Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/06042/2016

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision and Reasons Promulgated**
On 11 February 2019	**On 28 February 2019**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

SHARON ANDREA GRAY
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Thoree of Thoree and Co. Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before me following the grant of permission to the appellant in respect of the determination of First-tier Tribunal Judge Graves dismissing, on 7 November 2018, her appeal against the respondent's refusal to issue her with a permanent residence card.

2. The appellant is a Jamaican national born on 30 January 1974. She initially entered the UK as a visitor in June 2002 and overstayed. She made student applications in December 2002, March and April 2003 which were all refused. Nevertheless, she remained in the UK.

3. On 19 January 2008, he appellant married a Polish national but, according to the Home Office chronology and for reasons which are not explained, she did not apply for a residence card until 3 July 2010. This was issued on 12 November 2010 valid for five years. On 16 November 2015, she applied for a permanent residence card. By that time, she and her husband were separated (they separated in in September 2014) but it does not appear that this change in circumstances was brought to the attention of the Secretary of State. The application was refused on 9 May 2016 because the respondent considered that she had failed to show that her sponsor was a qualifying person and because she had not shown that she had resided in the UK for five continuous years in accordance with the Regulations. A short time later, the appellant filed for divorce.

4. The appeal was initially listed for hearing on 5 October 2017 but had to be adjourned as the appellant's representatives was double booked. It was relisted for 19 December 2017. On that occasion it was adjourned again with the judge making an 'Amos' direction, directing HMRC to supply documentary evidence of the sponsor's employment history. It then came for hearing before Judge Graves on 10 October 2018.

5. In the meantime, on 1 June 2017, the divorce was finalised.

6. Judge Graves dismissed the appeal. Permission to appeal was, however, granted on 28 December 2018 by First-tier Tribunal Judge Grimmett on the basis that the judge had arguably erred when assessing evidence at the date of the divorce, rather than at the date the divorce proceedings commenced (pursuant to Baigazieva [2018] EWCA Civ 1088).

The Hearing

7. I heard submissions from the parties at the hearing before me on 11 February 2019. For the appellant, Mr Thoree relied on the grounds and submitted that the relevant date was that of the initiation of divorce proceedings and not the date of the divorce itself. He submitted that the judge had misdirected herself at paragraphs 21, 22, 30 and 32. He stated that divorce proceedings had commenced on 27 May 2016 and that the judge had found that the sponsor had

been exercising treaty rights between April 2016 and April 2017. That was enough for the appeal to succeed. He further submitted that the appellant had herself worked from 2011. He asked that I re-make the decision and allow the appeal.

8. I then heard submissions from Mr Lindsay. He agreed that the relevant date was that of the initiation of divorce proceedings but drew my attention to the contradiction in when that was said to be. He argued that the only evidence before the judge as to the date of initiation of the proceedings was the appellant's witness statement where she asserted it was May 2016. That date had been shown to be wrong by the petition now adduced which gave the date as 6 June 2016. He submitted that there could be no error of law in the judge failing to consider a date that had turned out to be wrong. Mr Lindsay pointed to paragraph 31 of the determination where the judge had applied her mind to the correct test and had referred to the date of the initiation of divorce proceedings. He also pointed out that the judge had been asked by the appellant's representative to consider the situation as at the date of the divorce. There was no material error and the new evidence submitted could not be used to argue an error. The appellant's remedy was to make a fresh application and submit all the relevant documentary evidence. He submitted in the alternative, the judge had found that the appellant had not shown a continuous five year period. That finding should be preserved as it had not been challenged. If an error were to be found, he asked for a further hearing.

9. Mr Thoree responded. He submitted that regardless of the date of the commencement of proceedings, the judge had found that the sponsor had been working between April 2016 and April 2017. He submitted that the hearing had taken place before the handing down of Baigazieva. Whilst the judge may have referred to the date of the commencement of divorce proceedings in her determination, this had not been applied to her findings. There was ample evidence before the judge to show that the appellant had been continuously working since 2010 and there was evidence now available to show that her employment was continuing.

10. That completed submissions. At the conclusion of the hearing, I reserved my determination which I now give with reasons.

Discussion and Conclusions

11. I have considered all the evidence before me and have had regard to the submissions made. I remind myself that it is the evidence as it was before the First-tier Tribunal Judge that I must consider in order to determine whether or not she made an error of law and whether it

was a material one, and not the fresh evidence subsequently adduced for this hearing.

