



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/00015/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 10th January 2018

Promulgated

On 25th January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MATTHIAS EMEKA IFEJIKÀ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer

For the Respondent: Mr S Harding of Counsel instructed by OTS Solicitors

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against the decision of Judge M A Khan of the First-tier Tribunal (the FTT) promulgated on 26th April 2017 in which the FTT allowed the Claimant's appeal against the decision of the Secretary of State to refuse his application for permanent residence as the family member of an EEA national.
2. The Respondent before the Upper Tribunal was the Claimant before the FTT and I will refer to him as the Claimant.

3. The Claimant is a Nigerian citizen born 11th May 1977. On 10th July 2015 the Claimant applied for permanent residence in the UK as the family member of an EEA national.
4. The application was made on the basis that the Claimant was in a durable relationship with Rebecca Kung a French citizen, to whom I shall refer as the Sponsor, who had been exercising treaty rights in the UK.
5. The Claimant explained that the Sponsor had been working in the UK between April 2006 and April 2011 when she moved to Switzerland. The couple had resided together for that five year period, and remained in a relationship.
6. The application was refused on 11th December 2015 with reference to the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations). The Secretary of State issued a notice of immigration decision specifically referring to regulations 6, 7(3), 8(5), 15(1)(b), and 15(2). In summary the Secretary of State's reasons for refusal letter did not accept that evidence had been provided to prove that the Sponsor had acquired permanent residence in the UK, not accepting that the Sponsor had been exercising treaty rights in the UK for a continuous period of five years.
7. The Secretary of State pointed out that if, which was not accepted, the Sponsor had acquired permanent residence by 2011, because she has not been residing in the UK since that date, a right to permanent residence would have been lost by virtue of regulation 15(2) as she had been absent from the UK for a period exceeding two consecutive years.
8. The Secretary of State contended that when the Sponsor ceased working in the UK in 2011, the Claimant ceased to be residing in the UK in accordance with the 2006 Regulations.
9. It was not accepted that the Claimant and Sponsor had continued to be in a durable relationship. It was accepted that the Claimant had been issued a residence card in 2010 on the basis of his durable relationship with the Sponsor, but it was not accepted that he was still entitled to a residence card, as the Sponsor was no longer in the UK, and it was not accepted that he had resided in the UK for a continuous period of five years in accordance with the 2006 Regulations.
10. The Claimant appealed to the FTT and the appeal was heard on 11th April 2017. The Secretary of State was not represented at the hearing. The FTT heard evidence from the Claimant and Sponsor and found that they had been living together since March or April 2006 until the Sponsor left the UK to relocate in Switzerland. The FTT found that the Sponsor had been exercising treaty rights for a continuous period of five years from 10th April 2006 until 10th April 2011. The FTT therefore concluded that the requirements of regulations 6, 7, 8(5), and 15(1)(b) of the 2006 Regulations were satisfied. The FTT was satisfied that the Claimant and Sponsor were in a durable relationship between April 2006 and April 2011, and they continued "to be in a relationship even though the EEA national

lives in Switzerland, she returns to the UK on a monthly basis.” The FTT allowed the appeal.

11. The Secretary of State applied for permission to appeal to the Upper Tribunal. In summary it was contended that the FTT had erred by making a material misdirection of law. The Secretary of State pointed out that the Claimant was issued with a residence card on the basis of his durable relationship with the Sponsor on 14th July 2010. There was no evidence that they had ever married. It was contended that the FTT was wrong in law in finding that the Claimant satisfied regulation 15(1)(b) as he had not resided in the UK as a family member of an EEA national in accordance with the regulations for a continuous period of five years.
12. The Secretary of State referred to regulation 7(3) which provides that an extended family member is to be regarded as a family member of an EEA national if he or she has been issued with an EEA family permit, a registration certificate, or a residence card. The Secretary of State made the point that an extended family member cannot benefit from family member status until issued with one of the documents referred to above. The issue of residence documentation does not have retrospective effect. The Appellant only became a family member pursuant to regulation 7, once he had been issued with the residence card on 14th July 2010, and therefore would not acquire permanent residence until 14th July 2015.
13. It was submitted that the Claimant was not entitled to permanent residence, because the Sponsor had left the UK in April 2011 and was resident in Switzerland, and was therefore not exercising treaty rights in the UK, and not residing with the Claimant in the UK. The only evidence of contact between the parties after April 2011 was e-mail communication.
14. Permission to appeal was granted by Judge Kelly of the FTT in the following terms;
 - “2. It is arguable that the Tribunal erred in law by impliedly treating the Appellant as the family member of his EEA partner (to whom he is not and has never been married) prior to the time when (on 14th July 2010) he was issued with his EEA residence card, and that this was material to the outcome of the appeal given that the EEA Sponsor returned to Switzerland in March 2011 where she has since remained. Permission to appeal is accordingly granted.”
15. Following the grant of permission the Claimant did not lodge a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the FTT had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

