



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/04550/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 29 November 2018**

**Decision & Reasons
Promulgated
On 17 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

**LINDA DUFIE GYAMFI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Jafferji, Counsel

For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant, a citizen of Ghana born on 20 February 1975. She appeals against a decision of the First-tier Tribunal dismissing her appeal against the respondent's decision of 20 February 2017 refusing her permanent residence as an EEA family member.

Background

2. In brief outline the background to this appeal is as follows. The appellant came to the UK in December 2002 with entry clearance as a visitor. She had been in a relationship from 2000 with her former husband, a Norwegian national. Following her arrival in the UK he came to join her from Norway in December 2005. They were married on 19 February 2011. They have three children, a daughter born on 26 April 2001 in Ghana, a daughter born in London on 20 August 2006 and a son also born in London on 8 March 2008.
3. The appellant was granted a residence card on the basis that she was a family member of an EEA national valid from 12 September 2011 until 12 September 2016. It is her case that at the time of the application her husband was then employed as a refuse truck driver and had been in employment in the UK since his arrival in 2005 until February 2012 when he became permanently incapable of working as he suffered a brain haemorrhage. The appellant left her husband on 8 April 2013 because he subjected her to physical and emotional violence. They were divorced on 7 February 2017. The appellant has been working since February 2014.
4. On 18 October 2016 the appellant applied for permanent residence under the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”) but her application was refused on 20 April 2017.

The Hearing Before the First-tier Tribunal

5. Having considered the evidence and submissions, the judge referred firstly to reg. 10 of the 2016 Regulations setting out the requirements for qualifying for a retained right of residence. The judge said that the appellant, however, still had to meet the requirements of reg. 15. She commented at [6.7] of her decision that the respondent accepted that the appellant had been exercising treaty rights as if she were an EEA national as a worker since February 2014 and also that when she was issued with a residence card on 12 September 2011, her spouse was then exercising treaty rights.
6. She said that this did not cover a five-year period and the respondent asserted that the appellant had not provided any evidence with her current application to show that the period covered by his treaty rights made up the requisite five years. To show that, she would have to rely on her former husband’s exercise of treaty rights from about October 2011 to February 2014 but on her own evidence he had not been in employment since February 2012.
7. The judge then referred to the respondent’s guidance document, “Free movement rights: retained rights of residence” addressing the situation of applicants who were unable to provide all the evidence relating to their

sponsor due to “difficult circumstances”, recognising that where a relationship has broken down due to domestic violence it may not always be possible to provide all the necessary documents about the sponsor.

8. On that issue the judge said that the thrust of the policy referred to situations where the evidence was difficult to obtain, but that was not the present case as the evidence had not been provided, not because it was difficult to obtain but because it did not exist: [6.15]. The judge accordingly dismissed the appeal. There was a delay in issuing the decision: the hearing was on 16 May 2018 and the decision was not signed until 21 August 2018 and only promulgated on 10 September 2018. The judge acknowledged and regretted the delay explaining that it had arisen for personal/health reasons.

The Grounds of Appeal

9. In the grounds it is argued that the judge’s decision was flawed by a failure properly to apply the 2016 Regulations to the facts of the case as she failed to determine whether the appellant’s former husband had acquired a right of permanent residence due to five continuous years of residence in the UK as a worker from 2005 until 2010 or to consider whether he had acquired a right of permanent residence as a worker who had ceased activity or whether the appellant had acquired a right of permanent residence as the family member of her former husband. It is argued that the judge also failed to consider whether the appeal should be allowed on the basis the appellant had at the very least acquired a retained right of residence or to determine whether she was residing in accordance with the 2016 Regulations at the date of her divorce.
10. The grounds also argue that the judge did not properly assess the failure of the Respondent to apply her own policy in the light of the evidence that the appellant was a victim of domestic violence and had failed to focus on the relevant issues, her husband’s employment between 2005 and 2012 and the evidence of his permanent incapacity to work, , whereas she had focused on the evidence of employment after 2012 which did not exist because he had not been working. The grounds then suggest that the judge might have been hampered in determining this appeal due to the passage of time since the hearing and it might be that her recollection of the submissions and issues was impaired.
11. Permission to appeal was granted by the First-tier Tribunal on the basis that it was arguable that the judge had failed to make reasoned findings on the evidence, had made other numerous failings and that there was a paucity of reasoning in the decision. The judge granting leave commented that he could not understand how the judge had arrived at her conclusions in paras [6.15]-[6.18] when dismissing the appeal.
12. In his submissions, Mr Jafferji adopted his grounds submitting that there was a lack of factual findings and that the judge had focused on the wrong

issues. She appeared to have accepted that the appellant was entitled to a retained right of residence or at least she had not found that she was not so entitled. When considering the issue of permanent residence, the judge had failed to make any relevant findings of fact when there was evidence that the appellant's former husband had been working, even though the appellant may not have been able to provide documentary evidence.

13. Mr Whitwell submitted that the judge had been entitled to dismiss the appeal as the fact remained that the appellant had not produced evidence to support her claim that her former husband had acquired permanent residence. The judge had referred to the respondent's guidance about the circumstances in which it would not be possible for an applicant to provide all the necessary documents but he submitted that in the circumstances of this appeal, there had been no onus on the respondent to make further enquiries.

Assessment of Whether the First-tier Tribunal Erred in Law

14. I am satisfied that the judge did err in law in her assessment of this appeal. The respondent refused the application on the basis that the appellant had failed to provide sufficient evidence to support her claim. At the hearing before the judge, Mr Jafferji had submitted that the lack of evidence leading the respondent to refuse the application could be bridged by applying the guidance set out in the respondent's own policy. His initial submission had been that the respondent had not followed that policy and following the decision in Greenwood (No 2) [2015] UKUT 29 that, although the First-tier Tribunal had no power to remit her case to the respondent, the Upper Tribunal had expressly recognised that the First-tier Tribunal could conclude that the respondent's decision was unlawful. He had submitted that as the respondent had failed to take his own policy guidance into account, the position was that a lawful decision remained to be made.
15. The judge did not accept that argument on the basis that the evidence had not been provided because it was difficult to obtain but because it did not exist [6.15]. This must be a reference to the fact that the appellant's former husband had not been in work since February 2012. However, in order to establish permanent residence, the appellant was seeking to rely on her husband's work from 2005 until February 2012. If he was working during that period and no documentary evidence was available to support that contention, the issue might then arise of whether there were serious reasons why that evidence might be difficult to obtain.
16. Accordingly, I am satisfied that the judge erred in law by failing to focus on the issue of whether the appellant's former husband had acquired a right of permanent residence either as a result of his own continual residence from 2005 until 2012 as a worker or whether the period from 2012 onwards could properly be included due to his permanent incapacity to work. I am also satisfied the judge erred by focusing on the fact that the

appellant had been working since 2014 when the relevance of her work related to the period after the date of divorce. I am also satisfied that the judge failed to make clear findings on whether the appellant was, in any event, a family member who had retained the right of residence.

17. For these reasons I am satisfied that the decision should be set aside. As further findings of fact on the issues identified above need to be made, this is a case which should be remitted to the First-tier Tribunal for a full rehearing by a different judge.

Decision

18. The First-tier Tribunal erred in law. The decision is remitted to the First-tier Tribunal for a full rehearing by a different judge.

Signed: H J E Latter

Date: 29 December 2018

Deputy Upper Tribunal Judge Latter