



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/01970/2016

THE IMMIGRATION ACTS

Heard at Field House
On 14 June 2018
Extempore

Decision & Reasons Promulgated
On 22 June 2018

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MS TINA KEHINDE EDWARDS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Nnamani, Counsel instructed by Adukus Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Feeney promulgated on 18 July 2017. That decision dismissing her appeal under the Immigration (European Economic Area) Regulations 2016 was set aside by me for the reasons set out in the decision issued on 29 March 2018. There is no need to deal with the reasons which I gave for finding an error of law (a copy of which is attached) but in essence the question now comes down to the fact as to whether the appellant has in fact established a five year period in which her husband was a worker before divorce proceedings were commenced. The reason for that is that once her husband had acquired permanent residence he being a worker for five years then so long as she was

married and residing in the United Kingdom for that period she too acquired permanent residence by operation of the European Economic Area Regulations.

2. I am satisfied from the documents produced to me which include PAYEs for the tax years beginning 6 April 2010 until 20 April 2015 and from salary slips covering the period from that up to 28 August 2015 relating to her former husband that he was a worker for that period at the very least. It is therefore unnecessary for me to consider whether he was a worker prior to that date nor is it necessary for me to consider whether he was a worker or otherwise a qualified person after that date for the simple reason that once the five year period as a worker is achieved the appellant also became entitled to permanent residence at that point, it not being in doubt that she was resident in the United Kingdom as the family member of an EEA national at the time. As at the latest she became a permanent resident on 6 April 2015, several months before divorce proceedings were commenced, I am satisfied that she is entitled to permanent residence and it therefore follows that the appeal is to be allowed on that basis.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I remake the decision by allowing the appeal under the Immigration (European Economic Area) Regulations
3. No anonymity direction is made.

Signed

Date 21 June 2018



Upper Tribunal Judge Rintoul

ANNEX - ERROR OF LAW



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/01970/2016

THE IMMIGRATION ACTS

Heard at Field House
On 2 March 2018
Extempore

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MS TINA KEHINDE EDWARDS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Nnamani, Counsel instructed by Adukus Solicitors
For the Respondent: Ms Z Ahmad, Home Office Presenting Officer

DECISION AND REASONS

3. The appellant appeals with permission against the decision of First-tier Tribunal Judge Feeney promulgated on 18 July 2017 in which she dismissed the appellant's appeal under the Immigration (European Economic Area) Regulations 2016 (the EEA Regulations") to refuse to issue the appellant with a document confirming her right of residence in the United Kingdom.
4. The appellant's case is that she was married to Mr Defoe, a French national, that marriage having taken place in 2008. Shortly before that, Mr Defoe entered the United

Kingdom and, as the documents show, started employment. He was also registered for national insurance. The marriage broke down a number of years later resulting in the appellant applying for a decree nisi and later for a decree absolute which was on 9 June 2016.

5. Prior to the issue of the decree absolute, the appellant made an application on 3 September 2015 for a residence card confirming her right of permanent residence as a person married to an EEA national who had complied with the requirements of the Regulations for the period of five years. The Secretary of State refused that application for a number of reasons primarily that the appellant had failed to show that she had ceased to be married to an EEA national and therefore could not qualify for a retained right of residence as she did not comply with Regulation 10(5) in that one of the requirements is that the marriage had been terminated. The Secretary of State also concluded that there was insufficient evidence to show that the EEA family member, Mr Defoe, had been exercising treaty rights, the Secretary of State doubting the authenticity of one of the P60s which had been submitted with the application. The Secretary of State therefore concluded on no basis was the applicant entitled to the residence card sought.
6. When the appeal came before Judge Feeney on 15 June 2017 the respondent was not represented and the appellant was represented by her solicitor, Mr Adekenju. The judge heard evidence from the appellant and reached a number of conclusions but the focus of the decision was, unfortunately, as to whether Mr Defoe had been employed or was exercising treaty rights in another capacity as at the date of divorce. The judge concluded on the basis of the evidence that that was not so and concluded that the appellant had therefore not shown that she met the requirements of Regulation 10(5). The judge also found that the applicant had not shown that she had retained a right of residence because the appellant had not shown that Mr Defoe was employed at the date of divorce.
7. The appellant sought permission to appeal on a number of grounds:-
 - (i) that the judge had not properly assessed the documents which had been produced and had ignored relevant evidence which showed that the husband, Mr Defoe had been exercising treaty rights at the date of decision;
 - (ii) that the judge had become involved in irrelevant matters such as the dates on which the documents supplied had been submitted
 - (iii) that the judge misdirected herself in law as to the application of the EEA Regulations.
8. A difficulty arises in assessing this appeal: for whatever reason neither the Secretary of State nor the judge nor for that matter the appellant's representatives approached the case in the proper manner, asking the questions which should have been asked which are:
 - (i) On what date did Mr Defoe first become a qualified person, that is a person exercising treaty rights?

