Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/03559/2018**

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice
On 15 April 2019

Decision & Reasons Promulgated
On 13th May 2019

Before

UPPER TRIBUNAL JUDGE FINCH

Between

CELESTINA AGHEDO

(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. K. Shoye, CW Law Solicitors

For the Respondents: Mr. S. Kotas, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant is a national of Nigeria. She entered the United Kingdom, as a student, on 23 September 2010 and married a French national by proxy in a marriage conducted in Nigeria on 27 August 2011. She applied for a residence card, as his partner, on 3 March 2012. Her

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application was refused but her subsequent appeal was allowed and she was granted a residence card as the spouse of an EEA national on 27 February 2013, which was valid for five years.

2. The Appellant's marriage broke down and a petition for divorce was filed on 23 March 2016. A decree absolute was granted on 2 July 2017. On 11 November 2017 the Appellant applied for a retained right of residence on the basis that she had previously been married to an EEA national. Her application was refused on 19 February 2018.

3. The Appellant appealed against this decision on the basis that she had retained a right of residence under regulation 10(5) of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") and had not sought a residence order under regulation 15 of the EEA Regulation. However, First-tier Tribunal Judge Paul dismissed his appeal in a decision promulgated on 11 January 2019. First-tier Tribunal Judge Garratt granted the Appellant permission to appeal to the Upper Tribunal on 1 March 2019

ERROR OF LAW HEARING

4. Both representatives made oral submissions. During the hearing I had drawn the case of *MDB and others (Article 12, 1612/68) Italy* [2010] UKUT 161 (IAC) to the attention of the parties and at the end of the hearing I directed that they provide further written submissions in relation to this case. Both parties subsequently provided such written submissions.

ERROR OF LAW DECISION

5. Regulation 10 of the Immigration (European Economic Area) Regulations 2006 states that:

"(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 … of that 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 … the marriage … had lasted for at least three years and the parties to the marriage … had resided in the United Kingdom for at least one year during its duration; ...

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

(a) is not an EEA national but would, if he were an EEA national, be a worker …"

6. Regulation 15 of the EEA Regulations states:

"**15.-** (1) The following persons acquire the right to reside in the United Kingdom permanently—

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

(b) a family member of an EEA national who is not an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

(c) a worker or self-employed person who has ceased activity;

(d) the family member of a worker or self-employed person who has ceased activity, provided—

(i) the person was the family member of the worker or self-employed person at the point the worker or self-employed person ceased activity; and

(ii) at that point, the family member enjoyed a right to reside on the basis of being the family member of that worker or self-employed person;

(e) a person who was the family member of a worker or self-employed person where—

(i) the worker or self-employed person has died;

(ii) the family member resided with the worker or self-employed person immediately before the death; and

(iii) the worker or self-employed person had resided continuously in the United Kingdom for at least two years immediately before dying or the death was the result of an accident at work or an occupational disease;

(f) a person who—

(i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and

(ii) was, at the end of the period, a family member who has retained the right of residence.

(2) Residence in the United Kingdom as a result of a derivative right to reside does not constitute residence for the purpose of this regulation.

(3) The right of permanent residence under this regulation is lost through absence from the United Kingdom for a period exceeding two years.

(4) A person who satisfies the criteria in this regulation is not entitled to a right to permanent residence in the United Kingdom where the Secretary of State or an immigration officer has made a decision under regulation 23(6)(b), 24(1), 25(1), 26(3) or 31(1), unless that decision is set aside or otherwise no longer has effect."

7. The Appellant had applied for indefinite leave to remain on 11 November 2017 and in Section 8 of the application form, she indicated that she was relying on a retained right of residence and, in answer to question 1.10, she had also made it clear that she was applying for a retained right of residence as an ex-spouse. There were two refusal letters, both dated 19 February 2019, one of which referred to the Appellant having applied for a permanent residence card to confirm that she had retained a right of residence.

8. The Appellant's legal representative relied on a copy of Home Office Guidance entitled *Free Movement Rights: retained rights of residence* and submitted that First-tier Tribunal Judge Paul had failed to take this guidance into account when reaching his decision. In particular, he relied upon the fact that on page 12 of the Guidance under the heading *Marriage or civil partnership: officially terminated* there is a bullet point which provides a link to *Decision making; permanent residence where the applicant has a retained right of residence.* It was submitted on behalf of the Appellant that the fact that there is then a reference to regulation 10(5) further down the same page indicates that once the requirements of regulation 10(5) are met an applicant is automatically entitled to permanent residence.