16. Mr Tarlow relied upon the grounds contained within the application for permission to appeal, submitting that those grounds displayed a material error of law, which meant that the FTT decision must be set aside.
17. Mr Harding disagreed and submitted that there was some ambiguity as to the meaning of regulation 7(3). Mr Harding submitted that the interpretation of the FTT was correct, and it was not necessary for an extended family member to have to wait until a residence card was issued, before accruing five years' residence in accordance with the regulations. I was asked to find that the FTT was entitled to conclude that the Claimant should be granted permanent residence, because he had been issued with a residence card, in July 2010, and prior to that had resided with the Sponsor in accordance with the 2006 regulations.
18. Neither representative relied upon any case law on this issue, and when I indicated that I intended to reserve my decision, both agreed there would be no need for a further hearing. If I accepted the submissions made by Mr Tarlow, the decision of the FTT must be set aside and remade and dismissed, and if I accepted Mr Harding's submissions, the decision of the FTT stood, and subject to any further appeal, the Claimant would be entitled permanent residence.

My Conclusions and Reasons

19. In my view the FTT materially erred in law and I therefore set aside the decision for the following reasons.
20. There is no dispute that the Sponsor is a French citizen and that she exercised treaty rights in the UK between 3rd April 2006 and 10th April 2011. She was employed by Bloomberg LP in London during that period. Therefore the Sponsor was exercising treaty rights as a worker and satisfied regulation 6 of the 2006 Regulations.
21. There was no challenge to the finding made by the FTT that the Claimant and Sponsor resided together in a durable relationship between March/April 2006 and April 2011 when the Sponsor relocated to Switzerland. It is common ground that the couple were not married at that time, and are still not married. It is also common ground that the Claimant was issued with a residence card on 14th July 2010, on the basis of his durable relationship with the Sponsor. This means that at that time the Secretary of State accepted the Claimant was the extended family member of the Sponsor pursuant to regulation 8(5).
22. In order to be granted permanent residence the Claimant must satisfy regulation 15(1)(b) which is set out below;
 - "15(1) The following persons shall acquire the right to reside in the United Kingdom permanently -
 - (b) a family member of an EEA national who is not himself 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;”

23. If the Claimant and Sponsor were married, the Claimant would be a family member of the Sponsor pursuant to regulation 7, as her spouse. That however is not the case here.
24. It therefore must be considered whether the Claimant is a family member, as he must be a family member rather than an extended family member to qualify pursuant to regulation 15(1)(b).
25. It is therefore relevant to consider regulation 7 which is set out in part below;
- “7 (1) Subject to paragraph (2), for the purposes of these regulations the following persons shall be treated as the family members of another person -
- (3) Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked.”
26. I conclude that the FTT materially erred in law in finding that the Claimant was entitled to permanent residence because he resided as an extended family member, with the Sponsor between April 2006 and April 2011. The error is that the Claimant did not become a family member pursuant to regulation 7(3) until he was issued with a residence card on 14th July 2010. For that reason the decision of the FTT is set aside.
27. I remake the decision by dismissing the Claimant’s appeal. My view is that in order to acquire permanent residence pursuant to regulation 15(1)(b) the Claimant must reside in the UK with the Sponsor in accordance with the 2006 Regulations for a continuous period of five years beginning with the time when he became a family member as opposed to an extended family member, which was 14th July 2010.
28. The Claimant has not resided with the Sponsor in accordance with the 2006 Regulations for a continuous period of five years since July 2010, as it is accepted that the Sponsor relocated to Switzerland in April 2011, and has been living and working in Switzerland since that date. The Sponsor has not been exercising treaty rights in the UK since April 2011.
29. Therefore the Claimant cannot satisfy regulation 15(1)(b) which is why the appeal must be dismissed.

Notice of Decision

30. The FTT erred in law. The decision is set aside. I re-make the decision. The Claimant’s appeal is dismissed.

Anonymity

The FTT made no anonymity direction. There has been no request made to the Upper Tribunal for anonymity and I see no need to make an anonymity direction.

Signed

Date 10th January 2018

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

The appeal is dismissed. There is no fee award.

Signed

Date 10th January 2018

Deputy Upper Tribunal Judge M A Hall