Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/08967/2017

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On: 15 March 2019	**On 21 March 2019**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

ANITA BOAKYE OPOKU

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Garrod, instructed by Justice & Law Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a national of Ghana born on 24 June 1972, appeals, with permission, against the decision of the First-tier Tribunal dismissing her appeal against the respondent's decision to refuse to issue her with a permanent residence card under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"), as the former family member of an EEA national who has retained a right of residence in the UK upon divorce.

2. The appellant was previously issued with a residence card on 28 September 2010, valid until 28 September 2015, following her marriage to a French national on 15 December 2008. She was divorced from her EEA national

sponsor on 28 August 2015. On 16 September 2015 the appellant applied for a permanent residence card under the EEA Regulations 2006 on the basis of retained rights upon divorce. Her application was refused on 15 February 2016 and her appeal against that decision was dismissed by the First-tier Tribunal on 28 June 2017. On 27 July 2017 the appellant applied again for a permanent residence card under the EEA Regulations 2016 as a family member who had retained a right of residence upon divorce. Her application was refused on 30 October 2017.

3. The appellant's application was refused on three grounds. Firstly, she had failed to produce her former spouse's valid passport or national identity card and had failed to submit any evidence to show that she could not obtain the required documentation. Secondly the respondent relied upon findings made by the First-Tier Tribunal Judge in the appellant's previous appeal, and the lack of further evidence, as to gaps in the EEA national family member's Treaty rights such that he could not demonstrate a continuous period of five years of residence in accordance with the regulations. Such gaps arose as a result of a refusal to accept the EEA national's claimed self-employment with Clean Space Partnership from January 2013 to January 2015. Thirdly, the respondent made reference to the appellant's former spouse's registration certificate having been revoked on 28 June 2016 as his identity and/or personal details had been identified as participating in an organised marriage and a benefit fraud.

4. The appellant's appeal against that decision was heard in the First-tier Tribunal by Judge Bennett on 30 November 2018. Judge Bennett accorded no weight to the respondent's third reason as there had been no assertion that the marriage was one of convenience. With regard to the first reason, he found at [36(g)] that adequate alternative evidence of the EEA national's identity had been produced. With regard to the second reason, the judge noted the previous First-tier Tribunal's finding that the requirements of regulation 10(5) and (6) of the 2006 Regulations had not been met as the appellant had failed to show that the relevant EEA national was a qualified person at the date of the divorce. He considered himself bound by the previous Tribunal's finding rejecting the appellant's claim in regard to the EEA National's self-employment with Clean Space Partnership and therefore did not accept that the EEA national was exercising treaty rights from 13 August 2013 to 9 April 2014 or 12 April 2014 until 24 January 2015. However Judge Bennett's findings at [30(d) and (e)] and [33(d)] were that the EEA national remained a qualified person, by virtue of his employment, from 25 January 2015 until 18 March 2016, and that he was a qualified person at the time the divorce petition was presented. He accepted that the appellant was residing in the UK in accordance with the 2016 Regulations by virtue of regulation 14(2). The judge nevertheless found that the appellant did not qualify for a permanent right of residence - at [33](e)] he found that she did not qualify under regulation 15(1)(b) because there was no continuous period of five years of residence in accordance with the regulations in the period up to 25 August 2015 and at [34(f)] he found that the appellant did not qualify under regulation 15(1)(f) because five years had not elapsed since 25 January 2015.

5. Permission to appeal that decision was sought and granted on the grounds that the judge had arguably erred by imposing an extra requirement of five years continuous work by the EEA national.

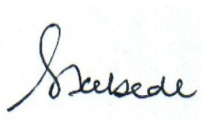
6. At the hearing Mr Walker accepted that Judge Bennett had erred in law by requiring there to be a five year period of the EEA national exercising treaty rights. He conceded that, on the findings the judge had made, the appellant had established a retained right and met the requirements of regulations 10(5) and 14(3). Mr Walker did not agree that the appellant had demonstrated an entitlement to permanent residence and submitted that the judge had not erred by finding as such, but he conceded that the appeal had to be allowed on the basis that the decision was not in accordance with the EEA Regulations 2016.

7. Mr Garrod, in response, agreed that the appeal should be allowed on that basis and that it was then open to the appellant to make an application to the respondent for a permanent residence card. Although he was not conceding that the judge was entitled to make the findings that he did on entitlement to permanent residence and although he did not agree with the judge's findings at [21] in regard to his inability to deviate from the previous Tribunal's findings on the appellant's self-employment, he confirmed that he was not pursuing a challenge to the decision in respect to permanent residence.

8. In view of Mr Walker's concession, there is no need for me to make any detailed findings. In any event it is clear, when taking Judge Bennett's findings at [30(d) and (e)] together with his findings at [33d)] and [34], that he should have found that the appellant met the requirements in regulations [10(5)] and [14(3)] and was entitled to a retained right of residence in the UK upon divorce, albeit that she had not demonstrated an entitlement to permanent residence. The appeal is therefore allowed on that basis.

DECISION

9. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside and is re-made by allowing the appellant's appeal under the EEA Regulations 2016, with reference to regulation 10(5) and 14(3).

Signed: 

Upper Tribunal Judge Kebede Dated: 18 March 2019