



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/07407/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 4 January 2019

Decisions & Reasons Promulgated  
On 15 January 2019

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

BAMIGBE EBENEZER OGUNGBAMILA  
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms D Revill of Counsel instructed by Liberty and Co Solicitors  
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before me following my decision of 13 August 2018 to set aside the decision of First-tier Tribunal Judge Callow of 31 January 2018.
2. The appellant challenges the respondent's decision of 2 June 2016 to refuse to issue him with a permanent residence card under reg. 15(1)(f) of the EEA Regulations.

3. The appellant is a national of Nigeria, born on 10 October 1981. There is no evidence of his claimed entry in 2005. Although the respondent maintained that his marriage to an EEA national was a sham, he failed to adduce the evidence he relied on in that respect and that allegation has not, therefore, been made out. The only issue remaining is whether the appellant can show a five year period during which he has been exercising treaty rights as an EU national, including evidence of his ex-wife's work up to the point of the commencement of divorce proceedings.

### **The Hearing**

4. The appellant attended the hearing and gave his evidence in English. He confirmed that the contents of his witness statement were true and accurate. He stated that he worked as a Health Care Assistant at the Royal Free Hospital and had done so since 2015. There was no cross examination. I then heard submissions.
5. For the respondent, Mr Mills submitted that the respondent had been entitled to make the decision as at the time the decision was made, the evidence had not covered a five-year period and the evidence of the sponsor's work had been insufficient. However, time had since passed, and the matter had to be assessed as at the date of the hearing. There was documentary evidence of the sponsor's employment from January 2014 up to the divorce in March 2015. There was then evidence of the sponsor's employment up to the present time. He submitted that the appellant appeared to have benefited from the delay in the resolution of his appeal.
6. For the appellant, Ms Revill relied on her skeleton argument and submitted that there was evidence to cover a five year period working back from the date of the hearing to show that the appellant had been in employment and that at the date of commencement of divorce proceedings his sponsor had been in employment and indeed had been going back to January 2014. Her skeleton argument set out the specific documentary evidence to corroborate the submissions made. The five year period had been demonstrated and the appeal should be allowed.
7. At the conclusion of the hearing I reserved my determination which I now give with reasons.

### **Findings and Conclusions**

8. Reg. 10 (5) states:

*“The condition in this paragraph is that the person (“A”) –*

*(a) ceased to be a family member of a qualified person or an EEA national with a right of permanent residence on the termination of the marriage or civil partnership of A;*

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

*(c) 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; ...”*

9. Reg. 6 states:

*“The condition in this paragraph is that the person –*

*(a) is not an EEA national but would, if the person were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6...”*  
(added emphasis).

10. Whilst there does appear to be a lack of clarity as to whether it is the date of the termination of the marriage that should be taken into account or the commencement of the divorce proceedings, this matter was clarified by the Court of Appeal in Baigazieva v Secretary of State for the Home Department [2018] EWCA Civ 1088 so that the right to reside is only retained on the termination of the marriage, but the criteria for retention are to be considered at the time of the initiation of divorce proceedings.
11. There was agreement between the parties that although the respondent could not be criticized for the decision made in June 2016, as regards the issue of employment/self-employment, the evidence for the five years preceding the present date of hearing clearly showed that the sponsor had been working between January 2014 and the time the divorce proceedings commenced in June 2014 and that the appellant had been in employment since then. Having considered Ms Revill’s helpful skeleton argument setting out all the evidence and period covered, in accordance with my directions, I must concur with that view.
12. Bundle 1 contains evidence of the sponsor’s employment with Newgate Finance from January 2014-March 2015 in the form of pay slips and P60s. The respondent accepted in the decision letter that the appellant had been working

between March 2015 and October 2015 and Bundles 2 and 3 contain evidence of employment from October 2015 to the present date in the form of payslips and P60s.

13. This seems to me to be adequate evidence that the sponsor was exercising treaty rights up until the date that divorce proceedings commenced. I am satisfied that the appellant has adduced adequate documentary evidence to show that his sponsor was a qualified person at the time the divorce proceedings commenced. It follows that he is entitled to retain his rights of residence.

**Decision**

14. The appeal is allowed under the EEA Regulations.

**Anonymity**

15. I was not asked to make an anonymity order and there is no reason to make one.

Signed



Upper Tribunal Judge

Date: 4 January 2019