



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/07497/2014
IA/07509/2014 & IA/07515/2014

THE IMMIGRATION ACTS

Heard at Stoke on Trent
On 21 October 2014

Determination Promulgated
On 4 November 2014

Before

Deputy Upper Tribunal Judge Pickup
Between

Rosemary Oghenewaيرة Nwokolo
Sophia Chisom Nwokolo
Roy David Chibuike Nwokolo
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr C Amgbah, instructed by UK Law Associates
For the respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants, Rosemary Oghenewaيرة Nwokolo, date of birth 16.12.76, Sophia Chisom Nwokolo, date of birth 2.10.02, and Roy David Chibuike Nwokolo, date of birth 8.6.07, are citizens of Nigeria.

2. These are their linked appeals against the determination of First-tier Tribunal Judge Taylor promulgated 23.5.14, dismissing their appeals against the decisions of the respondent, dated 27.1.14, to refuse the first appellant's application made on 5.8.13 for a permanent EEA residence card on the basis of a retained right of residence pursuant to the Immigration (EEA) Regulations 2006, and the related applications of the child appellants. The Judge heard the appeal on 9.5.14.
3. First-tier Tribunal Judge McWilliam granted permission to appeal on 11.6.14.
4. Thus the matter came before me on 21.10.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Taylor should be set aside.
6. The relevant background to the appeal can be briefly summarised as follows. On 27.11.08 the first appellant was issued a residence card as the spouse of Mr Maxime Sylva. They were divorced on 15.7.13. The appellant claims a retained right of residence under regulation 10 and applied for a permanent residence card under regulation 15, based on her own five years residence as the spouse of an EEA national exercising Treaty rights prior to the date of the divorce.
7. For the reasons set out briefly below, I find that there was no error of law in the determination of Judge Taylor. The grounds are poorly drafted, confused and misguided and the grant of permission misunderstands the regulations. At the hearing, Mr Amgbah also appeared unable to understand the regulations. For example, at §10 of the grounds it is suggested that the First-tier Tribunal was seeking evidence that the former husband had exercised Treaty rights for a continuous period of 5 years. That is not correct. The grounds and Mr Amgbah's submissions failed to appreciate or comprehend that in order to qualify for a permanent right of residence, the first appellant has to show that she has completed a five-year continuous period of residence in accordance with the regulations.
8. At §10 of the determination Judge Taylor found that the first appellant had a retained right of residence following the divorce in 2013, in that her former husband had been a qualified person at the date of divorce, that he was residing in the UK at that time, that the marriage had lasted at least 3 years and that the parties had resided in the UK for at least one year during the duration of the marriage (10(5)). The judge also found that the first appellant met the requirement under regulation 10(6).
9. However, at §6 the judge found that the appellant did not meet the requirements regulation 15(1)(b) for a permanent right of residence. The judge carefully explained why that was. Although the former husband was exercising Treaty rights and thus a qualified person at the date of termination of marriage in 2013, there was insufficient evidence to show that he had been so qualified throughout any five-year period preceding termination of marriage. In particular, there were gaps in the documentary

evidence between 2009 and 2010. It follows that during those gaps the first appellant cannot have been resident in the UK in accordance with the regulations, as there is insufficient evidence that the former husband was exercising Treaty rights during those gap periods, even if he was exercising Treaty rights at the date of divorce. For any continuous period the clock can only start at the earliest date of continuity at which the first appellant was residing in the UK in accordance with the regulations, in other words as the family member of an EEA national present in the UK and exercising Treaty rights. On the evidence, the judge found that the earliest date began after February 2010.

10. It is arguable that there is a far simpler explanation as to why the first appellant could not meet regulation 15(1)(b): that when the application was made and considered by the Secretary of State, the first appellant was no longer the family member of an EEA national, that family relationship having terminated in divorce in 2013. However, regulation 15(2) states that a right of permanent residence shall only be lost through absence from the UK for a period exceeding two consecutive years. In other words, the right accrues the moment the five-year period is reached and is only lost by significant absence from the UK. However, this is a moot point as, for the reasons explained by the judge, there was insufficient evidence that 5 years had accrued at the date of termination of marriage in 2013. As stated by the Upper Tribunal in OA (EEA -retained right of residence) Nigeria [2010] UKAIT 0003:

“To count as a qualifying period of residence under reg 15(1)(b) a person must show, inter alia, that the five years in question are ones in which the said residence has been ‘in accordance with these Regulations.’ That entails that during those five years the EEA national on whom the family member relies in order to establish his or her right must have been continuously in the UK as a ‘qualified person’ under reg 6... exercising Treaty rights... In this case the respondent vigorously disputes that the appellant could meet this requirement because there was insufficient evidence to show that he continued to be a qualified person for the duration of that period.”

11. In that case, as in the present appeal, there were gaps in evidence of the EEA husband’s employment, or other acceptable evidence of qualification under regulation 6, during the period of the marriage and thus the EEA national spouse was not qualified within the meaning of the regulations for the entire period of the marriage.
12. However, the first appellant claimed entitlement to a permanent right of residence not under regulation 15(1)(b) but 15(1)(f), which is the correct provision where there is a retained right of residence following termination of relationship as a family member of an EEA national qualified by reason of exercising Treaty rights in the UK at the date of termination of marriage.
13. However, as previously stated, as the husband has not been shown to have been exercising Treaty rights throughout the marriage, the continuous five-year period can only begin at the earliest when there was cogent evidence that he was exercising Treaty rights, which the judge found at §10 was 26.8.11, the date of a wage slip produced in evidence.

14. Thus for the purpose of any five-year continuous period, from that date in 2011 the first appellant was resident in the UK in accordance with the regulations as the family member of an EEA national exercising Treaty rights in the UK. That period continued up to the termination of the marriage in 2013, some 2 years, from which point onwards the first appellant continued, as she had a retained right of residence, to accrue further time towards the continuous period of five years required under regulation 15(1)(f). According to Judge Taylor, eventually, if she retains the right of residence under the regulations, she will reach a five-year continuous period, entitling her to a right of permanent residence, but it is obvious that if the period could only begin in 2011, it cannot reach its five-year completion until approximately August 2016. It thus follows that the first appellant is not entitled to a permanent right of residence under the regulations at the present time.
15. I note that in OA, headnote (v) states that, “Reg 15(1)(f) provides a route for acquiring a permanent right of residence based on a retained right of residence. But, as under reg 15(1)(b), so under reg 15(1)(f) the family member has to show that the EEA national concerned was exercising Treaty rights continuously over the relevant period of five years.”
16. This suggests that the applicant has to show that the former husband continues to exercise Treaty rights until the five-year period is complete (see §33 of the judgement in OA). I am not sure that can be right, as it would mean that a person in the first appellant’s situation could never acquire a permanent right of residence unless she could also show that the former EEA husband continued to qualify as exercising Treaty rights, even after termination of marriage and up until she meets the five-year period. However, it is not necessary for me to determine this issue as, if correct, it also resolved against the interests of the first appellant.
17. In the circumstances, Judge Taylor was correct to dismiss the appeal. In doing so he explained carefully at more than one place within the determination why the first appellant could not qualify at the present time for a permanent right of residence. I find no material error in the determination. The appeals of the child appellants must also fail with that of the first appellant.

Conclusion & Decision

18. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeals remain dismissed.



Signed:

Date: 31 October 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.



Signed:

Date: 31 October 2014

Deputy Upper Tribunal Judge Pickup