



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/08385/2016**

Appeal Number:

E

A/08387/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 19 June 2017**

**Decision promulgated
On 20 June 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

FLORENCE ANAYO CHIDI

S N

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sadozai of Sadozai Solicitors

For the Respondent: Mr Tufan Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Lucas ('the Judge') promulgated on 24 November 2016 in which the Judge dismissed the appellants' appeals against the respondent's refusal to issue a Permanence Residence Card.
2. The appellants are citizens of Nigeria born on 31 January 1974 and 26 February 2009 respectively.
3. The appellants asked for the matter to be considered on the papers, as a result of which the Judge considered the material made available before concluding at [16]:

16. This appeal has no prospect of success. The Appellant and Sponsor have stated that the evidence submitted with the claim made on 13 January 2016 was either incorrect or simply inadequate. She has gone on to produce new documents in a new bundle which include new contact numbers and addresses for his employer, together with a variety of new evidence of employment, salary and residence which were not before the Respondent when this claim was considered. The purpose of these claims is not to permit rolling disclosure because this would make the task of the Respondent to be, at best, impossible. It is the responsibility of the Appellant, no one else, to ensure that evidence is adequate at the time of application. It is not appropriate - in effect - to present a fresh claim after the Refusal decision.
4. The Judge stated that the correct approach was for the appellants to lodge an entirely fresh claim and that as it was admitted the evidence provided with the application was either inaccurate or inadequate, the claim had no prospects of success and was accordingly dismissed.
5. Permission to appeal was granted by another judge of the First-tier Tribunal. The operative parts of the grant being in the following terms:
 2. Despite the application having been lodged on behalf of the appellants by a firm of solicitors the grounds asserted no error of law in the decision. The Judge did not say no evidence not was lodged with the application as is asserted by the appellant.
 3. There is an arguable error by the Judge not raised by the appellant's representatives which is that an appellant in an EEA application must lodge documents which show at the date of hearing evidence of five years exercise of treaty rights by the EEA national. It appears that there was such evidence before the Judge in the form of P 60s for six years and subsequent bank statements.

Error of law

6. The Judge makes a fundamental misdirection of law at [1] of the decision where it is stated "... Appeal against the decision of the Secretary of State made on 28 June 2016 to refuse to grant them permanent residence in the UK as the family member of Ebera Chidi, an Italian national". A Residence Card does not grant status upon an individual entitled to the same. The right of any EEA national or family member to reside in accordance with the Regulations arises if they can satisfy the appropriate specified criteria. For example, if an EEA national resides in a host member state for a period of five years as a worker, exercising treaty rights, they will have acquired the right to remain in that state for the period they continue to exercise treaty rights (in whatever capacity) from the date of entry up to the expiration of the five-year period and thereafter a right of permanent residence, which can only be lost in limited circumstances. This right does not come into existence because it is granted by the Secretary of State.
7. A Residence Card is evidence of a right acquired under the terms of the Regulations which reflect the Free Movement Directive and later case law. In this case, the Secretary of State did not refuse to grant permanent residence for the Secretary of State has no power to refuse

permanent residence if the requirements of the Regulations or EU law are satisfied and the person entitled to such a right has not conducted themselves in a manner that warrants their removal from the Member State. The Secretary of State is entitled to refuse to issue a Residence Card but only if satisfied that the relevant criteria cannot be met. It is not a case, as it is with domestic immigration rules, of a right only accruing once grant by the Secretary of State.

8. Whether a person is exercising treaty rights and has acquired a right of residence or permanent residence is a fact sensitive analysis. It is also an ongoing process. The Judge therefore erred in limiting the date at which the issues were to be considered to the date of the application. Whilst there is a specific timeline in relation to some domestic applications, to the situation appertaining at the date of application, such a restriction is not arguably permitted in relation to EU law issues and the right of Free Movement.
9. It is not disputed that the information provided to the Secretary of State with the application was incorrect or inadequate. It is not disputed that an additional addendum bundle has been provided containing a considerable number of documents which support the contention the EEA national has been exercising treaty rights and has resided in the UK in accordance with the Regulations for a continuous period of five years, as a worker, and that the EEA member's spouse, Florence Chidi, and their daughter SN has lived with the EEA national in accordance with the Regulations for the requisite period. This is accepted by Mr Tufan.
10. Accordingly, at the date of the previous hearing and this hearing the appellants' have discharged the burden of proof upon them to the required standard to show that the EEA national has acquired a right of permanent residence as he has been exercising treaty rights for more than five years as a worker and the appellants' have also resided in the UK in accordance with the Regulations for a continuous period of five years as family members of an EEA national exercising treaty rights. On this basis, the decision of the Judge is set aside. The decision is re-made. The appeal is allowed.

Decision

11. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed.**

Anonymity

12. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....

Upper Tribunal Judge Hanson
Dated the 19 June 2017