Asylum and Immigration Tribunal

OA (EEA - retained right of residence) Nigeria [2010] UKAIT 00003

THE IMMIGRATION ACTS

Heard at Procession House	
On 2 September 2009	

Before

SENIOR IMMIGRATION JUDGE STOREY

Between

OA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Dr V Onipede, Counsel, instructed by De Soyza & Fernando Solicitors

For the Respondent: Mr J Parkinson, Home Office Presenting Officer

i. *Reg 10 of the Immigration (European Economic Area) Regulations 2006 is a free-standing provision which enables a family member who would otherwise cease to have a right of residence to continue to do so in certain circumstances. So far as concerns persons who fall within reg 10(5), so long as their marriage or civil partnership is at least three years old it is possible for them to qualify for a retained right of residence after just one year of residence in the United Kingdom. But to achieve a permanent right of residence on the strength of a retained right of residence it is always necessary to show residence in the UK for a continuous period of five years.*

ii. *Under reg 10(5)(a) the phrase "termination of the marriage …" can only mean the lawful ending of the marriage by legal proceedings (i.e. divorce); it cannot mean "breakdown of the marriage"; see also WW (EEA Regs. – civil partnership) Thailand [2009] UKAIT 00014.*

iii. *To count as a qualifying period of residence under reg 15(1)(b) a person must show, inter alia, that the five years in question are ones in which the said residence has been "in accordance with these Regulations". That entails that during those five years the EEA national on whom the family member relies in order to establish his or her right must have been continuously in the UK exercising Treaty rights (save for certain periods of absence specified in reg 3).*

iv. *For the purposes of reg 15(1)(b) the period of time during which a person "has resided in the United Kingdom with the EEA national…" must commence from the date the person first became a family member, that being the date of marriage in the case of a spouse.*

v. *By contrast, Reg 15(1)(f) provides a route for acquiring a permanent right of residence based in part on a retained right of residence. Under reg 15(1)(f) the family member has to show that he was residing in the United Kingdom in accordance with the Regulations for a continuous period of five years, and at the end of that period he has a retained right of residence.*

DETERMINATION AND REASONS

1. The appellant is a national of Nigeria. In a decision notified on 29 June 2009 Immigration Judge (IJ) Gillespie allowed her appeal. The respondent was successful in obtaining an order for reconsideration and so the matter comes before me.

2. The background to this reconsideration is as follows. The appellant entered the United Kingdom on February 2000 and in about November 2000 claimed asylum. On 28 April 2001 she married a French national, Mr Abdoul Aziz Diop. Soon after she applied for the issue of a residence permit as the spouse of an EEA national (under the Immigration (European Economic Area) Regulations 2000). On 14 October 2003 she was granted such a permit. On 29 August 2008 she applied for issue of a permanent residence card residence permit as the family member who had retained the right of residence under reg 10(5) of the Immigration (European Economic Area) Regulations 2006 (hereafter the "2006 EEA Regulations). In her application for this she stated that her husband had left home and she had begun divorce proceedings. On 12 December 2008 the respondent requested her solicitors to provide her marriage certificate, decree absolute, evidence that she had been residing in the UK for five years and evidence that her EEA spouse had been exercising Treaty rights in the UK up until the time of the divorce. In the course of further correspondence the appellant's solicitors provided a number of documents including a birth certificate for her son born on 17 December 2003 and a letter from Her

Majesty's Court Service. The latter stated that the appellant was not entitled to the decree sought because:

> "The Petitioner continued to live with the respondent for sixteen months or so after finding out about the adultery. She says she found out in December 2004 and he did not leave till April 2006. She cannot therefore rely on adultery as grounds for divorce, see Matrimonial Causes Act 1973, s.2 (1)."

3. On 29 April 2009 the respondent made a decision refusing to issue her a permanent residence card.

Relevant Legal Framework

4. It will assist, before proceeding further, to set out the relevant legal provisions and to note relevant jurisprudence of the European Court of Justice (ECJ).

5. Reg 6 of the 2006 EEA Regulations defines "qualified person" as meaning "a person who is an EEA national and in the United Kingdom as (a) a jobseeker; (b) a worker; (c) a self-employed person; (d) a self-sufficient person; or (e) a student".