12. It was not alleged by the respondent in the decision letter that the marriage was one of convenience and the judge proceeded on the basis that it was genuine.

13. The judge was required to consider whether, under reg. 10, the appellant had retained the right of residence, with specific reference to sub paragraph (5) *and also* whether she was entitled to permanent residence under reg. 15(f). Achieving the first does not automatically result in the second. To satisfy 10(5) the appellant had to show that her spouse was a qualified person at the date the divorce proceedings commenced, that the marriage had lasted at least three years, that the appellant and sponsor had been in the UK with the sponsor exercising treaty rights for at least one of those years and that following the divorce the appellant had been exercising treaty rights as though she herself had been an EEA national.

14. Under reg. 15(f), the appellant had to show that she had resided in the UK for a continuous five year period and that she had retained rights of residence at the end of that period.

15. It is agreed that the appellant and her husband married on 19 January 2008 and divorced on 1 June 2017. Divorce proceedings were initiated in May 2016, according to oral evidence before the judge, and June 2016 according to a petition which was adduced with the permission to appeal application and which was not before the judge.

16. It is not correct, as maintained by Mr Thoree in his submissions, that at the time of the appeal hearing in October 2018, the Baigazieva judgment had not been handed down. It was issued in June 2018 and so should have been known to all the parties. It was patently wrong to ask the judge to determine whether the sponsor was a qualified person at the date of the divorce (at 14). Nevertheless, I am satisfied that the judge applied her mind to the correct test. Despite what she says about the period of the divorce itself (at paragraph 30), it is plain, at paragraph 31, that she was aware of what the appellant had to show and when. She states: *"...the appellant does have to establish that Mr Pisula was actually in the country, exercising treaty rights here, both during any period of residence relied upon, and also at the commencement of divorce proceedings"*. She then proceeds to consider the evidence, finding that apart from the oral evidence, there was very little reliable evidence to show the sponsor's presence in the UK over the duration of the marriage. His

bank statements showed no activity, although the appellant claimed he was working at the time, and the documentary evidence was largely in the form of junk mail sent to him at the claimed matrimonial address. There were also inconsistencies identified with the address where the appellant claimed they lived and that shown on the documents for the same period (at 31). The judge accepted, however, that there was satisfactory evidence for the sponsor's employment between April 2016 to April 2017 and so found that he was here and had been a qualified person during that time and also that the marriage had lasted for at least three years. The judge therefore found that at best the appellant could rely on having met two of the requirements of reg. 10(5) although plainly she had met all three of the requirements in that at the time divorce proceedings commenced, whether in May or June 2016, the sponsor was accepted to be in the UK and exercising treaty rights. The appellant has, therefore, shown retained rights of residence.

17. The judge went on to find, however, that the appellant had not shown that she had acquired permanent residence (at 32). The grounds are silent on this failing. She observed that Mr Thoree, who represented the appellant then as he did now, was unforthcoming about what five year period was relied on even though she sought to clarify this (at 15). She found that there was no evidence covering the appellant's employment/self-employment after April 2017. She took account of the appellant's oral evidence but found it to be vague and at odds with HMRC records. She found evidence of the appellant's own activities would have been available to her and she was not prepared to simply accept the inconsistent oral evidence. Although Mr Thoree sought to rely on a supplementary bundle of evidence relating to the appellant's work, that evidence was not before the judge and there is no explanation for why evidence, at the least up to the date of that hearing was not adduced.

18. The problem for the appellant is that the grounds make no challenge at all to the findings of the judge on the five year period and there was no application to amend the grounds to include such a challenge. Therefore, even if the judge had erred regarding the test to be applied to until when the sponsor had to be a qualified person, that error is immaterial to the outcome of the appeal as the judge's finding that the appellant had not established she was entitled to a permanent residence card did not form part of the challenge.

19. It may be that instead of pursuing this appeal, the appellant may have been better off making a fresh application to the respondent with all the relevant evidence. That is, of course, an avenue still open to her.

20. For all these reasons, therefore, I conclude that there is no material error of law in the judge's decision.

Decision

21. The judge did not make any material errors of law. The appeal is dismissed.

Anonymity

22. I make no order for anonymity.

Signed

Upper Tribunal Judge
Date: 25 February 2019