



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/13358/2016
EA/13372/2016

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre
On: 17th August 2018

Decision and Reason Promulgated
On: 13th September 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Charity [A.]
[C.A.]
(no anonymity direction made)

Appellants

And

The Secretary of State for the Home Department

Respondent

For the Appellant: Mr Adalakum, Arndale Solicitors
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are nationals of Ghana who are respectively a mother born on the 9th May 1976 and her daughter born on the 4th January 2009. They appeal with permission¹ the decision of the First-tier Tribunal (Judge Thorne) to dismiss their

¹ Permission granted on the 26th March 2018 by First-tier Tribunal Judge Mailer

linked appeals against the Respondent's decision to refuse to issue them with confirmation of a 'retained right of residence' in accordance with the Immigration (European Economic Area) Regulations 2006.

Background and Matters in Issue

2. The Appellants' applications for recognition of a right of residence under EU law were received by the Respondent on the 10th May 2016. The parties agree that the applicable legal framework is therefore the Immigration (European Economic Area) Regulations 2006 ('the Regs').
3. The background to their applications was as follows. Ms [A] married a German national Mr [G.J.] on the 16th August 2010 by way of customary marriage recognised in Ghana. Mr [J] was at that time exercising treaty rights in the United Kingdom, and Ms [A] was accordingly granted a residence card as a family member (spouse) of Mr [J], on the 6th July 2011. Her daughter was granted a right of residence in line with her, as the family member (step-daughter) of Mr [J]. The marriage was not however a happy one, and the Appellant herself describes it as "rocky". On the 4th March 2016 the Family Court in Liverpool granted Ms [A] a decree absolute and the marriage came to an end. On the 10th May 2016 she applied for a residence card for herself and her daughter confirming their 'retained right' of residence in the United Kingdom as family members of an EEA national.
4. The Respondent refused to recognise any such right. It turns out that on the 11th July 2012 the Respondent had received a letter from Mr [J] stating that he and Ms [A] had separated and their marriage had been dissolved by the customary court in Ghana on the 1st September 2011. The Respondent deduced from this that the marriage had already been dissolved for some years, and that the Appellant could not demonstrate that she met the requirements of Regulation 10 of the 2006 Regs, namely that she and her husband had been married for 3 years, at least one year of which had been spent living in the United Kingdom. Issue was also taken with the fact that Ms [A] was not working at the date of termination of marriage, which on her case had been the United Kingdom divorce issued by Liverpool Family Court in March 2016.
5. When the matter came before Judge Thorne he found that the Appellant had been entirely unaware of Mr [J]'s actions. She had not known that he had sought dissolution of the marriage in Ghana and since neither she or her family had played any role in that dissolution, it could not be said that the divorce was in accordance with the operative law in Ghana. The marriage had not therefore been terminated until the 4th March 2016. The Judge further accepted that the marriage had subsisted for more than three years, and that both husband and wife had been working throughout the relevant period. It had been shown that Mr [J] had been exercising treaty rights at the date of divorce. The determination goes on:

“26. However, I do not accept that A has proved on the balance of probabilities that she lived with S in the United Kingdom for a period of a year during the marriage. Her evidence is that soon after the marriage in 2010 their relationship was very rocky. All of the P60 documents indicate that A & S were living together at different addresses from each other. There is no documentary evidence establishing that they ever lived at the same address for a period of a year as required under the EEA Regulations.

27. In addition, in her oral evidence, she said that the last time she had worked in the United Kingdom was June 2015. This means that A has not been a worker, self-employed or self-sufficient person since the date of divorce as required under the EEA Regulations. In my judgement, her explanation that this was “because the Home Office took my passport and revoked my visa” does not assist her”.

6. On the basis of his paragraphs 26 and 27 the Judge dismissed the appeals.

Discussion and Findings

7. Before me the parties were in agreement that the First-tier Tribunal erred in importing into the Regulations a requirement that the parties to the marriage live *together* in the United Kingdom for a period of a year. Regulation 10 provides:

‘10.- (1) In these Regulations, “family member who has retained the right of residence” means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).

...

- (5) A person satisfies the conditions in this paragraph if –
- (a) **he ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person;**
 - (b) **he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;**
 - (c) he 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 civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;**

...’

8. It was accepted that the marriage took place in 2010, and that Ms [A] had entered the country in 2011. Both she and Mr [J] had lived here ever since. They had therefore spent at least once year of their marriage both living in the United Kingdom before the divorce was finalised in March 2016. They were not required

by Reg 10(5)(d)(i) to live in the same house. Paragraph 26 of the determination is therefore set aside.

9. Mr Bates was further prepared to concede that the Tribunal had erred in its approach to whether the Appellant was exercising treaty rights at the date of termination of the marriage. The original refusal letter had proceeded on the basis that Ms [A] was lying when she said that she had been ignorant of her Ghanaian divorce in 2011; that was the date of divorce and she had therefore been living unlawfully in the United Kingdom for a number of years; that being the case the Respondent had taken steps in 2015 to revoke her 'family permit' and seize her passport. As a result of this action Ms [A] had, on the 30th November 2015, lost the job that she had held since October 2011. That was the sole reason why she was not considered to be exercising treaty rights at the date of divorce in March of the following year. Mr Bates accepted that since the Respondent's analysis had now been held to be wrong, it had to be conceded that in November 2015 Ms [A] was still married to Mr [J]. In accordance with the decision in Diatta v Land Berlin (C-267/83) she was still a family member at that point and was living lawfully in the UK: she should never have lost her passport, right to reside in the UK or her job. He accepted that in those circumstances the Respondent could not properly refuse her a residence permit on the grounds that she was not exercising treaty rights at the relevant time. Alternatively it could be said that she was "involuntarily unemployed" as per Regulation 6(2) and thus remained a qualified person.
10. It follows that the decision of the First-tier Tribunal is set aside and remade with the appeal being allowed.

Decisions and Directions

11. The decision of the First-tier Tribunal contains errors of law such that the decision must be set aside.
12. The appeals are allowed.

Upper Tribunal Judge Bruce
17th August 2018