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Reducing the evidential burden in retained rights cases (Baigazieva v Secretary of State for the Home Department)

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Immigration analysis: Adam Pipe, barrister at No. 8 chambers comments that a major headache for immigration lawyers has been slightly eased by the recent decision of the Court of Appeal in Baigazieva v Secretary of State for the Home Department where it was held that a third country national, relying upon a retained right of residence, has to show that their former spouse was a qualified person to the point of the initiation of divorce proceedings rather than the point of divorce. Until this decision it has been very difficult for individuals to show that their former spouse was working at the date of the decree absolute which is usually much later than when the relationship broke down.

Baigazieva v Secretary of State for the Home Department [2018] EWCA Civ 1088

What are the practical implications of this case?

This is an important and welcome judgment as it has been very difficult for individuals to prove that their former spouse was exercising Treaty Rights at the date of divorce (see *Amos v Secretary of State for the Home Department* [2011] EWCA Civ 552).

Claimants have been forced to rely upon the Tribunal (Immigration and Asylum Chamber) making directions that the Secretary of State make enquires with HMRC based upon the Secretary of State's policy set out in 'Free movement rights: retained rights of residence' which states:

'Where a relationship has broken down due to domestic violence or other difficult circumstances it may not always be possible for the applicant to provide all of the necessary documents about the EEA national sponsor. In such circumstances, you can make further enquiries about the EEA national sponsor's status but only where the applicant has shown they have made every effort to provide the necessary evidence.'

However, sometimes the Tribunal has been reluctant to make such directions and of late practitioners have had difficulties with the Secretary of State failing to comply with such directions.

It is more likely that claimants will be able to establish that their former spouse was a qualified person prior to the initiation of the divorce proceedings and this judgment eases the evidential burden upon them. However, given that relationships often break down sometime before the initiation of divorce proceedings, there will still be a number of cases where the Secretary of State should be invited to follow her policy and make enquiries with HMRC (this should be done at an early stage as part of the initial application).

Practitioners should remember, however, that an individual is still a family member until the point of divorce notwithstanding the fact that the couple are no longer residing together (see para 37 of *NA and PM (EEA - spouse - 'residing with') Turkey* [2011] UKUT 89 (IAC)) and I have come across a number of cases where the claimant has established a Permanent Right of Residence prior to the divorce and has no need to rely upon retained rights at all.

What was the case about?

The appellant in this case was a national of Kyrgyzstan who was appealing the decision of Upper Tribunal Judge Bruce finding that she had not retained a right of residence in the United Kingdom as the former spouse of an EEA national under regulation 10(5) of the Immigration (European Economic Area) Regulations 2006 (I(EEA)R 2006). I(EEA)R 2006, regulation 10 of transposes article 13(2) of Directive 2004/38/EC into domestic law. I(EEA)R 2006 have now been revoked and replaced by the Immigration (European Economic Area) Regulations 2016 however regulation 10 of the 2016 Regulations is substantially the same as the former provision.

The material parts of I(EEA)R 2006, regulation 10 stated:

'10.—(1) In these Regulations, "family member who has retained the right of residence" means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).

[…]

(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 or civil partnership of the qualified 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 or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

[…]'

Upper Tribunal Judge Bruce had found that the appellant had to establish that her former spouse was a qualified person up until the divorce was finalised and that in this case she had not done so.

What did the court decide?

Baigazieva had a 'relatively unusual procedural history' as this was a case where the Secretary of State agreed that the Upper Tribunal's determination was wrong and invited the Court of Appeal to give a short judgment on the issue of law.

The parties submitted, and Singh LJ agreed, that the answer to this issue was available in the judgment of the CJEU in NA (Judgment) [2016] EUECJ C-115/15 which found, in a case which involved the domestic violence retained rights provisions, there is a distinction between the point at which the right of residence is retained and the criteria to be met for that to happen.

Whilst the appellant's retained right did not take effect until the point of divorce there was no warrant for the conclusion that she had to prove that her former spouse remained a qualified person up until that point. This is supported by the language of Article 13(2)(a) of Directive 2004/38/EC which refers to 'prior to the initiation of the divorce'. I(EEA)R 2006, regulation 10 was not only a faithful transposition of the Directive but more clearly captures the distinction to be drawn between the cessation of family member status at the point of divorce and the criteria to be met for the right of residence to be retained at that point.

The court was satisfied that the guidance given in *NA* was sufficiently clear and that there was no need for a reference to the CJEU. The appellant's appeal was therefore allowed by consent.

Case details

- Court: Court of Appeal, Civil Division
- Judge: Singh LJ
- Date of judgment: 20 April 2018

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