9. One of the basis on which First-tier Tribunal Judge Garratt granted permission to appeal was that it was arguable that First-tier Tribunal Judge Paul had failed to take this policy into account. However, having read the reference to the link to permanent residence in its context

in the policy and giving the wording of the surrounding passages their plain and simple reason, I find that it is not possible to construe the policy as meaning that everyone, who is entitled to a retained right of residence is also entitled to permanent residence. This reading is incompatible with the requirements provided in regulation 10(5) and 15 of the EEA Regulations and, in particular, with regulation 15(1)(f) which states that an applicant must have resided in the United Kingdom in accordance with the Regulations for a continuous period of five years. There is no evidence to show that this was the case for the Appellant or her sponsor. Therefore, I find that, even if First-tier Tribunal Judge Paul had failed to take this policy into account, this did not give rise to any material error of law.

10. The Appellant was also granted permission to appeal on the basis that it was found in the case of *Idezuna (EEA – permanent residence) Nigeria* [2011] UKUT 00474 (IAC) that "sometimes a family member may have acquired a right of permanent residence on the basis of historical facts". In the Appellant's case, she had married her EEA national partner on 27 August 2011 and resided here as his spouse until the divorce petition was filed on 23 March 2016. It was potentially possible for her to accrued a right of permanent residence by aggregating her residence as a spouse and as a person with retained rights of residence. However, she would still have to show that throughout the necessary five-year period her spouse was exercising a Treaty right or she was meeting the requirements to meet the requirements for retaining a right of residence.

11. The Appellant's legal representative was not able to take me to the necessary evidence to show that this was the case, as the evidence relating to her ex-husband's employment was for the time period 2015-2017, apart from one letter, dated 17 February 2012, referring to his national insurance number. Therefore, she can only show that he was working from 2015 to 23 March 2016 and that she had retained a right of residence from 23 March 2016 to date. This does not add up to the necessary continuous five-year period of residence.

12. Therefore, First-tier Tribunal Judge Paul made no material error of law when he found that the Appellant was not entitled to permanent residence.

13. However, it has not been disputed that the Appellant and her ex-husband had been married for more than three years or that they had lived together in the United Kingdom for at least one year during their marriage. First-tier Tribunal Judge Paul also accepted that the Appellant had been working here from 15 January 2015 to 19 February 2018. As a consequence, at the date of the appeal hearing, the Appellant did meet the requirements of regulation 10(5) of the EEA Regulations.

14. In the case of *MDB and others (Article 12, 1612/68) Italy* [2010] UKUT 161 (IAC) the Upper Tribunal found that:

> "In a case concerned with an EEA decision the tribunal judge is obliged by s.84(1)(d) of the Nationality, Immigration and Asylum Act 2002 to decide whether the decision breaches <u>any</u> of the appellants' rights under the Community Treaties in respect of their entry to or residence in the United Kingdom (emphasis added); see also s.109(3). Where the decision is a refusal to issue a permanent residence card that may necessitate, in the event that refusal is found correct, considering whether the appellant was entitled nonetheless to an extended right of residence".

15. The Appellant's legal representative submitted that *MDB* remained good law as the substance of the residence rights contained in the Immigration (European Economic Area) Regulations 2016 were substantially the same as those in the Immigration (European Economic Area) Regulations 2006.

16. However, schedule 2 to the 2016 Regulations states:

"1. The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if it were an appeal against a decision of the Secretary of State under section 82(1) of the 2002 Act (right of appeal to the Tribunal) –

> Section 84 (grounds of appeal), as though the sole permitted grounds of appeal were that the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom ("an EU ground of appeal")."

17. As the Home Office Presenting Officer noted in his submissions, in *Oksuzigku (EEA appeal – "new matter")* [2018] UKUT 385 (IAC) the Upper Tribunal found that:

> "By virtue of schedule 2(1) of the Immigration (EEA) Regulations 2016 ('the 2016 Regulations') a "new matter" in section 85(6) of the Nationality, Immigration and Asylum Act 2002 includes not only a ground of appeal of a kind listed in section 84 but also an EEA ground of appeal".

18. Section 85(6) states that:

> "A matter is a 'new matter' if-
>
> (a) it constitutes a ground of appeal of a kind listed in section 84, and
>
> (b) the Secretary of State has not previously considered the matter in the context of –
>
> (i) the decision mentioned in section 82(1), or
>
> (ii) a statement made by the appellant under section 120".

19. The Appellant had not previously relied on the fact that she had retained a right of residence which entitled her to a further period of residence but not permanent residence. Therefore, this falls within the definition of a "new matter".

20. As a consequence, for the purposes of section 85(5) I could only consider this new matter within the present appeal if the Secretary of State had consented to me doing so and he has not provided such consent.

21. It is open to the Appellant to apply for further residence as someone who has a retained right of residence. It would also be open to the Secretary of State to grant her such residence on the basis of the evidence already provided to him for the purposes of this appeal.

22. For these reasons I find that there were no errors of law in the manner in which First-tier Tribunal Judge Paul decided the appeal which was before him.

Decision

(1) The appeal is dismissed.

(2) The decision of First-tier Tribunal Judge Paul is maintained for the reasons given above.

Nadine Finch

Signed Date 9 May 2019

Upper Tribunal Judge Finch