Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00046/2018 (V)

THE IMMIGRATION ACTS

Heard at a remote hearing via Skype	**Decision & Reasons Promulgated**
On 10 March 2021	**On 18 March 2021**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

EVA ANKU-TSEDE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Bazini, Counsel instructed by JJ Law Chambers
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

1. I now remake the decision concerning an appeal against the respondent's decision dated 24 October 2016 in which the appellant's application for a residence card was refused. This decision follows my 'error of law decision' dated 6 November 2020, in which I found that the decision of the First-tier Tribunal ('FTT') sent on 23 March 2020, dismissing the appellant's appeal contained an error of law and would be remade in the Upper Tribunal ('UT').

Issue in dispute

2. The issue before the FTT was whether or not the appellant was a "family member who has retained a right of residence" for the purposes of regulation 10 of the Immigration (EEA) Regulations 2006 ('the 2006 Regulations'). At the beginning of the resumed hearing before me both representatives agreed that the FTT accepted that all the requirements of regulation 10(5) were met save for regulation 10(5)(c), by reference to regulation 10(6)(b), in particular:

    (a) The appellant's ex-husband ('H') is a French and therefore an EEA citizen; they married on 20 September 2008 when H was a "qualified person" because he was working at the time, and the appellant ceased to be a family member of H on the termination of their marriage on 30 December 2010.
    (b) The appellant was residing in the UK in accordance with the 2006 Regulations as of 30 December 2010, when she was working as a care assistant.
    (c) The appellant is not an EEA national (she is a citizen of Ghana) but she has been a worker in the UK at all material times.
    (d) The appellant was a victim of domestic abuse while the marriage was subsisting.

3. Both parties accepted at all material times during the course of the UT proceedings (including at the beginning of the resumed hearing) that there is a single issue in dispute: whether or not H was a "qualified person" i.e. working or self-employed at the time that divorce proceedings were initiated on 2 June 2010. I also note for completeness that it is agreed that the parties separated before this i.e. H left the matrimonial home in August 2009.

4. I pause to note that both representatives submitted that the older 2006 Regulations apply because of the vintage of the application and decision in this matter. In any event, given the narrow ambit of the issue in dispute, it matters not which version of the Regulations apply. The issue before me remains a straightforward one: was H in employment or self-employed in June 2010.

Evidence

5. The appellant relied upon a consolidated bundle containing an updated witness statement from her dated 3 February 2021, her divorce petition, a letter from solicitors dated 18 November 2008 and a witness statement from Ms Gregory. Shortly before the hearing the appellant filed and served a further witness statement (the March 2021 statement) which she confirmed together with her previous statements to be true at the hearing.

6. The appellant was cross-examined by Mr Bates. Although there were initial technical difficulties, these were resolved and the appellant was able to fully answer the questions asked by Mr Bates. Both representatives expressed satisfaction that although there were difficulties, the hearing proceeded fairly.

Submissions

7. Mr Bates relied upon a position statement dated 9 March 2021 and made helpful comprehensive submissions in support of the SSHD's contention that the appellant was unable to displace the burden of proof upon her to establish that H was exercising Treaty rights at the relevant time. I refer to Mr Bates' submissions in more detail below when making my findings. Mr Bazini invited me to find the appellant a credible witness and that she had done enough to establish it was more likely than not that H continued to work in the UK at the relevant time.

8. After hearing submissions from both representatives, I reserved my decision which I now provide with reasons.

Findings

9. The burden of proof remains upon the appellant to satisfy me that H was exercising Treaty rights in June 2010, and was therefore a "qualified person" at the time that divorce proceedings were initiated. The appellant faces obstacles in displacing the burden of proof. First, she entirely accepted that after H left the matrimonial home in August 2009, she had no contact with him whatsoever, and could not say with certainty that he continued to work. Second, all this happened over 10 years ago and corroborating documentary evidence is very limited. Third, the evidence available from HMRC, as set out in a statement from Mr Richards dated 10 April 2019, confirms that H was not in any form of PAYE employment other than for a short time in a period between October to November 2008, when he earned £660, and there was no record of any self-assessment or national insurance number for him. It is important to record that like Ms Aboni before him, Mr Bates acknowledged on behalf of the respondent, that the HMRC evidence did not necessarily mean that H was not employed informally. He may of course have been paid 'cash in hand'. However, Mr Bates submitted that there was no credible evidence of informal employment for the period December 2008 to June 2010.

