



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

Appeal Number: EA/03952/2016

**THE IMMIGRATION ACTS**

**Heard at: Field House  
On: 15 March 2019**

**Decision & Reasons Promulgated  
On: 21 March 2019**

**Before**

**UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**ABDOULAYE SAMOURA**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms H Foot, Counsel

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant, a national of Guinea born on 9 January 1988, appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse to issue him with a permanent residence card under the Immigration (European Economic Area) Regulations 2006 ("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 entered the UK on 20 January 2008 with a student visa and was granted further leave to remain as a student until 31 May 2010. He married a French national, [NI], on 14 May 2010, and was subsequently

granted a residence card as the family member of an EEA national valid until 26 October 2015. The couple were divorced on 15 June 2015.

3. On 22 October 2015 the appellant applied for a permanent residence card under the EEA Regulations 2006 as a family member who had retained a right of residence upon divorce. His application was refused on 25 March 2016 on the basis that he had failed to provide evidence of his ex-spouse's Treaty rights and therefore was unable to satisfy the requirements of Regulation 10(5) and he had failed to provide evidence that he had resided in accordance with the regulations for five continuous years for the purposes of Regulation 15(1)(f).

4. The appellant's appeal against that decision was heard in the First-tier Tribunal on 25 September 2018, following an adjournment to enable the respondent to obtain information about the appellant's former spouse from other government agencies since the appellant was unable to obtain the information from his former spouse himself. The respondent produced evidence from HMRC and the DWP in regard to the appellant's former spouse's employment status. The appellant's evidence was that he and his wife had separated in August 2013 and he had lost contact with her. He later found out that she had finished a university course in November 2014 and had been on job seekers' allowance from then until she fell ill in 2015. The appellant produced a statement from a solicitor who had been instructed to obtain evidence from his ex-wife together with attached email correspondence between the solicitor and his ex-wife. The appellant's representative argued that, in the alternative to showing five years continuous residence in accordance with the Regulations prior to the divorce, the appellant had retained a right of residence following the divorce and had an extended right of residence under Regulation 14.

5. The First-tier Tribunal found that the only independent and reliable evidence was that from HMRC and the DWP which failed to show that the appellant's former spouse was a qualified person for the whole of the relevant period as there were a number of gaps. The First-tier Tribunal considered that the appellant's claim to permanent residence therefore failed. For the same reasons the Tribunal considered that the appellant's claim to an extended right of residence also failed and that the appellant had been unable to show that his ex-wife was a qualified person. The First-tier Tribunal accordingly dismissed the appeal.

6. Permission to appeal that decision was sought on the grounds that the Tribunal had failed properly to consider the alternative argument in regard to a retained right of residence, as the evidence showed that the appellant's ex-wife was a qualified person at the time of the termination of the marriage. The evidence from HMRC was that the appellant's ex-wife was self-employed from 2010 to 2011 and from 2011 to 2012 and then again from 2016 to 2017. The appellant's evidence was that his ex-wife ceased activity as a result of disability. The evidence from DWP showed that at the time of the divorce the appellant's ex-wife was receiving income-related Employment and Support Allowance which was awarded to claimants who were ill or disabled and unable to work. There was therefore sufficient evidence to found a claim that the appellant's ex-wife was a qualified person at the date of divorce, on the basis

of being a self-employed person who was temporarily incapacitated through illness.

7. Permission was granted by the Upper Tribunal on 22 January 2019.

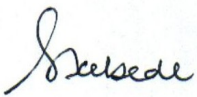
8. At the hearing Ms Foot submitted that the First-tier Tribunal's findings on five years continuous exercise of treaty rights prior to divorce and the appellant's entitlement to permanent residence were not challenged. The challenge was only to the findings on the alternative argument, that the appellant had a retained right of residence on divorce and an extended right under Regulation 14(3). Ms Foot submitted that the appellant's ex-wife was a qualified person at the time of the divorce, within the terms of Regulation 6(3), as a person no longer in self-employment who was temporarily unable to pursue her self-employment as the result of an illness or accident. The First-tier Tribunal's findings at [23] did not take account of the evidence of her incapacity and disability. Ms Foot referred to the evidence from HMRC and DWP together with the email from the appellant's former wife at page 36 of the appeal bundle which showed that she fell within Regulation 6(3) and was temporarily unable to pursue her self-employment due to her disability but then resumed her self-employment in 2016. She relied upon the decision in FMB (EEA Regulations - reg 6(2) (a) - 'temporarily unable to work') Uganda [2010] UKUT 447 in support of her submission that the period in which the appellant's former wife was unable to work was temporary.

9. Mr Walker submitted that the Secretary of State agreed that the First-tier Tribunal had failed to look at the evidence of the appellant's ex-wife's circumstances which did demonstrate that she fell within Regulation 6(3) and that the Tribunal had therefore materially erred in law. He agreed with Ms Foot's submissions and conceded that the appellant's ex-wife was a qualified person at the time of the divorce and that the appellant met the requirements of Regulation 10(5) and 14(3). He conceded that the appeal should be allowed on that basis.

10. In view of Mr Walker's concession, there is no need for me to make any detailed findings. The respondent had refused the appellant's application only on the basis that the evidence did not show that his former wife was exercising treaty rights at the time of the divorce. The appellant's ability to satisfy the other parts of Regulation 10(5) was not in dispute. The evidence before the First-tier Tribunal was sufficient to show that the appellant's former wife was a qualified person at the relevant time under Regulation 6(3). Accordingly the evidence was sufficient to show that the appellant was entitled to a retained right of residence in the UK upon divorce, pursuant to Regulation 10(5) and an extended right pursuant to Regulation 14(3), albeit that he had not demonstrated an entitlement to permanent residence. The appeal is therefore allowed on that basis.

## DECISION

11. 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 2006, with reference to regulation 10(5) and 14(3).

Signed: 

Upper Tribunal Judge Kebede  
2019

Dated: 18 March