Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03950/2015

THE IMMIGRATION ACTS

Heard at Field House **On 4th December 2017** **Signed, corrected and sent to Promulgation on 12th January 2018.**	**Decision & Reasons Promulgated** **On 15 January 2018**

Before

Upper Tribunal Judge Chalkley

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS OLUBUKOLA AFOLABI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: *Mr T Wilding, Home Office Presenting Officer*
For the Respondent: *Mr O Ngwuocha, instructed by Carl Martin Solicitors*

DECISION AND REASONS

1. In this appeal the Secretary of State is the appellant and to avoid confusion I refer to her throughout as being, "the claimant".

2. The respondent is a citizen of Nigeria, who was born on 24th December 1973.

3. On 8th December 2016, the claimant refused the respondent's application for a residence card as evidence of a retained right of residence in the United Kingdom as the former spouse of [LM], a Polish national exercising treaty rights in the United Kingdom.

4. The respondent entered the United Kingdom on 19th July 2003 and was in possession of a student visa valid between 11th June 2003 and 31st August 2004. Thereafter, the respondent obtained successive extensions of her student leave until 30th April 2010.

5. On 15th May 2010, the respondent married [LM] ("the appellant's former spouse") in the United Kingdom and on 18th February 2011, she was granted an EEA residence card valid until 18th February 2016.

6. Sadly, on 15th May 2014, the respondent was granted a decree absolute of divorce in proceedings numbered [ ] before the Central Family Court. On or about 21st April 2015, the respondent made the application giving rise to her appeal. The application was refused on 8th December 2015, when a decision was also made to revoke the residence card granted on 18th February 2011, with reference to Regulation 20(2) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations").

7. Following representations from the respondent's solicitors the revocation of the respondent's residence card decision was revised and the respondent was subsequently issued with a residence card valid between 30th August 2016 and 30th August 2021.

8. Having heard evidence and submissions, First-tier Tribunal Judge M Hembrough noted correspondence in the respondent's bundle which included an HMRC self assessment income tax statement dated April 2014, which showed that the former sponsor had made a payment towards an outstanding balance on 11th April, 2014. There was also an HMRC statement in relation to the former sponsor's self-employed class 2 NIC contributions dated 14th December 2014, showing a payment due of £74.25. An income tax calculation for the year ended 5th April 2015, showed that the former sponsor had declared taxable income of £7,822 in that year which straggles the point of divorce. The judge found at paragraph 16 of the determination that she was satisfied to the requisite standard that the former spouse had been exercising EEA treaty rights as at the point of divorce. The divorce was on 15th May 2014.

9. At paragraph 17 of the determination the judge went on to say that for the avoidance of doubt she also recorded that the respondent had presented P60s in her own name for the years 2014 to 2016 and other correspondence which showed that she was economically active in each of those years. The judge found herself satisfied that the respondent met the requirements of Regulation 10(6) and allowed the appeal.

10. Dissatisfied with the judge's decision, the claimant applied for permission to appeal which was granted. The basis of the application was that the First-tier Tribunal

Judge had allowed the appeal on the misunderstanding about what the appeal concerned. The judge had restricted herself only to making findings on whether the respondent's former spouse was exercising treaty rights as at the date of divorce. However, the grounds point out that this was not in dispute and the respondent has a residence card valid until 2021 recognising her retained right of residence. However, the application was made and the subsequent refusal by the claimant was in respect of permanent residence. In the refusal letter of 8th December 2016, the claimant indicated that she had not been provided with any evidence of the respondent's former spouse exercising treaty rights between 2010 and 2012 and the judge had not made any findings on the central issue, despite highlighting the issue in paragraph 8 of the determination. The respondent's representative told me that it was not necessary for the Immigration Judge to make a finding on whether or not the former spouse was exercising treaty rights in 2012.

