



IAC-AH-SAR-VI

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

Appeal Number: IA/48977/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 4th April 2016**

**Decision & Reasons Promulgated
On 4th May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MR OKWY KINGSLEY ORAEKWE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Nwaekwu (LR)
For the Respondent: Ms N Willocks-Briscoe (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Rayner, promulgated on 20th August 2015, following a hearing at Taylor House on 21st July 2015. In the determination, the judge dismissed the appeal of the Appellant, who

subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Nigeria, who was born on 8th January 1982. He appeals against the decision of the Secretary of State dated 1st December 2014 to refuse his application for a permanent residence card, as confirmation of his right to reside in the United Kingdom, following his marriage to an EEA national, namely, a Miss C.M. Ribeiro, a citizen of Portugal.

The Appellant's Claim

3. The Appellant's claim is that he relies upon Regulation 17 of the EEA Regulations, whereupon the Secretary of State must issue a residence card to a person, where the person is a family member of a qualified person or of an EEA national with a permanent right of residence under Regulation 15. The Appellant claims that he was a family member who has retained a right of residence of an EEA national. However, the Respondent's refusal letter states that the Appellant had not shown that his wife was exercising treaty rights and that Regulation 15(1)(f) could not be satisfied, such that the Appellant's wife had not been in the UK for five years exercising treaty rights, and nor was he a person who had retained a right of residence. But, the Appellant responded to this with the suggestion that because the marriage was subsisting at the time that the Respondent considered Mr Oraekwe's application, the Respondent should have considered the matter under Regulation 15(1)(b) rather than Regulation 15(1)(f), because in the former provision all that the Appellant had to show was that the Appellant was a family member of an EEA national who was exercising treaty rights for a continuous period of five years.
4. The judge went on to refer to Section 85(4) and held that under the determination of **EA (Section 85(4) explained) Nigeria [2007] UKAIT 00013** which was to the effect that the Appellant cannot succeed by showing that he would be granted leave if he made an application on the date of the hearing: he can succeed only by showing that he will be granted leave if he made, on the date of the hearing, the same application as that which resulted in the decision under appeal.
5. This was important to the Appellant's circumstances because at the date of the hearing, the Appellant's argument was that his relationship, which had earlier broken down, had now led to a reconciliation, and that this being so he qualifies under Regulation 15(1)(b) of the EEA Regulations, which refer only to his being able to show that he is a "family member of an EEA national" who has been living in the UK for a continuous period of five years.
6. The judge, however, held that this was not the same application as that which resulted in the decision under appeal, because at that time the evidence was that his relationship had broken down.
7. The appeal was dismissed.

Grounds of Application

8. The grounds of application state that the judge ought to have considered Regulation 15(1)(b) of the EEA Regulations because the Appellant's marriage was not dissolved by a decree absolute.
9. On 31st January 2016, permission to appeal was granted on the basis that this was a case where the Appellant had made an application for a residence card on the basis that he and his Portuguese wife were getting divorced. He claimed a retained right of residence under Regulation 15(1). However, by the time of the hearing, there was no divorce that had been obtained, and both parties had in fact remained in the UK. The Appellant therefore relied upon **Diatta v Land Berlin (Case 267/83) [1985] ECR 567**, which was to the effect that he remains the family member of an EEA national. The Tribunal, however, declined to make a finding on this new argument, because it had not been the way that the case had been advanced in the original application and was dependent upon new evidence. This decision was arguably an error of law.
10. On 28th February 2016, a Rule 24 response was entered to the effect that the grant of permission was on the basis that the judge failed to consider the Appellant's claimed reconciliation with his wife and a new amended grounds under Regulation 15(1)(b), having failed to make out his case under Regulation 15(1)(f), for a retained right of residence on the basis of his application and claim that he and his wife were getting divorced. However, there was no material arguable error of law here. The judge was fully aware that the Appellant had made a very clear application to the Respondent to be considered under Regulations 10 and 15(1)(f).

