Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05305/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29th July 2019	**On 21st August 2019**

Before
UPPER TRIBUNAL JUDGE REEDS

Between
CHARLOTTE AKO BESONG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Delbourgo, Counsel instructed on behalf of the Appellant.
For the Respondent: Ms Isherwood, Senior Presenting Officer.

DECISION AND REASONS

1. The Appellant appeals against the decision of the First-tier Tribunal Judge Ford who in a determination promulgated on 1st August 2018 dismissed her appeal under the Immigration (EEA) Regulations 2016 against the Respondent's decision dated 22nd

May 2017 refusing her application for a residence card. Permission was granted by the First-tier Tribunal, Judge Simpson on 24th September 2018.

2. In a decision promulgated on the 31st December 2018, I gave reasons why the decision of FtTJ Ford demonstrated the making of an error of law and the decision was set aside to be re-made by the Upper Tribunal rather than by way of remittal to the First-tier Tribunal. As the issue related to the issue of the appellant having to establish the work history of her former partner, directions were made for the respondent to make enquiries of the HMRC and the DWP records in the name of her ex-husband; that is normally described as an **Amos** Direction. Those enquiries were not without their difficulties but were produced in two documents, one from HRMC and one from the DWP setting out what was known from the records that they held.

The re-making of the decision:

3. For the purposes of the proceedings before me the Appellant is represented by Counsel Ms Delbourgo and the Senior Presenting Officer is now Ms Isherwood. The FtTJ made anonymity direction which had been continued in the interim but no grounds have been advanced as to why any such direction should still continue to be made in these proceedings (see *Smith (appealable decisions: PTA requirements; anonymity)* [2019] UKUT 216).

4. I have heard the oral evidence of the appellant and have a number of documents served on behalf of the appellant , including witness statements, none of which have been put in a consolidated bundle and it has been necessary at points in the hearing to have documents copied to ensure all present had the same papers. I am satisfied that both advocates have had sight of all the documents relied upon by each party and I have taken into account all of the documentation before me.

5. I have also been provided with skeleton arguments from each advocate. It is not necessary to set out those submissions and I confirm that I have taken them into account when reaching my decision. I intend to consider those submissions in my analysis of the issues relevant to this appeal.

The factual background:

6. The history and background to the marriage has not been clear throughout these proceedings and the witness statements provided have been lacking in detail. At times during the hearings that have been before the Upper Tribunal I have had to enquire of the appellant to provide necessary information, for example, as to the date the parties separated which had not been referred to in the documents or witness statements. It has therefore not been an easy task to ascertain the factual background. What I set out below is as a result of the oral evidence given by the appellant during the hearing.

7. It is not said when the appellant's ex-spouse entered the UK or in what circumstances. The Appellant married on the 19th August 2011. The parties lived together until they separated. When asked to give the date of their separation at a previous hearing before me, she stated that it was December 2014. However, when questioned about the date and against that background that she gave birth to the child of her present partner she stated it was sometime in 2014.

8. As to her ex-spouses' employment history, the appellant had stated that she believed that her former husband had been working for the whole duration of the time that she had been in the UK. She set out that she was unable to provide any documents regarding his work as he had always been secretive (see paragraphs 7-8; w/s 27/3/18). In cross examination she said that he had been manipulative and less than straightforward and that she had worked in the marriage. She said that she had supported him when he was working and that he did not discuss his work with her. In her oral evidence she was asked why she had said that her ex-spouse had been self-employed when the checks revealed that he had not returned any forms for self-employment. She stated that she had this heard through friends but did not know what he was doing. She said that he was not self-employed to begin with. When asked about the basis of his claim for ESA or DLA she stated that he had been in hospital and that he had a problem with his knee

9. On the 18 November 2016 a divorce petition was issued based on her husband's unreasonable behaviour. The evidence before the Tribunal demonstrates that the divorce petition was not served and there were difficulties with serving such a petition to the extent that deemed service was then ordered on 3rd October 2017 by the County Court. For these proceedings the issue of the divorce petition on 18th November 2016 according to a recent statement of the Appellant is of significance given the decision of the Court of Appeal in **Baigazive v Secretary of State Reported [2018] EWCA Civ 1088**.

