



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/03459/2016

THE IMMIGRATION ACTS

Heard at Field House
On 18 May 2018

Decision & Reasons Promulgated
On 24 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MRS MONICA CHIKA OBICHI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance by the Appellant or her representative
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a re-make decision following my previous conclusion that the First-tier Tribunal had erred in law (the error of law decision is annexed to this decision, below). In summary I found that when considering the Appellant's EEA claim under Regulation 10 of the Immigration (European Economic Area) Regulations 2006, the First-tier Tribunal misdirected itself in law in respect of Regulation 10(2)(a) and

Regulation 15. I had been unable to re-make the decision immediately because further evidence on the issue of Regulation 10(6) was required. I issued directions for such evidence to be provided. Further evidence was indeed submitted both to the Upper Tribunal and the Respondent.

The hearing before me

2. Unfortunately neither the Appellant nor her representatives attended the hearing. However in the circumstances that did not preclude me from proceeding to decide the appeal. This is mainly because prior to the hearing Mr Kotas had considered the further evidence provided by the Appellant and taken what I would describe as a perfectly fair and reasonable view of this case. In an email to the Upper Tribunal on 16 May 2018 he wrote as follows:

“...The SSHD has now seen the further evidence filed by the appellant. The SSHD can confirm that he accepts the appellant has demonstrated she could be regarded as qualified in her own right as at the date of her husband’s death, that the sponsor was a qualified person at the date of his death, and finally, that the appellant has demonstrated that she has acquired a permanent right of residence having been so qualified for a continual five year period. The Upper Tribunal is invited to allow the appellant’s appeal accordingly without the need for the further hearing.”

3. I have looked at the further evidence for myself and the concession made by Mr Kotas is entirely appropriate. It is quite clear that the Appellant is and has been working in the United Kingdom. It has never been in dispute, indeed the First-tier Tribunal had accepted, that the Sponsor had been a qualified person at the time of his untimely death in 2013. Finally, it is equally clear that the Appellant had been residing in accordance with the Regulations for in excess of a continual period of five years.

Re-make decision

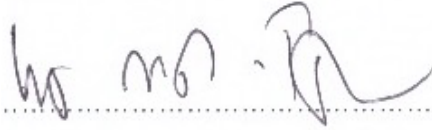
4. In light of Mr Kotas’s concession and the evidence now before me I conclude that the Appellant has acquired a permanent right of residence in the United Kingdom by virtue of Regulations 10(2)(a), Regulation 10(6), and Regulation 15(1)(f) of the 2006 Regulations.
5. The appeal is therefore allowed.

Notice of Decision

The decision of the First-tier Tribunal contained material errors of law and is set aside.

I re-make the decision by allowing the appeal.

No anonymity direction is made.



Signed

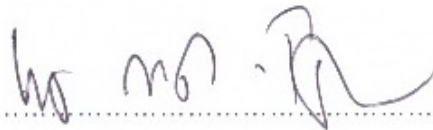
Date: 23 May 2018

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a reduced fee award of £70.00. Although the Appellant has succeeded, she had not provided all relevant evidence to the Respondent or the First-tier Tribunal.



Signed

Date: 23 May 2018

Deputy Upper Tribunal Judge Norton-Taylor

ANNEX: ERROR OF LAW DECISION



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

Appeal Number: EA/03459/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 15 March 2018**

Decision & Reasons Promulgated

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Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**MRS MONICA CHIKA OBICHI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Mannan, Counsel, instructed by Stuart & Co Solicitors
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

6. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Widdup (the judge), promulgated on 9 August 2017, wherein he dismissed the Appellant's appeal against the Respondent's decision of 7 March 2016, refusing to

issue her with a permanent residence card under the Immigration (European Economic Area) Regulations 2006.

7. The Appellant, a national of Nigeria, had married a Polish citizen on 9 June 2010. On 26 October 2010 the Appellant had been issued with a five-year residence card as a family member of her EEA national spouse. Sadly, the Appellant's husband passed away on 25 February 2013. The Appellant then made an application for a permanent residence card. This first application was refused by the Respondent and a subsequent appeal dismissed ([IA/09227/2014](#)). The decision of the First-tier Tribunal appears to have been based on the fact that the Appellant had not been cohabiting with her husband immediately prior to his death. As a result Regulation 15 of the 2006 Regulations could not be satisfied. That decision was not successfully challenged.
8. A second application for a permanent residence card was made on 6 October 2015. It was this application which led to the appeal before the judge.

