



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/03002/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On: 6 March 2018

Decision & reasons Promulgated  
On: 9 March 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

SAMUEL IBITOSHO AFOLABI  
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Dr Victor Onipede, Counsel  
Instructed by London South Law Chambers  
For the respondent: Ms Zakera Ahmed, a Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the respondent's refusal to grant him an EEA residence permit as a person as a family member who has retained the right of residence pursuant to Regulation 10 or Regulation 15 of the Immigration (European Economic Area) Regulations 2006 (as amended). The appellant is a citizen of Nigeria.

## **Background**

2. The factual matrix in this appeal is not disputed. The appellant entered the United Kingdom in April 2006, on what basis is unclear. On 24 October 2009, he married an EEA citizen. On 26 March 2010, the appellant successfully applied for an EEA residence card, which was issued on 21 September 2010, to expire on 21 September 2015.
3. However, on 15 February 2012, the appellant's EEA spouse deserted him.
4. On 18 September 2015, the appellant applied to the respondent to recognise retained rights of residence. He was then still married to his wife and divorce proceedings had not yet begun. The appellant told the respondent that he did not know where his wife was, having not heard from her since she deserted him.
5. The appellant was unable to produce any evidence of his wife having exercised Treaty rights in the United Kingdom during the marriage. The respondent endeavoured to verify whether the wife had been exercising Treaty rights in the United Kingdom at any time.
6. The appellant thought his former spouse had worked for a company called CJA at a particular address. The respondent's enquiries indicated that there was no company called CJA using that postal address, that the telephone number was not answered, and that the company registered under that name at Companies House had a different address. Neither party appears to have approached HMRC to see whether they had a record of payment of income tax by the wife.
7. On 9 November 2015, almost two months after making his retained right of residence claim, the appellant issued divorce proceedings against his wife, as the petitioner. He still did not know where she lived.
8. On 15 February 2016, decree nisi was pronounced. On 19 February 2016, the respondent refused to recognise retained rights of residence for this appellant.
9. On 15 April 2016, two months after the refusal letter, the marriage was finally ended by decree nisi of divorce.

## **First-tier Tribunal decision**

10. The First-tier Tribunal dismissed the appellant's appeal.

## **Permission to appeal**

11. Upper Tribunal Judge Coker granted permission to appeal on the basis that the period under Regulation 10(5)(d)(i) had arguably been miscalculated.

## **Rule 24 Reply**

12. There was no Rule 24 Reply.

13. That is the basis on which this appeal came before the Upper Tribunal.

### Upper Tribunal hearing

14. I heard oral argument from Dr Onipede for the appellant, and from Ms Ahmed for the respondent. Dr Onipede relied on Regulation 10(5)(d)(i) and on the Upper Tribunal decision in *OA* as summarised in the judicial headnote. The appellant had produced forms P60 for the years 2010 – 2014 but not for the date of the termination of the marriage. He relied on the content of the appellant's bundle and accepted that the right of appeal in EEA cases did not arise out of section 85 of the Nationality, Immigration and Asylum Act 2002 (as amended).

15. I did not consider it necessary to call upon Ms Ahmed in this appeal.

16. I reserved my decision.

### Discussion

#### The EEA Regulations

17. So far as material, the provisions of Regulation 10 are as follows:

**10.—(1)** In these Regulations, “family member who has retained the right of residence” means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5). ...

(5) A person satisfies the conditions in this paragraph if –

(a) he ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person;

(b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;

(c) he 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;... or

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

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

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

(8) A person with a permanent right of residence under regulation 15 shall not become a family member who has retained the right of residence on the death or departure from the United Kingdom of the qualified person or the termination of the marriage or civil partnership, as the case may be, and a family member who has retained the right of residence shall cease to have that status on acquiring a permanent right of residence under regulation 15.”