6. Reg 7(1) states that:

> "Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person –
> (a) his spouse or his civil partner…"

7. Reg 10, headed "Family member who has retained the right of residence". provides

> "10. — (1) In these Regulations, "family member who has retained the right of residence" means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).
>
> (2) A person satisfies the conditions in this paragraph if—
>
> (a) he was a family member of a qualified person when the qualified person died;
>
> (b) he resided in the United Kingdom in accordance with these Regulations for at least the year immediately before the death of the qualified person; and
>
> (c) he satisfies the condition in paragraph (6).
>
> (3) A person satisfies the conditions in this paragraph if—
>
> (a) he is the direct descendant of—

(i) a qualified person who has died;

(ii) a person who ceased to be a qualified person on ceasing to reside in the United Kingdom; or

(iii) the person who was the spouse or civil partner of the qualified person mentioned in sub-paragraph (i) when he died or is the spouse or civil partner of the person mentioned in sub-paragraph (ii); and

(b) he was attending an educational course in the United Kingdom immediately before the qualified person died or ceased to be a qualified person and continues to attend such a course.

(4) A person satisfies the conditions in this paragraph if the person is the parent with actual custody of a child who satisfies the condition in paragraph (3).

(5) A person satisfies the conditions in this paragraph if—

(a) he ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person;

(b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;

(c) he satisfies the condition in paragraph (6); and

(d) either—

(i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

(ii) the former spouse or civil partner of the qualified person has custody of a child of the qualified person;

(iii) the former spouse or civil partner of the qualified person has the right of access to a child of the qualified person under the age of 18 and a court has ordered that such access must take place in the United Kingdom; or

(iv) the continued right of residence in the United Kingdom of the person is warranted by particularly difficult circumstances, such as he or another family member

having been a victim of domestic violence while the marriage or civil partnership was subsisting.

(6) The condition in this paragraph is that the person—

(a) is not an EEA national but would, if he were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; or

(b) is the family member of a person who falls within paragraph (a).

(7) In this regulation, "educational course" means a course within the scope of Article 12 of Council Regulation (EEC) No. 1612/68 on freedom of movement for workers.

(8) A person with a permanent right of residence under regulation 15 shall not become a family member who has retained the right of residence on the death or departure from the United Kingdom of the qualified person or the termination of the marriage or civil partnership, as the case may be, and a family member who has retained the right of residence shall cease to have that status on acquiring a permanent right of residence under regulation 15."

8. Reg 15, headed "Permanent right of residence", provides:

"15. —(1) The following persons shall acquire the right to reside in the United Kingdom permanently—

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

(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;

(c) a worker or self-employed person who has ceased activity;

(d) the family member of a worker or self-employed person who has ceased activity;

(e) a person who was the family member of a worker or self-employed person where—

(i) the worker or self-employed person has died;

(ii) the family member resided with him immediately before his death; and

(iii) the worker or self-employed person had resided continuously in the United Kingdom for at least the two years immediately before his death or the death was

the result of an accident at work or an occupational disease;

(f) a person who—

(i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and

(ii) was, at the end of that period, a family member who has retained the right of residence.

(2) Once acquired, the right of permanent residence under this regulation shall be lost only through absence from the United Kingdom for a period exceeding two consecutive years.

(3) But this regulation is subject to regulation 19(3)(b).”

9. Reference should also be made to the corresponding provisions of Directive 2004/38/EC (“the Citizens Directive”). Recital 15 states:

> “Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis”.

10, Art 2(1) lists as one category of “family member”, “(a) the spouse”.

11. Then there are the provisions of Arts 12-14:

> “Article 12
>
> Retention of the right of residence by family members in the event of death or departure of the Union citizen
>
> 1. Without prejudice to the second subparagraph, the Union citizen's death or departure from the host Member State shall not affect the right of residence of his/her family members who are nationals of a Member State.
>
> Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).
>
> 2. Without prejudice to the second subparagraph, the Union citizen's death shall not entail loss of the right of residence of his/her family members who are not nationals of a Member State and who have been residing in the host Member State as family members for at least one year before the Union citizen's death.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on a personal basis.

3. The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.

Article 13

Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership

1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.

   Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:

   (a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or

   (b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or
   (c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or

(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on a personal basis.

Article 14

Retention of the right of residence

1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein. In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

   (a) the Union citizens are workers or self-employed persons, or

   (b) the Union citizens entered the territory of the host Member State in order to seek employment.

   In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.”

