Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32267/2015

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11th July 2017	**On 12th July 2017**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

[OB]
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Abdar, legal representative from Lambeth Law Centre
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Ghana born in May 1982. She arrived in the UK on 30th March 2003 as a visitor. On 7th August 2006 the appellant married a Portuguese citizen [MR], and on 16th October 2009 she was granted an EEA

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residence card by the respondent as a result of this marriage, as was her husband. On 3rd March 2015 the couple were divorced.

2. The appellant has two children the first of whom, born in September 2012, she says is the child of her husband. The second child, born in August 2014, she says is from another relationship. The appellant says her husband was violent to her, and it is notable that he has a criminal record of offences between 2011 and 2014, which resulted in him being deported to Portugal in December 2014.

3. The appellant applied for a permanent right of residence under the EEA Regulations on the basis of this marriage, and it is the refusal of this application that gives rise to this appeal. Her appeal against the decision was dismissed by First-tier Tribunal Judge Raymond in a determination promulgated on the 31st March 2017.

4. Permission to appeal was granted by Judge of the First-tier Tribunal Andrew on 31st May 2017 on the basis that it was arguable that the First-tier judge had erred in law as it is arguable that he failed to consider whether the appellant met the requirements of Regulation 15(1)(b) of the EEA Regulations, and instead erroneously considered Regulation 10 of those Regulations.

5. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

6. The appellant notes that the decision was not written by the First-tier Tribunal Judge for over two months and argues that this may have contributed to the errors made in the decision.

7. It is argued by the appellant that the First-tier Tribunal did not consider properly the argument of the appellant that she had become permanently resident in the UK on 7th August 2011 under Regulation 15(1)(b) of the EEA Regulations. The appellant accepted that she could not benefit from Regulation 10 of the EEA Regulations. It is argued that the appellant began to accrue residency via her marriage and her husband's exercise of Treaty rights from 7th August 2006 and thus had five years residence by 7th August 2011. The starting point for residency was not therefore October 2009 as the First-tier Tribunal assumes. Although the HMRC evidence does not go back for more than five years, and so does not pre-date 2011, there was other evidence in the appellant's bundle that shows her husband was working from 2008 as well as the oral evidence of the appellant, whom the First-tier Tribunal found to be a credible witness. The respondent had accepted the appellant's husband was exercising Treaty rights in 2008 (date of the evidence provided to her) and 2009 when she issued the appellant and her husband residence permits. It was further not open to the First-tier Tribunal Judge to go behind this decision of the respondent without giving the appellant notice of his intention to do so.

8. There is no Rule 24 notice from the respondent. Mr Bramble said firstly in submissions that he was disadvantaged as he did not have the presenting officer from the First-tier Tribunal hearing's notes. I was able to read him what was written on the record of proceedings at the beginning after recording the names of the representatives which is as follows: "not issue of retained rights – but whether appellant has permanent residency". On this basis Mr Bramble accepted that there had been a legal error not to consider Regulation 15(1)(b) of the EEA Regulations but said that the respondent did not accept that this error was a material one.

9. I then asked that the parties make submissions on the two closely related issues as to whether there had been a material error of law and whether the appellant was entitled or not to succeed under Regulation 15(1)(b) of the EEA Regulations, and thus to make submissions simultaneously on the issues of error of law and remaking. As it was not clear whether the appellant had been found to be credible generally I asked that she be called to give evidence so I could hear submissions on this issue. I did not set aside the findings of Judge Raymond in his decision on Regulation 10 of the EEA Regulations as these were not contested to be wrong. At the end of the hearing I reserved my determination.

Evidence and Submissions on Issue of Material Error of Law and Remaking it there was such an Error

10. Mr Abdar called the appellant to give evidence. She confirmed that her statement was true and correct to the best of her knowledge and belief. In this statement, in summary, she says as follows. She met her husband in November 2005, and they started dating in January 2006. At this point she was very unhappy and was living unlawfully in the UK. She found her husband very sweet and caring, although she was aware he also had problems of his own and when he was drunk would talk about issues with his father.

11. On 7th August 2006 the appellant and her husband were married, and started cohabiting and living on her husband's earnings. Due to his level of earnings they struggled to pay rent in London, and in February 2008 they moved together to Hemel Hempstead. The appellant says they were very happy at this time. Her husband worked as a cleaner at Chelsea stadium at Stamford Bridge, which she believed was a job he had done since they met and before this. He worked as a security guard from 2008, and throughout the time of their marriage had also been self-employed as a barber working from a friend's barber's shop in Camberwell, London. In 2008 they applied for residence cards, which were given in 2009. The appellant then started to work for the NHS as a nursing assistant, a job which she has done ever since that time.

