Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **EA/06176/2016**

THE IMMIGRATION ACTS

At **Field House** Decision & Reasons **Promulgated**
on **16 January 2019** **On 29 January 2019**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Afua Mantebea BOADU

appellant

and

Secretary of State for the Home Department

respondent

Representation:
For the appellant: *Olumuyiwa Jibowu* (counsel instructed by MJ Solomon & Partners)
For the respondent: Mr Tom Wilding

DETERMINATION AND REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Derrick Pears), sitting at Hatton Cross on 24 May 2018, to dismiss an EEA appeal by a citizen of Ghana, born 1971. The appellant came here in 2005, married the sponsor (a citizen of Spain, as well as Ghana) on 14 March 2010, and got a residence card, valid till 29 November 2015. On 26

NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.
(2) persons under 18 are referred to by initials, and must not be further identified.

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November she applied for a permanent residence card, which was refused on 11 May 2016.

2. Meanwhile the appellant had fallen out with her husband, and presented a petition for divorce on 20 August 2015: decree nisi was pronounced on 18 January 2016, with decree absolute following on 9 March. Permanent residence was refused for a number of reasons, the main and only one now in issue being that the appellant had failed to show that her sponsor had been a 'qualified person' for a period ending on 1 December 2013.

3. In a clear and fully-reasoned decision on the facts, the judge accepted a number of points made by Mr Jibowu for the appellant; but he found that the sponsor was not a 'qualified person' for the period from April 2011 to April 2013. The basis for this was a letter from HM Revenue and Customs [HMRC], giving the sponsor's work history, dated 14 May 2015, and filed by the appellant's solicitors. This showed that the sponsor's earlier employment ended in fact on 27 June 2010, so the judge was generous in regarding it as continuing till he received a small redundancy payment on 5 April 2011. The sponsor's later period of employment did not start till 1 December 2013; so once again the judge was generous in taking it as starting in April that year.

4. The judge went on to conclude on that evidence that the sponsor "… was not a qualified person for the period between April 2013 and April 2013 and therefore the requirements of regulation 10 (5) are not met". This was the point where the case set off on a wrong track. While reg. 10 dealt with the requirements for a retained right of residence, permanent right of residence was governed by reg. 15 of the Immigration (European Economic Area) Regulations 2006, in force at the date of the decision.

5. The judge's decision was appealed on the basis that he had misunderstood the requirements of reg. 15: the first-tier permission judge refused it, on the basis of the judge's finding of fact about the sponsor not having been a 'qualified person' for the whole of the necessary five years. However permission was given in the Upper Tribunal, on the basis that the appellant qualified by reason of a retained right of residence.

6. Reg. 15 provides a permanent right of residence for

> (f) a person who—
>
> (i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and
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> (ii) was, at the end of that period, a family member who has retained the right of residence.

7. The important word there is 'and': to be qualified under that paragraph, as she claimed, the appellant had to show a period of five years, during which she had been here in accordance with the Regulations, *and* at the end of which she had a retained right of residence. No question of a retained right of residence could arise till she presented her petition for divorce (see *Baigazieva* [2018] EWCA Civ 1088): while Mr Jibowu argued that she had already acquired one after three years of marriage (see reg. 10 (5) (d) (i)), the contrary is perfectly clear, as explained in *OA* (EEA -

retained right of residence) Nigeria [2010] UKAIT 1088, at paragraph 31 onwards.

8. *OA*'s position was discussed by Judge Storey in characteristically lucid terms, as follows:

> 33. The appellant fails to surmount the first test. She does so for the same reasons as she was unable to surmount the reg 15(1)(b) test, namely that she is unable to establish that her residence with her husband was "in accordance with these Regulations". To accord with the Regulations, her status as a family member had to be based on his continuing to exercise Treaty rights, but there was insufficient evidence to show her husband was continuing to exercise Treaty rights during the relevant period. Unlike reg 15(1)(b), reg 15(f)(i) does not of course require that the appellant has "resided with" the spouse, but otherwise its conditions are the same as under reg 15(1)(b). Accordingly the appellant cannot succeed under reg 15(1)(f).
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> 34. Even if I am wrong in my assessment of the appellant's position under reg 15(1)(f)(i), I would still not have found that the IJ was right to have regarded the appellant as someone who had acquired a retained right of residence. The fact of the matter was that during the relevant period her marriage continued in being, albeit the relationship between the couple had broken down. It had never terminated. There was still not as yet a point in time from which one could look back and calculate whether there had been a qualifying period of residence.
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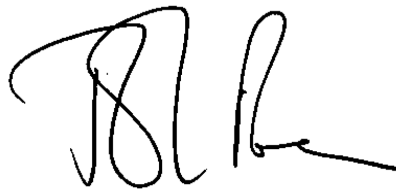
> 35. The relevant provision for deciding whether there is a retained right of residence in the first place is, of course, reg 10(5)(a) which states that a person satisfies the conditions in this paragraph if "he ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person". The IJ's opinion was that the term "terminated" meant effective breakdown of a marriage. There are several reasons why I consider this to be an erroneous construction.

9. Much, equally characteristic, learning followed; but there is no need to go into it here. There is no material difference, so far as the argument before me is involved, between the facts of *OA* and those of the present case. This appellant was entitled to a permanent right of residence, so far as reg. 15 (f) (i) goes, if she had reached five years' stay here under the Regulations at any stage between her marriage on 14 March 2010, and the date of the hearing on 24 May 2018. The difficulty with that is that, either counting from the beginning, or to the end of that period, she had to include some or all of the period between April 2011 and April 2013 for which (as the judge accepted) she was unable to show that her husband had been a 'qualified person'.

10. While the appellant would have retained whatever right of residence she had when she put in her petition on 20 August 2015, she was not a person with a retained right of residence until then (see *OA* at 34). While a retained right of residence, once it came into being, would have made it unnecessary for her to show that her sponsor was a 'qualified person' at any time after that, it could not enable her to re-write history by dispensing with any such requirement for the time they were together.

11. It follows that there was no continuous period of five years during which the appellant had lived here in accordance with the Regulations, so that she cannot make her case under reg. 15 (f) (i). As she was unable to do that, there was no five-year period, for the purposes of 15 (f) (ii), at the end of which it was open to her to show that she had a retained right of residence, even if, which is not the case, she were able to succeed under 15 (f) (ii), without also satisfying 15 (f) (i).

Appeal dismissed



16/1/2019
(a judge of the Upper Tribunal)