Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03955/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 September 2018	**On 15 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

MR PIUS FOLORUNSO ADEDARA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Adisa
For the Respondent: Ms A Everett, HOPO

DECISION AND REASONS

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge S H Smith dismissing his appeal against the decision of the

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respondent dated 24 March 2017 to remove him from the UK pursuant to Regulation 23(6)(a) of the Immigration (European Economic Area) Regulations 2016.

2. The appellant is a citizen of Nigeria born on 3 July 1979. He had previously been issued with a residence card as the family member of an EEA national, Telma Lopes Rodrigues, valid until 11 November 2014. They divorced on 4 March 2013.

3. On 21 October 2014 the appellant applied for a permanent residence card on the basis that he was a family member who had retained the right of residence. That application was refused, and an appeal against that refusal decision was dismissed by First-tier Tribunal Judge Abebrese on 23 May 2016. The appellant was consequently left with no right to reside under the predecessor regime to the 2016 Regulations, and accordingly was a person liable to removal.

4. The judge considered the appellant's appeal under Regulation 10(5)(a) of the 2016 Regulations which imposes a temporal requirement for the EEA sponsor, namely the appellant's wife, to be a "qualified person" at the point of the divorce. This means that the qualified person must be exercising treaty rights at the point of the divorce from the appellant, said the judge. The judge also said that this is a matter which the appellant has already litigated, unsuccessfully, having failed to adduce evidence of this nature at the point of that appeal.

5. The judge found the appellant's evidence unreliable as to how he was able to obtain the documents not through his ex-wife herself but through her friend who he only named as Ruth. He could not remember Ruth's surname.

6. In any event the judge applied **Devaseelan** and held that the documents produced by him go to facts personal to the appellant in circumstances when the appellant had the opportunity to provide this evidence to the previous judge, but did not. The judge held as follows at paragraph 32

> 32. It follows that the evidence adduced by this Appellant fails to establish that his ex-wife was exercising Treaty rights at the point of their divorce for the following reasons. First, taken at its highest, the self-assessment tax calculation 2013 does not demonstrate that the ex-wife was exercising Treaty rights at the point of divorce. Secondly, the Appellant's evidence surrounding this document, and his wider accounts that his wife was exercising Treaty rights at the point of divorce, is characterised by a number of weaknesses which lead me to place little weight on it in any event. Thirdly, given there has been a previous judicial determination of this precise matter, I treat this new evidence with the greatest of circumspection.

7. The judge concluded that the appellant failed to satisfy him on the balance of probabilities that his wife was exercising treaty rights at the point of their divorce.

8. Permission was granted to the appellant on grounds which argued that the judge erred in that he considered the law by reference to the date of divorce, rather than at the outset of divorce proceedings in accordance with **case C-218/14 Kuldip Singh and Others v Minister for Justice and Equality**.

9. At the hearing Mr Adisa submitted the Court of Appeal's decision in **Baigazieva [2018] EWCA Civ 1088**. The Court of Appeal said that this appeal turned on the correct interpretation of Regulation 10(5) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). The Court of Appeal held that the question of interpretation which arises in this case in relation to Regulation 10 of the 2006 Regulations also arises in the same way in relation to Regulation 10 of the 2016 Regulations. In the 2006 Regulations a "qualified person" meant a person who was an EEA national and in the UK as a jobseeker, worker, self-employed person, self-sufficient person or student (see Regulation 6).

10. The Court of Appeal considered the decision in **NA v SSHD [2014] EWCA Civ 995**, which the Court of Appeal referred the following question for a preliminary ruling from the Court of Justice of the European Union ("CJEU"):

> *"Must a third country national ex-spouse of a union citizen be able to show that their former spouse was exercising treaty rights in the host member state at the time of their divorce in order to retain a right of residence under Article 13(2) of Directive 2004/38/EC?"*

11. In giving its preliminary ruling, the CJEU reformulated the question to reflect the precise facts of the case before it, which involved domestic violence, and posed the following question:

