Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02860/2018

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision and Reasons Promulgated**
On 21st December 2018	**On 11th January 2019**

Before

UPPER TRIBUNAL JUDGE COKER

Between

BENEDICTA [D]
(anonymity direction not made)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Akohene, instructed by BWF Solicitors
For the Respondent: Mr Tan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. Ms [D] made an application for a permanent residence card in accordance with the Immigration (European Economic Area) Regulations 2016 on 11 December 2017. Her application was refused for reasons set out in a decision dated 21st March 2018 and her appeal dismissed by First-tier Tribunal judge Bannerman in a decision promulgated on 27th June 2018.

2. Ms [D] sought permission to appeal, and was granted permission, on the following grounds:

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(i) The First-tier Tribunal judge erred in law in failing to have adequate regard to the circumstances of the breakdown of the marriage in considering the lack of documentation; failing to have regard to the respondent's policy in terms of documentation and failing to give adequate reasons.

(ii) Erred in law in appearing to suggest that the marriage was a marriage of convenience;

(iii) Erred in law in raising the former husband's exercise of Treaty Rights and in any event erred in law in finding that the husband was not exercising Treaty Rights for the requisite period.

3. The grant of permission states that the sole reason for the refusal was the failure to provide relevant documentation but did not restrict the grant of permission.

4. The relevant parts of the respondent's decision are as follows:

> "…
>
> You can submit another application if you can provide evidence that you are the former family member of an EEA or swiss national exercising Treaty Rights in the UK …
>
> **Reasons why your application has been refused**
>
> Your application has been considered under regulation 21(5) …
>
> …
>
> As you have failed to provide a valid original passport or national identity card you [sic] application has been refused.
>
> This department has determined that you do not have a retained right of residence in the UK following divorce from your EEA or Swiss national sponsor.
>
> …"

5. It was accepted by the parties that the First-tier Tribunal judge should consider whether, if the appellant is not entitled to permanent residence, she is entitled to a retained right of residence. It was not argued that the sole ground of refusal was the lack of documentation; the challenge was to the decision as a whole and the findings made on each discrete issue. There was no challenge to the credibility findings made by the judge:

- Her claim to have suffered domestic violence was not credible
- Her claim to have had no direct contact with her husband since 2013 was not credible
- It was not true that she had been unable to put her husband's name on the middle child's birth certificate

6. The judge found that the appellant was married to and then divorced from her husband (paragraph 88), that she had previously had a residence card which had expired on 12th January 2017 (paragraph 90), that most of what she said

was untruthful (paragraph 85), that the eldest child can stay with his father in the UK even if he stays part of the time with the appellant although he was 'far from satisfied' that he does live with her, that he struggled to accept that she ever did anything other than marry and then divorce her husband (para 95), that she has lived in the UK at the address as shown on the bank documentation (para 97), that she was untruthful throughout her evidence (para 97).

Ground 1

7. The respondent is enjoined in policy documents to take a pragmatic approach to cases where there has been a breakdown in a relationship and gives the example where a relationship has ended acrimoniously and where every effort has been made to obtain documents. It is not apparent from the evidence before the First-tier Tribunal what efforts were made by the appellant to obtain documents of identity of her former husband. If she is in direct contact with him there was no explanation why he had not been asked for documents; if she was not in contact with him but had contact through a mutual friend, there was no evidence from the friend or the appellant what efforts she had made through that friend to obtain documents. Her evidence was that there were still documents relating to him coming to her home and that had been the case since they separated in 2014.

8. The judge made findings on the evidence before him that the appellant had, overall, not given credible evidence. The respondent's policy requires a pragmatic approach in circumstances that make it difficult for an appellant to obtain documents. This appellant has been found by the judge not to be a victim of domestic violence, to be untruthful about contact with her husband and to have produced very little evidence of attempts made to obtain documents. Although the judge makes no direct reference to the respondent's policy, there is nothing significant in the evidence that could have led to a different finding to that made by the judge that there was any reason "beyond her control" that she could not produce original documentation. There is no material error of law by the First-tier Tribunal in finding that she had failed to provide the required documentation.

Ground 2

9. The judge nevertheless went on to make findings on the appellant's overall claim.

10. Although the judge casts some doubt on the genuineness of the appellant's marriage, he does not make a finding that the marriage was a marriage of convenience. As correctly pointed out in the grounds and by Mr Akohene, there had been no assertion by the respondent that the marriage was one of convenience thus resulting in a 'shift in the burden of proof". The judge has not found there to be a marriage of convenience, there is no identified error of law.

Ground 3

11. The judge found it improbable that the appellant's former husband could have been continuously in work when travelling between Manchester to London to

work or Manchester to Crewe (paragraph 96). The evidence before the First-tier Tribunal of his employment consisted of 5 P60s covering 5 continuous years. The appellant's evidence was that her husband had been working for a company in London, whilst living in Manchester and working sometimes in Crewe and sometimes in London where the company's headquarters were. She said he sometimes left for a week or two at a time to work in London. She said that his income was sufficient to meet family expenses and rent. It was submitted to the First-tier Tribunal, and in the grounds of appeal to the Upper Tribunal, that part time working counts as employment for the purpose of exercising Treaty Rights provided the work is genuine and provides an effective means for a person to earn a living even if it needs to be supplemented from public funds – *Levin* (1982) EUECJ R-53/8. There is no suggestion here that public funds were claimed (although Ms [D] has been receiving public funds since their separation). The appellant did not produce any payslips of her husband indicating the hours he worked. Nor was there evidence of what rent he paid, if any, when he was working away from home, or what the rent on the family home was. Mr Akohene said that the husband could have worked somewhere in the region of 15-20 hours per week and earned that amount of money, given the low pay rate. But there was no evidence to that effect – it is pure speculation on the part of Mr Akohene to suggest this.

12. The appellant's evidence overall was not credible. According to the First-tier Tribunal her evidence was "vague", she "could not provide direct answers to many of the questions asked" and her witness statement "reads confusedly". It was open to the judge to consider that lack of credibility when considering whether the appellant's husband had been exercising Treaty Rights for a continuous period. Whilst the judge accepts that many people can survive on a low wage, it was open to him to find, when the only evidence before him as to earnings was the P60s and the appellant's inconsistent and incredible evidence, that the husband was not residing in the UK for the five year period exercising Treaty rights. The existence of the P60s is insufficient when considered in the context of a person travelling to work and working in three different areas of the UK and paying rent for a family home in Manchester with no additional income shown, to be considered effective. Although one explanation may be 20 hours a week at low pay, an equally acceptable explanation is bursts of employment for long hours and not in the country for other periods of time. The judge was entitled to consider the evidence in the round and reach the findings he did that the husband was not continuously in work and was not exercising Treaty Rights.

13. There is no material error of law identified in ground 3.

Conclusion

14. There is no identifiable material error of law in the decision by the First-tier Tribunal dismissing the appellant's appeal.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision

The decision of the First-tier Tribunal dismissing the appeal stands.

Date 28th December 2018

Upper Tribunal Judge Coker