Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/06422/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15th November 2018	**On 30th November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

KOLAWOLE SHAKIRU SHITTA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Olaogun, Aminu Aminu Solicitors
For the Respondent: Mr T Wilding, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Colvin promulgated on 4th July 2018 dismissing his application for confirmation of a right to a residence card as a family member having retained a right of residence following divorce from a former spouse under

Regulation 10(5) of the Immigration (EEA) Regulations 2016. The Appellant appealed against that decision and was granted permission to appeal by First-tier Tribunal Judge Grant-Hutchison in the following terms:

> "It is arguable that in light of the case of Baigazieva v SSHD [2018] EWCA Civ 1088 that has been handed down since the date of promulgation of the decision, with no disrespect to the Judge, that the evidence that the Appellant had provided may have been sufficient to show that [the] EEA national was exercising Treaty rights when divorce proceedings were commenced".

2. I was not provided with a Rule 24 response from the Respondent but was given the indication that the appeal was resisted.

Error of Law

3. At the close of the hearing I reserved my decision which I shall now give. I do find that there is a material error of law in the decision such that it should be set aside. My reasons for so finding are as follows.

4. As observed by Judge Grant-Hutchison in granting permission to appeal, since the decision of the First-tier Tribunal a relevant judgment of the Court of Appeal given by Lord Justice Singh was handed down on 20th April 2018 wherein the Secretary of State as a party to that appeal sought to clarify her position in respect of the proper manner in which the question of when the assessment of a retained right of residence should be made under Regulation 10(5) of the Immigration (EEA) Regulations 2016 (hereafter "EEA Regulations").

5. I have read [11] to [18] of *Baigazieva* with particular care and it is plain from [12] to [14] that, as Lord Justice Singh observes, the Secretary of State has confirmed that there is a distinction drawn from the CJEU's judgment (arising from a reference made in the matter of *NA v Secretary of State for the Home Department* [2014] EWCA Civ 995) between, "first, the point at which the right of residence is retained, and secondly, the criteria to be met for that to happen". As is stated at [14] of *Baigazieva*, the reference in Regulation 10(5)(a) to a family member's status ceasing "on the termination of the marriage" and the ratio in *Diatta v Land Berlin* (C-267/83 1985 ECR 567) are consistent with [47] to [48] of the CJEU's judgment in *NA* and it is accepted that Article 13(2) of the European Directive of Free Movement does not take effect until the point of divorce, but that does not mean that the third country national had to show that the qualified status of their spouse continued up until that point. As confirmed in [16] of *Baigazieva*, Regulation 10(5) is supposed to represent a faithful transposition of Article 13(2)(a) of the Directive and is purposefully drafted to distinguish between the cessation of family member status at the point of divorce under Regulation 10(5)(a), and the criteria to be met for the right of residence to be retained at that point in terms of Regulation 10(5)(c) with reference to Regulation 10(6). Thus, it is apparent from [12] of the judgment in *Baigazieva* that the Secretary of

State's position is that the point at which the right to reside is retained pursuant to Article 13(2) is the initiation or commencement of divorce proceedings; and secondly, the criteria to be met for the retention of that right are to be seen in paragraphs (a) to (d) of Article 13(2) of the Directive.

6. Thus, in that light it is apparent that the First-tier Tribunal has erred in considering whether the Appellant is able to show that he himself was a worker or self-employed person or otherwise qualified after the initiation of divorce proceedings. As far as I read Article 13(1) and 13(2)(a) to (d) in light of the judgment of *Baigazieva*, any court or tribunal considering this matter will be concerned with whether an applicant or appellant is able to meet sub-paragraphs (a) to (d) of Article 13(2) when divorce proceedings commenced or at the point of divorce (i.e. decree absolute).

7. Thus, given that the First-tier Tribunal's analysis is largely concerned with the years following the Appellant's divorce proceedings, that is an assessment that is not entirely relevant when considering whether the Appellant has retained his right of residence and thus the decision suffers from material error by taking irrelevant evidence into when assessing whether the right was retained under Article 13(2)(a) to (d) of the Directive.

8. Mr Olaogun was keen to highlight that page 25 of the Appellant's bundle before the First-tier Tribunal contained a letter from HMRC dated 2nd May 2018 which showed that the relevant branch of Government had confirmed the Appellant's employment history which, according to the start and end dates, certainly covered the period during which the divorce proceedings were commenced. Mr Olaogun further highlighted that there was a payslip for the relevant month in which the divorce proceedings began, namely October 2015 and he also pointed out that at page 42 of the Appellant's bundle a payslip existed which reflected the Appellant had worked the very month in which the divorce was concluded.

9. Thus, in light of the above findings, I find that there is a material error of law in the decision such that it should be set aside.

10. However, I am unable to remake this decision as the Respondent must have the opportunity of testing the evidence on these issues if he is so advised and given that the matter requires the evidence to be heard *de novo*.

Notice of Decision

11. The appeal to the Upper Tribunal is allowed.

12. The decision of the First-tier Tribunal is hereby set aside and this appeal is to be remitted to be heard by a differently constituted bench.

13. I make the following directions in respect of the further remitted appeal hearing that is to take place before the First-tier Tribunal.

Directions

(i) The appeal is to be remitted to IAC Taylor House.

(ii) No interpreter is required.

(iii) One witness is apparently to be called.

(iv) Time estimate given is two hours.

(v) No special directions have been requested by either party.

(vi) I do not make an anonymity direction as one is not appropriate or called for.

Signed Date

Deputy Upper Tribunal Judge Saini 25 November 2018