



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

Appeal Number: EA/02289/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 13 December 2019**

**Decision & Reasons Promulgated
On 30 December 2019**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

**MS CATHERINE NDUTA NGARI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Dr C. Ikegwuruka, OISC, Almonds Legal

For the Respondent: Mr N. Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Catherine Nduta Ngari, is a citizen of Kenya, born on 13 December 1992. She appeals against a decision of First-tier Tribunal Judge Boylan-Kemp MBE promulgated on 16 August 2019. The judge dismissed her appeal against a decision of the respondent to refuse her application for a permanent residence card as a family member who has retained the rights of residents under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations").

Factual background

2. On 21 August 2014, the appellant married a citizen of Portugal. She was issued with a residence card as the family member of an EEA national in 2015. Unfortunately, the relationship broke down, and, on 14 February 2018, divorce proceedings were initiated. The appellant and her former husband divorced on 21 August 2018. On 4 March 2019, the appellant applied for a permanent residence card as a family member who had retained the right of residence under regulation 15(1)(f) of the 2016 Regulations.
3. On 1 May 2019, the respondent refused the application. The respondent was not satisfied that the appellant's former husband had been a "qualified person" or had enjoyed the right of permanent residence when divorce proceedings were initiated. The appellant had also provided insufficient evidence that she was residing in the United Kingdom under the regulations in her own capacity, either at the date of the initiation of divorce proceedings, or thereafter. Finally, the appellant had not provided evidence that she had resided in the United Kingdom in accordance with the regulations for the required continuous period of five years.
4. Permission to appeal was granted by Judge E M Simpson of the First-tier Tribunal on the basis that the appellant had satisfied "one of the two routes open to her in retaining a right of residence under EU law, following her divorce, namely the retained rights of residence provisions under Reg 10, and accordingly her appeal fell to be allowed on that ground..."

Legal framework

5. Under regulation 19(2) to the 2016 Regulations, a non-EEA national who enjoys the right of permanent residence is entitled to a permanent residence card.
6. Regulation 15 sets out the criteria for the acquisition of the right of permanent residence. It provides:
 - "(1) The following persons acquire the right to reside in the United Kingdom permanently—
 - (a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;
 - (b) a family member of an EEA national who is not 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;
 - (c) a worker or self-employed person who has ceased activity;
 - (d) the family member of a worker or self-employed person who has ceased activity, provided—

- (i) the person was the family member of the worker or self-employed person at the point the worker or self-employed person ceased activity; and
 - (ii) at that point, the family member enjoyed a right to reside on the basis of being the family member of that worker or self-employed person;
- (e) a person who was the family member of a worker or self-employed person where—
- (i) the worker or self-employed person has died;
 - (ii) the family member resided with the worker or self-employed person immediately before the death; and
 - (iii) the worker or self-employed person had resided continuously in the United Kingdom for at least two years immediately before dying or the death was the result of an accident at work or an occupational disease;
- (f) 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 the period, a family member who has retained the right of residence.”

7. Regulation 10(5) makes provision for a person to be a “family member who has retained the right of residence” following divorce or termination of their marriage or civil partnership. Paragraph (5) provided, at the relevant time:

“(5) The condition in this paragraph is that the person (“A”)—

- (a) ceased to be a family member of a qualified person or an EEA national with a right of permanent residence on the termination of the marriage or civil partnership of A;
- (b) was residing in the United Kingdom in accordance with these Regulations at the date of the termination;
- (c) satisfies the condition in paragraph (6); and
- (d) either—
 - (i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership, the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;
 - (ii) the former spouse or civil partner of the qualified person or the EEA national with a right of permanent residence has custody of a child of that qualified person or EEA national;
 - (iii) the former spouse or civil partner of the qualified person or the EEA national with a right of permanent residence has the right of access to a child of that qualified person or EEA national, where the child is under the age of 18 and where a court has ordered that such access must take place in the United Kingdom; or

(iv) the continued right of residence in the United Kingdom of A is warranted by particularly difficult circumstances, such as where A or another family member has been a victim of domestic violence whilst the marriage or civil partnership was subsisting.

(6) The condition in this paragraph is that the person—

(a) is not an EEA national but would, if the person were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; or

(b) is the family member of a person who falls within paragraph (a).”

Regulation 10(5) was amended with effect from 15 August 2019 to reflect the requirements of Baigazieva v Secretary of State for the Home Department [2018] EWCA Civ 1088: see The Immigration (European Economic Area) (Amendment) Regulations 2019. Baigazieva held that the relevant date for the purposes of regulation 10(5)(a) and (b) was when divorce proceedings were commenced, rather than the termination of the marriage following the successful institution of divorce proceedings. The amendment does not have retrospective effect, but the judge in the present matter correctly read regulation 10 *as though* regulation 10 had such effect in any event. See [10].