11. Relying on the grounds of appeal, Mr Wilding reminded me that the hearing before the First-tier Tribunal was in March 2017. At that time the respondent was required to show a five year period before the hearing when the former spouse had been exercising treaty rights. The judge had made no findings at all on any five year period, simply a finding in respect of 2014 when the parties divorced. There was no finding as to the period before April 2014 as to the spouse's status. The evidence purported to cover the period 2012/2013 and 2013/2014. There was no evidence to cover the period 2010/011 or 2011/2012. The appeal was on recognition of permanent residence, but the judge had failed to understand and appreciate this.

12. For the respondent, Mr Ngwuocha submitted that the point made by the claimant was considered by the judge, because the bundle of evidence before the judge contained evidence that the respondent's former spouse was exercising treaty rights in May 2014. Going back there was no dispute as to the evidence provided as to the tax years 2012/2013 and 2013/2014. The judge considered the evidence in paragraphs 15, 16 and 17 of the determination. At pages 16, 17 and 18 of the respondent's bundle there was clear evidence that her former spouse was exercising treaty rights. There was a letter dated 14 December 2014 from HM Revenue and Customs addressed to him requesting payment of £74.25. It was said to be in respect of his liability to pay tax for the period 6th April 2014 to 11th October 2014. At page 17 was a self-assessment statement addressed to the former spouse dated April 2014 and it referred to a payment being made by him of income tax on 11th April 2014. It also showed a 30 days' late penalty for 2012/2013 of £49 and at page 18 of the respondent's bundle is a self-assessment statement dated March 2014 addressed to the former spouse showing a payment made by him on 27th November 2013, of £100 and a balance remaining for the year 2012/13 of £978.79. The fact that the former sponsor was registered as being self-employed as evidenced by these documents clearly indicates, Mr Ngwuocha submitted, that the former spouse was exercising treaty rights. As long as he was always registered as being self-employed and in the United Kingdom it follows, he submitted, that he must have been exercising treaty rights.

13. Responding briefly, Mr Wilding suggested that this submission cannot be correct. What the respondent has to show is a continuous period of five years during which her former spouse has been exercising treaty rights. The judge in the judge's determination did not consider this issue at all. The five year period in question could be any five year period and it could be the period ending on the date of the hearing before the First-tier Tribunal. What the judge looked at was payments made in 2014. The fact that a tax return has been made in a particular period does not necessarily mean that the subject of the tax return is still exercising treaty rights and that is the issue which this judge failed to grapple with and which the respondent has failed to prove. I reserved my decision.

14. The judge noted the Reasons for Refusal Letter which in the material section is as follows:-

> "You have submitted three HMRC tax calculations on various NIC statements for [LM] covering the financial years 2009/10, 2012/13 and 2013/14.
>
> However, as you have provided no evidence to demonstrate how [LM] was exercising treaty rights during the years 2010/11 and 2011/12. You have failed to show that your EEA national former spouse was continuing to exercise free movement rights up to the point of divorce."

15. The judge was clearly satisfied on the evidence that the respondent's former spouse was continuing to exercise free movements up to the point of divorce but failed to appreciate that the respondent was required to show a full five year period during which the former spouse was exercising free movement rights.

16. I am afraid I disagree with the suggestion made by the respondent's solicitor that if someone is registered with HMRC as being self-employed and in the United Kingdom, then they are exercising treaty rights. It is possible, for example, for someone to have registered during a particular tax year as being self-employed but to have given up their self-employment because they were simply not earning sufficient money, but still to be registered as self-employed. They may then have become an employee, they may then have become a jobseeker, but without evidence that they were actually continuing with the self-employment, one can only speculate how they were exercising treaty rights. The determination does contain a void and for that reason is defective.

17. The judge fell into error. **As a result, I set aside the judge's determination.** Unfortunately, there is a lack of evidence showing a complete five year period during which the respondent's former spouse was exercising treaty rights. I have decided to remake the decision myself. I find that the respondent has failed to discharge the burden of proof upon her and her appeal is dismissed.

Notice of Decision

The appeal is dismissed.

Anonymity

No anonymity direction is made.

Richard Chalkley
Upper Tribunal Judge Chalkley

TO THE RESPONDENT
FEE AWARD

There is no fee award.

Richard Chalkley
Upper Tribunal Judge Chalkley