Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/01497/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reason Promulgated**
On 24 October 2017	**On 31 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SAMUSIDEEN TAYO ADEKUNKLE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms T White (counsel) instructed by Farani Javid Taylor, solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Hawden-Beal promulgated on 9 February 2017, which dismissed the Appellant's appeal.

Background

3. The Appellant was born on 12 September 1974 and is a national of Nigeria. On 23 January 2016 the Secretary of State refused the Appellant's application for a residence card confirming a permanent right to reside in the UK under Regulations 10(5) and 15(1)(f) of the Immigration (EEA)Regulations 2006.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Hawden-Beal ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 22 August 2017 Designated Judge Woodcraft gave permission to appeal stating

> The Judge dismissed the appellant's appeal against refusal to issue a residence card finding that the appellant had not retained rights under regulation 10(5) of the EEA Regulations because the appellant could not show the relevant five-year period for the exercise of treaty rights, see paragraph 11 of the determination. The grounds of onward appeal argue that the Judge misdirected herself in finding the five-year period had to be counted back from the date of divorce as opposed to any five-year period during the marriage (which the appellant could establish).
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> Arguably the Judge has erred in determining which five-year period is the relevant one to take note of. The issue turned on whether a retained right is always preserved, Idezuna [2011] UKUT 474 appears to answer the point.
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> All grounds may be argued.

The Hearing

5. Mrs White, counsel for the appellant, moved the appeal. She relied on the skeleton argument that she had prepared and told me that at [11] of the decision the Judge's finds that the appellant's ex-wife was exercising treaty rights of movement from 2009 until 2014, & that amounts to a finding that the appellant acquired the right of permanent residence. She told me that the Judge made a material error of law because the Judge looked for evidence that the appellant's ex-wife was exercising treaty rights of movement at the date of divorce, in October 2016. She told me that because a permanent right of residence had been established by 2014 it continued to exist and was not extinguished by divorce.

6. Miss Isherwood, for the respondent, candidly conceded that [11] of the decision created difficulty for her and told me that she had no further submission to make. The rule 24 note for the respondent indicates that

the respondent does not oppose the appeal and asks for the decision to be set aside and a fresh decision be substituted

Analysis

7. In Idezuna [2011] UKUT 474 it was held that

> (1) Typically, the focus in EEA appeals involving family members is on either or both (i) the nature of the relationship with the EEA national/Union citizen; and (ii) the question of whether the EEA national/Union citizen has been exercising Treaty rights in the UK over the relevant period. What constitutes the relevant period, however, may be a matter requiring particular consideration and sometimes a family member may have acquired a right of permanent residence on the basis of historical facts. In the present case, for example, once the appellant had established that his wife was exercising Treaty rights for five continuous years since the date of marriage (and before he was divorced), then (subject to (d) below) he was from that date someone who had a right of permanent residence which could not be broken by absence from the UK unless in excess of two years.
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> (2) Continuous residence in the UK of the applicant/appellant family member is an essential requirement for proving permanent residence: see regulation 15(1)(b) of the Immigration (European Economic Area) Regulations 2006 and Article 16(2) of Directive 2004/38/EC).
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> (3) Whilst often it may not be in dispute that the applicant/appellant family member has been in the UK during the relevant period, that is not something that can be taken for granted and it may sometimes become necessary on appeal for the tribunal judge to make a finding on the matter based on the evidence. If it has not previously been raised by the respondent, however, procedural fairness dictates that an appellant must be afforded a proper opportunity to deal with the issue.
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> (4) When assessing whether the applicant/appellant family member has resided in the UK continuously for the purposes of qualifying for permanent residence, it must be recalled that regulation 3(2) of the 2006 Regulations provides that continuity of residence is not affected by (a) periods of absence from the United Kingdom which do not exceed six months in total in any year; (b) periods of absence from the United Kingdom on military service; or (c) any one absence from the United Kingdom not exceeding twelve months for an important reason such as pregnancy, childbirth, serious illness, study or vocational training or an overseas posting (Article 16(3) of the Directive is to similar effect).

> (5) Once a right of permanent residence has been acquired, it can be lost only through the absence from the host Member State 'for a period exceeding two consecutive years' (regulation 15(2) of the 2006 Regulations; Article 16(4) of the Directive).

8. At [11] of the decision the Judge found that the appellant's ex-wife was exercising treaty rights of movement between 2009 and 2014, but found that that evidence did not help the appellant because his marriage was not dissolved by divorce until October 2016. The Judge says that the relevant period is October 2011 to October 2016, and found against the appellant because there is no evidence of the appellant's ex-wife's activities for the final years of marriage between 2014 and 2016.

9. Quite correctly the appeal is not opposed. It is accepted that the Judge's finding that the relevant period is five years to October 2016 is wrong. That finding is a material error of law. I therefore set the Judge's decision (promulgated on 9 February 2017) aside.

10. There is sufficient material before me to enable me to substitute my own decision. The Judge's finding that the appellant's ex-wife was exercising treaty rights from 2009 to 2014 is not challenged. The respondent accepts that the appellant entered the UK on 20 August 2005 as a student. Leave to remain was extended until 30 November 2009. On 24 February 2010 the appellant applied for a residence card. A residence card was issued on 30 August 2010 and was valid until 13 August 2015. On 11 August 2015 the appellant submitted an application for permanent residence. The appellant's marriage broke down, and decree absolute was granted on 26 October 2016.

11. Under regulation 15(1)(b) of the 2006 regulations the non-EEA family member of an EEA national who has resided in the UK for five years in accordance with the regulations acquired a permanent right of residence. On the facts as the Judge found them to be the appellant's ex-wife, who is an EEA national, exercised treaty rights of movement continuously for five years from 2009 to 2014. During that same period the appellant lived with the EEA national as her spouse. It was at that point that the appellant acquired the right to permanent residence.

12. The application that the appellant made was for documentary evidence to certify the right of residence already acquired. Idenzuna is authority for the need to consider when the five-year period actually runs rather than focusing on the date of divorce or the date of application and working backwards.

13. Under regulation 15(2) the right of permanent residence is lost only by absence from the UK for more than two consecutive years. The appellant has not been absent from the UK. The effect of the Judge's finding that the appellant's ex-wife exercising treaty rights for five continuous years to

2014 means that the appellant is entitled to the document that he applied for because by 2014 he had established a permanent right of residence.

14. No challenge is taken to the Judge's finding that the appellant's ex-wife exercised treaty rights for five continuous years between 2009 in 2014. I am therefore able to substitute my own decision.

15. Because the appellant acquired a permanent right of residence in 2014, the appellant is entitled to a residence card as confirmation of his right to reside permanently in the UK. On the facts as the Judge found them to be, the appellant retained the right of residence after divorce.

Decision

16. The decision of the First-tier Tribunal promulgated on 9 February 2017 is tainted by material errors of law. It is set aside

17. I substitute my own decision.

18. The appeal against the respondent's decision dated 23 January 2016 is allowed under the immigration EEA regulations 2006.

Signed Paul Doyle Date 27 October 2017
Deputy Upper Tribunal Judge Doyle