10. The most significance evidence that H may have been informally employed comes from the appellant herself. I note as Mr Bates reminded me that when she married H she was an unlawful overstayer. I accept that this reflects adversely upon her general credibility. However it is important to note that the FTT accepted her evidence as credible. This included her claim that she was the victim of domestic abuse. I was impressed with the appellant's evidence before me. She provided consistent and straightforward responses to the questions asked. She conceded that she did not have as much information as she wished but was adamant in her consistently articulated belief that when they were living together she always believed H to be working. In my judgment the appellant has provided cogent and credible reasons for holding that belief: H left the home early and returned late each day in a manner consistent with employment; they shared household expenditure; he worked in a restaurant

before changing his job to work at a company "dealing with electrical parts"; when they first applied for a residence card H had to show his payslips to solicitors. That account is consistent with the HMRC and SSHD records that H was employed for a period of time at the end of 2008. There is no documentary evidence to confirm H's employment after this time but the appellant carefully and robustly explained in her statement and oral evidence that she would not have married a man who did not work or was not prepared to work, and he always worked. I accept the appellant's evidence that H gave her every indication during the time they shared a home that he was in full-time employment. She had no concerns that he was not contributing his share of household expenditure. As Mr Bazini observed, the daily routines described by the appellant were consistent with H's lawful albeit 'informal' employment. I accept the appellant genuinely believed H to have been working during the time that they lived together and that belief is more likely than not to be well-founded.

11. The period after H left the matrimonial home up to the date divorce proceedings were initiated is more difficult to assess. The appellant has been consistently candid as to this part of the chronology. She entirely accepted that after H left the matrimonial home in August 2009, she no longer had any contact with H. She however stated in her February 2021 statement that when filing his response to the divorce proceedings, H confirmed his occupation as "delivery driver", and this is reflected in the divorce petition. She explained that this was consistent with his ambition to become a delivery driver, as articulated to her when they lived together. In his position statement, Mr Bates submitted that the divorce petition contains no signature from the ex-spouse confirming the accuracy of this information nor any indication as to whether the occupation was current or historical at the date the form was completed. Mr Bates observed that it is not unusual for occupations to be recorded even where the individual is not presently economically active.

12. In her March 2021 statement the appellant sought to clarify her evidence. She repeated that she had no personal knowledge of H's occupation after he left the matrimonial home and confirmed that she was only able to speculate that the information concerning H's occupation being as 'delivery driver' in the divorce petition must have come from information obtained by her family solicitors when liaising with H or his legal representatives at the time. Mr Bates invited me to find that this constitutes pure speculation and little weight should be attached to this.

13. The divorce petition was clearly prepared on the appellant's behalf by the family solicitors named within the petition itself. I do not accept that they would have engaged in guesswork as to H's circumstances. They were able to provide H's full London address at the time. There is no reason to believe this to be inaccurate. Indeed the divorce decree was made on 5 October 2010 and completed on 30 December 2010. It would have been difficult for the decree to have been lodged on 5 October 2010 in the absence of correct contact details for

H. I am satisfied that it is more likely than not that the family solicitors confirmed H's address and occupation with him. There was no reason for H to lie about his occupation in the divorce petition. The occupation provided must also be viewed in the context of the appellant's own evidence, which I have accepted to be credible including the following: H had always worked; he had articulated a desire to be a delivery driver to her during their marriage; she understood from a friend that at the date of the divorce itself H was still working.

14. I bear in mind that Mr Bates checked Home Office records but was unable to find any indication of any subsequent application from H since the sponsorship of the appellant's application. He invited me to find that particularly curious given the incentive to regularise 'settled status' on the part of EEA citizens in the UK. In my view the absence of more recent Home Office records does not shed any bright light on H's circumstances so many years ago in 2010.

15. I am satisfied that when all the circumstances are viewed holistically, H was living in the UK and employed as a delivery driver at the relevant date in 2010, as set out in the divorce petition. I entirely accept that this is inconsistent with the HMRC evidence. However, I am satisfied that it is more probable than not that after his PAYE employment ended in November 2008, as the appellant claimed H remained in the UK employed on an informal and continuous basis until the date of the divorce decree in October 2010.

Conclusion

16. Having resolved the sole issue in dispute in the appellant's favour I conclude that the respondent's decision under appeal breaches the 2006 Regulations.

Decision

17. I remake the decision by allowing the appeal under the Immigration (European Economic Area) Regulations 2006.

Signed: *Ms Melanie Plimmer* Dated: *10 March 2021*
Upper Tribunal Judge Plimmer