was made on 4 May 2016 and again refused and not appealed. The current application was made on 1 December 2016.

3. The judge noted the appellant's evidence as regards her work history and also the work history of Mr Free. He also took into account the Devaseelan guidance in respect of the earlier decisions, noting in particular what was recorded by Judge Cope at paragraph 79 of his decision in 2015 that the appellant had told him she had not worked and she had been advised that she had no right to do so following the dismissal of her earlier appeal. Her evidence before the judge in 2015 was that her relationship with Mr Free had broken down in mid-2007. On the basis of the Devaseelan guidance the judge concluded that the appellant was not entitled to work and had in fact not worked since September 2010 up to the date of the decision of the judge in February 2015 because that judge had heard direct evidence on the issue and that had to be the starting point for this judge's decision.

4. The judge noted the appellant's evidence that she had in fact been working for the Mortgage Advice Centre from July 2010 (the company later changed its name to Wallsend Lets in 2012) and she said she had been employed there ever since. She gave the reason for telling the judge in February 2015 that she had not worked since the dismissal of her appeal in 2010 on the basis that she was asked about full-time work and was only working part-time. The judge's decision had recorded that she said she had not worked since she had been advised that she had no right to do so following the dismissal of her appeal by the judge in 2010.

5. The judge was not satisfied that the appellant had told the truth about her employment history. He did not find credible the reason that she gave for saying to the judge in 2015 that she had not worked since 2010. The judge was not satisfied that the appellant had worked for Wallsend Lets since 2010. The letter from the company did not make any mention of when she was supposed to have begun her employment and her relationship with them, the only copy of the contract of employment was a photocopy and the respondent had not seen the original, the wage packets in the bundle were handwritten on generic wages envelopes and there were no pay slips from this employment in the bundle of documents and no one from Wallsend Lets had attended the Tribunal to give evidence and as a consequence the letters, contract and wage packets from Wallsend Lets were given little weight.

6. With regard to Mr Free, the judge was not satisfied that he was exercising his treaty rights whilst in employment prior to the divorce in October 2010 as set out in the HMRC records in the bundle. The evidence relating to Mr

Free's national insurance contributions only related to the amount of tax and national insurance he paid but did not state the dates he started and finished working for the relevant employers, as there were several changes of employer during that period and it was therefore impossible to ascertain whether he was continuously exercising his free movement rights up to the point of divorce or whether there were any breaks in continuity or the duration of such breaks. The judge concluded that the appellant had not met the requirements of Regulation 10(5) or (6) of the EEA Regulations and therefore had not retained a right of residence following her divorce and had not met the requirements of Regulation 15(1)(f) as she had not resided under the Regulations for five continuous years.

7. The appellant sought, and was granted permission to appeal on the basis that there was arguably a lack of clear findings with regard to the material requirements of the EEA Regulations, and it was argued that the judge had been satisfied that Mr Free was working at the time of the divorce rather than working continuously up to the divorce which was not required, according to Amos [2011] EWCA Civ 552. The judge granting permission considered that there was arguably a lack of sustainable findings on the material matter concerning whether Mr Free was exercising treaty rights at the time of divorce and there was a pre-occupation with strict continuity of exercise of treaty rights contrary to a purposive construction of EU treaty rights and authority and there was an arguable lack of material findings and findings which were not reasonably sustainable on the evidence.

8. In his submissions Mr Pipi relied on and developed points made in his skeleton argument. He argued that the judge had erred with regard to both Regulation 15(1)(b) and Regulation 15(1)(f).

9. The judge had not addressed the first of these at all and the appeal should have been allowed under this provision. Mr Free had been a worker throughout. The judge had referred to frequent changes of job though he could not say if he had exercised treaty rights continuously for five years. The key issue was whether the ex-husband Mr Free was a worker. He met the conditions as set out at paragraph 16 onwards in the skeleton. The case of Barry could be seen as relevant to this. There the EEA citizen had worked for only two weeks in a six month period but nevertheless was held to be a worker. The judge had focused too much on the change in the work over a long period of time so it could not be said that he had worked continuously but the question was whether he was a worker and if so that did not matter. It was enough that he was engaged in genuine economic activity within that period. The national insurance contributions which could be seen at paragraphs 70 to 100 of the bundle showed genuine economic activity. As a consequence the requirements of Regulation 15(1)(b) were made out.

10. With regard to the Regulation 15(1)(f) issue, paragraph 25 onwards in the skeleton addressed this. The judge had found that Regulation 10(5) was not met as there was no evidence that the husband was exercising treaty

rights before the divorce and that was wrong on the evidence before the judge. The national insurance records went back to the 1980s and it was clearly an error to say there was no evidence of the exercise of Treaty rights prior to the divorce. It was not a requirement in any event.

11. The judge had also erred with regard to the appellant's work history. It was not a requirement that had to be proved. It could only be possibly the case if the appellant had not accumulated five years before the divorce. Once there had been five years before the divorce there was no requirement to carry on working after that and that was a further error of law. It did not appear from the decision that other parts of Regulation 10 were in issue.