The judge's decision

9. Under the sub-heading "Findings of fact" the judge refers to Regulation 10(2)(a) of the 2006 Regulations and states that the Appellant had to show that she was the family member of an EEA national with a permanent right of residence when that national died. At paragraph 36 the judge accepts that what he describes to be "the appellant", but must surely have referred to the EEA national, was indeed a qualified person who had exercised Treaty rights in the United Kingdom. However, the judge goes on to conclude that the EEA national had not had permanent residence and therefore the Appellant could not succeed under Regulation 10(2). In relation to Regulation 15 the judge concludes that this could not be satisfied because the Appellant had not been living with her husband immediately before he passed away in 2013.

The grounds of appeal and grant of permission

10. The succinct grounds of appeal simply assert that the judge misdirected himself as to the requirements under Regulation 10(2)(a) of the 2006 Regulations. The EEA national in question needed to have a permanent right of residence or be a qualified person at the point of their death. The judge had therefore committed a material misdirection. The grounds assert that the misdirection was material because of the finding that the EEA national had been a qualified person.
11. Permission to appeal was granted by First-tier Tribunal Grant-Hutchinson on 26 January 2018.

The hearing before me

12. At the outset Mr Duffy quite rightly conceded that the judge had materially erred in law by misdirecting himself as to the correct requirements under Regulation 10(2)(a) of the 2006 Regulations. There were in fact two alternatives for the EEA national in question: either they could have acquired a permanent right of residence or they could have been a qualified person at the time of their death. Mr Duffy also accepted that the judge had been wrong to have believed that there was a requirement for the Appellant to have been cohabiting with the EEA national immediately before his death.
13. Both concessions by Mr Duffy were entirely correct. It is quite clear from the wording of Regulation 10(2)(a) that there are indeed two alternatives. The judge had referred to and applied only one of these. The judge was also wrong in respect of his interpretation of Regulation 15. It is clear from the case law (in particular see PM (EEA – spouse – “residing with”) Turkey [2011] UKUT 89 (IAC) that there does not have to be cohabitation, but merely that the Appellant and the EEA national resided in the United Kingdom. There has never been any suggestion that the Appellant and her late husband had been living outside of this country at any material time.

Decision on error of law

14. The judge clearly erred in law for the reasons stated above. The error was clearly material because the judge had expressly found that the EEA national was a qualified person at the point of his death (see [36]).
15. In light of the above I set aside the decision of the First-tier Tribunal.

Disposal

16. I would normally have expected to be able to go and re-make the decision in this appeal. However, somewhat unfortunately two problems arise. First, the judge failed to deal in any way with the requirement of Regulation 10(6) of the 2006 Regulations, namely whether the Appellant had been able to show that she could be regarded as a qualified person in her own right as at the date of the EEA national's death and thereafter (at least until her five years' continuous residence in this country had been clocked up by June 2015).
17. The second problem is that the Appellant's representatives have failed to provide any evidence on this issue either before the First-tier Tribunal or me. I would categorise this situation as unfortunate because there was always a very strong prospect that the judge's decision would be overturned at the error of law hearing

and those representing the Appellant should have appreciated this and provided relevant evidence in order that I could re-make the decision immediately.

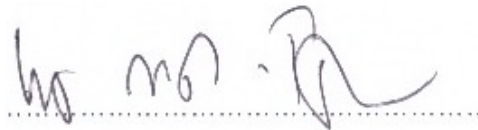
18. In the event, it has not been possible and it may be that any additional evidence in respect of the Regulation 10(6) issue is deemed to be contentious by the Respondent. Therefore I am going to adjourn this appeal and set it down for a resumed hearing before me in due course. I will issue directions to the parties, below.
19. If it is the case that sufficiently good evidence is provided by the Appellant in respect of the narrow issue the Respondent may wish to take a view and notify the Appellant and the Tribunal that no further oral hearing is required.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside.

I adjourn this appeal for a resumed hearing to take place before me in due course.

No anonymity direction is made.



Signed Signed

Date: 4 April 2018

Deputy Upper Tribunal Judge Norton-Taylor

Directions to the Parties

1. **The Appellant shall provide the Respondent and Upper Tribunal with any available documentary evidence relating to her employment/self-employment circumstances in the context of Regulation 10(6) of the 2006 Regulations. Such evidence shall be served on the Respondent and filed with the Tribunal no later than 28 days from the date this decision is sent out to the parties.**
2. **The Respondent shall notify the Appellant and Upper Tribunal as to whether she requires there to be a further resumed hearing.**