Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/05383/2018**
HU/18779/2018

THE IMMIGRATION ACTS

Heard remotely via Skype for Business	**Decision & Reasons Promulgated**
On 22 January 2021	**On 15 February 2021**

Before

UPPER TRIBUNAL JUDGE LANE

Between

SACHINTHAKA RANASINGHE KORALAGE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Malik
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Sri Lanka who born on 27 July 1985, appeals to the Upper Tribunal against a decision of the First-tier Tribunal, promulgated on 20 January 2020, which dismissed his appeal against decisions of the Secretary of State dated 24 July 2018 and 5 September 2018 to refuse (i) his application for a residence card and (ii) his application to remain on human rights grounds.

2. The appellant had leave to remain in the United Kingdom from 16 October 2008 until 22 October 2012 and, between 22 October 2012 until 1 March

2018, had a residence card as a family member of an EEA national (his spouse). A decree absolute dissolving the appellant's marriage was issued on 22 May 2018; the divorce petition had been issued on 23 October 2017. The appellant claimed a right to remain as the former family member of an EEA national and on private life Article 8 ECHR grounds (including a claim that there exist very significant obstacles to his re-integration in Sri Lanka). Before the First-tier Tribunal the appellant accepted that his EEA appeal could not succeed; the appellant could not prove that his former spouse was a qualified person at the date of initiation of the divorce proceedings [54]. The appellant's remaining grounds of appeal focussed on his claimed long residence (10 years plus) and Article 8 ECHR. He relied upon the respondent's policy concerning long residence which provides that a period of residence which was lawful for the purposes of EU law may count towards a continuous period of long residence for the purposes of a grant of leave to remain outside the Rules. However, the judge [69] found that, from April 2016 and notwithstanding that he had a residence card which did not expire until 1 March 2018, the appellant had not been lawfully present under EU law. After April 2016, the judge found that it had not been established that the appellant's former spouse had been exercising Treaty Rights as a worker or otherwise. The judge held that the residence card had declaratory authority only; where evidence showed that the basis upon which it had been issued no longer pertained, then the card *per se* was insufficient to prove lawful residence for the purposes of the respondent's policy.

3. The judge's findings and his view of the law concerning residence cards were determinative of the appeal because, as he states at [82], 'the appellant's accepts that he cannot succeed under paragraph 276ADE or in relation to Article 8 outside the Rules other than by reference to meeting the spirit of paragraph 276B [i.e. 10 years continuous lawful residence]'.

4. The appellant does not challenge the judge's finding at [64] that he would not face very significant obstacles on return to Sri Lanka. Whether the judge correctly calculated the period of continuous lawful residence turns on domestic and European jurisprudence concerning residence cards. The appellant argues that the judge failed to apply the principles of *Nkrumah (OFM – annulment of residence permit)* Ghana [2011] UKUT 00163 (IAC) which held that:

> 9. Once residence card has been issued it retains its validity as authority to remain unless or until it expires, lapses by reason of prolonged absence or is revoked under regulation 20.

5. The judge refers to *Nkrumah* at [16]. However, the appellant submits that he erred by failing to follow that decision of a Presidential panel of the Upper Tribunal. As a consequence, the continuous period of the appellant's lawful residence should have ended not in April 2016 but March 2018 and the judge's assessment of proportionality was, therefore, based on an inaccurate factual matrix.

6. The respondent submits that the judge did not err in law. On the contrary, she argues that his decision is consistent with the judgment of the European Court of Justice in Case C-325/09 (*Dias v Secretary of State for Work and Pensions*). *Dias* was promulgated after *Nkrumah* and, unlike the Upper Tribunal decision, supported the First-tier Tribunal's opinion that residence card is of declaratory value only:

> 44 Since Ms Dias' third period of residence in the United Kingdom was based solely on the possession of a residence permit issued in accordance with Directive 68/360, the present case therefore makes it necessary to examine whether such residence permits were declaratory in nature or whether they created rights.
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> 45 In that regard, Ms Dias submits that a residence permit issued by the government of the host Member State and not withdrawn by it, even though it had the possibility to do so, conferred a right of residence on the person concerned throughout its period of validity. In her view, since Directive 68/360 did not contain any provision equivalent to Article 3 of Directive 90/364, the right of residence recognised under Directive 68/360 and certified by the grant of a residence permit remained in effect until that permit expired or was withdrawn, irrespective of the fact that its holder had ceased to fulfil the conditions necessary for residence.
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> 46 By contrast, the United Kingdom and Danish Governments and the European Commission express the view that the residence permit issued under Directive 68/360 was purely declaratory and did not establish any right of residence.
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> 47 Ms Dias' contention cannot be accepted.
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> 48 As the Court has held on numerous occasions, the right of nationals of a Member State to enter the territory of another Member State and to reside there for the purposes intended by the EC Treaty is a right conferred directly by the Treaty, or, as the case may be, by the provisions adopted for its implementation. The grant of a residence permit to a national of a Member State is to be regarded, not as a measure giving rise to rights, but as a measure by a Member State serving to prove the individual position of a national of another Member State with regard to provisions of European Union law (see Case C-408/03 Commission v Belgium [2006] ECR I-2647, paragraphs 62 and 63 and case-law cited).
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> 49 Such a declaratory, as opposed to a constitutive, character of residence permits, in regard to rights, has been acknowledged by the Court independently of the fact that the permit in question was issued pursuant to the provisions of Directive 68/360 or Directive 90/364 (see, to that effect, Commission v Belgium, paragraph 65).
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> 50 It follows that the differences between the provisions of Directives 90/364 and 68/360 cannot justify the contention that, contrary to the principle noted in paragraph 48 of the present judgment, residence permits issued pursuant to Directive 68/360 were capable of establishing rights for their holders.

> 51 In addition, it should be borne in mind that Article 3 of Directive 90/364 referred, not to the permit issued to prove the right of residence, but to the right of residence as such and to the conditions laid down for the grant of that right. Consequently, no conclusion can be drawn from that provision with regard to the nature of the residence permit provided for in Article 2(1) of Directive 90/364, nor, a fortiori, with regard to that provided for in Article 4(2) of Directive 68/360.
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> 52 In addition, the only provision of Directive 68/360 which referred to the withdrawal of the residence permit, namely Article 7(1) of that directive, confirms the existence of an inherent link between that permit and the citizen's already existing right of residence. Like the right of residence of a worker which, as with the status of worker itself, was not lost solely because its holder was no longer in employment, either because he was temporarily unable to work as a result of illness or accident or because he was involuntarily unemployed, this being duly confirmed by the competent employment office, that provision also did not allow the valid residence permit of a worker who was in such a situation to be withdrawn.
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> 53 Finally, it is, admittedly, true that, with regard to the declaratory nature of residence permits, the Court has ruled only in regard to situations in which such a residence permit had not been issued even though the Union citizen concerned fulfilled the conditions governing residence in the host Member State in accordance with European Union law.
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> 54 However, as has been pointed out in paragraphs 48 to 52 of the present judgment, the declaratory character of residence permits means that those permits merely certify that a right already exists. Consequently, just as such a declaratory character means that a citizen's residence may not be regarded as illegal, within the meaning of European Union law, solely on the ground that he does not hold a residence permit, it precludes a Union citizen's residence from being regarded as legal, within the meaning of European Union law, solely on the ground that such a permit was validly issued to him.

7. I agree with the respondent that the judgment in *Dias* unequivocally supports the reasoning of the First-tier Tribunal. I accept that a Presidential decision of the Upper Tribunal should be accorded significant respect by the First-tier Tribunal but *Nkrumah* was not a starred or country guidance decision and was not, as a matter of procedure, binding on the First-tier Tribunal. Moreover, *Nkrumah* was decided without the Upper Tribunal having the benefit of reading *Dias*. It is worth noting that the italic headnote of *Nkrumah* (which contains that part of the decision which the panel considered required reporting) does not include the passage upon which the appellant relies. Mr Malik drew my attention to the use by the European Court to the word 'solely' at [54] of Dias *('…residence may not be regarded as illegal solely on the ground that he does not hold a residence permit…'*). He submitted that there were other factors in the appeal which affected the weight to be accorded the public interest in the proportionality assessment. Had the judge accepted that the appellant had enjoyed almost 10 years of continuous lawful residence (i.e. October 2008 until March 2018), then he may have accepted Mr Malik's submission that

the appellant had only failed to prove long residence under the policy for a 'marginal and technical' reason.

8. I am not persuaded that the use of the qualifying adverb 'solely' can bear the significance which Mr Malik places on it. The *ratio* of *Dias* could not be clearer and the First-tier Tribunal cannot be criticised for following it (albeit possibly coincidentally, as the judge does not refer to the judgment). Accordingly, the First-tier Tribunal made its Article 8 ECHR assessment by reference to an accurate factual matrix. It then reached a decision on the Article 8 ECHR appeal which was plainly available to it. It follows that he appellant's appeal should be dismissed.

Notice of Decision

The appeal is dismissed.

Signed Date 29 January 2021
Upper Tribunal Judge Lane