Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/13403/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th December 2018 and	**On 6th February 2019**
On 14th January 2019	

Before

UPPER TRIBUNAL JUDGE COKER

Between

ANITA DONKOR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Waheed, counsel, instructed by BWF solicitors
For the Respondent: Mr E Tufan on 10th December 2018, Mr T Melvin on 14th January 2019, Senior Home Office Presenting Officers

DECISION AND REASONS

1. This is the appeal of Ms Donkor against a decision of First-tier Tribunal Judge Neville who for reasons set out in a decision promulgated on 29 March 2018 dismissed her appeal against the respondent's decision to refuse to grant her a permanent residence card under the Immigration (European Economic Area) Regulations 2006.

Error of law – (decision given *ex tempore)*

2. The application had been made on two bases. First of all that she was a divorcee but had retained her rights of residence and secondly that in any event she was entitled to a permanent residence card because she had completed five years'

residence in the UK with her partner in accordance with the Regulations. The First-tier Tribunal Judge found that the appellant and her husband had not actually been divorced and therefore the issue of obtaining permanent residence through that route was not applicable. That decision has not been challenged by the Secretary of State.

3. The significant issue in this case is whether or not the appellant's husband was exercising treaty rights for the five years prior to the decision. Reliance is placed on his schedule of work. He is self-employed and there was no challenge or dispute that he had earned and paid taxes on the sums that he had given evidence of. During 2010/2011 he earned £5,400, 2011/2012 he earned £3,535, 2012/2013 he earned £8,100, 2013/2014 £1,100, 2014/2015 £14,540 and 2015/2016 £17,746. The appellant and her husband had each been granted their residence certificates in 2010. Five years therefore ran from that first year of self-employed earnings of £5,400 through to the 2015/2016 year of £17,746.

4. Mr Tufan submitted that for the year 2013 to 2014 the earnings of £1,100 were neither effective nor adequate to amount to self-employed earnings. It is correct that during the first two years the sponsor earned less than £6,000 per annum and in the third year he earned over £8,000. Mr Waheed submitted that the earnings had to be looked at overall and that in a good year somebody could, as he puts it, take their foot off the pedal and have a bit of a relaxing time and just work a little bit but that when looked at overall the sponsor was, in the period leading up to 2014, earning enough. He had earned over that four year period some £17,000 or £18,000. In the third year of that period he had earned just slightly less than he had earned the previous two years and therefore when those figures are taken into account it was apparent when looked at overall that the sponsor was self-employed and his earnings were effective and appropriate. They were not what could be called pin money.

5. One of the difficulties however is that the bank statements that had been produced to the First-tier Tribunal did not include the bank statements for the year 2013/2014 save for February 2013 where he starts January with a balance in his account of £851.63 and on 4 February ends up with £921.63, having had one deposit of £300 during that time. The next bank statement starts on 17 April 2014 where he shows having a balance of £67.96. So, during two and a half months he seems to have spent some £850.

6. The First-tier Tribunal Judge in his decision was concerned about those earnings. He says in paragraph 18 that it demands an explanation. He refers to the lack of bank statements for that period of time, but he says that given the omission of those statements and the lack of any evidence from the sponsor to explain his low earnings in that year he could not be satisfied that the appellant had satisfied her burden of proof. The decision, he says, was put before the applicant and those evidential deficiencies were apparent to her. He goes on to say that the Tribunal is entitled to attribute significance to her failure to meet those deficiencies. Whether that is strictly correct or not is actually not the point. The fact is that looking at the figures of earnings between 2011 and 2014 the sponsor cannot be said to have been earning effective earnings that would prevent him from needing to show some other source of income to be able to show that he was exercising his treaty rights.

7. On that basis, I am satisfied that the decision of the respondent to dismiss the appeal is not infected by an error of law. The First-tier Tribunal was justified in dismissing the appeal on the grounds that the sponsor had not shown that he was exercising treaty rights for the five years in question such that the appellant could claim to be entitled to a permanent residence card.

8. The other ground of appeal upon which permission was granted however was that the First-tier Tribunal Judge ought, in accordance with *MDB and Others (Article 12, 1612/68)* [2010] UKUT 161 have considered not only whether the appellant was entitled to permanent residence, but also whether she was entitled to a residence card. The grounds of appeal quote from paragraph 44 of *MDB* and say "where the decision is a refusal to issue a permanent residence card that may necessitate, in the event that refusal is found correct, considering whether the appellant was entitled nonetheless to an extended right of residence". And then goes on to say that even though *MDB* would not have had enough time to qualify for permanent residence it would have sufficed to qualify them for an extended right of residence under Regulation 14(2). That of course was the old Regulations.

9. Mr Tufan makes the point that there has not been an application for an extended right of residence and that is correct. It is therefore quite possible that this appellant could not have had her application for an extended right of residence considered in the appeal that was before the First-tier Tribunal but in the light of *MDB,* which has not so far as I know been overturned by anything subsequent to 2010, I am satisfied that the First-tier Tribunal Judge did err in law in failing to consider whether on the basis of the evidence that was in front of him at that time the appellant was entitled to a residence card.

10. Of course the position has moved on now and so although I set aside the decision of the First-tier Tribunal insofar as the judge failed to reach a decision on whether she was entitled to a residence card, some two years have now passed and whether the appellant's sponsor is or is not currently exercising treaty rights is a matter for evidence as of today.

11. In the circumstances therefore I have considered whether or not to remit this to the First-tier Tribunal for further evidence to be taken or whether to retain this before me and grant leave to the appellant to file and serve further evidence on where the sponsor is currently living and whether he is currently exercising treaty rights and so for that reason I will remit it to be heard before me on 14 January.

12. The appellant has leave to file and serve such further evidence as she wishes to rely on, such evidence to be filed by Monday 31 December.

Remaking the decision on 14th January 2018

13. The appellant filed a bundle of documents including wage slips and bank statements. Mr Melvin confirmed that no issue was taken with their genuineness. He made no submissions but invited the Tribunal to consider the documents and make a decision on whether the appellant was entitled to a residence card on the basis of the documents.

14. I have considered the documents. No adverse matters were drawn to my attention. I am satisfied the appellant meets the requirements of the Immigration (European Economic Area) Regulations 2006 for the issue of a residence card.

15. I allow the appeal.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I re-make the decision in the appeal by allowing it such as to find the appellant meets the EEA Regulations for the grant of a residence card.

Date 14th January 2019

Upper Tribunal Judge Coker