



**Upper Tribunal
(Immigration and Asylum Chamber)**

Amsar (Isle of Man: free movement) [2019] UKUT 00012 (IAC)

THE IMMIGRATION ACTS

**Heard at Field House
On 23 October 2018**

Decision & Reasons Promulgated

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Before

**THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE COKER**

Between

**MOHAMAD ASLAM MOHAMED AMSAR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr R de Mello, Direct Access
For the respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

(1) The Isle of Man and the Channel Islands are not part of the United Kingdom and have only a very limited legal relationship with the European Union.

(2) An EU national who works on the Isle of Man is not thereby exercising EU rights of free movement for the purposes of the Immigration (EEA) Regulations 2006.

A. Introduction

1. The appellant is a citizen of Sri Lanka. His former wife is a Latvian national. They married in Cyprus in 2005 and travelled together to the United Kingdom in 2008. The couple divorced in April 2014.
2. The appellant's claim to be entitled to be in the United Kingdom depends upon whether he is a family member who retained a right of residence in the United Kingdom, following that divorce. This requires him to show that his former wife was exercising EU free movement rights at the time of the divorce (which can be determined by reference to the position when the divorce proceedings were initiated: Baigazieva v SSHD [2018] EWCA Civ 1088).
3. At all material times, the appellant's former wife was resident in the Isle of Man, where she was employed as a member of staff of a passenger ferry, which travelled between the Isle of Man and the United Kingdom.
4. If, during this period, the appellant's former wife was exercising EU rights of free movement, then the relevant requirements of the Immigration (EEA) Regulations 2006 (as then in force) mean that the appellant has retained the rights of residence in the United Kingdom and will be entitled to demand the respondent formally to recognise that fact. If, on the other hand, the appellant's former wife was not exercising such rights, the appellant's claim fails.
5. The First-tier Tribunal found against the appellant on this issue. Permission to appeal was granted by that Tribunal.

B. The relationship of the Isle of Man with the European Union

6. The question whether the appellant's former wife was exercising rights of free movement requires us to examine the relationship of the Isle of Man with the European Union. In this regard, the Upper Tribunal has received helpful written and oral submissions from Mr de Mello and from Mr Mills. We are very grateful to both.
7. When the United Kingdom became a member of (what is now) the European Union on 1 January 1973, special provision was made for the Channel Islands and the Isle of Man, since these islands are not part of the United Kingdom of Great Britain and Northern Ireland.

(i) Protocol 3 to the Treaty of Accession of the United Kingdom to (what is now) the European Union

8. Protocol 3 to the Treaty (or Act) of Accession 1972 reads as follows:-

“Article 1

1. The Community rules on customs matters and quantitative restrictions, in particular those of the Act of Accession, shall apply to the Channel Islands and the Isle of Man under the same conditions as they apply to the United Kingdom. In particular, customs duties and charges having equivalent effect between those

territories and the Community, as originally constituted and between those territories and the new Member States, shall be progressively reduced in accordance with the timetable laid down in Articles 32 and 36 of the Act of Accession. The Common Customs Tariff and the ECSC unified tariff shall be progressively applied in accordance with the timetable laid down in Articles 39 and 59 of the Act of Accession, and account being taken of Articles 109, 110 and 119 of that Act.

2. In respect of agricultural products and products processed therefrom which are the subject of a special trade regime, the levies and other import measures laid down in Community rules and applicable by the United Kingdom shall be applied to third countries.

Such provisions of Community rules, in particular those of the Act of Accession, as are necessary to allow free movement and observance of normal conditions of competition in trade in these products shall also be applicable.

The Council, acting by a qualified majority on a proposal from the Commission, shall determine the conditions under which the provisions referred to in the preceding sub-paragraphs shall be applicable to these territories.

Article 2

The rights enjoyed by Channel Islanders or Manxmen in the United Kingdom shall not be affected by the Act of Accession. However, such persons shall not benefit from the Community provisions relating to the free movement of persons and services.