Diatta v Land Berlin [1985] EUECJ R-267/87

12. It is useful to summarise next the Diatta v Land Berlin case. Mrs Diatta had married a French national who resided and worked in Berlin. After living with her husband for some time she separated from him on 29 August 1978 with the intention of divorcing and thereafter lived in separate accommodation. On the expiry of her residence permit she requested an extension. On reference to the ECJ the principal question was whether, in order to qualify for a right of residence under Article 10 of Regulation No. 1612/68, being a member of a worker's family necessarily required her to live permanently with him. In concluding that there was no such requirement the Court stated at paragraph 20:

> "It must be added that the marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority. It is not dissolved merely because the spouses live separately, even where they intend to divorce at a later date."

The appellant's grounds of appeal

13. The appellant's grounds of appeal contended that the respondent was wrong not to find that the appellant had submitted enough evidence to show she had a retained right of residence. They pointed out that she had produced evidence that she had resided with her husband for three years. They submitted that it was wrong for the respondent to expect to produce a decree absolute as opposed to a divorce petition.

The IJ's determination

14. The IJ first considered whether the appellant was entitled to a permanent residence card under reg 15(1)(b). Noting that reg 15(1)(b) provides that a family member of an EEA national who has resided with the EEA national in accordance with the Regulations for a continuous period of five years shall acquire the right to reside in the UK permanently, the IJ found that the appellant could not meet this requirement, as she had not been residing with her husband for such a period.

15. In the IJ's judgment there was, however, an alternative route to a permanent residence card open to this appellant, namely reg 15(1)(f) which relates to a person who has retained the right of residence within the meaning of reg 10 by virtue of being a person who had ceased to be a family member on termination of their marriage. According to the respondent the appellant could not meet this requirement because she had no final order of divorce (decree absolute). But in the IJ's view such an interpretation would lead to an absurdity in that it would leave a person in the position of the appellant unreasonably unprotected:

> “There is no reason evinced why the right of residence should be retained only by a divorced spouse and not by a spouse who is in the process of obtaining a divorce.
>
> The alternative interpretation, that the marriage relationship be broken down, provides protection to all family members who have suffered breakdown of a relationship with an EEA spouse. It does not bring about any artificial interruption of lawful residence during a period when cohabitation has ceased but an order of divorce is not yet made, as does the more limited interpretation. Had it been the intention of the lawgiver to require that the marriage had been terminated by final order of divorce, it would have been a simple matter to insert in the provisions, after the word ‘termination’, the words ‘by divorce’ or any the words deemed appropriate. It is not necessary to insert any words into the provision in order to permit the word termination to have its widest meaning embracing the effective breakdown of the marriage relationship and the termination of cohabitation. I consider that the wider meaning of the word termination is, for these reasons, to be preferred.
>
> The facts show that the appellant had lived with her spouse for three years prior to the date of institution of the proceedings and that they lived together for at least one year in the United Kingdom. The appellant has therefore retained a right of residence and meets the requirements of Regulation 10(5) and accordingly of Regulation 15(f)(ii).”

Respondent’s grounds for reconsideration

16. The respondent's grounds for reconsideration tackled the IJ's reasons in reverse order. Addressing his finding that the appellant had shown she had retained a right of residence under reg 15(1)(f), the respondent submitted that, contrary to the IJ's view, the term ‘termination’ was unambiguous and that his proposed interpretation was also at odds with the principles established by the ECJ in Diatta v Land Berlin, namely that a relationship of marriage abides until that marriage is ended and that cohabitation is not a requirement. In that case, as here, the grounds noted, the subject was estranged from her husband and living separately pending divorce proceedings.

17. As to the IJ's assessment of whether under reg 15(1)(b) the appellant was entitled to a permanent residence card through a separate route by virtue of being the family member of a qualified person throughout the period of five years, the respondent's written grounds took a position that was in part more favourable than that of the IJ. They averred that “the application of Diatta might appear to mean that the appeal should nevertheless have succeeded, as five years residence has accrued since the marriage…” However, the grounds hastened to add, that was still not enough to enable the appellant to qualify because, whilst she could show that five years had accrued, no adequate evidence of her husband’s status at all material times had been provided and unless he was exercising Treaty rights throughout that period, the requirements of reg 15(1)(b) could not be met.

