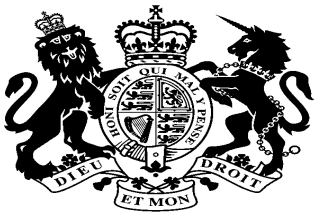

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/08454/2016
EA/08457/2016
EA/08458/2016
EA/08459/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On Wednesday 16 January 2019	**On Monday 28 January 2019**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) MS OLAYOMBO BOLATITO HANNAH OLATUNJI
(2) MISS ABISOLA TINA MARYAM HAMMED
(3) MR OLANSILE HABIB HAMMED
(4) MR MARTIN AYOBAMI DAVID HAMMED
(anonymity direction not made)

Respondent

Representation:
For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer
For the Respondent: Mr S Salam, solicitor, of Salam and Co Solicitors Ltd

DECISION AND REASONS

BACKGROUND

1. This is an appeal brought by the Secretary of State. For ease of reference, I refer to the parties hereafter as they were in the First-tier Tribunal. The Respondent appeals against a decision of First-Tier Tribunal Judge Rowlands promulgated on 15 October 2018 ("the Decision") allowing the Appellants' appeals against the Respondent's decision dated 30 June 2016 refusing them permanent residence cards as the former family members of an EEA national exercising Treaty rights in the UK, Mr Bertrand Dolmin, who is a French national. Both parties are agreed that, due to the timing of the Appellant's application to the Respondent and the relevant transitional arrangements, the governing regulations are the Immigration (European Economic Area) Regulations 2006 ("the Regulations").

2. The First Appellant is Mr Dolmin's former spouse and the other three Appellants are her children. Although they were born on 28 August 1995, 2 March 1989 and 21 November 1991 respectively and therefore two of them were no longer under 21 years at the date of the Respondent's decision, and all were over 21 years by the date of the hearing before Judge Rowlands, the Respondent did not take issue with their entitlement to permanent residence as dependents of the First Appellant in the event that she was so entitled. I raised this issue at the hearing before me but, as Mr Salam rightly pointed out, there is no issue taken in the Respondent's decision letter, Mr Tarlow did not submit that the outcome of their appeals should not follow from the result of the First Appellant's appeal and Mr Salam explained that all the children remain in education and remain dependent on the First Appellant. I therefore need consider only the position of the First Appellant who I refer to hereafter as "the Appellant".

3. The Respondent took issue in his decision with the genuineness of the Appellant's marriage to Mr Dolmin. Even if that were genuine, he did not accept that the Appellant could satisfy the Regulations as he said that the evidence did not show that Mr Dolmin was exercising Treaty rights prior to the divorce or that the Appellant was exercising Treaty rights as if she were an EEA national after the divorce. The Respondent expressly accepted that there were payslips covering the period February 2012 to September 2015 but said that the evidence prior to February 2012 was insufficient. There was therefore a gap from October 2010 (immediately prior to the grant of residence permits to the Appellants) for a period of five years. The Respondent also pointed to a lack of evidence that the Appellant was exercising Treaty rights as if she were an EEA national after her divorce in August 2015. The Respondent therefore concluded that the Appellants had not shown that they were entitled to permanent residence cards, applying regulations 10(5, 10(6) and 15(1)(f) of the Regulations.

4. The Judge accepted the Appellant's case that her marriage was not one of convenience. There is no challenge to that finding. In relation to the remaining issues, the Judge concluded as follows:

> "[16] … I am not satisfied on the basis of the evidence that has been provided that this was a marriage of convenience and believe that it certainly was a genuine marriage as far as she was concerned. The Respondent is clearly satisfied that she continues to remain in the United Kingdom in accordance with the EEA Regulations i.e. working and the only remaining issue is whether the former spouse is.
>
> [17] I am satisfied that there is sufficient evidence to show that he was working and exercising treaty rights up until 2014 and that would have been more than five years after they had been married and that this shows that he has been exercising treaty rights for the relevant period. Even if there were some gaps towards the end of the period I work on the basis of the presumption of continuance. If he had been working for many years in one job or in self-employment and there was no indication that anything might have changed in that respect then I have no reason to disbelieve that he wouldn't be so working.
>
> [18] I am satisfied to the relatively low standard that all four Appellants meet the requirements for the issue of an EEA residence card on a permanent basis."

5. The Respondent's challenge to the Decision is, in essence, a challenge to the failure to give sufficient reasons. The first ground is pleaded as such. The second is a failure to take account of and/or resolve conflicts of fact or opinion on a material matter – in essence, that the Judge has misunderstood the Respondent's case when reaching the conclusions at the end of [16] and at [17] of the Decision.

