



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/35109/2014

**THE IMMIGRATION ACTS**

Heard at Phoenix House  
On 12 May 2015

Determination Promulgated  
On 8 June 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MR OBAFEMI OLUGBENGA ODELE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the appellant: Mr M Adofutelegam of counsel

For the respondent: Mr M Diwnycz, Senior Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a citizen of Nigeria born on 9 January 1975. He appealed to the First-tier Tribunal against the decision of the respondent dated 28 August 2014 to refuse to issue him with a residence card as a family member of an EEA national pursuant to the Immigration (European Economic Area) Regulations 2006 (the '2006 Regulations'). First-tier Tribunal Judge Nicholson dismissed that appeal.
2. Upper Tribunal Judge Deans, granted the appellant permission to appeal to the stating that there was evidence before the Judge showing that the couple were living together in a durable relationship from May 2005 until March 2014. The Judge should

have considered whether the appellant acquired a right of permanent residence prior to March 2014 and that this was the only arguable ground.

3. The matter came before me for hearing on 12 May 2015.
4. The Judge identified the two issues in the appeal. The first one being that he has to determine whether between 14 August 2009 and 14 August 2014, the appellant and his sponsor were in a durable relationship. The second issue was whether the appellants sponsor was exercising treaty rights in the United Kingdom. He concluded that the appellant has to therefore prove under Regulation 15 of the 2006 Regulations that the appellant was living as a family member with his sponsor who was exercising treaty rights.
5. The Judge stated by virtue of Regulation seven (7) he was only to be treat as the appellant sponsor's family member during the currency of his residence card and so long as he complied with Regulation 8 (5). He further advised himself that in order to be entitled to permanent right of residence, the appellant had to be residing as a family member during those five years.
6. The Judge set out the evidence before him. He stated that the appellant arrived in the United Kingdom on 5 September 2004 and subsequently began living with his partner Anne Onsoien, a Norwegian national. Following a successful appeal to the Asylum and immigration Tribunal, the appellant was granted a residence document under the EEA Regulations valid from 14 August 2009 until 14 August 2014. On 4 July 2014 the appellant applied for a residence card on the basis of a permanent right of residence which application was refused by the respondent on 28 August 2014.
7. He stated that is starting point for his determination is the previous decision of Judge Grant-Hutchinson promulgated on 29 June 2007. Judge Grant Hutchinson accepted that at that time the couple were in a durable relationship. He stated that in accordance with the case of **Devaseelan** this finding is his starting point. The Judge noted in his determination, that there was sufficient evidence before Judge Grant-Hutchinson upon which she concluded that the couple were in a durable relationship at that time and that finding was effectively given force when a residence card was issued in August 2014 to the appellant. The Judge stated, "I proceed therefore on the basis that as at August 2014 the appellant and his sponsor were in a durable relationship."
8. The judge stated in his determination, "For the purpose of this determination I will accept that the appellant and the sponsor continued live together in a relationship at various addresses between 2009 and March 2014 because there is sufficient documents which demonstrates this. There is also other evidence to indicate that this couple were in a durable relationship between 2009 and March 2014.
9. The Judge however stated that this was not the end of the matter because the real issue in this case is whether the appellant and his sponsor were in a durable relationship between March 2014 and August 2014.

10. The Judge said that it is important to take into account the past history of that relationship. The evidence shows that the relationship came to an end in March 2014 when the sponsor moved out of the shed home. Since that time the couple became “an ex-couple not an ongoing couple”. The Judge found that there appellant and his sponsor were not in a durable relationship during the period of March 2 August 2014. He however accepts that they are in the durable relationship between August 2009 and March 2014.
11. The Judge found that looking at the evidence in the round, there was sufficient evidence to show on a balance of probability and for the purpose of this determination that treaty rights were being exercised by the sponsor. This however becomes academic because the appellant does not succeed under Regulation 15 (1 (b) because of the durability point.
12. The appellant’s grounds of appeal argue as follows. The first-tier Judge found that the EEA national had been exercising treaty rights at paragraph 68 but concluded that the appellant could not show that he had resided as a family member of an EEA national for a continuous period of five years. At paragraph 61, the Judge found that the appellant could show that he had resided as a family member of an EEA national for 4 ½ years but no more. The Judge based this finding on the fact that the couple had stopped living together in March 2014. The Judge materially erred in law in failing to consider whether the appellant qualified for permanent residence on the basis of historical facts. The appellant relies on the case of **Idezuna (EEA-permanent residence) Nigeria [2011] UKUT 00474 (IAC)**.
13. It is sufficient to show that the appellant sponsor exercised treaty rights for over five continuous years since the day it was determined that he had been in a durable relationship with her to avoid unequal treatment of married and unmarried partners as set out in the case of the **State of the Netherlands v and Florence Reed [1986] EU ECJR 59 /85**.
14. The Judge referred to paragraph 5 where Judge Grant-Hutchinson found that the appellant and his partner had been residing together since 2006 /2007 and accepted at paragraph 52 that the appellant and his partner continued to live together in a relationship at various addresses between 2009 and March 2014. The Judge also relied on Regulation 7(3) to limit his consideration of the period of residence card. This is a material error of law because that Regulation simply sets out the circumstances when an extended family who has residence card **shall** be treated as a family member. (Emphasis added). Insofar as Regulation 7 (3) attempts to impose a precondition or requirement of a residence card in order to exercise rights of residence or permanent residence it is submitted there is no such requirement in the Directive and such a condition is expressly contrary to and incompatible with Article 25.
15. In her rule 24 response, the respondent stated that she does not oppose the appellant’s application for permission to appeal on the basis of historical facts, namely whether the appellant had already acquired a right of permanent residence