Discussion

8. An examination of the chronology of the appellant’s residence in the United Kingdom under the 2016 Regulations demonstrates that it would have been impossible for her to have acquired the right of permanent residence by the time her appeal was heard. She commenced her residence under the regulations upon her marriage to her former husband on 21 August 2014. Her appeal before the First-tier Tribunal took place on 9 July 2019. The date of that hearing is the relevant date for my assessment of whether the judge erred in law. By 9 July 2019, the appellant had accrued a maximum of 4 years’ and 11 months’ residence. On any view, she was short of the five year threshold. The decision of the First-tier Tribunal did not, on any view, involve the making of an error of law.
9. Regulation 10(5) of the 2016 Regulations defines the term “family member who has retained the right of residence”. It is primarily a definition provision. It establishes a gateway through which a non-EEA spouse of an EEA national may pass upon (post-Baigazieva, the initiation of their) divorce or termination of the marriage, in order to become a “family member who has retained the right of residence”. Regulation 10(6) imposes a qualitative requirement for a putative non-EEA family member to reside *as though* they were a qualified person (see regulation 6) in their own right. The residence rights of family members who have retained the right of residence are no longer parasitic upon their EEA “sponsor”; rather, such persons acquire the ability to generate their own right to reside.

10. The unchallenged findings of the judge below at [12] of her decision are that the appellant meets the requirements to be a family member who has retained the right of residence under regulation 10(5): she was married for a total of at least three years, one of which was in this country, and she satisfied regulation 10(6).
11. The effect of the appellant having passed through the gateway of regulation 10(5) and (6) is that, upon ceasing to enjoy a parasitic right to reside based on her former husband's residence, she was able to enjoy a right to reside in her own capacity. The requirement that she "exercise Treaty rights", as though she were an EEA national, continued to apply.
12. It appears that the judge granting permission to appeal conflated the three year temporal requirement contained in regulation 10(5) with the *five* year threshold for acquiring a permanent right of residence. The significance of the three year requirement in regulation 10(5) is that - provided the other criteria are met - the appellant is able to secure a right to reside *as though she were* an EEA national. She is not exempted from the need to accrue five years' continuous residence in order to acquire the right of permanent residence. Being a family member who has retained the right of residence simply enables the appellant to accrue the right of permanent residence, despite no longer being a family member of an EEA national. So much is clear from regulation 15(1)(f): to obtain the right of permanent residence on a retained rights basis, it is necessary to reside in the United Kingdom for five years under the Regulations and, at the end of that period, be a family member who has retained the right of residence.
13. Judge Boylan-Kemp's findings were entirely consistent with the above analysis and did not involve the making of an error of law. The judge said at [14]:

"The relevant subsection [*sic*] in the appellant's case is (f). I have found that she has retained rights under regulation 10, so the remaining issue is whether she has lived in the UK in accordance with these regulations for a continuous period of five years. The appellant married on 21 August 2014 and prior to this point she was here on a student visa issued under the immigration rules. Therefore, on the chronology before me I find that the appellant was not residing in accordance with the regulations until her marriage to an EEA national, which means that she cannot satisfy the five-year requirement until 21 August 2019. Therefore, I find that she does not yet have a right to reside in the UK on a permanent basis under regulation 15."
14. Dr Ikegwuruka submits that the respondent should have issued a residence card in response to the application for a permanent residence card. He contends that the Secretary of State's practice is to issue "lesser" EEA "products" if the primary application fails on a technicality. As such, he contends that the judge fell into error by not allowing the appeal on the basis that the respondent should issue the appellant a "normal" residence card, rather than a permanent residence card.

15. Dr Ikegwuruka relied on Samsam (EEA: revocation and retained rights) Syria [2011] UKUT 00165 (IAC) as authority for the above proposition. It does not assist his submission. The headnote states at (2):

“Regulation 10 of Immigration (EEA) Regulations 2006 requires the applicant to demonstrate that: a genuine marriage has lasted three years and the couple have spent one year together in the United Kingdom and that the EEA national spouse was exercising treaty rights at the time he ceased to be a family member.”

The decision is against Mr Ikegwuruka. At [53] and [54] it states in terms that five years’ residence is required to acquire the right of permanent residence on a retained rights basis (assuming there was not some other, separate, route under the Regulations). Nowhere does it state that the respondent should issue a “normal” residence card upon an unsuccessful application for a permanent residence card. In any event, the authority is somewhat dated now. Not only does it address the situation under the Immigration (European Economic Area Regulations) 2006, but it deals with the pre-Baigazieva position.

16. There are a number of additional difficulties with the submission.
17. First, the respondent was not asked by the appellant to issue a residence card if the permanent residence card application failed. It cannot, therefore, be an error of law for the judge not to have found that the respondent did not do something that the appellant did not invite her to do.
18. Secondly, the statutory powers of the tribunal are simply to allow or dismiss an appeal. The tribunal does not have the ability to direct the respondent to take particular action. This is an appeal against a refusal to grant a permanent residence card; allowing the appeal may only take place on the basis that the respondent should have granted the appellant a permanent residence card, but unlawfully failed to do so. It is not possible for me to find that the judge should have found that the respondent was required to act in some other way, as the statutory powers to do so do not exist.

Conclusion

19. The decision of the First-tier Tribunal did not involve the making of an error of law. The unchallenged findings of fact of the judge were that the appellant had enjoyed a non-permanent right to reside from her marriage to the date of the hearing on 9 July 2019. If she makes a fresh application to the respondent, she may be able to establish that she continued to meet the requirements for a right to reside in the short period that followed the hearing before the First-tier Tribunal until she met the five year threshold.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law.

This appeal is dismissed.

No anonymity direction is made.

Signed *Stephen H Smith*
2019

Date 20 December

Upper Tribunal Judge Stephen Smith