



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: EA/06306/2016  
EA/07187/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 20 July 2018

Decision & Reasons Promulgated  
On 03 August 2018

Before

DR H H STOREY  
JUDGE OF THE UPPER TRIBUNAL

Between

MRS NADIYA TKACHUK (FIRST APPELLANT)  
MR SERHIY PELYKH (SECOND APPELLANT)  
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms K Degirmenci, Counsel, instructed by Yemets Solicitors  
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. On 15 June 2018 I sent a decision setting aside the decision made by Judge James of the First-tier Tribunal (FtT) dismissing the appellants' appeals. I directed that the appellants' representatives produce chronologies showing the working history since date of marriage of the first appellant's ex-spouse and the first appellant. These were duly produced in time for the hearing.
2. At the outset Mr Bramble submitted that the principal appellant could not succeed in establishing a right of permanent residence on the basis of the ex-spouse's working

history since that history had been interrupted by at least one period of imprisonment. The appeal had to fail for this reason irrespective of whether the first appellant at the date of initiation of the divorce proceedings or date of divorce had acquired retained rights.

3. After discussion and consideration of the documentary evidence, both parties agreed that the first appellant's husband had been in prison in 2014 for six weeks, in April/May 2015 for two-three weeks and in detention from 12 October 2015 for six months awaiting removal. Both parties further agreed that the date of initiation of divorce proceedings was 15 May 2015 and that the first appellant's ex-husband had achieved early release from prison the day before, on 14 May 2015.
4. On the basis of these agreed facts, it is clear that Mr Bramble is entirely right. In order to show permanent residence a person can establish the requisite five years of continuous residence by virtue of a combination of the EEA national's working history and the family member working having acquired retained rights. But in this case the first appellant's ex-husband's period of continuous residence was interrupted by his periods of imprisonment. Two days before the date of initiation of the divorce proceedings he was in prison. Therefore any five year period of continuous residence would have to begin from 15 May 2015 and permanent residence could not be achieved, at best, before May 2020. The fact that prison breaks continuity of residence for the purposes of acquiring permanent residence and that periods of residence acquired before imprisonment cannot be aggregated was definitively decided by the CJEU in case **C-378/12 Onuekwere** 16 January 2014.
5. Ms Degirmenci initially sought to argue that this inability of the appellants to be able to show permanent residence did not mean they could not succeed in their appeals because they were still entitled to residence cards by virtue of the first appellant having acquired retained rights. However, this same argument was rejected by me in my error of law decision. The appellants' appeal was against refusal of permanent residence cards, not residence cards. They can only succeed if able to show permanent residence.
6. Ms Degirmenci invited me to proceed to make findings of facts on the first appellant's and her ex-spouse's working histories as it may assist in applying to the respondent for residence cards on the basis of retained rights.
7. As I explained to the parties, now I have accepted that any continuity of permanent residence the first appellant's ex-spouse had accrued had been broken in April/May 2015, I cannot engage in fact-finding that now lies outside the scope of this appeal. I am able to state as a finding that the first appellant's ex-husband was no longer in detention at the date of initiation of divorce proceedings (15 May 2015) - that is agreed between the parties and satisfactorily evidenced by documents before me - but I cannot venture upon whether at that date (or the date of divorce) he was exercising treaty rights.

No anonymity direction is made.

Signed

Date 31 July 2018

A handwritten signature in black ink that reads "H H Storey". The signature is written in a cursive style with a large, sweeping flourish at the end of the word "Storey".

Dr H H Storey  
Judge of the Upper Tribunal