> *"… whether Article 13(2)(c) of Directive 2004/38 is to be interpreted as meaning that a third country national, whose divorce from a union citizen at whose hands she has been the victim of domestic violence during the marriage, is entitled to retain her right of residence in the host member state, on the basis of that provision, where the divorce postdates the departure of the union citizen spouse from that member state".*

12. The answer given by the CJEU to that question was that the EU spouse (the qualified person) must reside in the host member state "until the date of the commencement of divorce proceedings" if the third country victim of abuse is to be entitled to rely on Article 13(2)(c) (see paragraphs 50 to 51 of its judgment). The CJEU did not suggest that it was necessary for the EU spouse to reside in the host member state until the divorce itself was granted (in the system of family law in this country, that would be by a court issuing a decree absolute).

13. The Court of Appeal said that the appellant submits that this reasoning must logically extend to her circumstances. She does not claim a history of domestic violence but states that prior to the initiation of the divorce proceedings in her case, the marriage had lasted at least three years, including one year in the host member state; in other words, she invokes sub-paragraph (a) of Article 13(2). She submits

that in her case also it was sufficient to provide evidence that her spouse was a qualified person up until the date of the commencement of divorce proceedings and that it was not necessary to provide evidence of that qualified person's status continuing until the date of the decree absolute.

14. The Secretary of State was satisfied in the case of **NA** that the CJEU's judgment provided sufficient guidance on the correct approach. The Court of Appeal quashed the respondent's decision refusing the applicant's application for a residence permit as a family member with a retained right of residence and ordered the respondent to issue a residence permit to the applicant as a family member with a retained right of residence in the UK.

15. In the light of the Court of Appeal's decision in **Baigazieva**, I find that the judge's decision cannot stand. Indeed, Ms Everett accepted that the judge erred in law in his decision.

16. Ms Everett however argued that there was no evidence that the sponsor was exercising treaty rights at the commencement of the divorce proceedings. She said the judge had issues with the documents provided by the appellant although she accepted that everyone at the hearing was looking at the wrong time.

17. Mr Adisa relied on the copy of the divorce petition which he said was submitted by the appellant's solicitors to the Upper Tribunal and to the respondent under cover of a letter dated 12 September 2018. The divorce petition was issued in the Principal Registry of the Family Division on 5 July 2012.

18. Mr Adisa also relied on copies of documents from HM Revenue & Customs. He indicated that he had the original documents with him.

19. Ms Everett said that because the judge had issues with the appellant's evidence as to how he managed to obtain these documents, I cannot just accept them and that the case needs to go back for rehearing.

20. I accept that the judge had problems accepting the appellant's evidence as to how he obtained these documents. Nevertheless, the documents are from HM Revenue & Customs. The respondent has had these documents for some time and if she had an issue with them, she could have had them verified. She has not done so. Mr Adisa had the originals with him and there was no indication by Ms Everett that she wanted to see them.

21. I am satisfied in spite of the judge's misgivings as to how these documents were obtained, that they are genuine documents and that I can rely on them to determine the appellant's appeal.

22. In light of **NA**, the issue that I have to consider is whether the appellant has provided sufficient evidence that his spouse was a qualified person up until the date of the

commencement of the divorce proceedings. The divorce petition was issued on 5 July 2012.

23. It is apparent from the documents from HM Revenue & Customs that the appellant's EU spouse was a self-employed person. In his statement dated 18 April 2018 the appellant said his ex-wife was a hairdresser. She visited her customers at home to fix their hair. Some of the customers would also come to their home to have their hair done. This evidence was not disputed at the hearing before the First-tier Judge on 1 May 2018.

24. The tax calculation for 2012-13 (year ended 5 April 2013) from HM Revenue & Customs showed that Mrs Rodrigues had a profit of £6,305.00 from self-employment. This tax calculation fell into the time period when the divorce petition was issued.

25. In the light of this evidence, I am satisfied that the appellant was a family member with a retained right of residence in July 2012 when the divorce proceedings were commenced. Therefore, the appellant's appeal against the respondent's decision to remove him from the UK succeeds.

26. The appellant's appeal is allowed.

No anonymity direction is made.

Signed Date: 10 October 2018

Deputy Upper Tribunal Judge Eshun