- (ii) Are there any gaps in him exercising that right within the five years after that date?
 - (iv) Did he cease to be a worker or qualified person as a result of any of those gaps?
 - (v) If not, on what date did Mr Defoe acquire permanent residence?
9. If Mr Defoe acquired permanent residence in 2013, as appears to be the case, then whether or not he was exercising treaty rights by being economically active after that date is not relevant. That is because under reg.14 (2) of the EEA Regulations, the family member of a person who has a right of permanent residence is entitled to remain and time spent resident here on that basis constitutes lawful residence in accordance with the EEA Regulations under reg. 15 (1)(b).
 10. If, as appears to be the case, Mr Defoe continued to be resident in the United Kingdom, the appellant continued to accrue lawful residence and may have consequently acquired permanent residence at some point in 2013, well before the divorce became final. That is because if Mr Defoe was exercising treaty rights on the date on which the appellant married him, she at that date became, by operation of law, a family member of an EEA national who is a qualified person and began to accrue lawful residence under the EEA Regulations.
 11. It may well be that on a proper analysis of the timeline in this appeal that the appellant acquired permanent residence on the fifth anniversary of her marriage, that is, in 2013 but that question was not asked.
 12. In any event, it is only if the appellant's husband had not acquired permanent residence prior to the divorce that the issue of whether he was working or not is relevant, given the wording of reg. 10 (5) (a)
 13. For these reasons, although the judge may be right about the documents and the appellant's former husband's position immediately prior to the divorce in 2016, that is not the relevant issue given that the prior questions of whether the appellant and/or her former husband had acquired permanent residence had not been asked.
 14. There are P60s which cover a lengthy period prior to the divorce and whilst I accept the indication from the respondent that there may be an issue as to whether he was effective the level of income being relatively low, those are not matters considered by the judge. The judge was concerned with documents related to tax returns which postdate the possibility of the appellant's husband acquiring permanent residence. Further, the judge appears to have accepted the P60s at face value and it is not at all clear how the judge would have approached the case had she directed herself properly in law as to the questions to be answered. For these reasons I consider that the decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.
 15. I consider that in the circumstances, it is appropriate to adjourn the matter to allow further evidence as to if and when the appellant's partner acquired permanent residence.

16. I therefore make the following directions:

- (a) The respondent is directed to contact HMRC in order to obtain details of the appellant's ex husband (Mr Keiba Defoe) (NI No.) National Insurance and Income Tax records from his entry into the system in 2008 until the date of divorce, 9 June 2016;
- (b) The material at a. is to be served on the Upper Tribunal and the appellant at least 10 days before the next hearing, in redacted form if necessary;
- (c) So far as is necessary, these directions are to operate as directions made pursuant to rule 5 (3) (d) requiring HMRC and or DWP to disclose the information required;
- (d) Pursuant to rule 14 it is directed that the information provided pursuant to the directions at a. to d. above is not to be disclosed by the parties to any third party without further order of the Upper Tribunal
- (e) The resumed hearing will be listed after 14 May 2018

Signed

Date: 27 March 2018



Upper Tribunal Judge Rintoul