Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10605/2015

THE IMMIGRATION ACTS

Heard at Field House, London
On the 11th December 2015

Decision & Reasons Promulgated
On the 5th January 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MISS FATIMAT AJOKE OGUNSHINA
(No anonymity direction made)

Respondent/Claimant

Representation:
For the Appellant (The Secretary of State): Mr Norton (Home Office Presenting Officer)
For the Respondent/Claimant: No Attendance

DECISION AND REASONS

1. This is the Secretary of State for the Home Department's appeal against the decision of First-tier Tribunal Judge Morrison promulgated on the 10th June 2015 in which he allowed the Claimant's appeal under Regulation 15 (1) (f) of the Immigration (European Economic Area) Regulations 2006, and found that the Claimant had acquired the right to reside in United Kingdom permanently. As this is the Secretary of State's appeal, for the purpose of clarity throughout this decision, Miss Ogunshina will

be referred to as the "Claimant" and the Secretary of State for the Home Department will be referred to as the "Secretary of State".

2. Despite Notice having been sent of the time, date and location of the hearing to both the Claimant and to her legal representative ABS Legal Services on the 19th November 2015, listing the appeal to be heard at 10 a.m. on Friday 11th December 2015 at Field House, 15 Breams Buildings, London, EC4A 1DZ, by 11:30 a.m., no one had attended on behalf of the Claimant. I asked my clerk to check to ensure that no message been received at the Tribunal, and no message had been received on behalf of the Claimant at the Tribunal and there was no correspondence which sought to explain the absence of the Claimant or her representative, and no request for an adjournment had been made. I further noted that the Claimant had agreed to a short notice hearing date on the 8th November 2015, and although having asked for further time to submit the Rule 24 response, that response was contained within the appeal papers before me. In such circumstances pursuant to Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I was satisfied that the Claimant had been notified of the hearing or that reasonable steps had been taken to notify her of the hearing and that it was in the interests of justice to proceed with the hearing in the absence of the Claimant, no explanation having been given for her failure to attend, there being no adjournment request and the statement in her Rule 24 response that the appeal should be conducted on the papers.

3. Within the Grounds of Appeal, it was argued that First-tier Tribunal Judge Morrison had found that the Claimant's EEA national husband had been exercising his Treaty rights from mid-January 2012 until the date of the divorce between the Claimant and her husband on the 4th November 2014 and that thereafter the Claimant had been self-employed. It was argued that this did not qualify the Claimant for permanent residence as she was required to have lived in accordance with the Regulations for a continuous five-year period and that the Judge appeared to have taken periods of the Claimant's employment from 2009 and amalgamated those with that of the sponsor to give a combined working total of 5 years. It is argued that as the EEA spouse’s employment was recorded as having started in mid-January 2014, the Claimant cannot be considered as having lived in accordance with those Regulations before then.

4. Permission to appeal was granted by Judge of the First Tier Tribunal Kimnell on the 29th September 2015 and he found that the Secretary of State’s argument that the Judge erred in finding that Regulation 15 (1) (f) was satisfied had merit.

5. In her Rule 24 response, the Claimant argues that permission to appeal should not have been allowed and that granting permission is contrary to the relevant provisions of Regulation 15 and Regulation 10 (5) of the Immigration EEA Regulations 2006 and that the Secretary of State knew

that she was issued with a Residence Card as a family member of an EEA national who was exercising Treaty rights in 2009. She argued that she had lived in the UK in accordance with the Regulations and in particular Regulation 15 (1) (b) and (f) as a family member of an EEA national who has retained right of residence and that she had been living in accordance with the Regulations as a self-employed individual in 2010, 2011, 2012 2013 and as a worker in 2014 and 2015. She argues that her Residence Card was issued as a result of evidence of her EEA sponsor exercising treaty rights in 2009 and that the appeal is simply a waste time and money. She argues that the appeal should be conducted on the papers.