18. Regulation 15(1)(f) allows for the acquisition of a permanent right of residence for persons who have resided in the United Kingdom in accordance with the Regulations for a continuous period of 5 years, and who are, at the end of such period, a family member who has retained the right of residence.
19. The definition of a family member who has retained the right of residence is pivotal both under Regulation 10 and Regulation 15. If an appellant cannot bring himself within the definition of such a person in Regulation 10, then he also fails under Regulation 15. The Upper Tribunal considered Regulation 10 in *OA (EEA - retained right of residence) Nigeria (Rev 1) [2010] UKAIT 00003*:

*“i. Reg 10 of the Immigration (European Economic Area) Regulations 2006 is a free-standing provision which enables a family member who would otherwise cease to have a right of residence to continue to do so in certain circumstances. So far as concerns persons who fall within reg 10(5), so long as their marriage or civil partnership is at least three years old it is possible for them to qualify for a retained right of residence after just one year of residence in the United Kingdom. But to achieve a permanent right of residence on the strength of a retained right of residence it is always necessary to show residence in the UK for a continuous period of five years.*

*ii. Under reg 10(5)(a) the phrase “termination of the marriage ...” can only mean the lawful ending of the marriage by legal proceedings (i.e. divorce); it cannot mean “breakdown of the marriage”; see also WW (EEA Regs. – civil partnership) Thailand [2009] UKAIT 00014.*

*iii. To count as a qualifying period of residence under reg 15(1)(b) a person must show, inter alia, that the five years in question are ones in which the said residence has been “in accordance with these Regulations”. That entails that during those five years the EEA national on whom the family member relies in order to establish his or her right must have been continuously in the UK exercising Treaty rights (save for certain periods of absence specified in reg 3).*

*iv. For the purposes of reg 15(1)(b) the period of time during which a person “has resided in the United Kingdom with the EEA national...” must commence from the date the person first became a family member, that being the date of marriage in the case of a spouse.*

*(v) By contrast, Reg 15(1)(f) provides a route for acquiring a permanent right of residence based in part on a retained right of residence. Under reg 15(1)(f) the family member has to show that he was residing in the United Kingdom in accordance with the Regulations for a continuous period of five years, and at the end of that period he has a retained right of residence.”*

20. In *HS (EEA: revocation and retained rights) Syria [2011] UKUT 165 (IAC)*, the Upper Tribunal considered the other requirements for a genuine marriage and the exercise

of Treaty rights at the date of termination of the marriage. The judicial headnote in *HS*, so far as material to this appeal, was as follows:

*“...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.”*

21. The facts in this case do not entitle the appellant to a retained right of residence. He can show from the forms P60 that his wife worked (perhaps) for CJA up to the end of the 2013/2014 tax year. But CJA does not seem to be trading at the relevant address, at least not in 2015/2016 and there is no other evidence that his wife was still exercising Treaty rights when this application was made in September 2015, nor in April 2016, when the marriage ended.
22. This application is premature: when the appellant applied to the respondent for recognition that he was a family member who has retained the right of residence, the marriage had not been legally terminated. The appellant's wife had left him, some three years previously, but they were still married. He did not even begin divorce proceedings until after he had made the application, and the decree absolute was not received until after the refusal letter had been issued in February 2016.
23. The ground on which permission to appeal was granted, the calculation of residence under Regulation 10(5)(d)(i), is a conjunctive part of the whole test in Regulation 10(5). The appellant needs to show that at the date of his application to be considered a 'family member who has retained the right of residence' under Regulation 10, the marriage had been terminated by a decree absolute of divorce (Regulation 10(5)(a)); that he was residing in the United Kingdom in accordance with the Regulations at the date of termination (Regulation 10(5)(b)), in this case by showing that his former wife was then exercising her Treaty rights in the United Kingdom; that he is a 'family member' as defined in Regulation 10(6), about which there is no difficulty in this case; *and* that (in this case) the marriage lasted for the period specified (Regulation 10(5)(d)(i)). The present appellant cannot meet either Regulation 10(5)(a) or (b) and therefore Regulation 10(5)(d) is not reached.
24. This appeal is hopeless and I dismiss it.

## DECISION

25. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law.

I do not set aside the decision but order that it shall stand.

Date: 8 March 2018

Signed *Judith AJC Gleeson*  
Upper Tribunal Judge Gleeson