before the date of separation from his sponsor. The respondent invites the Tribunal to determine the appeal with a fresh oral continuance hearing to consider whether the appellant meets the requirements of the Regulations 15 of the 2006 Regulations.

16. At the hearing I heard submissions from the appellant's counsel and Senior Presenting Officer said that he would leave the matter in my hands.
17. I find that there is an error of law in the determination of the First-tier Tribunal in relation to the application of the 2006 Regulations. The Judge accepted that there was sufficient evidence that the appellant and his sponsor were in a durable relationship when a residence card was issued by the respondent to the appellant in August 2014. He stated "I proceed therefore on the basis that as at August 2014, the appellant and his sponsor were in a durable relationship."
18. Having found that the appellant and the sponsor had been in a durable relationship, he nevertheless dismissed the appellant's appeal for reasons which are erroneous in law. The appellant historically had acquired a right of permanent residence before the date of separation from his sponsor as he lived with his sponsor from May 2005 until March 2014 on the bases which he was previously issued with a residence card by the respondent. The Judge accepted that the first-tier Tribunal Judge Nicholson's determination at paragraph 52 found that the appellant and his partner "continued to live together in a relationship at various addresses between 2009 and March 2014.
19. The Judge did not take into account the case of **Idezuna** where it was stated "What constitutes the relevant period, (of residence) however, may be a matter requiring particular consideration and sometimes a family member may have acquired a right of permanent residence on the basis of historical facts". The Judge did not consider the appellant's historical residence in the United Kingdom when there was clear evidence before him of this historical residence.
20. Therefore it was a matter of fact before the Judge that the appellant and his partner resided together in a durable relationship for over five years and that the EEA national had been exercising her treaty rights during this entire period. Once a right of permanent residence has been acquired, it can be lost only through the absence from the host Member State "for a period exceeding two consecutive years" (Regulation 15(2) of the 2006 Regulations; Article 16(4) of the Directive).
21. The 2006 Regulations were made to implement Directive 2004/38/EC of the European Parliament and the Council (the "**2004 Directive**"). The 2006 Regulations repealed and replaced earlier legislation dealing with the immigration rights of EEA nationals and their family members, in particular the Immigration (European Economic Area) Regulations 2000 (S.I. 2000/2326) (the "**2000 Regulations**"). The 2004 Directive in turn replaced the previous EC legislation in this field, to which the 2000 Regulations previously gave effect. One of the features of the 2004 Directive was the introduction of a permanent right of residence in a host member State. Such a right of permanent residence was not provided for in the 2000 Regulations or in the earlier EC legislation.

22. Regulation 15(1) of the 2006 Regulations provides that “The following persons shall acquire the right to reside in the United Kingdom permanently”, followed by a list of relevant categories of persons. The only categories potentially relevant to the appellant are the category referred to in Regulation 15(1)(b), namely “a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years”, and the category referred to in paragraph 15(1)(f), namely “a person who – (i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and (ii) was, at the end of that period, a family member who has retained the right of residence”.
23. There is ample evidence provided by the appellant that the appellant is entitled to a residence card on the basis that the appellant and his sponsor were living together in a durable relationship from May 2005 until March 2014 and therefore the appellant had already acquired a right of permanent residence in the United Kingdom which cannot be taken away from him other than an absence of more than two years from the United Kingdom.
24. The Judge took no issue that the appellant sponsor was exercising treaty rights in the United Kingdom.
25. I therefore set aside the decision of the first-tier Tribunal Judge in its entirety as it contains various errors of law both in fact and law. I substitute my decision and allow the appeal.

**DECISION**

I allow the appeal under the 2006 Regulations.

Dated this 4<sup>th</sup> day of June 2015

Signed by

.....  
Mrs S Chana  
A Deputy Judge of the Upper Tribunal