Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25891/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On July 24, 2017	**On August 01, 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MISS ADENIKE ABIKE KOLAWOLE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Kaihiva, Counsel, instructed by Queen's Park Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I do not make an anonymity direction under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (S.I. 2008/2698 as amended).

2. The appellant is a national of Nigeria. On February 10, 2015 solicitors acting on behalf of the appellant lodged an application as confirmation of the appellant's right to reside in the United Kingdom. The appellant had made an application on the basis that she was the divorced spouse of an EEA national who had been exercising treaty rights in the United Kingdom and at the date of divorce she too was working

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in the United Kingdom. The respondent refused her application on June 23, 2015 and grounds of appeal were lodged by her on July 15, 2015 under Regulation 26 of the Immigration (EEA) Regulations 2006 and Section 82(1) of the Nationality, Immigration and Asylum Act 2002.

3. Her appeal came before Judge of the First-tier Tribunal Herlihy on November 9, 2016 and in a decision promulgated on November 29, 2016 the Judge dismissed her appeal and found that the respondent's decision was in accordance with the EEA Regulations.

4. The appellant appealed this decision on December 13, 2016, arguing that the Judge had erred in assessing evidence regarding the appellant's work and secondly had erred in the application of Regulation 15(1)(f) of the 2006 Regulations. Permission to appeal this decision was granted by Designated Judge Macdonald on June 9, 2017 and the matter was listed before me on the above date.

5. Having heard submissions from both representatives, I reserved my decision.

SUBMISSIONS

6. Mr Kaihiva adopted his skeleton argument that he handed to the Tribunal. He also adopted the grounds of appeal and submitted that there had been two material errors in law and that the decision should be set aside and remade.

7. His first argument, which formed ground one of his grounds of appeal, was that the Judge had materially erred in paragraph 6.4 of her decision in finding that the appellant had failed to provide evidence of employment. With regard to this ground, Mr Kaihiva pointed out to me that there were a number of wage slips at pages 89 and 90 of the original bundle and these wage slips suggested that her employment had begun in December 2013 and bearing in mind the wage slip for September 2014 showed an income in excess of £3,700 and the wage slip confirmed that she began her employment on December 16, 2013 it was submitted that the Judge had erred in finding that she had not complied or satisfied Regulation 10(6) of the 2006 Regulations. That Regulation required the appellant to be working when the marriage terminated and he submitted this evidence, albeit limited, should have led to the Judge making a finding that she had been working. The Judge had accepted the marriage had existed for more than three years before termination and that they had lived together for twelve months in the United Kingdom and in those circumstances the Judge, at the very least, should have found that the appellant was a person who had retained the right of residence. By failing to do so the Judge erred in law.

8. The second ground of appeal related to the Judge's misdirection in respect of permanent residence. He submitted that under Regulation 15(1)(f) the appellant was entitled to permanent residence if she demonstrated she had resided in the United Kingdom in accordance with these Regulations for a continuous period of five years and had retained the right of residence at the end of that period. He submitted that there was oral evidence from the appellant concerning her former spouse's

employment and there was evidence in the bundle from page 21 to page 33 of his employment between 2013 and 2015. He submitted the Regulation was met.

9. Mr Tufan objected to the application and submitted that the finding by the Judge regarding the appellant's income was a finding open to her on the evidence. It was up to the appellant to provide sufficient evidence and although he accepted it was not necessary to provide evidence all the way back to 2013 he submitted there were no wage slips between the date of divorce (April 2014) and September 2014 to support the wage slip relied on and it followed the Judge was entitled to find she had not satisfied Regulation 10 of the 2006 Regulations.

10. On the second issue Mr Tufan submitted that there was a total lack of evidence that the appellant's former spouse had been working prior to the divorce save for the period March 2013 to April 2014. The Tribunal in the decision of OA (EEA - retained right of residence) Nigeria [2010] UKAIT 00003 clarified the position regarding both Regulation 10 and Regulation 15 of the 2006 Regulations.

FINDINGS

11. In granting permission to appeal Designated Judge of the First-tier Tribunal Macdonald found simply that it was arguable that the Judge had erred in law. No further explanation was given for those reasons.

12. During the appeal hearing I raised with the two representatives the issues that needed to be considered and it was agreed that the first issue that this Tribunal had to address his mind to was whether or not the appellant was entitled to a retained right of residence.

13. The relevant Regulation that needs to be considered is Regulations 10(5) of the 2006 Regulations. Regulation 10(5) states that where a person has ceased to be a family member of a qualified person and was residing in the United Kingdom in accordance with these Regulations at the date of divorce and she was working then as long as the marriage has lasted for three years and they had spent one year in the United Kingdom she was entitled to a retained right of residence.

14. In her decision the Judge stated at paragraph 6.4, "there were clear gaps in the appellant's own employment history between 2013 and 2014. The only evidence that she was working in 2014 were payslips from October 2014 some seven months after her divorce."

15. I have referred myself to the relevant bundle of documents and note that the payslip that was issued on October 3, 2014 included the following information:

    (a) She commenced work at AIM Commercial Cleaning Limited on December 16, 2013.