Article 3

The provision of the Euratom Treaty applicable to persons or undertakings within the meaning of Article 196 of that Treaty shall apply to those persons or undertakings when they are established in the aforementioned territories.

Article 4

The authorities of these territories shall apply the same treatment to all natural and legal persons of the Community.

Article 5

If, during the application of the arrangements defined in this Protocol, difficulties appear on either side in relations between the Community and these territories, the Commission shall without delay propose to the Council such safeguard measures as it believes necessary, specifying their terms and conditions of application.

The Council shall act by qualified majority within one month.

Article 6

In this protocol, Channel Islander or Manxman shall mean any citizen of the United Kingdom and Colonies who holds that citizenship by virtue of the fact that he, a parent or grandparent was born, adopted, naturalised or registered in the Island in question; but such a person shall not for this purpose be regarded as a Channel Islander or

Manxman if he, a parent or grandparent was born, adopted, or naturalised or registered in the United Kingdom. Nor shall he be so regarded if he has at any time been ordinarily resident in the United Kingdom for five years.

The administrative arrangements necessary to identify those persons will be notified to the Commission.”

(ii) Article 355 of the Treaty of the Functioning of the European Union

9. Article 355 of the Treaty of the Functioning of the European Union deals with the territorial scope of the EU Treaties, as follows:-

“1. The provisions of the Treaties shall apply to Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin the Azores, Madeira and the Canary Islands in accordance with Article 349.

2. The special arrangements for association set out in Part Four shall apply to the overseas countries and territories listed in Annex II.

The Treaties shall not apply to those overseas countries and territories having special relations with the United Kingdom of Great Britain and Northern Ireland which are not included in the aforementioned list.

3. The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible.

4. The provisions of the Treaties shall apply to the Åland Islands in accordance with the provisions set out in Protocol 2 to the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.

5. Notwithstanding Article 52 of the Treaty on European Union and paragraphs 1 to 4 of this Article:

(a) the Treaties shall not apply to the Faeroe Islands;

(b) the Treaties shall not apply to the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus except to the extent necessary to ensure the implementation of the arrangements set out in the Protocol on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus annexed to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union and in accordance with the terms of that Protocol;

(c) the Treaties shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972.

6. The European Council may, on the initiative of the Member State concerned, adopt a decision amending the status with regard to the Union, of a Danish, French or Netherlands country or territory referred to in paragraphs 1 and 2. The European Council shall act unanimously after consulting the Commission."

C. The view of the Government of the Isle of Man

10. The following passages are taken from the website of the Government of the Isle of Man:-

"The Isle of Man has a very limited legal relationship with the European Union. Article 355.5(c) of the Treaty on the Functioning of the European Union (before the ratification and coming into force of the Lisbon Treaty it was Article 299(6)(c) of the Treaty establishing the European Community) states:

"this Treaty shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972."

The arrangements referred in Article 355.5(c) of the Treaty are those set out in Protocol No. 3 to the Act of Accession which formed part of the United Kingdom's Treaty of Accession 1972 to what was then the European Economic Community. A copy of Protocol 3 is reproduced below. Under this special relationship the Island is outside of the European Union for most purposes.

Under Protocol 3, the Isle of Man is part of the customs territory of the Union. There is free movement of industrial and agricultural goods in trade between the Island and the Union. EU customs legislation and certain legislation relating to the trade in agricultural goods applies directly to the Island by virtue of Protocol 3.

The Isle of Man neither contributes to, nor receives anything from, the funds of the European Union.

Any proposal to amend the text of Protocol 3 would require the unanimous approval of all Member States of the EU.

Apart from the requirements of Protocol 3 all other EU legislation is not directly applicable to the Island. The Isle of Man Government may, however, choose to enact legislation that is similar to, or based on, EU legislation if it believes that this is in the Island's interests.

The Island's relationship with the Union allows it to trade with countries in the European Economic Area that are not EU Member States (Iceland, Liechtenstein and Norway) in a fashion generally similar to its trade with the Union itself."

