



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/02414/2017

THE IMMIGRATION ACTS

Heard at Field House
On 12 September 2018

Decision & Reasons Promulgated
On 25 September 2018

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

AJIBIKE OLAYINKA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr U Okoroh instructed by Gromyko Amedu Solicitors

For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria who was born on 2 August 1982.
2. On 10 November 2010, the appellant married a French national, Mr Kevin Beard, through a traditional Nigerian marriage ceremony. On 8 April 2011 the appellant was issued with a residence card as a family member (spouse) of an EEA national under the Immigration (EEA) Regulations 2006 (SI 2006/1003 as amended) (the "EEA Regulations 2006"). That residence card was valid until 13 September 2016.

3. On 31 August 2016, the appellant applied for a permanent residence card on the basis that, following her divorce from her former spouse on 6 April 2016 she had a retained right of residence which, when taken with her residence in the UK prior to her divorce, gave rise to a permanent right of residence under reg 15(1)(f) based upon five years continuous residence in the UK.
4. On 21 February 2017, the Secretary of State refused the appellant's application under the Immigration (EEA) Regulations 2016 (SI 2016/1052) (the "EEA Regulations 2016") which had, by the date of decision, replaced the EEA Regulations 2006. As relevant to the issues in this appeal, the two sets of Regulations are materially the same in regs 14 ("extended right of residence"), 15 ("right of permanent residence") and regs 18 and 19 respectively (permanent residence documentation).
5. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 16 May 2018 Judge Geraint Jones QC dismissed the appellant's appeal. The judge found that the appellant could not establish that she had a permanent right of residence because she could not show that she had resided in the UK in accordance with the EEA Regulations 2006 after 31 December 2012 as she could not establish that she had been living with her spouse.
6. The appellant sought permission to appeal, inter alia, on the ground that the judge had misdirected himself in requiring that the appellant be living with her husband whilst they were married in order to establish a right of residence under the EEA Regulations 2006.
7. On 12 July 2018, the First-tier Tribunal (Judge P J M Hollingworth) granted the appellant permission to appeal.
8. At the hearing before me, Ms Fijiwala, who represented the Secretary of State, accepted that the judge had erred in law in applying the EEA Regulations 2006 and 2016. She accepted that, in order to establish a right of residence, the appellant did not have to show that she was living with her spouse in the UK. She accepted, in the light of Upper Tribunal's decision in PM (EEA - spouse - "residing with") Turkey [2011] UKUT 89 (IAC), that it was not necessary to establish a right of residence as a family member of a "qualified person" under reg 14 of the EEA Regulations 2006 and 2016 that the family member (spouse) should be living *with* his or her spouse. It sufficed that they were both in the UK even if they were not living together. Ms Fijiwala accepted that the judge's decision should, as a consequence, be set aside.
9. Further, having considered the evidence before the First-tier Tribunal, Ms Fijiwala accepted that the appellant could establish a permanent right of residence under reg 15(1)(b) of the EEA Regulations 2016 (which is in the same terms as reg 15(1)(b) of the EEA Regulations 2006) based upon her residence in the UK for a continuous period of five years in accordance with the EEA Regulations. Ms Fijiwala accepted that the evidence demonstrated that the appellant's spouse was a "qualified person", as a worker, from 4 January 2011 as evidenced by the P60 documents at pages 31 and 32 of the bundle. She accepted that the appellant's spouse was a "qualified person"

for a period of at least five years thereafter. Consequently, between 4 January 2011 and 4 January 2016, the appellant could show that she had resided in the UK as the spouse of a “qualified person” for a period of five years in accordance with the EEA Regulations 2006. Under reg 15(1)(b), Ms Fijiwala accepted that, therefore, the appellant had established a permanent right of residence.

10. I agree with the position taken by Ms Fijiwala.
11. First, the judge clearly misdirected himself in requiring the appellant to establish that she was residing with her spouse in order to show that she was residing in accordance with the EEA Regulations 2006.
12. Regulation 14(2) of the EEA Regulations 2006 provides that:

“a family member of a qualified person residing in the United Kingdom under paragraph (1)...is entitled to reside (“remain”) in the United Kingdom for so long as he remains the family member of the qualified person (“that person”) or EEA national.”

(The words in brackets reflect the different wording in the EEA Regulations 2016 but which do not affect its meaning.)

13. Regulation 15(1)(b) of the EEA Regulations 2006 recognises a “permanent right of residence” is acquired by:

“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.”

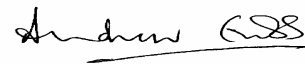
(The wording of reg 15(1)(b) of the EEA Regulations 2016 is not materially different.)

14. There is no requirement in reg 14(2) that the EEA national and his or her spouse should be living together in the same household and, as PM makes plain, it is not a prerequisite to the acquisition of a permanent right of residence under reg 15(1)(b). The requirement to reside “in the United Kingdom with the EEA national” simply means that the family member (as well as the EEA national) must have resided in the UK (see [12] and [33] of PM).
15. Secondly, the evidence demonstrates that from 4 January 2011 until 4 January 2016 – a continuous period of five years – the appellant and her spouse lived in the UK (albeit not together for the whole of that period) and during that period the sponsor was a “qualified person”. The appellant was, accordingly, residing in the UK for that period in accordance with the right of residence recognised in reg 14(2) of the EEA Regulations 2006. At the conclusion of that five-year period, the appellant acquired a permanent right of residence by virtue of reg 15(1)(b) of the EEA Regulations 2006. She, therefore, acquired that permanent right of residence prior to her divorce on 6 April 2016. Her divorce did not affect her permanent right of residence which continued to exist. She did not need to rely on a retained right of residence at the date of divorce. She already had a permanent right of residence prior to her divorce.

Decision

16. Consequently, the First-tier Tribunal erred in law in dismissing the appellant's appeal. That decision is set aside.
17. For the reasons I have given, I remake the decision allowing the appellant's appeal on the basis that she has established a permanent right of residence which came into existence on 4 January 2016 and is, on production of the required documentation, entitled to a permanent residence card under reg 19 of the EEA Regulations 2016.

Signed



A Grubb
Judge of the Upper Tribunal

20 September 2018