    (b) For the month of September she had been paid net £536.34 and gross £680.80.

(c) Her gross pay to date was £3,727.12 with tax and national insurance deductions of £753.66.

16. The Judge's conclusion that there was no evidence that she had been exercising treaty rights since the termination of her marriage cannot be sustained. The payslips in the bundle clearly demonstrated that the appellant commenced work in that job on December 16, 2013 and I am satisfied the Judge should have found that she was working at the date of the termination of the marriage and continued to be so employed after that date.

17. I therefore find that there was a material error on this first issue and the appellant is entitled to a residence card based on a retained right of residence.

18. I turn to the second issue as to whether or not the appellant is entitled to permanent residence. Regulation 15(1)(f) contains a twofold test. Firstly, the appellant has to show that she has resided in the United Kingdom in accordance with the Regulations for a continuous period of five years and secondly, that she is someone who at the end of that period had retained a right of residence.

19. It seems that my finding concerning her retained residence above addresses the second part of the test so the issue is whether she satisfied the first part of that test. The Judge was not satisfied she did and gave her reasons and it is those reasons that Mr Kaihiva has challenged.

20. The appellant was able to provide evidence that her former spouse worked between March 2013 and April 2014 but she was unable to provide any further documentary evidence of his employment prior to this date. It may well be that there is further evidence available to show this but at the date the appeal was heard there was no documentary evidence that the former spouse was exercising treaty rights before April 2013. There was oral evidence from the appellant but the Judge was not satisfied on balance that this was sufficient.

21. In Amos v Secretary of State for the Home Department; Theophilus v Secretary of State for the Home Department [2011] EWCA Civ 552 the Court of Appeal held that a divorced spouse had to establish that he or she had the right of residence before the question whether, notwithstanding the divorce, the right had been retained by Article 13 of the Citizens Directive could be determined. The right was subject to Articles 16(2) or 18 of the Citizens Directive. The former provision applied to family members of EEA nationals who must have resided with the EEA national in the host Member State legally for a continuous period of five years. The word "legally" had to be given a Community meaning, which essentially depended on the exercise of Treaty rights.

22. In Diatta v Land Berlin (Case 267/83) the European Court of Justice concluded that the Claimants were not required to show that their former spouses were working for a continuous period of five years prior to their applications for the right of permanent residence. The requirements of the Citizens Directive applicable to the Claimants were that at all times while residing in the UK until their divorce the

spouse had to be a worker or self-employed (or otherwise satisfied Article 7(1) of the Citizens Directive); the marriages had to have lasted at least three years, including one year in the UK, and they had to show that they were workers, self-employed or otherwise satisfied the penultimate paragraph of Article 13(2). Provided the conditions in regulation 10(5) continued to be satisfied, after five years' continuous residence in the UK, a non-EEA national would be entitled to a permanent right of residence under regulation 15(1)(f) (paras 29 – 31). Under regulation 10 of the 2006 Regulations, the ex-spouse of an EEA national continues to enjoy a right of residence if he was residing in the UK in accordance with the Regulations when the marriage was terminated (i.e. the decree of divorce was made absolute), and the marriage had lasted for three years, at least one of which was spent by both parties in the UK.

23. How does all this affect the appellant. Put simply the appellant had to show the following:

    (a) Her former husband must have been exercising Treaty rights up to the date of the divorce, but thereafter that is not required. The evidence she adduced supports this as the tax returns show he was working up to and including the date of the divorce.

    (b) What is required is that, after the divorce, the appellant must herself exercise 'Treaty rights', in the sense of being a worker or self-employed or self-sufficient. That is set out at Article 13 of the Citizens Directive, and is reproduced at regulation 10(6) of the 2006 Regulations. This was also demonstrated by the appellant as evidenced by my finding above.

    (c) To obtain permanent residence the appellant has to show that between them they have been living here continuously for five years in accordance with the Regulations.

    (d) Once she demonstrates five years between them which in this case would be April 2018 she would be entitled to permanent residence under Regulation 15(1)(f) of the 2006 Regulations.

24. The appellant cannot show a full five years continuous residence in accordance with the Regulations and the Judge was therefore entitled to find she was not entitled to permanent residence.

25. The argument presented today by Mr Kaihiva amounts to a mere disagreement with that finding. The mere fact there had been an error on the right of residence does not mean the decision on permanent residence contained a similar error. The test and the requirements are different.

Decision

The making of the First-tier Tribunal did involve a partial error of law. I have set aside the original decision and I have remade the decision as follows:

(a) I find the appellant is entitled to a retained right of residence under Regulation 10(5) of the 2006 Regulations and the respondent should issue her with a residence card accordingly.

(b) I find there was no error of law with regard to the granting of permanent residence under Regulation 15 of the 2006 Regulations and I uphold that part of the Judge's decision.

Signed Date 27.07.2017

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I make no fee award as I have dismissed the permanent residence aspect of the appeal.

Signed Date 27.07.2017

Deputy Upper Tribunal Judge Alis