D. Isle of Man legislation

11. An example of the Isle of Man Government enacting legislation similar to that of the EU is the Immigration (European Economic Area) Regulations 2009. These

Regulations are based on Directive (2004/8/EC) regarding citizens' free movement. The 2009 Regulations deal, amongst other things, with the way in which an EEA national may be admitted to and subsequently obtain extended or permanent rights of residence in the Isle of Man.

12. Another piece of Isle of Man legislation is the Immigration (Isle of Man) Order 2008. This extends to the Isle of Man certain provisions of the United Kingdom's Immigration Act 1988, including section 7 of that Act, subsection (1) of which provides as follows:

"Persons exercising Community rights and nationals of member States

(1) A person shall not under the [Immigration Act 1971] require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable EU right or of any provision made under section 2(2) of the European Communities Act 1972".

13. So far as relevant, article 10 of the 2008 Order provides:

"Extension of the Immigration Act 1988 to the Isle of Man

10. – (1) The following provisions of the 1988 Act shall extend to the Isle of Man subject to the modifications specified in Schedule 4.

(2) The provisions are-

...

(d) section 7 (persons exercising Community rights and nationals of member States);"

14. Schedule 4 to the Order modifies section 7, as it applies to the Isle of Man:

"2. –(1) Section 7 of the 1988 Act is modified as follows.

(2) In subsection (1)-

(a) for "the United Kingdom in any case in which he is entitled to do so" substitute "the Isle of Man where he is entitled to enter or remain in the United Kingdom".

E. Department of Health and Social Security v Barr and another (C-355/89, 3 July 1991)

15. We shall return to the 2008 Order in due course. We must next turn to a case decided by the European Court (as it then was) which is directly about the Isle of Man.
16. In 1991, the Court of Justice of the European Communities (as it then was) was required to consider the effect of Protocol No 3. A reference was made to the Court by the Deputy High Bailiff's Court in Douglas, arising out of criminal proceedings

brought by the Isle of Man Department of Health and Social Security against an employee and his employer, for committing an offence contrary to the Control of Employment Act 1975, an Act of the Tynwald (the Parliament of the Isle of Man). The employee, a national of the United Kingdom, had taken up employment with the employer as a company lawyer in the Isle of Man, without having the work permit required for such a post by the Control of Employment Act, in the case of persons who were not "Isle of Man workers".

17. The reference asked whether the 1975 Act contravened the terms of Protocol No 3 insofar as it:-

“(a) Imposes controls or restrictions on employment in the Isle of Man of persons other than Isle of Man workers as defined in the [Act], which discriminate in terms of the controls or restrictions imposed by reference to trade, professional type of employment?

(b) Applies treatment with regard to employment in the Isle of Man of natural and legal persons of the Community different from the rights which are enjoyed by Manxmen in the United Kingdom?”

18. The reference also asked whether Article 4 of Protocol 3 meant no more than that the Isle of Man authorities should not discriminate between natural and legal persons of the Community on the ground of nationality.

19. Having decided in the affirmative that the Deputy High Bailiff's Court had jurisdiction to make the reference, the European Court held as follows:-

“The questions submitted for a preliminary ruling

11. It must be borne in mind that according to the established case-law of the Court, in proceedings instituted under Article 177 of the Treaty, the Court may not rule on the compatibility with Community law of a national law or regulation. However, it may provide the national court with all the criteria for the interpretation of Community law which it needs in order to enable it to assess the compatibility of the provisions in question with the rule of Community law relied upon.

The first part of the first question and the second question

12. These questions must be considered and defined in the light of the circumstances of the case, resulting from the statutes of the Isle of Man, the observations submitted to the Court and the explanations provided at the hearing.

