Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/03604/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 October 2018	**On 07 November 2018**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OTIS FRIMPONG
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms E Lanlehin, Counsel instructed by JF Law Solicitors
For the Respondent: Ms T Lindsay, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Ghana. His date of birth is 8 August 1974.

2. On 19 September 2016 the appellant made an application for permanent residence under the Immigration (European Economic Area) Regulations 2016 (the "2016 Regulations").

3. This application was refused on 20 March 2017 because it was not accepted by the Secretary of State that the appellant had retained a right of residence following the end of his marriage to an EEA national.

4. The appellant appealed. His appeal was dismissed by the First-tier Tribunal (FTT) Judge Coutts following a hearing on 24 April 2018. Permission was

granted to the appellant by the Upper Tribunal Judge Blum on 1 August 2018. The matter came before me on 25th of October 2018 to determine whether the judge made an error of law. I heard representations from both representatives

5. Although it was not made clear in the decision of the FTT, the appellant and the EEA sponsor married on 26 December 2010. The appellant's evidence was that the relationship started to deteriorate in 2014. There was in the appellant's bundle a Decree Absolute dated the 26 July 2016 indicating that the Decree Nisi was made on 7 June 2016.

6. The appellant submitted payslips to show that the sponsor was employed in January 2016 to the date of divorce on 26 July 2016. This was accepted by the judge. The judge found that the evidence established that she was employed from the start of the tax year in April 2015 until the end of September 2015. The judge identified the issue before him as being whether the sponsor exercised treaty rights between October 2015 and December 2015. The appellant's evidence was that the sponsor told him that she had taken unpaid leave during that time because of stress.

7. The judge found that the appellant gave his evidence in an "open and straightforward manner and that he was a credible witness." His evidence was that throughout the two-month period between October and December 2015 his wife was a worker. She was on unpaid leave from her employment with the NHS. The judge stated at paragraph 25 "the evidence, in the round, suggests that she had decided to take a break from work while she resolved family land dispute." The judge found that the sponsor left her employment at the end of September 2015 and was not working between October and December 2015. The judge found that during this time she was not a worker or a job seeker. He found that she recommenced employment in January 2016 (having considered the evidence before him he decided that she had in fact started a new job in January 2016).

8. The grounds assert that the judge failed to apply the law having expected the appellant to establish that his ex-wife was exercising treaty rights throughout the period of the marriage until the date of the divorce. It is also asserted that the judge was wrong when concluding that the sponsor was not a worker was she was on unpaid leave from October to December 2015.

9. I heard submissions from both parties. Both agreed that Baigazieva v SSHD [2018] EWCA 1088 sets out the law as it currently stands, and as it was at the date of the hearing before the FTT. Mr Lindsay submitted that in the absence of evidence about when divorce proceedings were issued the appeal cannot succeed. Ms Lanlehin submitted that despite the absence of evidence relating to the issue of proceedings and when this was and whether the sponsor was at that time exercising treaty rights, in the light of the fact that there was clear evidence that she was exercising treaty rights at the date of the Decree Absolute and since 2015, the judge should have allowed the appeal.

10. The approach of the Secretary of State which was accepted by the Court of Appeal in Baigazieva is that a third country national, to retain the right of residence in the UK reliance on regulation 10 (5), does not need to show that their former EEA spouse exercised treaty rights as a "qualified person" until the divorce itself. Rather, it is sufficient to show that the former EEA spouse exercised treaty rights until divorce proceedings were commenced. The Secretary State's submission before the Court of Appeal was that for the right to be retained at the point of divorce when the decree absolute was granted, it was necessary to show that the EEA spouse was a qualified person when divorce proceedings were commenced. The Court of Appeal agreed.

11. Whilst there was evidence that the judge accepted that the EEA sponsor was employed from April 2015 to September 2015 and January 2016 until 26 of July 2016, the appellant's evidence was that his marriage broke down in 2014. There was no evidence in the appellant's witness statement or in oral evidence relating to the date when legal proceedings commenced.

12. The relevant law was not brought to the attention of the FTT by either party and the appellant's solicitors failed to properly identify the material time in the grounds seeking permission. However, the judge materially erred because he did not consider whether the EEA sponsor was exercising treaty rights at the correct time in accordance with the law as it stood set out in Baigazieva. In fact, the judge did not apply the law as it was before this decision. It is not clear to me why he focused on the period from October 2015 to December 2015 and why the appeal should have failed, if the sponsor was not exercising Treaty Rights during that period. I set aside the decision of the judge to dismiss the appeal.

13. The appellant did not submit further evidence in the event that the UT were to find a material error and go on to re-determine the appeal. I am surprised that neither party drew my attention to the evidence in the application form. I have considered the application form that the appellant submitted to the respondent when applying for a retained right of residence. At question 8.17, the appellant was asked the date when legal proceedings began to end the marriage; namely, the date the divorce petition was filed. He did not give an exact date but indicated that it was in March 2016. There is no reason for me to disbelieve what is written in the form; particularly, considering the appellant was found to be entirely credible by the FTT. It is believable that proceedings were issued at that time. The judge found that at this time the EEA national was exercising treaty right.

14. The law as it stands when properly applied to the evidence in this case establishes that the appellant retained a right of residence at the point of divorce.

15. There was no other issue raised by respondent in the reasons for refusal letter, before the FTT or at the hearing before me which would suggest that because the appellant has established that his ex-wife was a qualified person when divorce proceedings commenced, his appeal should not be allowed under the EEA regulations. There was no issue in relation to the

appellant's employment. His evidence was that he had been employed since the date of divorce. I re-make the decision and allow the appeal under the EEA Regulations 2016.

16. The appeal is allowed under the 2016 Regulations.

Signed Joanna McWilliam Date 30 October 2018

Upper Tribunal Judge McWilliam