12. In his submissions Mr Tarlow relied on the Rule 24 reply. The judge had looked at the pay slips and found they could not be relied on. Looking at that it was a finding open to him and he had also properly relied on the Devaseelan guidance. Taken as a whole there was no error of law in the decision and if the Tribunal disagreed the matter could be re-made by it.

13. By way of reply with regard to the documents considered at paragraphs 164 and 165 of the bundle, the judge addressed these at paragraph 46 and did not say they were relied on and also the documents related to 2010 and if the main submission was accepted that the appellant did not have to work after the divorce it did not matter whether these documents were accepted or not.

14. I reserved my decision.

15. Helpful guidance was provided by the Court of Appeal in the case of Amos to which I have referred above in respect of cases of retained residence. Both appellants in that case were non-EU nationals who had married EU nationals and subsequently divorced and applied for recognition of their right to permanent residence. At paragraph 29 the Court of Appeal set out the following requirements of the Directive that were applicable to the appellants:

> "(1) At all times while residing in this country until their divorce, their spouse must have been a worker or self-employed (or otherwise satisfied the requirements of Article 7.1).
>
> (2) Their marriages had to have lasted at least three years, including one year in this country.
>
> (3) They must be able to show that they are workers or self-employed persons or otherwise satisfy the requirements of the penultimate paragraph of Article 13.2".

16. The Court of Appeal went on to say the following:

> "30. The Regulations are consistent with these propositions. Regulation 10(5) provides that a 'family member who has retained the right of residence' must in a case such as the present appeals satisfy the following conditions:

(a) His or her divorce from the EEA national.

(b) He or she was residing in the UK in accordance with the Regulations at the date of the divorce. He or she will have been so residing if Regulation 14 applied, i.e. if the EEA national spouse was a 'qualified person' i.e. for present purposes a worker or self-employed person (as to which see the definitions in Regulations 2 and 6).

(c) He or she is a worker or self-employed person, and therefore satisfies paragraph (6).

(d) Three years' marriage, including at least one year's residence in the United Kingdom.

31. Provided these conditions continue to be satisfied, after five years' continuous residence in the UK a non-EEA national will be entitled to a permanent right of residence under Regulation 15(1)(f)".

17. On applying this guidance to the findings of the judge in this case, it is clear that the marriage had lasted for at least three years prior to the initiation of the divorce, the couple having married in 2004 and the divorce taking place in 2010.

18. As regards the evidence respecting Mr Free, it is clear from the above guidance that at all times while residing in the UK until his divorce he had to have been a worker or self-employed or otherwise satisfied the requirements of Article 7.1. In this regard as can be seen from the judge's decision, he was not satisfied that Mr Free was exercising Treaty rights whilst in employment prior to the divorce in October 2010. The judge's concern was that the evidence relating to Mr Free's national insurance contributions only related to the amount of tax and national insurance he paid but did not state the dates he started and finished working for the relevant employers as there were several changes of employer during this period and it was therefore impossible to ascertain whether he was continuously exercising his free movement rights up to the point of divorce or whether there were any breaks in continuity or the duration of such breaks.

19. I consider that the reasoning at paragraph 52 in the judge's decision is consistent with the guidance set out at paragraph 29(1) of Amos. The judge was not satisfied that it had been shown that at all times while residing in the UK until his divorce Mr Free was a worker or self-employed. There were concerns about the lack of evidence as to continuity and that was a finding in my view that was properly open to the judge.

20. As regards the third requirement, again it is necessary for the appellant to show that she was a worker or self-employed person or otherwise satisfied the requirements of the penultimate paragraph of Article 13.2 of the Directive. On the judge's findings this was not done. Again, I consider it was open to the judge to conclude that despite the documentary evidence put in, weight was to be placed on what the appellant had said before the judge in 2015, and the judge's reasons for not accepting her explanation

as to why she said that set out at paragraph 47 of his decision, were fully open to him. The judge went on to give careful consideration to the Wallsend Lets evidence but for the reasons set out at paragraph 49 did not give that more than little weight and it clearly did not satisfy the judge that it went to show that it should override the evidence given by the appellant in 2015 which was clear. The judge was also, as part of the reasoning in this regard, entitled to attach weight to the absence of employment or wages documents from the Wallsend Mortgage Advice Centre which the appellant said she had worked at one time and the lack of pay slips from Wallsend Lets. The concerns about the documents at pages 164 to 165, the wage packets, were also fully open to the judge. Accordingly I consider that the judge's decision was consistent with the guidance in Amos and the decision reached was one which was fully open to the judge.

21. I should say with regard to the arguments made in respect of Regulation 15 by Mr Pipi with regard to Regulation 15(1)(b), the appellant is not a family member as she is required to be to benefit from Regulation 15, bearing in mind the definition of family member at Regulation 7. She can only at best be a family member who has retained the right of residence and that is a different legal entity from a family member. Accordingly I do not accept the argument that once she had resided for five years in the United Kingdom with Mr Free that that meant she was entitled to a permanent right of residence under Regulation 15(1)(b). The argument with regard to paragraph 15(1)(f) depends upon the arguments set out above from Amos, and the appellant cannot be said to be a person who has resided in the United Kingdom in accordance with the 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. Accordingly I uphold the judge's decision. The appeal is dismissed.

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Allen