12. The appellant's relationship with her husband began to deteriorate as when drunk he became physically and sexually abusive. Towards the end of 2011 she became pregnant but he did not want her to keep the baby, and she discovered he was having an affair with someone else. When she confronted him he punched her and she left the family home, and afterwards did not put his name on her

son's birth certificate. She then had a relationship with another man, and her daughter was born in 2014, however that relationship ended during the pregnancy as she discovered that man had a partner and other children he had not told her about. She realised that she would not be getting back together with her husband in September 2014 and so applied for a divorce which was granted in March 2015.

13. The appellant wishes to remain in the UK to bring up her two children and continue to work for the NHS.

14. In oral evidence she added the following. That her husband earned between £600 and £800 from his cleaning job at Stamford Bridge. She could not remember the name of the cleaning company he worked for. He also did part-time barbering and painting and decorating, but she did not know how much he earned from this as he would not tell her. The painting was at weekends in people's homes. The barbering was when he was not working as a cleaner as sometimes that job was full-time and sometimes part-time. She did not have documentary evidence about the cleaning job. He did these types of work for the whole period they cohabited from 2006 to 2011. He was not an educated person. She has worked in Whipps Cross Hospital in the emergency surgery theatre since 2009. The problems in the relationship came when her husband drank alcohol and became violent. She had moved out in November 2011 due to the physical and sexual abuse he subjected her too.

15. The appellant said that she had first heard that he had spent time in prison when she called his brother in 2012. His brother said he had been in prison but at that time she did not want to believe this was true. She had called her husband's brother as her husband would not allow her to contact him directly. She only knew for certain he had been in prison when she received the respondent's refusal letter. She had never personally had information about his criminal convictions.

16. Mr Bramble submitted that the appellant had to show that her husband had been in the UK exercising Treaty rights for a continuous period of 5 years whilst they were married, and that that period had to finish by 13th September 2011 when he was convicted and sentenced to a term of imprisonment. He said that he accepted that the appellant had shown that her husband had been exercising Treaty rights from March 2008 to September 2011, but not the period August 2006 to March 2008 as there was no documentary evidence supporting the contention that he worked and was self-employed during this earlier period. He submitted that the appellant should not be seen as a credible witness on this issue as she had said that she was not aware of her husband's imprisonment until his brother raised it in 2012, and even then did not believe it, and she also claimed that she was living with him until November 2011. If her husband was imprisoned in September 2011 she would surely have noticed his going to court and being sent to prison. There was therefore no material error of law in not examining Regulation 15(1)(b) of the EEA Regulations as the appellant was not entitled to a permanent residence permit.

17. Mr Abdar submitted that it should be accepted that the appellant lived with her husband for five years whilst he exercised Treaty rights and was entitled to a permanent residence permit. It was accepted by the respondent that her husband exercised Treaty rights from March 2008 to September 2011. The period in dispute was August 2006 to March 2008. It has been said that there is no documentary evidence of his work but this is not strictly true. There is a letter from HMRC dated 3rd February 2009 which indicates that HMRC had evidence that her husband had exercised self-employment in the past and should be making tax returns. This indicated that for the tax year April 2007 to April 2008 he must have provided them with some evidence which triggered the sending of this letter.

18. In addition the oral and written evidence of the appellant was credible. The appellant had a trusted job in an emergency surgery room, and gave simple believable evidence about a young couple who lived together with the husband working to support them. It was also the case that the First-tier Tribunal had made a specific finding that she was credible with respect of her account that her husband was violent, as this tallied with his history of criminal convictions, when making findings under Regulation 10 of the EEA Regulations.

19. Mr Abdar also submitted that it was not incredible that the appellant would not know if her husband, who was already away drinking and having an affair on a regular basis, had been to court and been convicted of a criminal offence on 13th September 2011. Further, the sentence he received would appear to have been a 10 week suspended sentence at that point. The refusal letter then appears to state that during the period of this suspended sentence he reoffended and was given an 8 week sentence which he served. This could therefore have been at any point between 13th September and approximately the end of November 2011, and thus it would during that period he would have spent 4 weeks in prison. This is therefore consistent with the appellant being unaware of her husband spending time in prison as it could have been that it took place after the separation in November 2011, with the possibility that it was not such a long period at one time as part could have been on remand, followed by time on bail and then being taken back into custody to serve the rest of the sentence.

Conclusions – Error of law and Remaking

20. In the case of Onuekwere v Secretary of State for the Home Department (C - 378/12) [2014] Imm AR 551 the Court of Justice of the European Union found that periods of imprisonment by a third country national cannot be taken into account for the purpose of accruing five years lawful residence under Article 16 of the Citizens' Directive and further that any periods of residence before and after a prison sentence cannot be aggregated. As a result it is clear that the clock stopped for the appellant's husband in terms of acquiring permanent residence when he served his first prison sentence.

