Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/09787/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On May 6, 2015	**On May 8, 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ABDUL GAFAR OLANIYI ODUNUGA-BAKARE
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Walker (Home Office Presenting Officer)
For the Respondent: Mr Ume-Ezeoke, Counsel, instructed by Spiropoulos Lawal Solicitors

DETERMINATION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.

2. The Appellant is a citizen of Nigeria. On June 25, 2012 he applied for permanent residence as the family member of an EEA national that had

permanent residence. On January 26, 2014 the respondent refused his application.

3. The appellant appealed that decision on February 20, 2014 under section 82(1) of the Nationality, Immigration and Asylum Act 2002 and Regulation 26 of the Immigration (European Economic Area) Regulations 2006.

4. The appeal came before Judge of the First-tier Tribunal Andonian (hereinafter referred to as the "FtTJ") on September 12, 2014, and in a decision promulgated on September 29, 2014 he allowed the appeal under the 2006 Regulations.

5. The respondent lodged grounds of appeal on October 7, 2014 submitting the FtTJ had erred. Permission to appeal was refused by Judge of the First-tier Tribunal Hollingworth on the basis the respondent had failed to bring the relevant matters to the attention of the FtTJ. Permission to appeal grounds were renewed on December 3, 2014 and permission was granted by Deputy Upper Tribunal Judge Archer on March 12, 2015. He found the FtTJ failed to have regard to the implications of the decision of Case 378/12 Nnamdi Onuekwere v Secretary of State for the Home Department (hereinafter referred to as "Case 378/12") and this amounted to an arguable error in law.

6. The matter came before me on the above date and the parties were represented as set out above. The appellant was not in attendance.

7. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 and I see no reason to alter that order

PRELIMINARY ISSUES

8. I raised with Mr Walker his three grounds of appeal. He handed to me the appellant's previous determination from May 8, 2012 in which the appellant's appeal against the deportation order was refused.

9. Having checked the file I advised the parties that this document had not been submitted to the FtTJ and there did not appear to be any reference to previous proceedings in the determination. Mr Walker suggested the refusal letter contained the details but on checking both the court file and Mr Walker's file it was noticed that the refusal letter contained 5 pages but was missing pages 2 and 4. The respondent's original grounds of appeal made no reference to the previous decision and I indicated to Mr Walker that the FtTJ could not have erred where he had nothing before him that mentioned other proceedings and the refusal letter was incomplete. I informed Mr Walker that I saw no merit to Ground Two of his amended grounds of appeal.

10. With regard to Ground Three I indicated to both parties that they would only have to address me on this ground if I rejected Ground One of the

grounds of appeal. Both Mr Walker and Mr Ume-Ezeoke agreed with this approach.

SUBMISSIONS ON ERROR IN LAW

11. Mr Walker relied on Ground One of his grounds of appeal and submitted that although the respondent had wrongly accepted the appellant had satisfied Regulation 15 of the 2006 Regulations it had been incumbent on the FtTJ to apply the Regulations correctly. There was no dispute that the appellant received a custodial term of five years in October 2009 and he remained in custody until February 2012. The appellant had been granted a right of residence as a family member of an EEA national in March 2005 and in order to satisfy Regulation 15 of the 2006 Regulations he had to demonstrate he had resided with an EEA national for a continuous period of five years. He had been detained in October 2009 thus breaking the period of continuity and the European Court of Justice made clear in Case 378/12 that any period in custody did not count and the period in custody interrupted the continuous period required under the Regulation 15. The Court made clear that periods of residence could not be aggregated and he invited me to find an error in law and to remake the decision by dismissing it.

12. Mr Ume-Ezeoke accepted any period in custody did not count but submitted that there was discretion in respect of whether the periods could be aggregated. He accepted the FtTJ had to apply the law correctly regardless of what submissions were made to him.

FINDING ON MATERIAL ERROR OF LAW

13. There was no dispute that the appellant's residence in the United Kingdom as a family member of an EEA national commenced in March 2005. In order to obtain permanent residence he had to satisfy Regulation 15(1)(b) of the 2006 regulations and show he had resided with an EEA national in accordance with the Regulations for a continuous period of five years.

14. There is no dispute that on October 12, 2009 the appellant was sentenced to five years imprisonment for drug offences.

15. The Court made clear at paragraph [27] of its judgement in Case 378/12 that

> "In view of all the foregoing considerations, the answer to the first question is that Article 16(2) of Directive 2004/38 must be interpreted as meaning that the periods of imprisonment in the host Member State of a third-country national, who is a family member of a Union citizen who has acquired the right of permanent residence in that Member State during those periods, cannot be taken into consideration of the context of the acquisition by that national of the right of permanent residence for the purposes of that provision."

16. It therefore follows that the period between October 12, 2009 and February 9, 2012 (date of release) could not count.

17. The issue is whether the periods March 2005 to October 2009 and post February 9, 2012 could be aggregated and therefore enable the appellant to satisfy Regulation 15.

18. The answer to this lies in paragraph [32] of Case 378/12 where the Court made clear that periods of residence cannot be aggregated. The Court stated, "… continuity of residence is interrupted by periods of imprisonment". Accordingly, the appellant could not satisfy Regulation 15 and the FtTJ must have erred by agreeing that the Regulation was met. As the appellant cannot meet the requirement of Regulation 15 he is not entitled to permanent residence and his application must fail

DECISION

19. There was a material error. I set aside the decision and I remake the decision and dismiss the appellant's application under the 2006 Regulations.

Signed: Dated: **May 6, 2015**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I reverse the fee award made as the appellant's appeal has failed.

Signed: Dated: **May 6, 2015**

Deputy Upper Tribunal Judge Alis