



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

Appeal Number: EA/07134/2016

THE IMMIGRATION ACTS

Heard at Newport (Columbus House)

**Decision & Reasons
Promulgated
On 26th July 2017**

On 18 July 2017

Before

**UPPER TRIBUNAL JUDGE GRUBB
DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE**

Between

MAYLIN ALONZO NITURA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Otieno, Counsel

For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of the Philippines who was born on 1 May 1971. On 16 June 2006, she married a British citizen, Peter Stewart Turberville. He was born on 17 August 1946. On 5 October 2010, the appellant was issued with a residence card as the family member of an EEA national. The basis for that card was the 'Surinder Singh' principle as Mr Turberville is a British citizen. The card was issued under Regulation 9 of the

Immigration (European Economic Area) Regulations 2006 (SI 2006/1003 as amended) (“the EEA Regulations”).

2. On 1 October 2015, the appellant applied for a residence card on the basis that she had acquired a permanent right of residence under reg 15(1)(b) because she had resided in the UK with her husband in accordance with the EEA Regulations for a continuous period of five years. That application was refused by the Secretary of State on 29 February 2016. The Secretary of State was not satisfied that either the appellant or her husband had continuously resided in the UK for five years as required.
3. The appellant appealed to the First-tier Tribunal. Her appeal was determined on the papers and dismissed by Judge O’Rourke. Permission to appeal to the Upper Tribunal was granted by the First-tier Tribunal on 17 November 2016.
4. The appeal initially came before us on 2 May 2017. In a decision promulgated on 11 May 2017, we concluded that the judge had erred in law in dismissing the appellant’s appeal, in particular by failing properly to assess the evidence relevant to the claim that the appellant and sponsor had resided in the UK for a continuous period of five years. It was accepted before us that the periods of residence by the appellant and sponsor in Cyprus were of insufficient duration to break the continuity of any residence in the UK. At that hearing, the (then) Senior Presenting Officer also indicated that the Secretary of State might, at a further hearing, also put in issue whether the sponsor was a “qualified person” for the five-year period relied upon by the appellant.
5. At the resumed hearing, Mr Otieno on behalf of the appellant, put into evidence without objection from Mr Diwnycz affidavits from both the sponsor and a friend of the appellant and sponsor. In addition, there was a letter showing that the sponsor had been paid a pension in the UK by the state from 23 August 2011 - which would equate to him having reached the retirement age of 65 years. A number of bank statements from the sponsor were also put in evidence.
6. Having considered the evidence, Mr Diwnycz accepted on behalf of the Secretary of State that the appellant had established that both she and the sponsor had been resident in the UK for a continuous period of five years between 5 October 2010 and 4 October 2015. He also accepted that the appellant had established that the sponsor was a qualified person during that period. On that basis, Mr Diwnycz did not seek to argue that the appellant’s appeal should not be allowed.
7. Given the matters accepted by Mr Diwnycz, we are satisfied that the appellant meets the requirements of reg 15(1)(b) of the EEA Regulations and is entitled to a permanent residence card.
8. We do, however, note that in the light of the ECJ’s decision in Minister voor Vreemdelingenzaken en Integratie v Eind (C-291/05) [2008] 2 CMLR 1, it

was not necessary, in a Surinder Singh claim, for the appellant to establish that the sponsor was, on return to the UK from Cyprus, a “qualified person”.

Decision

9. The decision of the First-tier Tribunal to dismiss the appellant’s appeal under the EEA Regulations involved the making of a material error of law. That decision was set aside by our earlier decision promulgated on 11 May 2017.
10. We remake the decision, allowing the appellant’s appeal under the EEA Regulations on the basis that the appellant has acquired a permanent right of residence under reg 15(1)(b).

Costs

11. At the conclusion of the hearing, having announced our decision, Mr Otieno made an application for costs against the respondent.
12. The only basis upon which costs could be awarded in this appeal is under rule 10(3)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) on the basis that:

“the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings; ...”.

13. There is simply no basis for awarding costs to the appellant in this appeal. It was only at the resumed hearing before us that the appellant provided sufficient evidence to establish the required continuous residence of both the appellant and sponsor in the UK in order to succeed under the EEA Regulations. In the light of that evidence, Mr Diwnycz, having seen it on the morning of the hearing, accepted that the appellant met the requirements of the EEA Regulations. Clearly, the First-tier Tribunal proceedings were brought by the appellant and she was unsuccessful. The further appeal to the Upper Tribunal was also brought by the appellant and the conduct of the respondent has, throughout, been entirely reasonable in defending the appeal until the point at which the appellant produced sufficient evidence to meet the requirements of the EEA Regulations. For those reasons, we decline to make an order for costs in the appellant’s favour under rule 10(3)(d).

Signed

A Grubb
Judge of the Upper Tribunal

Date: 26 July 2017

TO THE RESPONDENT
FEE AWARD

The appellant also sought a fee award on the basis that she had succeeded in her appeal. However, for the reasons we have given above, she only succeeded in her appeal on the basis of the evidence produced before the Upper Tribunal. In those circumstances, we do not consider it appropriate to make any fee award in respect of a fee paid in order to appeal to the First-tier Tribunal where the appellant was unsuccessful on the evidence then presented.

Signed

A Grubb
Judge of the Upper Tribunal

Date: 26 July 2017