6. Permission to appeal was granted by First-tier Tribunal Judge Lambert in the following terms (so far as relevant):

> "… [2] The judge found that the Respondent had not proved that the 1st Appellant's former marriage had been one of convenience and that she had established exercise of Treaty rights by her ex-husband.
>
> [3] The grounds argue failure to give adequate reasons for the latter conclusion and to resolve a key conflict as to the 1st Appellant's exercise of treaty rights since the divorce.
>
> [4] The reasoning is rendered arguably inadequate by the extremely brief content of paragraph 17 and the absence there of any reference either to specific evidence or to argument put forward by the Respondent.
>
> [5] The Respondent also points to the judge's statement at paragraph 16 to the effect that the Secretary of State was satisfied that the 1st Appellant remained in the United Kingdom according to EEA Regulations, maintaining that the Refusal letter had in fact taken issue with this.

> [6] There is therefore an arguable error of law disclosed by the application."

7. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

ERROR OF LAW DECISION

8. Mr Tarlow relied on the Respondent's grounds by reference to [16] and [17] of the Decision. He accepted that there is no challenge to the finding that the marriage is not one of convenience. He accepted that the Judge may have been entitled to reach the conclusion he did, but the Respondent is entitled to know the reasons why he has lost.

9. Mr Salam sought to persuade me that the findings at [16] and [17] are adequate. He pointed out, correctly in my view, that the Decision has to be read with the Respondent's decision as the Respondent can be taken to know the detail of the case by reason of what he says in that decision. He also pointed out, again rightly, that the conclusions reached by the Judge have to be read alongside the remainder of the Decision and in particular what the Judge says earlier about the evidence.

10. However, when I pointed out to Mr Salam that the Judge said at [16] of the Decision that the Respondent had not taken issue with the exercise of Treaty rights by the Appellant as if she were an EEA national, his only response was that this was not relevant because the Appellant married Mr Dolmin in February 2009 and had therefore acquired a permanent right of residence as his family member in February 2014, prior to the divorce in 2015 and did not have to show that she was working before August 2015. That is right if the Appellant had indeed acquired permanent residence prior to divorce. However, the Judge's assertion at [16] discloses a fundamental misunderstanding of the Respondent's case.

11. That might not be material if the Judge's conclusions at [17] are a sustainable finding that the Appellant is entitled to a permanent residence card based on the position prior to divorce. The Judge there refers to there being sufficient evidence which, allied with the presumption of continuance, deals with the gap towards the end of the period. However, that too reveals a fundamental misunderstanding of the Respondent's case because his case is that there was evidence that Mr Dolmin was exercising Treaty rights from February 2012 to September 2015 but insufficient evidence prior to that date. The Judge concludes that there is sufficient evidence up to 2014 but does not say what that is. The Judge has therefore failed to engage with the salient issue or provide reasons for his conclusion.

12. Mr Salam sought to persuade me that when the Judge referred to "end of the period" at [17], he was referring to the end of Mr Dolmin's period as a self-employed person prior to commencing employment for others. I had some difficulty understanding this submission. Mr Salam drew my attention to what is said at [12] of the Decision about the date when the Appellant acquired a permanent right of residence which may be relevant to the point at [16] of the Decision but does not relate to this issue. Even if the Judge was talking about the period of self-employment, that does not resolve the issue because Mr Dolmin began working in the tax year 2011-12 and the period which the Respondent challenges begins in October 2010. It is also unclear why the presumption of continuance would assist when the period at issue was prior to the date when Mr Dolmin ceased to be self-employed and not after. In any event, I reject Mr Salam's attempts to interpret the words "the period" as anything other than the period which the Judge had to consider which was the five-year period establishing the Appellant's entitlement to permanent residence.

13. There is a further difficulty with the Judge's conclusions in his reference to suppositions rather than conclusions about what the evidence shows. He says that "[e]ven if there were some gaps towards the end of the period" without resolving whether those gaps exist. He then says that "[i]f he had been working for many years in one job or in self-employment and there was no indication that anything might have changed ..." without reaching any conclusion whether that was what the evidence shows.

14. The Respondent is entitled to know the reasons why he has lost just as is an appellant. The Respondent expressly raised two issues regarding the exercise of Treaty rights by Mr Dolmin and by the Appellant. The Judge has misunderstood the Respondent's case on both counts, has failed to make any reference to what the documents show about those issues and has failed to reach conclusions supported by adequate reasons resolving the conflict between the cases of the two parties.

15. For those reasons, I am satisfied that the Respondent's grounds are made out. The Respondent is entitled to reasons why the appeals should be allowed. I am also therefore satisfied that the error of law is material and that I should set aside the Decision in order to re-make it. There is though no challenge to the Judge's findings in relation to whether the marriage is one of convenience. Accordingly, I preserve the findings made in that regard. I set aside the final sentence of [16] and paragraph [17] of the Decision.

16. I see no need to re-hear oral evidence since there is no challenge to the issue which most of that evidence concerns and the findings which I need to re-make concern the documentary evidence rather than the Appellant's oral evidence. Neither party invited me to re-hear evidence and I therefore also preserve the record of that evidence as set out in the Decision.

17. Both parties were content for me to re-make the decision on the papers based on the documentary evidence. I indicated that, if it appeared to me when reviewing that evidence, that further submissions or evidence was required, I would give directions for such to be produced.