13. According to the defendants in the main proceedings, Article 4 of Protocol No 3 precludes the application of the provisions laid down in the Control of Employment Act. That statute provides, with penalties for non-compliance, that a person may not 'undertake, or become or be engaged in, any employment in the Island unless he is an Isle of Man worker', or employ any person unless the person employed is an Isle of Man worker, except under a permit granted by the Department of Health and Social Security. However, certain types of employment, which are listed in Schedule 1 to the Act but which do not include

that of company lawyer held by Mr Barr, may be taken up without a permit by persons who are not Isle of Man workers.

14. The defendants in the main proceedings consider that those derogations from the requirement of a work permit have the effect of restricting the right to take up certain types of employment, such as employment in the police, the armed forces or the civil service of the Isle of Man, to United Kingdom nationals, such as Mr Barr, or to Irish nationals, thus giving rise to unequal treatment in their favour. They come to the conclusion that all the provisions of the system established by the Control of Employment Act, including the requirement of a work permit for employment of the type undertaken by Mr Barr, are contrary to Article 4 of Protocol No 3.
15. In those circumstances, the first part of the first question and the second question must in substance be regarded as seeking to ascertain whether the fact that the Isle of Man authorities require all Community nationals who wish to take up a given type of employment to hold a work permit constitutes a breach of the obligation to ensure equal treatment laid down in Article 4 of Protocol No 3, where national legislation provides for derogations from that obligation for other types of employment and the effect of those derogations, in certain cases, is to render those types of employment accessible only to nationals of two Member States.
16. In that regard it must be pointed out that, as the United Kingdom rightly emphasizes, the rule laid down in Article 4 of Protocol No 3 cannot be interpreted in such a way as to be used as an indirect means of applying on the territory of the Isle of Man provisions of Community law which are not applicable there by virtue of Article 227(5)(c) of the EEC Treaty and Article 1 of Protocol No 3, such as the rules on the free movement of workers.
17. However, contrary to the view taken by the United Kingdom, the principle of equal treatment laid down by Article 4 of Protocol No 3 is not limited exclusively to the matters governed by Community rules which are referred to in Article 1 of that protocol. Article 1 relates to the free movement of goods, whilst Article 4 applies to natural and legal persons. Article 4 must therefore be regarded as an independent provision so far as its scope is concerned. It must be interpreted as precluding any discrimination between natural and legal persons from the Member States in relation to situations which, in territories where the Treaty is fully applicable, are governed by Community law.
18. Since the right to take up employment is a matter governed by Community law, the rule laid down by Article 4 of Protocol No 3 applies to that right even though Community nationals cannot thereby obtain on the Isle of Man the benefit of the rules on the free movement of workers.
19. In the light of those considerations, the possibility that nationals of some Member States of the Community may suffer discrimination by comparison with nationals of other Member States, as regards certain types of employment, cannot be regarded as affecting the compatibility with Community law of the requirement of a work permit for other types of employment, provided that requirement is applied without discrimination to all Community nationals. Contrary to the view taken by the defendants in the main proceedings, the possibility of discrimination in the case of certain types of employment does not

necessarily have the effect of rendering the entire system established by the Control of Employment Act incompatible with Community law.

20. Accordingly, the answer to the first part of the first question and to the second question must be that the fact that the Isle of Man authorities require all Community nationals who wish to take up employment on the island to hold a work permit does not constitute in the case of employment in general a breach of the obligation to ensure equal treatment laid down in Article 4 of Protocol No 3, even though national legislation provides for derogations from that obligation in the case of certain types of employment and the effect of those derogations is to give rise, in certain cases, to differences of treatment on grounds of nationality.

The second part of the first question

21. The second limb of the first question seeks in substance to ascertain whether the provisions of Protocol No 3 require the Isle of Man authorities to grant Community nationals the same treatment, with regard to employment, as that which is granted to Manxmen by the United Kingdom.
22. According to Article 2 of Protocol No 3, the rights enjoyed by Manxmen in the United Kingdom are not affected by the Act of Accession. However, that article specifies that such persons do not benefit from the Community provisions relating to the free movement of persons and services.
23. Article 2 of Protocol No 3 cannot therefore be interpreted as requiring the Isle of Man authorities to treat natural or legal persons from the Community in the same manner as Manxmen are treated in the United Kingdom. Nor is any such rule laid down elsewhere in the protocol.
24. Accordingly, the answer to the second limb of the first question must be that the provisions of Protocol No 3 must be interpreted as not requiring the Isle of Man authorities to grant to Community nationals the same treatment, with regard to employment, as that which is granted to Manxmen by the United Kingdom."