21. The material about the first appellant's first period in prison in the refusal letter most easily reads that on the 13th September 2011 he was given two sentences of

imprisonment: one of 10 week and one of 8 weeks. It does not say whether these ran concurrently or consecutively. As a result, the appellant's husband would have been imprisoned for between 5 and 9 weeks at this point. Although it is possible, as Mr Abdar submits, that this was not all in one block as it could be that he was arrested and remanded, and then released on bail for a period of time, and then served the period of sentence less the time on bail. It is in any case clear that any period of Treaty rights which results in the appellant being able to claim permanent residence must end on 13th September 2011.

22. I find that the First-tier Tribunal erred in law at paragraph 14 of the decision by stating that the appellant and her husband could only have obtained permanent residence by living in the UK and exercising Treaty rights after October 2009 when they obtained their EEA residence permits. Clearly they could have obtained this right based on the exercise of Treaty rights prior to this so long as there was a five year period in which there was sufficient evidence that the appellant's husband exercised such rights. I also find that there was an unlawful insufficiency of reasoning given for the decision that the appellant was not entitled to permanent residence under Regulation 15 at paragraph 22 of the decision, and for finding that there was no evidence at all of her husband having exercised Treaty rights prior to the HMRC records as is recorded at paragraphs 6 and 19 of the decision.

23. I now go on to assess whether these errors were material, and whether the appellant has shown that she can meet the requirements of Regulation 15(1)(b) of the EEA Regulations.

24. As is clear from the above submissions Mr Bramble accepted for the respondent that the appellant had shown that that her husband was in employment between March 2008 and September 2011. The key period in dispute is that from August 2006, when the appellant and her husband married and started to cohabit, until March 2008.

25. I agree with Mr Abdar that the letter from HMRC to the appellant's husband dated 3rd February 2009 strongly implies that they believed that he had done self-employed work in the tax year April 2007 to April 2008, and possibly prior to this.

26. I also find that the appellant should be seen as a credible witness. Judge Raymond had found her credible with respect to the violent history and breakdown of her relationship with her husband. Before me she answered all questions put to her carefully, indicating when she did not understand them and being precise in her answers, for instance in saying she had never personally had knowledge of her husband's criminal record and explaining the sources of her knowledge and how and when they came to her. She was obviously, if quietly, emotionally when she talked about his violence towards her. I find that given the state of her relationship by September 2011, which involved her husband drinking, being abusive to her and having an affair, and his having three jobs which included weekends and her full-time work as a care assistant at Whipps Cross Hospital,

that it is credible that he could have attended court and been imprisoned for a number of weeks prior to November 2011 without her knowledge. It is also perhaps supportive of the appellant's evidence that she did not notice his absence at this time that his period of imprisonment was not such that he lost his job with Cleanevent UK Limited, as this continued according to the HMRC letter of 15th August 2016 from 20th February 2009 to 6th August 2012.

27. I find that the appellant's testimony that her husband worked on an employed basis from August 2006 to March 2008 for a cleaning company, with his work being based at Stamford Bridge, as well as doing part-time self-employed barbering and painting and decorating to be credible and true. I find this as I find the appellant to be a generally credible witness as I have indicated above, and further I find that this evidence is enhanced in its credibility as at that point she had no right to work as a Ghanaian overstayer, and the pattern of work she says her husband took in this period is clearly consistent with that which is evidenced by the documents from HMRC from 2009 onwards, which in turn indicate he did low skilled and low paid employed and self-employed work.

28. I therefore find that the appellant has acquired a right of permanent residence under Regulation 15(1)(b) of the Immigration (EEA) Regulations 2016 as she was present in the UK with her husband who was exercising Treaty rights as an employed and self-employed person for a continuous period between 6th August 2006 and 13th September 2011 in the UK.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set the decision of the First-tier Tribunal aside.

3. I re-make the decision in the appeal by allowing it under the EEA Regulations as set out above.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant or her children from the contents of this claim due to her husband's history of violence and criminal deportation.

Signed: *Fiona Lindsley* Date: 11th July 2017
Upper Tribunal Judge Lindsley

Fee Award Note: this is **not** part of the determination.

In the light of my decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award. I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals. I have decided to make no fee award because it was clearly necessary to have the appeal hearing to understand the legal basis of the appellant's case and the evidence to support that argument.

Signed: *Fiona Lindsley* Date: 11th July 2017
Upper Tribunal Judge Lindsley