10. The application was then made by the Appellant for a residence card relying on her retained rights following divorce. That was based on being a former family member of an EEA national who was exercising treaty rights at the time of the divorce. She also applied for permanent residence.

11. In the application form that she provided, she set out details that she knew of his employment with Amazon from July 2011 to March 2012 and from March 2012 to February 2013 with Santander. After that she wrote in her application form that there was self-employment undertaken by her ex-husband but the dates of that or the sources of that self-employment were not known to her.

12. It is as a result of that that a direction was made for the Respondent to make enquiries of the HMRC records in the name of her ex-husband; that is normally described as an **Amos** Direction. These have now been completed and now form the factual background to the re-making of the decision.

13. The decisions on applications made are set out in the papers before me and in a decision that was made under Regulation 10(5) and Regulation 15(1)(f). The decision was made on the 22nd May 2017 and supported by the decision letter.

14. The decision letter stated that in order to qualify for a retained right of residence following divorce it was necessary for the applicant to provide evidence that she was currently in employment, self-employment or economically self-sufficient as if she were an EEA national.

15. It is plain from reading the decision letter that that was accepted by the Secretary of State given that the Appellant had provided evidence of her employment from two sources and also P60s from 2014 to 2016. It was also required that she provided evidence that her relationship or her marriage lasted for at least three years and that she and her former spouse resided in the United Kingdom for at least one year during the marriage. Again it is plain from the refusal letter that that was also accepted given that the marriage had lasted at least three years, the date of the marriage being 2011. What was not accepted was that the evidence of the EEA former spouse was exercising free movement rights in the United Kingdom at the time of the divorce and that she had not provided evidence of that.

16. In addition as the application was one for permanent residence she would have to demonstrate that she resided in accordance with the Regulations for a continuous period of five years and therefore she would have to show a continuous period of five years of treaty rights being completed and it made reference to them not being divorced and therefore the appellant having not supplied evidence of husband's employment to contribute to that five years' qualifying period and it makes reference to the Decree Absolute not being obtained.

<u>The legal framework:</u>

17. Regulation 10 of the Immigration (European Economic Area) Regulations 2006 states that:

> "(5) A person satisfies the conditions in this paragraph if-
>
> (a) he ceased to be a family member of a qualified person ... on the termination of the marriage ... 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 ... the marriage ... had lasted for at least three years and

the parties to the marriage ... had resided in the United Kingdom for at least one year during its duration; ...

(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"

18. Regulation 15 of the EEA Regulations states:

"**5.-** (1) The following persons acquire the right to reside in the United Kingdom permanently-

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

(b) a family member of an EEA national who is not 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;

(c) a worker or self-employed person who has ceased activity;

(d) the family member of a worker or self-employed person who has ceased activity, provided-

(i) the person was the family member of the worker or self-employed person at the point the worker or self-employed person ceased activity; and

(ii) at that point, the family member enjoyed a right to reside on the basis of being the family member of that worker or self-employed person;

(e) a person who was the family member of a worker or self-employed person where-

(i) the worker or self-employed person has died;

(ii) the family member resided with the worker or self-employed person immediately before the death; and

(iii) the worker or self-employed person had resided continuously in the United Kingdom for at least two years immediately before dying or the death was the result of an accident at work or an occupational disease;

(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 the period, a family member who has retained the right of residence.

(2) Residence in the United Kingdom as a result of a derivative right to reside does not constitute residence for the purpose of this regulation.

(3) The right of permanent residence under this regulation is lost through absence from the United Kingdom for a period exceeding two years.

(4) A person who satisfies the criteria in this regulation is not entitled to a right to permanent residence in the United Kingdom where the Secretary of State or an immigration officer has made a decision under regulation 23(6)(b), 24(1), 25(1), 26(3) or 31(1), unless that decision is set aside or otherwise no longer has effect."

19. In the decision of *Idezuna (EEA - permanent residence) Nigeria* [2011] UKUT 474 (IAC) it was held that "sometimes a family member may have acquired a right of permanent residence on the basis of historical facts". In the Appellant's case, she had married her EEA national partner on 27 August 2011 and resided here as his spouse until the divorce petition was filed on the 18th November 2016. It was potentially possible for her to accrue a right of permanent residence by aggregating her residence as a spouse and as a person with retained rights of residence. However, she would still have to show that throughout the necessary five-year period her spouse was exercising a Treaty right or she was meeting the requirements to meet the requirements for retaining a right of residence.

20. I have considered the evidence of the appellant in conjunction with the documentary evidence provided. As set out earlier, the appellant has little knowledge of her ex-spouses' employment and his history in this regard. As she stated in evidence, one of the reasons the marriage broke down was because he had been secretive concerning his daily activities. Her oral evidence was difficult to follow and from the answers given in cross examination she was unable to provide any background as to her ex-spouses work history. Her account of his employment in the application form is not consistent with the enquiries made with the HMRC and she was unable to provide any other evidence in support. I have no reason to disbelieve her account that she found him unhelpful when she was seeking information concerning his employment history when making her application under the EEA regulations. This is supported by the fact that he failed to respond to the divorce petition when it was issued, and substituted service was therefore required by order of District Judge. The only information tat is reliable is that set out in the documentation from HMRC and DWP.

21. It is against that background that I have been required to consider the documentary evidence concerning the employment history and circumstances of the appellant's ex-spouse. There are no employment records held for the years 2006 – 2007 all for the years 2007 – 2008 and the appellant has not stated in either oral or documentary evidence when her ex-spouse entered the United Kingdom.

22. Between 2008 – 2009 it is recorded that he was in employment and earned £344.35 and paid no tax or national insurance. It has been submitted on behalf of the respondent that all of the employment set out in the HMRC document for the years 2008 onwards does not demonstrate that he was in effective and genuine employment. On behalf of the appellant, Miss Delbourgo submits that the evidence provided suggested that he may have been a jobseeker in the UK prior to his finding employment in the tax year 2008 – 09. She further submits that the documentary evidence from the HMRC's records demonstrate that the appellant's ex-spouse had a series of temporary engagements for which he was taxed under PAYE making him an employee such that he meets the criteria set out in the decision of *Lawrie-Blum* EU case 66/85. Whilst her skeleton argument at paragraph 12 refers to the "temporary

and sporadic nature of his employment" and that it may have appeared the appellant that he was self-employed, she submits that the HMRC material was sufficient to conclude that he was a "worker" within the meaning of the case law of the CJEU.

23. She further submitted that employment can be part-time but still qualify as a "worker" within the meaning of EU law provided such part-time work is "effective" and genuine and not "purely marginal or ancillary" as provided in the case of *Levin* (see paragraph 13 of her skeleton argument and her oral submissions). In this regard, she submitted that the records provided by the HMRC demonstrate that he pursued a pattern of work which included relying upon the income of another family member and also by his receipt of either jobseekers allowance or other benefits, ESA or disability living allowance.

24. I have therefore considered those submissions in the light of the documentary evidence and the oral evidence of the appellant, insofar as she could assist.

25. The definition of a worker was set out in the well-known case of *Genc v Land Berlin* [C-14/09] where the court held that the concept of a worker must not be interpreted narrowly and that "any person who pursues activities which are real and genuine to the exclusion of activities on such a small scale as to be purely marginal and ancillary, must be regarded as a 'worker'".

26. The judgments of the Court of Justice of the European Union in *D.M. Levin v Staatsecretaris van Justitie* [1982] EUECJ R-53/81 and *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] EUECJ R-66/68. Both decisions were considered and taken into account by the Court of Appeal in *Barry v London Borough of Southwark* [2008] EWCA Civ 1440 and the Upper Tribunal's guidance in *Begum* (EEA - worker - jobseeker) Pakistan [2011] UKUT 275 (IAC), which summarised the guidance thus:

> "*(1) When deciding whether an EEA national is a worker for the purposes of the EEA Regulations, regard must be had to the fact that the term has a meaning in EU law, that it must be interpreted broadly and that it is not conditioned by the type of employment or the amount of income derived. But a person who does not pursue effective and genuine activities or pursues activities on such a small scale*

as to be regarded as purely marginal and ancillary or which have no economic value to an employer, is not a worker. In this context, regard must be given to the nature of the employment relationship and the rights and duties of the person concerned to decide if work activities are effective and genuine. ..."

27. The question addressed in the written submissions of Ms Isherwood was whether the appellant's ex-husband was pursuing effective and genuine economic activity or whether the activities were on such a small scale as to be purely marginal and ancillary.

28. In *Lawrie-Blum v Land Baden-Wurttemberg* Case 66/85 [1986] ECR 2121 it was found that the essential characteristic of the employment relationship is the fact that during a given time one person provides services for and under the direction of another in return for remuneration.

29. The case law indicates that remuneration appears to be the key, but payment need not be enough to live on, or it may be in kind rather than a formal wage. In *Kempf v Staatssecretaris van Justitie* Case 139/85 [1986] ECL 1741, it was found that a person may still be a worker even if their pay is so low that he or she needs to supplement it with unemployment benefit or has to apply for sickness benefit during a period of illness, provided that the effectiveness and genuineness of the activities of the person are established.

30. Therefore, if the work is genuine and effective, and not purely marginal and incidental therefore, it can be considered an economic activity.

31. Furthermore the decisions of the CJEU demonstrate 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.

32. I cannot accept the submission made by Miss Delbourgo that for the years 2008 – 2009 that he was a jobseeker or at any time before then. There is no evidence of this, either by way of jobseeker's allowance which would have been set out on the DWP

information schedule as it was for the period in 2012. Furthermore, it would be unlikely that he was a jobseeker for the period from 2006 – 2008 which is a period of two years. Nor can I accept that it is been demonstrated on the balance of probabilities that his employment in the year 2008 – 2009 was anything other than marginal in the context of the case law set out above. It is not been possible to consider the circumstances of his employment at that time or his own personal circumstances because there has been no evidence of any kind provided in which to make that assessment or even by way of inference.

33. However, in the light of the documentary evidence of the HMRC and DWP in conjunction with the appellant's oral evidence, I make the following findings of fact relating to the period there after. From 2009 – 2010 and 2010 – 2011 the appellant's ex-spouse earned an income which I am satisfied was not marginal and incidental but properly could be considered to demonstrate that he was in genuine and effective employment during these years. The evidence of the appellant was that he had signed up with a number of different recruitment agencies and this is supported by the number of employees that he worked for at that time, albeit for smaller sums. I accept the submission made by Miss Delbourgo that he had a series of employers as set out in the documents and that even if it were part-time it would not disqualify him from qualifying as a "worker" within the meaning of EU law.

34. I accept the appellant's evidence that she was in employment at the same time and that her ex-husband's wage and her wage was used to support them jointly. In the circumstances I do not find that his employment can be described as purely marginal and incidental, and I accept that it has been proved that the employment had been genuine and effective, even though lowly paid.

35. For 2011 – 2012 the appellant's ex-spouse was employment as demonstrated from the schedule and for the periods between June – August 2012, he received jobseekers' allowance. He was in employment again 2012 – 2013 and it is further recorded that from October 2012 to date he is been in receipt of employment support allowance (hereinafter referred to as "ESA") and disability living allowance ("DLA").

36. As to those benefits, I am satisfied that the submission made on behalf of the appellant was correct and that as the appellant's ex-spouse was granted ESA a proper inference to draw from that is that the UK authorities were satisfied that he was temporarily incapacitated. This did not detract from his status as a "worker".

37. There is no dispute that the date the divorce proceedings were initiated is the relevant date which in this case was 18 November 2016. Whilst the parties are separated prior to this date, whether or not the appellant was living with her ex-spouse throughout the period is immaterial in light of *PM (EEA - spouse - "residing with") Turkey* [2011] UKUT 89 (IAC) and the guidance stated therein as to the meaning of the phrase "residing with". [3].

38. The appellant's ex-spouse was in receipt of ESA and DLA and for the reasons that out above I am satisfied that the appellant's ex-spouse had likely acquired a permanent right of residence by reason of his status as a worker and a qualified person and having exercised those rights for a period of five years from 2009 – 2014 he had acquired a permanent right of residence in 2014. It is difficult to give the precise months because the written documentation from the government agencies do not specify the months themselves and the appellant's evidence did not assist.

39. I reject the argument advanced by Miss Isherwood that he did not have permanent residence because the GCID notes did not hold any information or record that a grant of permanent residence had been made to the appellant's ex-spouse. That is in direct contravention to the directive and the regulations and the appellant's ex-spouse acquires a permanent right of residence by operation of law. On the material evidence before me the likelihood is that he acquired this in 2014.

40. Consequently based on those findings, the appellant has demonstrated that she meets the requirements for a retained right of residence as the appellant's ex-spouse was exercising Treaty rights and on the basis of him having acquired right of permanent residence. From the date of her marriage in August 2011 until August 2016 she acquired the right of permanent residence as she was resident for that continuous period of five years and did so in accordance with the regulations.

Therefore if her ex-spouse was either a qualified person or had acquired the permanent right of residence for a period of five years during the marriage, the appellant succeeds in establishing her right to permanent residence.

41. I should also add that it is common ground that she has been in employment both at the time of the parties separation, at the time of the degree absolute in 2018 and at the date of the hearing and therefore she would have met the five year period by a combination of the earlier periods of residence as set out above and thereafter. It had also been accepted by the respondent that the marriage had lasted for three years and that she and her former spouse had resided together for at least one year during the marriage (see decision letter).

42. For those reasons I therefore find that the appellant has proved on the balance of probabilities that she is a family member of an EEA national who has resided in the United Kingdom with the EEA national in accordance with the 2016 Regulations for a continuous period of five years. The requirements of Regulation 15 are satisfied, and the appeal is allowed. The appellant is entitled to permanent residence in the United Kingdom.

Issue of costs:

43. The final issue related to the position as to costs. Miss Delbourgo made an application for the costs of the appellant to be paid by the respondent. The application was based on the position that the respondent should have made investigations with the government bodies and that after the HMRC documentation had been obtained, further information was necessary from DWP and that the Home Office should have made all the enquiries before they refused the application. She submitted that the appellant had been put to the expense of continuing with the appeal.

44. Ms Isherwood behalf of the Respondent submitted that there may have been a misunderstanding as to what enquiries were required and that the Secretary of State had not acted unreasonably in all the circumstances. She submitted that the Secretary

of State was not required by either the law by the guidance to undertake checks with the HMRC as set out in the decision of Amos and that the appellant had not undertaken any enquiries of her own despite her evidence that she had had some connection with the EEA national (in evidence given in cross examination). Furthermore, the HMRC documentation had been obtained and the DWP information was sent very quickly to the appellant's representatives. There had been no delay thereafter and hearing was necessary because the background evidence had not been made clear in the evidence provided by the appellant and the burden was upon the appellant to demonstrate that the Regulations were met.

45. I therefore considered those submissions when deciding whether or not to exercise any discretion that the Upper Tribunal may have in the award of costs.

46. The relevant procedure rule is as follows:

> "(1) The Upper Tribunal may not make an order in respect of costs (or, in Scotland, expenses) in proceedings [transferred or referred by, or on appeal from,] another tribunal except-" [provisions in relation to national security certificate appeals and under section 4 of the Forfeiture Act 1982] ...
>
> (3) In other proceedings, the Upper Tribunal may not make an order in respect of costs or expenses except-"
>
> > (d) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings; ... "

47. The Upper Tribunal has recently reviewed its costs jurisdiction in statutory appeals in *Thapa (costs: general principles; s 9 review)* [2018] UKUT 54. In making their submissions to the Upper Tribunal, neither advocate made any submissions by reference to this decision or to the principles that the Upper Tribunal should apply. The decision set out above, emphasizes that the power to award costs pursuant to Rule 10 is to be exercised with significant restraint and that that detailed examinations of other decided cases are unlikely to assist in deciding whether to award costs under either of those rules.

48. I have therefore taken that decision into account in reaching my decision on the issue of the costs. Having done so and recognizing that the power to award costs is to be exercised with significant restraint, I am not satisfied that the conduct of the Respondent was unreasonable. The history is set out in the decision of the FtTJ that the respondent did make enquiries ex-spouse but there had been difficulties in obtaining the National Insurance number and it had not been provided from the appellant's representatives (see letter 15 June 2018). A negative check was therefore received. There had been little evidence given by the appellant either before the FtTJ J or in the documentary evidence that has followed during these proceedings. In the submissions made to the Upper Tribunal, it had been submitted that the appellant's evidence (set out in the application form) that he had sources of employment and self-employment which would include invoices, accountant's letters, least of business premises et cetera, that this would provide the basis for further enquiries. It is accepted now that the appellant was mistaken about any form of self-employment as that is not reflected in the HMRC documentation. No account was given in the short witness statements provided that the appellant's ex-spouse was ever in receipt of any benefits. Much of the recent statement relied upon issues relevant to Article 8 (which was not relevant in the light of this as an EEA appeal and that no S120 notice had been served). I am satisfied that the DWP evidence was obtained in a very short time by Ms. Isherwood and that it would have been open to the appellant's legal advisors to have applied for an adjournment of the hearing on the 20th May either by way of an application prior to the hearing or by way of agreement. No action was taken and therefore I am not satisfied that there was any unreasonable conduct demonstrated at that hearing. Furthermore, after the service of the evidence, it was therefore necessary to consider the documentary evidence obtained from the government departments in the light of the appellant's evidence and in the light of the relevant case law.

49. For those reasons, I am not satisfied that the Respondent should pay the costs of the Appellant and I refuse the application made by Ms. Delbourgo. The previous costs

order shall be maintained for the reasons I set out in the earlier decision. The appellant will, in addition, receive her fee back.

Summary:

50. I therefore find that the Appellant has proved that she is a family member of an EEA national who has resided in the United Kingdom with the EEA national in accordance with the 2016 Regulations for a continuous period of five years. The requirements of regulation 15 are satisfied and the appeal is allowed. The Appellant is entitled to permanent residence in the United Kingdom.

Notice of Decision

The decision of the FTT contained material errors of law and was set aside. I substitute a fresh decision. The appeal is allowed pursuant to the 2016 Regulations.

Signed Upper Tribunal Judge Reeds *Upper Tribunal Judge Reeds*
Date: 16th August 2019

TO THE RESPONDENT
FEE AWARD

In the light of my decision to re-make the decision in the appeal by allowing, I have considered whether to make a fee award.

I make a fee award.

Reasons:

The appellant has achieved her primary objective, which was to prove that she was entitled to a permanent residence card.

Signed *Upper Tribunal Judge Reeds*
Date: 16th August 2019 Upper Tribunal Judge Reeds