F. Discussion

20. For the appellant, Mr De Mello submitted that, properly interpreted, EU law treats the Isle of Man as part of the United Kingdom. Even if that were not the position, Mr De Mello contended that the United Kingdom had unlawfully discriminated against the appellant's ex-wife, in that she was not recognised, whilst working in the Isle of Man, as exercising EU treaty rights; whereas, in contrast, a Manxman who falls within Article 6 of Protocol 3 is able to exercise EU free movement rights, across the EU (including Latvia).
21. In support of his first submission, Mr De Mello pointed to the fact that the Isle of Man is a Crown dependency, for which the United Kingdom is responsible. Mr De Mello also relied upon the CJEU judgment in Spain v United Kingdom [2007] 1 C.M.L.R.3 where, at paragraph 19, we find the following:-

"19. In Community law, Gibraltar is a European territory for whose external relations as a Member State is responsible within the meaning of Art. 299(4) EC and to which the provisions of the EC Treaty apply. The Act concerning the conditions

of accession of Denmark, Ireland and the United Kingdom and the adjustments to the Treaties ... provides, however, that certain parts of the Treaty are not to apply to Gibraltar.”

22. The Court held that the United Kingdom had not violated the provisions of EU law by granting the right to vote in European elections to certain qualified Commonwealth citizens, resident in Gibraltar, who are not nationals of the EU.
23. We are unable to accept Mr De Mello’s first submission. Article 1 of Protocol 3 makes it plain that the only EU free movement provisions that apply to the Isle of Man are those concerning agricultural products and products which are the subject of a special trade regime. Protocol 3 does not, in any sense, extend EU rights of free movement in respect of those entering, and working in, the Isle of Man. Article 355.5(c) is determinative of the matter. The EU Treaties apply to the Isle of Man “only to the extent necessary to ensure the implementation of” what is Protocol 3.
24. The case of Spain v United Kingdom does not assist the appellant. Although Gibraltar and the Isle of Man have in common the fact that neither is part of the United Kingdom, Gibraltar is, unlike the Isle of Man, part of the European Union. This is because Article 355.3 of the Consolidated Treaty (which superseded Article 299(4) EC) applies the Treaty to European territories for whose external relations a Member State is responsible. Although the United Kingdom is also responsible for the external relations of the Isle of Man, Article 355.5 expressly overrides 355.3.
25. Mr De Mello sought to derive support from article 10 of the Immigration (Isle of Man) Order 2008 (see paragraphs 12 to 14 above). Mr De Mello suggested that article 10 extends EU rights of free movement to the Isle of Man or, alternatively, that it is a recognition of the fact that such rights already exist.
26. The problem with this submission is it ignores the fact that the application of section 7 of the 1988 Act by article 10 was subject to the modification in Schedule 4 to the Order, set out in paragraph 14 above. The effect of the modification is to make the relevant part of section 7 read as follows:-

“A person shall not under the principal Act require leave to enter or remain in the Isle of Man where he is entitled to enter or remain in the United Kingdom by virtue of an enforceable EU right or of any provision made under section 2B of the European Communities (Isle of Man) Act 1973 (an Act of Tynwald).”
27. The important point to take from modified section 7 is that a person’s right to enter the Isle of Man, without the need to obtain leave to enter or remain under the Isle of Man legislation which corresponds to the United Kingdom’s Immigration Act 1971, is an ancillary right; that is to say, it is a right which is dependent upon the person in question having exercised EU Treaty rights in the United Kingdom. This in no sense means the person concerned is to be taken as exercising EU rights of free movement in the Isle of Man.
28. We turn to Mr De Mello’s “discrimination” submission. Mr De Mello said it is discriminatory for the United Kingdom, through the mechanism of Article 6 of Protocol 3, to enable certain Manxmen to exercise freedom of movement rights

across the states of the EU; whereas a person such as the appellant's ex-wife cannot be treated, for the purposes of United Kingdom law, as having exercised EU rights of free movement, while she was employed and working on the Isle of Man.