18. I now turn to re-make the decision.

RE-MAKING OF DECISION

Legal Framework

19. The relevant provisions of the Regulations read as follows:

> "**Family member who has retained the right of residence"**
>
> 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 or of an EEA national with a permanent right of residence on the termination of the marriage or civil partnership of that 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;
>
> (ii) …
>
> (6) The condition in this paragraph is that the person—
>
> (a) is not an EEA national but would, if he were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; or
>
> (b) is the family member of a person who falls within paragraph (a).
>
> …

(8) A person with a permanent right of residence under regulation 15 shall not become a family member who has retained the right of residence on the death or departure from the United Kingdom of the qualified person or the EEA national with a permanent right of residence or the termination of the marriage or civil partnership, as the case may be, and a family member who has retained the right of residence shall cease to have that status on acquiring a permanent right of residence under regulation 15."

"Permanent right of residence

15.- (1) The following persons shall acquire the right to reside in the United Kingdom permanently—

(a) … ;

(b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

…

(f) a person who—

(i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and

(ii) was, at the end of that period, a family member who has retained the right of residence.

…"

20. I begin with a statement of the dates which are relevant to my assessment of the evidence. The Appellant married Mr Dolmin on 24 February 2009. From that point in time she became his family member under the Regulations notwithstanding that she did not obtain a permanent residence card until 29 November 2010. No date is given for when divorce proceedings were issued. That is relevant to the date when it must be shown that Mr Dolmin was exercising Treaty rights. However, the decree nisi was pronounced on 2 June 2015 and the decree absolute followed on 17 August 2015. The Respondent does not take issue with the evidence showing that Mr Dolmin was exercising Treaty rights at both those dates and dating back to February 2012. He is right not to take issue with the evidence for that period as there is a complete set of payslips for that period supported also now by evidence from HMRC for the years 2012-13 up to 2016-17.

20. If the Appellant can show that Mr Dolmin was exercising Treaty rights at the date when they married, she became entitled to permanent residence on 24 February 2014. I therefore begin with what the evidence shows about the period to February 2012 which is disputed by the Respondent.

21. HMRC has produced information in relation to Mr Dolmin's employment also for the tax years 2010-11 and 2011-12. In 2010-11, he declared £8125 earnings from self-employment. In 2011-12, he declared earnings from self-employment of £7298 together with earnings from employment of £2086, £511, £877 and £34. The declaration for 2010-11 is consistent with the tax return produced for that year. There is also produced a tax return for the year 2009-2010 which shows business income of £7570. A further document sets out the tax calculation for 2011-12 which, whilst it differs slightly in relation to self-employed earnings (£5963 v £7298 according to the HMRC information) is consistent with the information given about employment earnings of £3508.

22. I am therefore satisfied that the evidence shows that Mr Dolmin was exercising Treaty rights in the period 2009 to 2012. I recognise that the evidence of the tax return for 2009-2010 does not show when in that year Mr Dolmin was working, taken alone. There are however bills for national insurance contributions for the period 4 January 2009 to 11 April 2009 (for £18.40) and for 10 January 2010 to 10 April 2010 (for £31.20). On balance, therefore, I am satisfied that Mr Dolmin was working, albeit possibly not earning very much, from January 2009 onwards and certainly from April 2009 onwards and up to the period which is not disputed from February 2012.

23. Taken at its lowest, the evidence therefore shows that the Appellant was entitled to a permanent right of residence in April 2014 as the family member of Mr Dolmin. At that time, the couple were still married. Accordingly, the Appellant does not have to show that she retained a right of residence after the divorce. She already had that right before she was divorced from Mr Dolmin.

24. Even if I am wrong about that and, as the Respondent appears to suggest, that the Appellant must show that she was either the family member of Mr Dolmin when he was exercising Treaty rights or in her own right as if she were an EEA national, from 29 November 2010 to November 2015, I am satisfied that she is able to satisfy the requirements of the Regulations.

25. The Appellant ceased to be a family member on 17 August 2015. The evidence contains pay slips and/or remittance advices for the company for which she works and of which she is a director dated 24 and 31 July 2015, 7, 14, 21, 23 and 28 August 2015 and 15 November 2015. She has remained a director of the company from 2015 to 2017. Therefore, although there is no evidence of income received in the period 28 August to 15 November 2015 or thereafter, I am satisfied that she has been exercising Treaty rights throughout the requisite period.

26. For those reasons, the Appellant is entitled to a permanent residence card confirming her permanent right to reside in the UK. As I have already indicated, no issue is taken with the rights of the other Appellants also to permanent residence cards as the Appellant's dependents.

27. For those reasons, these appeals are allowed.

DECISION

I am satisfied that the Decision contains a material error of law. The decision of First-tier Tribunal Judge Rowlands promulgated on 15 October 2018 is set aside to the extent set out at [15] and [16] above.

I re-make the decision. I allow the Appellants' appeals.

Signed Dated: 21 January 2019
Upper Tribunal Judge Smith