6. In his oral submissions to me, Mr Norton contended that the argument was fairly succinct and that the EEA Sponsor had only been exercising Treaty Rights since 2012. Although he agreed that the Claimant would have a retained Right of residence following the divorce, he argued that she did not qualify for a permanent right of residence until 2017, as the five-year requisite period commenced upon the sponsor starting to exercise his Treaty Rights. He relied upon the decision of Senior Immigration Judge Storey in the case of OA (EEA-Retained Right of Residence) Nigeria [2010] UKAIT 0003.

My Findings on Error of Law and Materiality

7. I find that First-tier Tribunal Judge Morrison has materially erred in law at [18] of his decision, when he found that as a result of the Claimant had been self-employed for 4 years between the 6th April 2009 and her former husband being employed from mid-January 2012 to the date of the divorce in 2014, that there was therefore evidence of a continuous exercise of Treaty Rights for a five-year period. Although the fact that the Claimant on the findings of First-tier Tribunal Judge Morrison continued to be self-employed after the date of the divorce, does mean that she was and is entitled to a retained right of residence under Regulation 10 (5) and (6) of the Immigration (EEA) Regulations 2006. However, the fact that the Claimant rather than her husband had been self-employed from the 6th April 2009 was not relevant for calculating the start of the continuous five-year period for the purpose of Regulation 15 (1) (f).

8. Under Regulation 15 (1) (f) a person shall acquire a right to reside in the United Kingdom permanently if they have:

> "(i) have resided in the United Kingdom in accordance with these Regulations for a continuous period of 5 years; and
>
> (ii) was, at the end of that period, a family member who has a retained right of residence".

9. Both limbs of Regulation 15 (1) (F) have to be satisfied. As was stated by Senior Immigration Judge Storey in the case of OA (EEA-Retained Right of Residence) Nigeria [2010] UKAIT 00003 at [33] to accord with

the Regulations, the Claimant's status as a family member had to be based upon her EEA husband continuing to exercise Treaty rights, but in that reported case there was insufficient evidence to show her husband was continuing to exercise Treaty rights during the relevant period.

10. Given that Ms Ogunshina's ex-husband according to the findings of First-tier Tribunal Judge Morrison did not start his employment until mid-January 2012 and therefore did not start to exercise his Treaty Rights as an EEA national until that date, the Claimant had not lived in the UK in accordance with the Regulations for a continuous period of 5 years either by the date of the original decision or by the date that First-tier Tribunal Judge Morrison considered the appeal. The Claimant will not be entitled to achieve permanent residence status until mid-January 2017, when the five-year period has been completed.

11. In reaching my decision I have fully taken account of the submissions made by the Claimant in her Rule 24 response, and although the Claimant was issued with a Residence Card back in 2009, that is not proof that her sponsor, her ex-husband, was exercising Treaty rights between 2009 and mid-January 2012, and given the finding of FFTJ Morrison that her husband was exercising Treaty Rights since 2012, which has not been cross appealed, that submission has no merit.

12. The decision of First-tier Tribunal Judge Morrison therefore does contain a material error of law and is set aside. I remake the decision, dismissing the Claimant Miss Ogunshina's appeal under the Immigration (European Economic Area) Regulations 2006, given that her ex-husband on the findings of First-tier Tribunal Judge Morrison had not commenced employment in the UK until mid-January 2012, and was thereby not exercising Treaty rights until that stage. The Claimant therefore had not resided in the United Kingdom in accordance with the Regulations for a continuous period of 5 years and therefore Regulation 15 (1) (f) of the Immigration (EEA) Regulations 2006 is not satisfied and will not be satisfied until mid January 2017.

Notice of Decision

I set aside the decision of First-tier Tribunal Judge Morrison, the same containing a material error of law;

I remake the decision dismissing the Claimant Ms Ogunshina's appeal under the Immigration (EEA) Regulations 2006;

No Anonymity Order is made, none having been made by the First-tier Tribunal and none having been sought before me.

Signed Dated 14th December 2015

RFMcGinty

Deputy Judge of the Upper Tribunal McGinty