Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/01239/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 April 2017	**On 3 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

UBADI NATHAN IBE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer
For the Respondent: Ms I Mahmud, instructed by Saviours Solicitors

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. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Meah, promulgated on 24 October 2016, which allowed the Appellant's appeal.

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Background

3. The Appellant was born on 25 October 1969 and is a national of Nigeria. On 11 August 2010 the appellant was granted an EEA residence card as the spouse of an EEA national. The appellant's marriage ended in divorce on 4 June 2014. On 22 April 2015, the appellant applied for permanent residence card claiming that he had retained a right of residence in the UK.

4. On 16 September 2015, the Secretary of State refused the Appellant's application.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Meah ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 8 March 2017 Judge Page gave permission to appeal stating inter alia

> The respondent has identified arguable grounds of appeal that can only be properly resolved if permission to appeal is granted. The respondent's argument is that the Judge erred in calculating that the appellant had resided in accordance with the regulations for five continuous years. The respondent asserts that the Judge erred in finding that the appellant had acquired a right of permanent residence on the basis of his self-employment from 2011 to 2016, failing to require the appellant to show that his ex-EEA spouse was exercising treaty rights for four years prior to their divorce. The respondent argues the appellant could only rely on his self-employment after divorce. If his EEA spouse was not exercising treaty rights before the divorce the respondent's grounds are arguable.

The Hearing

6. Mr Tarlow moved the grounds of appeal. He told me that the decision contains a material error of law because, at [13] and [14] of the decision, the Judge focuses solely on the appellant and finds that the appellant has been working in the UK for more than five years. Mr Tarlow had no criticism of that finding, but told me that those findings did not go far enough. This case concerns a retained right of residence, and the Judge has made no findings at all in relation to the appellant's Ex-wife, an EEA national. He told me that to qualify for a retained right of residence after divorce from an EEA national, it is essential that the EEA national was exercising treaty rights up to the date of divorce. There are no findings in the decision in relation to the EEA national. He reminded me that for a right to be retained the right has to exist in the first place. He told me that the absence of an analysis of the EEA national's position up to the date of divorce is a material error of law.

7. (a) For the appellant, Ms Mahmud told me that the question of whether the appellant's ex-spouse was exercising treaty rights had never been an

issue. She took me to the respondent's reasons for refusal letter, which is now reproduced at page 140 of the bundle prepared for the appellant for this hearing. The third paragraph of that letter says

> You have provided various self-employment documents from your EEA sponsor around the period that your decree absolute was issued. As such, it is accepted that your EEA sponsor was exercising treaty rights at the time your divorce was finalised.

(b) Ms Mahmud took me to [3] of the Judge's decision, where the Judge says

> In summary, the application was refused on the grounds that the respondent was not satisfied that the appellant had resided in accordance with the Immigration (European Economic Area) Regulations 2006 (EEA Regulations) for a period of five continuous years. This was the only ground of refusal and there was no application to either amend or add to these.

(c) Ms Mahmud told me that the decision does not contain a material error of law.

8. Both Mr Tarlow and Ms Mahmud agreed that, if I was to find a material error of law, I should substitute my own decision finding that the appellant has exercised treaty rights as a worker for a continuous period of five years, and (relying on the reasons for refusal letter) find that the EEA sponsor was exercising treaty rights up to and including the date of decree of divorce.

Analysis

9. In Amos v Secretary of State for the Home Department; Theophilus v Secretary of State for the Home Department [2011] EWCA Civ 552 the Court of Appeal held that a divorced spouse had to establish that he or she had the right of residence before the question whether, notwithstanding the divorce, the right had been retained by Article 13 of the Citizens Directive could be determined. The right was subject to Articles 16(2) or 18 of the Citizens Directive. The former provision applied to family members of EEA nationals who must have resided with the EEA national in the host Member State legally for a continuous period of five years. The word "legally" had to be given a Community meaning, which essentially depended on the exercise of Treaty rights.