My assessment

18. In this case we are only concerned with reg 10 insofar as it constitutes one of the routes by which a person can qualify for permanent residence under reg 15. It is worth noting, however, that reg 10 is also a free-standing provision, which enables a family member who would otherwise cease to have a right of residence to continue to do so in certain circumstances. So far as concerns persons who fall within reg 10(5), so long as their marriage or civil partnership is at least three years old it is possible for them to qualify for a retained right of residence after just one year of residence in the United Kingdom. (It is also to be noted that by virtue of reg 10(5)(c) he or she must also show that he or she (if not an EEA national) is a worker, a self-employed person, or a self-sufficient person under reg 6; or the family member of such a person.) But to achieve a *permanen*t right of residence on the strength of a retained right of residence it is always necessary to show residence in the UK for a continuous period of five years.

19. The decision in this case was to refuse an application for a permanent residence card. Mr Parkinson was prepared to accept that for the purposes of this appeal it did not matter that the claimed period of qualifying residence pre-dated 30 April 2006 (the date of the coming into force of the 2006 EEA Regulations). Hence it is not necessary for me to decide whether or not, by virtue of para 6 of Schedule 4 to the 2006 Regulations, all but two days of the period of residence on which she relied (dating from her marriage on 28 April 2000) stood to be treated as a qualifying period for the purposes of these Regulations. The respondent accepts that the past period can count in principle as a qualifying period.

Reg 15(1)(b)

20. Reg 15(1)(b) can be broken down into four main constituent elements as follows. In order to qualify for a permanent right of residence a person must show that:

- He or she is a family member of an EEA national who is not himself an EEA national;
- He or she is someone who has resided in the United Kingdom for a continuous period of five years;
- The five years in question must be ones in which the person has been "residing with" the EEA national; and
- The five years in question must be ones in which the said residence must be "in accordance with these Regulations".

21. As we have seen, the IJ did consider whether the appellant was entitled to succeed under reg 15(1)(b) but concluded in summary terms that she was not because she had not been residing with her husband for the requisite period of 5 years. However, if in fact the IJ was wrong about that and the appellant met all of the requirements of reg 15(1)(b) in full, then she was entitled to a permanent residence card irrespective of whether she also qualified under reg

15(1)(f) and hence any error on the part of the IJ in relation to the latter provision could not be said to have been material. That being the case, the respondent's application for reconsideration would be bound to fail.

22. As regards the requirement of reg 15(1)(b) that the five years must be ones in which the person has been "residing with" the EEA national, it is not necessary in this case to consider the precise meaning of that phrase, since Mr Parkinson readily accepted that the period of residence the couple enjoyed from the date of their marriage until her husband left her in April 2006 did amount to "residing with" each other.

23. As regards the requisite period of five years, it is not entirely clear that the respondent was right to consider that the appellant had resided with her husband for that period since, on the appellant's own evidence, she had married him on 28 April 2001 and he did not leave until April 2006. If he had left before 28 April 2006 the period involved would have been less than 5 years. However, once again, Mr Parkinson said that he respondent did not dispute that the appellant had resided with her husband for 5 years. Hence I shall proceed on the footing that here this part of the reg 15(1)(b) requirement was met as well.

24. To count as a qualifying period of residence under reg 15(1)(b) a person must show, inter alia, that the five years in question are ones in which the said residence has been "in accordance with these Regulations" . That entails that during those five years the EEA national on whom the family member relies in order to establish his or her right must have been continuously in the UK as a "qualified person" under reg 6 who exercising Treaty rights (save for certain periods of absence specified in reg 3). In this case the respondent vigorously disputes that the appellant could meet this requirement because there was insufficient evidence to show that he continued to be a qualified person for the duration of that period.

25. In Section 6 of the relevant application form (EEA4) which the appellant completed and submitted it is stated that:

> "As evidence of the exercise of Treaty rights in the United Kingdom by your EEA or Swiss family member, *both currently and continuously over the past 5 years*, please provide the following documents:
>
> **For time spent in employment** letter(s) from your family member's employer(s) confirming employment, P60s and most recent wage slips."" (Emphasis added) .

26. The documents produced by the appellant and sent to the respondent on 19 August 2008 included: a letter confirming her husband's employment with Top 4 Securities as a Security Officer, dated 27 June 2002, together with one payslip covering one month in August 2002 and another for April 2003 from the same firm; two payslips covering the month of April 2004 from O'Neill & Brennan Construction; a letter from Haypee Stores dated 4 April 2005 confirming his employment with them as a store supervisor, together with one

payslip covering one month in November 2005 and another covering April 2006.

