Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02535/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 September 2018	**On 16 May 2019**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

ANITA KONADU ABROKWA
(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Eteko, Legal Representative from Iras & Co Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of the First-tier Tribunal dismissing the appeal of the appellant against the decision of the respondent on 13 February 2007 refusing her application for "permanent residence" as a family member of an EEA national who retained a right of residence in the United Kingdom when the marriage was dissolved.

2. The refusal letter says that "in order to qualify for a retained right of residence following divorce from an EEA national, in accordance with Regulation 10(5) of the Immigration (EEA) Regulations 2016, the following

information is required:". The letter then sets out in some detail the requirement that there is evidence that the former spouse was exercising free movement rights at the time of divorce, that the marriage lasted for at least three years, that the appellant and her (then) spouse resided in the United Kingdom for at least one of those years and that the appellant was currently in employment, self-employment or economically self-sufficient as if she were an EEA national.

3. I draw attention to the requirement that "the former spouse was exercising free movement rights at the time of divorce" (see the first bullet point on the Reasons for Refusal Letter).

4. The letter then continues: "In addition, as your application is for permanent residence you must demonstrate that you have resided in accordance with the Regulations for a continuous five year period…".

5. Essentially this means that the appellant had to show that her husband was exercising treaty rights until the divorce and she was acting as if she were exercising treaty rights thereafter.

6. The respondent expressly accepted that the appellant had been exercising treaty rights as a worker from the date of divorce until 14 July 2015 but not that she had been exercising treaty rights for a continuous five year period.

7. Further, the respondent was not satisfied with the evidence that her former husband was employed as a worker or self-employed person for the necessary period.

8. The respondent found the evidence to be incomplete and unsatisfactory rather than dishonest.

9. The First-tier Tribunal Judge considered the evidence before her and came to substantially the same conclusion, namely that the evidence was just not sufficient to prove the case.

10. Permission to appeal was given by the First-tier Tribunal essentially because it was found arguable that the judge had not given sufficient thought to the evidence before her.

11. I hope that the appellant's representatives will see it as constructive criticism when I say that they could have presented the case more helpfully. This is a case that would have benefited from a skeleton argument, or possibly a witness statement from the appellant, cross-referencing the documents relied upon and explaining what she thought she had to prove and how she could do it.

12. That said, I agree with Mr Eteko for the appellant, (as did Mr Bramble) that the First-tier Tribunal did err in this case. There is evidence in the bundle that tends to support (I make no finding on its quality) the appellant's assertion that her former husband continued to exercise treaty rights and

the judge had not considered it, particularly evidence that he paid national insurance contributions in the tax years ending in April 2010, 2011, 2012, 2013 and 2014. Paying national insurance suggests receipt of an income about 8 times greater than then the sums paid.

13. However I find that error to be immaterial.

14. As is apparent from the above, the appellant was required to show that her husband was exercising treaty rights at the time of the divorce.

15. The date of divorce has been given as 7 July 2015 but the appellant said in her witness statement that her marriage was dissolved on 14 April 2015. I wonder if the appellant meant that the decree nisi was given on 14 April 2015. Be that as it may, Mr Bramble submitted that, following **Baigazieva v SSHD [2018] EWCA Civ 1088**, the relevant date was the date when proceedings were initiated (see regulation 10(5)(d)(i)). I am inclined to agree with him but it makes no difference in this case because, according to the original application, which is clearer than the copies, proceedings were issued on an unspecified day in January 2015.

16. Although not expressly "spelled out" in the refusal letter there was no evidence that the appellant's husband had been continuously employed after then end of April 2014 until the divorce. There was, in Mr Bramble's words, a "dead zone" between tax year ending in April 2014 and the appellant initiating divorce proceedings in January 2015.

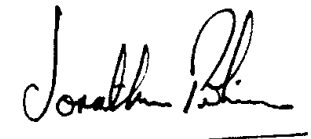
17. In short, there was no evidence before the First-tier Tribunal that the appellant's husband had worked between the start of the 2014/15 tax year and the divorce in the end of that tax year.

18. It follows that there was no evidence to support a necessary finding of fact and the error was not material.

Notice of Decision

19. This appeal is dismissed.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 15 May 2019