10. in Diatta v Land Berlin (Case 267/83); [1985] ECR 567 the European Court of Justice (as it was then) concluded that separation short of divorce did not affect the right of the non-national spouse under Article 16 of the Citizens Directive if both the EEA national and the non-national spouse continued to reside in the same Member State (paras 19 – 24). The Claimants were not required to show that their former spouses were working for a continuous period of five years prior to their applications for the right of permanent residence. The requirements of the Citizens Directive applicable to the Claimants were that at all times while residing

in the UK until their divorce the spouse had to be a worker or self-employed (or otherwise satisfied Article 7(1) of the Citizens Directive); the marriages had to have lasted at least three years, including one year in the UK, and they had to show that they were workers, self-employed or otherwise satisfied the penultimate paragraph of Article 13(2). The 2006 Regulations were consistent with those provisions. Provided that the conditions in regulation 10(5) continued to be satisfied, after five years' continuous residence in the UK, a non-EEA national would be entitled to a permanent right of residence under regulation 15(1)(f) (paras 29 – 31). Under regulation 10 of the 2006 Regulations, the ex-spouse of an EEA national continues to enjoy a right of residence if he was residing in the UK in accordance with the Regulations when the marriage was terminated (i.e. the decree of divorce was made absolute), and the marriage had lasted for three years, at least one of which was spent by both parties in the UK. This 'retained' right of residence may lead to a permanent right of residence under regulation 15(1)(f) if he has a total of five years' residence.

11. The decision contains a material error of law because, although the Judge correctly identifies the area of dispute between the parties, he does not make any findings of fact in relation to the appellant's EEA national ex-wife.

12. At [3] of the decision the Judge correctly says that there is no area of dispute other than whether or not the appellant had resided in accordance with the EEA regulations. The simple error that the Judge has made is just that he does not record the respondent's acceptance (contained in the reasons for refusal letter) that

> …….. your EEA sponsor was exercising treaty rights at the time your divorce was finalised.

13. In the absence of finding that the EEA sponsor was exercising treaty rights up to and including the date of decree of divorce, the decision is incomplete. Because the decision is incomplete I have to find that a material error of law exists, and so I must set the decision aside.

14. Although I set the decision aside I find that there is sufficient material before me to enable me to substitute my own decision

15. The 2006 EEA regulations have now been superseded by the 2016 EEA regulations. Although the new regulations revoked the 2006 EEA regulations by operation of Reg 1 (2), they are preserved for the purposes of appeals.

Findings of Fact

16. The appellant is a Nigerian national, born on 25 October 1969. On 4 June 2007, the appellant married Francia Maria Smith, an EEA national who was exercising treaty rights of movement in the UK.

17. On 11 August 2010 the respondent granted the appellant an EEA residence card as the family member of an EEA national exercising treaty rights. That residence card was valid until 11 August 2015.

18. On 4 June 2014 the marriage between the appellant and the EEA national ended in decree of divorce. From August 2010 until the date of decree of divorce, the EEA national was a self-employed person living and working in the UK. She was therefore a qualified person because she was an EEA national exercising treaty rights up to and including the date of divorce.

19. On 6 October 2010 the appellant started to work as a cleaner for solo service group. Since 3 November 2010 the appellant has been consistently employed by London Borough of Croydon as a neighbourhood caretaker. He continues in that employment. The appellant's P 60s from that employment from 2011 to 2017 are now reproduced in the appellant's bundle prepared for this appeal.

Conclusion

20. The appellant has retained the right of residence following divorce from his EEA national ex-wife. He is therefore a family member who has retained the right of residence in terms of regulation 10 of the Immigration (EEA) regulations 2006.

21. The appellant has lived in the UK in accordance with the EEA regulations as an employed person for a continuous period of five years. He is therefore entitled to a permanent right of residence under regulation 15(1)(f).

22. The appeal is allowed. The appellant meets the requirements of the Immigration (EEA) Regulations.

Decision

23. The decision of the First-tier Tribunal is tainted by material errors of law.

24. I set aside the Judge's decision promulgated on 24 October 2016.

25. I substitute my own decision. The appellant's appeal against the respondent's decision dated 16 September 2015 is allowed.

Signed Paul Doyle Date 1 May 2017

Deputy Upper Tribunal Judge Doyle