27. In her divorce petition dated 16 February 2009 the appellant had stated that her husband's occupation was a "cleaner". However, there was no evidence that the appellant or her representatives had taken steps to obtain evidence to show that her husband had in fact entered employment as a cleaner or to furnish a clearer picture of whether her husband was in employment other than during the periods covered by the above evidence. Plainly these documents did not establish that her husband remained someone who was a "worker" continuously for the requisite five years.

28. It must be said that the application form fails to make clear what the commencement date is for the relevant period of residence. By virtue of the wording of reg15(1)(b), it would appear to be the period from the date that the person has become a family member, so in this case from the date of marriage, whereas the question in the form, by referring to "the past 5 years", appears to suggest, incorrectly, it is the period dating back 5 years from the date of application. (If the date is not linked to the date of marriage, then it would also mean that on appeal in this type of case, by virtue of s.85(4) of the Nationality, Immigration and Asylum Act 2002, one would have to have regard to the date of decision and the date of hearing of an appeal.)

29. On the given facts of this case, however, it would make no difference whether one took the period from the date of marriage until the date of application (28 April 2001 – 19 August 2008) or the period of 5 years prior to the application (19 August 2003 - 19 August 2008). In both periods there were considerable gaps in the evidence relating to the husband's employment.

30. It is necessary, of course, to bear in mind that a person can continue to exercise Treaty rights as a "worker" even though falling unemployed either for reason specified in reg 6(2) or those established by ECJ jurisprudence: see RP (EEA Regs – worker – cessation) Italy [2006] UKAIT 00025 and IP and others (A2 national – worker authorisation – exemptions) Bulgaria [2009] UKAIT 00042. However, in this case, the evidence adduced covered only very limited periods of time and did not even establish that the husband was still in the UK at the date of application. Given that the burden is on the appellant to show that her husband was exercising Treaty rights continuously during the relevant 5 year period on the basis of employment or some other qualifying reason, I cannot see that the IJ erred in concluding she could not succeed on the basis of reg 15(1)(b). His reasons may or may not have been sound depending on whether her husband in fact left the matrimonial home on or after 28 April), but on the evidence the appellant had not discharged the burden of proof on her to show that her husband had continued to be a worker or otherwise to be a "qualified person".

Reg 15(1)(f)

31. The only issue, therefore, is whether the IJ was right to find that the appellant was entitled to a permanent residence card under reg 15(1)(f) by virtue of having had a retained right of residence. Dr Onipede has submitted that the IJ was right because the appellant was someone who had acquired a retained right of residence, by virtue of the termination/breakdown of her marriage, and having resided in the UK for a continuous period of five years.

32. It seems to me that Dr Onipede's submissions founder on the fact that reg 15(1)(f) contains a twofold test. An appellant must first show that he "has resided in the UK in accordance with these Regulations for a continuous period of five years (reg 15(1)(f)(i))" and that he is also someone who "was, at the end of that period, a family member who has retained the right of residence"(reg 15(1)(f)(ii)).

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).

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.

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.

36. First, it is plainly contrary to the judgment of the ECJ in Diatta v Land Berlin and it would take the most cogent reasons to seek to depart from an ECJ ruling, especially given that the Citizens Directive did not signal any departure from the approach taken in that case. Dr Onipede sought to argue that the ECJ in Diatta was only ruling on the issue of marriage law in Germany and that it did not necessarily preclude that "termination" could mean something other than lawful ending of a marriage. However, he was not able to point to any evidence

to support that contention and it flies in the face of the clear fact that the ECJ was seeking to provide a Community-wide definition of Articles 10 and 11 of Regulation (EEC) No 1612/68 which accords certain rights to the spouse of a worker who is a national of a Member State and who is employed in the territory of another Member State. The Advocate General noted and agreed with the Commission's view that in relation to the argument that Article 10 and 11 required not just lawful marriage but cohabitation in a common dwelling, the Community legislature cannot have intended to make the exercise of the right to free movement subject to a requirement which is derived from family law which varies according to the Member States. The Advocate General considered that in order for a person to show that he was residing with a worker the marital relationship should not be considered to be dissolved until there had been a "judicial decision which has become final". The Court's language was to similar effect: "the marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority".

37. It is for this reason that it does not assist to examine what meaning in given in UK law in other contexts to the term "spouse". Even if it is not always defined domestically as a person in a lawful marriage (Sch 1 Pt 1 of the Rent Act 1977 as amended by the Housing Act 1988 states that "[f]or the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant: see Ghaidan v Mendoza [2004] UKHL 30), this and related terms as they arise in the 2006 EEA Regulations have to be given a Community law, not a national law, interpretation and the ECJ has already given a definitive ruling, which it has not departed from since Diatta v Land Berlin.

38. Second, there is nothing in the wording of the Citizens Directive or the 2006 EEA Regulations to suggest that termination should have the wider, more diffuse meaning canvassed by Dr Onipede. To the contrary, Art 12 (2) refers to "divorce" ("divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2"). And one of the ways in which a person can qualify under reg 10(5) of the 2006 EEA Regulations is by being someone who satisfies the condition in para 6 (which concerns family members who are themselves workers or self employed or self-sufficient persons) and:

> "(d) either –
>
> (i) *prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage* or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at lest one year during its duration". (Emphasis added)

39. The reference to "proceedings" can only mean legal proceedings relating to divorce and intended to result by operation of law in the "termination" of the marriage. (Here too the wording in Art 12(2)(a) of the Citizens Directive is very similar, "prior to initiation of the divorce or annulment proceedings or termination of the registered partnership…")

40. Furthermore, the only other event which is seen by reg 10 to justify a person acquiring a retained right of residence has a similar clear-cut terminus in a temporal sense: death. Likewise, on the IJ's construction the references in reg 10(5)(d) (ii)-(iii) to "former spouse" would lose any sharp definitional edges and become contingent for their interpretation on assessing the fine detail of the process of breakdown.

41. Third, Dr Onipede's approach, because it would require defining "spouse" in terms of a purely factual relationship based on cohabitation and other personal ties, would mean that it would be very difficult (and intrusive) in practice to ascertain when the break occurred.

42. Fourth, to construe termination to mean "lawful termination" also best furthers the principle of legal certainty, since persons affected will have the security of knowing that their status as family members will not be contingent on being able to show living together under the same roof or cohabitation, matters which by their nature will sometimes be very difficult to pinpoint in time.

43. Fifth, to construe "termination" as meaning lawful termination is consistent with the object and purpose of the Citizen's Directive of legally safeguarding the rights of family members, since it ensures that a family member can continue to qualify as a family member even if for whatever reason the couple do not continue to live under the same roof or who separate. On Dr Onipede's construction, a person would cease to be able to count any period of residence (for the purposes of qualifying for a retained right of residence) from the date of the breakdown of his or her marriage, which will often be some significant period of time before the date of divorce.

44. Sixth, it is clear from Art 13 of the same Directive that the Community legislature saw only a specified number of circumstances as giving rise to a retained right of residence. Recital 15 states that family members "should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. It is only in respect of "such circumstances" that measures should be taken to ensure family members already residing in the territory of the host Member State retain their right of residence exclusively on a person basis.

45. The IJ thought that construing termination to mean termination by means of legal proceedings relating to divorce would leave family members "unreasonably unprotected" because it would leave unprotected all family members who have suffered breakdown of a relationship with an EEA national in circumstances similar to this appellant. It must straightaway be acknowledged that such an approach does leave some protection gap. But as already noted, so does his approach. It is not a case where one approach seeks to ensure protection whereas the other does not; both may do. At its highest the IJ's argument based on "protection" only shows that under either interpretation there will be winners and losers. Furthermore, the lack of protection he has in mind is only in respect of the lack of the ability to acquire

a *retained* right of residence. As the example of Diatta v Land Berlin makes clear, the breakdown of a relationship with a spouse does not as such place a family member outside the protection of Community law; it depends on the particular circumstances. But in order to benefit from Community rights of residence of all kinds the family member must meet certain conditions. Examples of a protection gap of this kind cannot justify seeking to rewrite Community legislation or case law.

46. For the above reasons, I conclude that the IJ materially erred in law. The only basis he gave for allowing the appellant's appeal was that she was someone who came within Art 15 by virtue of having acquired a retained right of residence; that approach was based on a mistaken interpretation of reg 10 and it also overlooked the additional need, in order for the appellant to qualify for a permanent residence card, to show that she had resided in accordance with the Regulations, which she could not, by virtue of the lack of sufficient evidence to show that her spouse exercised Treaty rights during the relevant period.

47. I turn to consider what decision to substitute for that of the IJ. For the reasons given above, the only decision that can be substituted is to dismiss the appellant's appeal.

Signed

Senior Immigration Judge Storey