29. We find this submission misconstrues the purpose and effect of Articles 2 and 6 of Protocol No 3. Article 6 is about the nationality law of the United Kingdom. What it does is to identify certain Channel Islanders or Manxmen, who are regarded as having a sufficiently strong connection with the United Kingdom, as entitled to be treated in the same way as British citizens. Channel Islanders and Manxmen who do not possess such a connection "shall not benefit from the Community provisions relating to the free movement of persons and services" (Article 2).
30. Once Article 6 is recognised for what it is; namely, a provision about nationality, the issue of discrimination evaporates. Each of the States of the EU is entitled to determine who are its nationals. EU law has no purchase on such matters. That is what lies behind Article 6.
31. As we can see from the judgment of the European Court in Barr, the issue of discrimination did, in fact, arise in relation to Article 4 of Protocol 3. At paragraph 17, the Court held that Article 4 was "an independent provision insofar as its scope is concerned". As such:-

"It must be interpreted as precluding any discrimination between natural and legal persons from the Member States in relation to situations which, in territories where the treaty is fully applicable, are governed by Community law."
32. For this reason, the Court held that Article 4 applied to the right to take up employment "even though Community nationals cannot thereby obtain on the Isle of Man the benefit of the rules on the free movement of workers" (paragraph 18).
33. The limited effect of this reading of Article 4 is, however, made plain in the judgment, at paragraphs 19 and 20. As Mr Mills pointed out, although the Court found that, so far as Article 4 was concerned, the equal treatment principle applied in respect of all matters governed by EU law, even where that specific part of the *acquis communautaire* did not apply to the Isle of Man, this did not mean the Isle of Man actually had to apply the standards provided for in that context by EU law.
34. Accordingly, the Isle of Man could operate a work permit scheme for those who did not have the status of an "Isle of Man worker", under its domestic legislation, provided that the scheme applied equally in respect of all EU nationals, including United Kingdom nationals. The key point, in this regard, is that the scheme would plainly be incompatible with EU "free movement" law. Therefore, far from assisting his case, Barr serves only to undermine both limbs of the appellant's submissions. The fact that Article 4 requires the authorities of the Isle of Man to "apply the same treatment for natural and legal persons of the Community" has no bearing on Article 6. It is not, to adopt Mr Mills' words, a "back-door route to claim rights of free movement".

G. The findings of the First-tier Tribunal

35. At paragraph 12 of the First-tier Tribunal's decision, Judge Astle made these findings:-

"The Appellant relies on his former wife's employment record with Manx Sea Transport Ltd. According to the documents supplied, its registered office is in Douglas, Isle of Man. It appears from other documents that deductions such as income tax were paid to the Isle of Man government. At the date of the divorce this was the situation and I am satisfied that she was employed in the Isle of Man. However, although the United Kingdom has certain responsibilities for the Isle of Man, it is not a member of the European Union. As such she was not a qualified person at the relevant time. The Appellant does not therefore [fulfil] the requirements of Regulation 10(5). He has not retained the right of residence and does not qualify for a permanent right of residence."

36. Given that there is no issue about the employment position of the appellant's former wife being different at the date of initiation of divorce proceedings, as opposed to the date of divorce, Judge Astle's findings of fact were determinative of the matter. The appellant's former wife was not, at any material time, exercising EU rights of free movement and was not, therefore, a qualified person for the purposes of the Immigration (EEA) Regulations 2006.

H. Decision

37. The decision of the First-tier Tribunal does not involve the making of an error on a point of law. The appeal is accordingly dismissed.

Signed

Date

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber