Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: EA/12009/2016
EA/12012/2016

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 16 January 2019	**On 25 April 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

DIANA [O] (FIRST APPELLANT)
[L D] (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: First appellant in person
For the Respondent: Mr D Mills, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are mother and son. The first appellant, Mrs [O], appeared before me as a litigant-in-person, following earlier rejection of an application for an adjournment. Mrs [O] was assisted by her husband. For convenience I shall hereafter refer to the first appellant as "the appellant".

2. In a decision sent on 4 February 2019 I set aside for material error of law the decision of Judge Law of the First-tier Tribunal (FtT) sent on 28 August 2018 dismissing the appellants' appeals against the decision made by the respondent on 20 September 2016 refusing to issue permanent residence cards.

3. I observed in my decision that there are a number of matters that are not in dispute. It is not in dispute that: Mrs [O]'s former husband, Mr AO, is an EEA national and that the couple married in July 2010; that she was granted a five year EEA spouse visa valid from 4 April 2011 - 4 April 2016; that following the breakdown of their marriage she initiated divorce proceedings on 24 June 2015; that the decree absolute was dated 5 November 2015; and that if Mrs [O] could establish her ex-husband remained a worker on 24 June 2015, the appellants would be entitled to succeed in their appeal, as her own work record makes up the necessary five year period.

4. I further observed that as a result of clarification of Court of Justice case law by the English Court of Appeal in the case of **Baigazieva** [2018] EWCA Civ 1088 in particular, it is now settled law that the relevant date for deciding whether the appellants derived a retained right of residence was the date of initiation of divorce proceedings. However, what has to be established is that the appellant's ex-husband remained a worker with the meaning of the EU Treaty at that date. The issue was whether he "remained" a worker because it is not now in dispute that:

   (i) he was in continuous employment between 1 October 2010 – 28 July 2014; and

   (ii) that his tax return for 2014/2015 showed substantial earnings; but that

   (iii) since the appellant had only been able to produce payslips for that year up to February 2015, it could not be demonstrated that he remained in employment beyond February 2015; and that therefore

   (v) there was a four-month gap between evidence of actual employment in February 2015 to the date of initiation of divorce proceedings in June 2015.

5. In finding a material error of law in the judge's treatment I stated that the judge failed to address whether, during that four-month period, the ex-husband was still a worker, even if not employed (or self-employed). That question needed to be addressed because where a person has formed a significant connection with the labour market (as her ex-husband had undoubtedly done in the period October 2010 – February 2015), it is necessary for the decision-maker to ask whether that can be said to have ceased even after a relatively short period (in this case four months); see **RP (EEA Regs – worker – cessation)** Italy [2006] UKIAT 00025.

6. I stated that it was wrong of the judge to "freeze-frame" the issue to the ex-husband's precise employment position at the date of initiation of

divorce proceedings. In cases of this kind the temporal scope for deciding the issue of whether a person remains a worker cannot be confined to one moment in time.

7. I then stated that:

> "I do not see any necessity for a further oral hearing. However, I do see the necessity for me to obtain a fuller picture of the ex-husband's activities in the four-month period between February 2015 and June 2015 and to this end I have decided not to proceed to make my decision until I have a response from the respondent to my following direction.
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> **Direction**
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> 8. That the respondent obtain from the DWP particulars of any recorded claim by the ex-husband as a job-seeker during the period March 2015 to 24 June 2015 and produce the results of this inquiry to the Tribunal (with copy to the appellant's representatives) by 14 February 2019 (sent to Field House, correspondence email marked FAO Dr Storey).
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> 9. Whilst Mrs [O] said at the hearing before me that she had no information about what her ex-spouse had been doing during this aforementioned period (although she speculated that he may have worked 'cash in hand'), I do not exclude that if she is able to obtain any independent evidence of his ex-husband's economic circumstances during the aforementioned period, she is entitled to submit it to the Tribunal (with copy to the respondent) by the same time-limit as above (and utilising the same email address and 'FAO Dr Storey' notification)".

8. In response to my directions, Mr Mills submitted copies of correspondence between him and the DWP following his request to them for information concerning the first appellant's ex-husband benefit history under s.40 of the 2007 Act. In a document sent to Mr Mills on 15 March 2019, the DWP confirmed that on the basis of a check of records held on the ex-husband since February 2013, no benefits had been claimed by him. I received no further evidence of submissions from the appellants.

My assessment

9. As identified in my error of law decision, the key matter I have to decide is whether at the date of initiation of the divorce proceedings on 24 June 2015 the appellant's ex-husband was still a worker. It is not in dispute that he had been employed between October 2010 and February 2015. That had been confirmed by HMRC records made available to the Tribunal.

10. As already explained in my error of law decision, the fact that an EEA national is not working at the precise date of the initiation of divorce proceedings is not fatal, since what matters is rather whether there is a continued connection with the labour market. It was for that reason that I sought further information in respect of the period between February 2015 (when HMCTS evidence confirmed he was still in work) and 24 June 2015 (when the appellant initiated divorce proceedings). As a result of the

further information obtained by way of my Direction to the respondent, however, there is nothing to indicate that during the relevant period of approx. four months the ex-husband maintained a connection with the labour market. There is no evidence that he made any claim as a job-seeker during this period - and that is despite the active steps taking by me to ascertain whether there was any evidence of job-seeking activity by him during the relevant period. I appreciate that the appellant may not have had any ways or means of contacting her ex-husband in recent times, but since (at my direction) the respondent has done all that could reasonably be expected to assist the appellant and the results have been negative, there is simply insufficient evidence for me to find that the ex-husband had kept connection with the labour market at the date of initiation of divorce proceedings. Possibly, if there had been evidence that the ex-husband had established a significantly longer (and unbroken) connection with the labour market in the UK previously, it would have been feasible to regard the four months involved as too short to constitute a cessation, but the evidence was that he had only exercised treaty rights for several months beyond four years (from October 2010 to February 2015). In all the circumstances I do not consider he can be said to have retained a connection with the labour market up until the date of initiation of divorce proceedings.

11. Accordingly, the appellants cannot qualify for permanent residence. They have only been able to establish a period of qualifying residence as family members for the period from October 2010-February 2015. That residence came to an end on a date prior to the initiation of the divorce proceedings.

12. For the above reasons the decision I must re-make is to dismiss the appellants' appeals.

13. To conclude:

    I have already set aside the decision of the FtT judge for material error of law.

    The decision I re-make is to dismiss the appellants'' appeals.

No anonymity direction is made.

Signed Date: 19 April 2019

H H Storey

Dr H H Storey
Judge of the Upper Tribunal