Submissions

11. At the hearing before me, Mr Nwaekwu submitted that the judge had failed to recognise that Section 85(4) has no application in an EEA case involving the marriage of an EEA national and referred to the case of **Boodhoo [2013] UKUT 00340**. This was an error, because the judge failed to accept then the evidence that was before him at the date of the hearing.
12. Second, the Appellant's wife had exercised treaty rights for five years and the judge failed to engage with the evidence in the appeal bundle to this effect. He should have considered whether the Appellant's wife was exercising treaty rights at the relevant time. The fact was that the Appellant's wife had remained in the UK and had qualified for a permanent right of residence at the date of the application and at the date of the hearing. The Appellant also would be deemed to have qualified as a spouse: see **Mulgeeci (IA/08588/2013)**, which was authority for the proposition that if the EEA wife had exercised treaty rights for five years, then the partner would also be entitled to stay.
13. For her part, Ms Willocks-Briscoe submitted that the issue was whether Section 85(4) had any relevance to the appeal. It is true that the judge made no findings on the

Appellant's evidence but that was because the new evidence was a different application from what had originally been submitted.

14. In his reply, Mr Nwaekwu went on to say that for the avoidance of doubt, he should make it clear that the divorce was filed on 10th March 2014, and this was at a time when the Appellant's visa was running out, but that in between that period, and the hearing of the appeal, there was a reconciliation between the parties, which reconciliation then broke down at the date of the hearing. However, the divorce decree was still not finalised at the date of the hearing, and under EEA law the position was that their marriage was a subsisting and valid one.
15. Both parties agreed that if I were to make a finding of an error of law, given how much evidence there was, including a 404 page Appellant's bundle, this matter should properly return back to the First-tier Tribunal, to be determined by a judge other than Judge Rayner on a de novo basis. Mr Nwaekwu pointed out that the decree absolute had now been announced on 17th December 2015.

Error of Law

16. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law. The case of **OA (EEA - retained right of residence) Nigeria [2010] UKAIT 00003** established that, "under Regulation 10(5)(a) the phrase 'termination of the marriage ...' can only mean the lawful ending of the marriage by legal proceedings (i.e. divorce); it cannot mean 'breakdown of the marriage'".
17. Under the Rule in **Diatta v Land Berlin**, the Appellant remained a family member of an EEA national in these circumstances. The judge should have considered the matter on that footing and Section 85(4) was not the appropriate authority for excluding consideration of these matters at the date of the hearing before the judge.
18. In **Ahmed (Amos; Zambrano; Regulation 15(A)(iii)(c) [2006] EEA Regs) [2013] UKUT 00089**, it was made clear that,

"... our starting point must be the ruling of the Court of Justice in **Diatta v Land Berlin Case 6-267/83 [1985] (EUECJR)**, in which the court has continued to endorse in subsequent case law. This case establishes that a spouse continues to enjoy an EU right of residence as the family member of a Union citizen notwithstanding the fact that the couple may be living apart or their relationship be problematic"
19. In the circumstances, the Appellant continued to benefit from the legal relationship between himself and his wife. The question then was that if his wife had obtained entitlement to permanent residence in the UK after five years as a qualifying person by 2014, or at the date of the hearing in 2015, the Appellant would have obtained that right as well after five years of marriage to her from 2008 to 2015.
20. The fact that his wife was absent at the hearing at that point had little bearing on his entitlement. The two were still married. Permanent residence, that they would have

acquired, would require a two year absence to break. The judge did not make any finding about the Appellant's wife being a worker for five years and at what date that had been achieved.

Re-making the Decision

21. I re-make the decision on the basis of the findings of the original judge, and the submissions that I have heard today. I am allowing this appeal to the extent that it is remitted back to the First-tier Tribunal under Practice Statement 7.2(b) because the nature or extent or any judicial fact-finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the already objective, it is appropriate to remit the case to the First-tier Tribunal.

Notice of Decision

22. The decision of the First-tier Tribunal involved the making of an error on a point of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is remitted back to the First-tier Tribunal, to be heard by a judge other than Judge Rayner, on a de novo basis.

23. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

28th April 2016