IAC-FH-KH-V2

Upper Tribunal
(Immigration and Asylum Chamber)

Idezuna (EEA - permanent residence) Nigeria [2011] UKUT 00474 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 27 October 2011	.....

Before

UPPER TRIBUNAL JUDGE STOREY

UPPER TRIBUNAL JUDGE P D KING

Between

IZA TOM IDEZUNA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: In person

For the Respondent: Ms M Tanner, Home Office Presenting Officer

1) Typically, the focus in EEA appeals involving family members is on either or both (i) the nature of the relationship with the EEA national/Union citizen; and (ii) the question of whether the EEA national/Union citizen has been exercising Treaty rights in the UK over the relevant period. What constitutes the relevant period, however, may be a matter requiring particular consideration and sometimes a family member may have acquired a right of permanent residence on the basis of historical facts. In the present case, for example, once the appellant had established that his wife was exercising Treaty rights for five continuous years since the date of marriage (and before he was divorced), then (subject to (d) below) he was from that date someone who had a right of permanent residence which could not be broken by absence from the UK unless in excess of two years.

2) Continuous residence in the UK of the applicant/appellant family member is an essential requirement for proving permanent residence: see regulation 15(1)(b) of the Immigration (European Economic Area) Regulations 2006 and Article 16(2) of Directive 2004/38/EC).

3) Whilst often it may not be in dispute that the applicant/appellant family member has been in the UK during the relevant period, that is not something that can be taken for granted and it may sometimes become necessary on appeal for the tribunal judge to make a finding on the matter based on the evidence. If it has not previously been raised by the respondent, however, procedural fairness dictates that an appellant must be afforded a proper opportunity to deal with the issue.

4) When assessing whether the applicant/appellant family member has resided in the UK continuously for the purposes of qualifying for permanent residence, it must be recalled that regulation 3(2) of the 2006 Regulations provides that continuity of residence is not affected by (a) periods of absence from the United Kingdom which do not exceed six months in total in any year; (b) periods of absence from the United Kingdom on military service; or (c) any one absence from the United Kingdom not exceeding twelve months for an important reason such as pregnancy, childbirth, serious illness, study or vocational training or an overseas posting (Article 16(3) of the Directive is to similar effect).

5) Once a right of permanent residence has been acquired, it can be lost only through the absence from the host Member State "for a period exceeding two consecutive years" (regulation 15(2) of the 2006 Regulations; Article 16(4) of the Directive).

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria. On 23 April 2004 he had married a Portuguese citizen, Ms DN, and had been issued with a residence card upon marriage as a family member of an EEA national, which expired on 13 September 2009. The couple were divorced on 15 March 2010. Shortly after, on 18 May 2010, the appellant applied for a residence card as confirmation of his right to reside permanently in the UK. The respondent refused that application on 15 November 2010 on the basis that there was a lack of evidence to show either (i) that the appellant's ex-spouse was exercising Treaty rights on the termination of the marriage, contrary to regulation 10(5)(a) and (6) of the Immigration (European Economic Area) Regulations 2006 (as would be necessary for him to qualify for a retained right of residence); or (ii) that he had resided in accordance with those Regulations for a continuous period of five years (as would be necessary for him to qualify for permanent residence under regulation15(1)(f)). The appellant appealed. In a determination notified following a hearing on 4 January 2011 the First-tier Tribunal (Immigration Judge Herlihy) dismissed his appeal against the respondent's decision. The IJ considered the appellant could not qualify because it had not been shown that the appellant's ex-spouse was exercising Treaty rights in the 5 years immediately preceding the divorce. The IJ also concluded that the appellant had not shown that he lived in the UK continuously since the marriage. The appellant was successful in obtaining a grant of permission.

2. In a decision dated 30 September 2010 the Upper Tribunal Judge (Judge Storey) decided that the First-tier Tribunal had materially erred in law and its decision was to be set aside. The IJ had been wrong to have focused exclusively on the appellant's circumstances in the five years immediately preceding his divorce (i.e. between 15 March 2005 and 15 March 2010) and had wrongly considered therefore that he could only show he qualified for permanent residence if able to establish that he had acquired a retained right of residence. The IJ had failed to recognise that the appellant's ex-spouse had been in the UK exercising Treaty rights unbrokenly from the date of the marriage until the date of divorce (para 8.5) which was a period longer than five years. Following the Court of Justice ruling in Lassal (European citizenship) [2010] C-162/09 (07 October 2010) the IJ should have identified periods capable of qualifying a person for a right of permanent residence under Directive 2004/38/EC as including periods commencing before 30 April 2006, when the Directive entered into force. That being the case, the appellant had acquired a right of permanent residence on 23 April 2009, i.e. five years

after the couple had married. It was accepted that during that period the appellant's then spouse was in the UK exercising Treaty rights continuously. It was not necessary for the couple to establish that during this period they were cohabiting, only that both were present in the UK: see PM (EEA - spouse -"residing with") Turkey [2011] UKUT 90 (IAC). Hence the IJ should have recognised that the appellant had an alternative route for qualifying for permanent residence separate from whether he met the requirements for a retained right of residence.

3. We turn to a matter not dealt with in the set-aside decision. On further analysis it seems to us that there was a further error on the part of the First-tier Tribunal. The IJ appears to have dismissed the appeal for the additional reason that the appellant had not shown he was continuously present in the UK, yet had not afforded him any opportunity to address this additional point.

4. Having set aside the First-tier Tribunal decision, UTJ Storey decided it was not possible to remake the decision there and then as the Tribunal lacked evidence to establish whether or not, in addition to meeting the above requirements (relating to the exercise by the ex-spouse of Treaty rights for five continuous years from the date of marriage), the appellant could show that during the relevant period he had himself been continuously present in the UK and in fairness he had to be afforded an opportunity to address the matter.

5. At the hearing the appellant gave evidence. He said that he had stayed in the UK continuously from the date of his marriage until the date of his divorce, except for two short periods in 2006, one in October when he travelled to the Netherlands and the other between 29 October and 17 December when he went back to Nigeria on the death of his father. In support of his oral evidence he produced his Nigerian passport covering the relevant period which showed stamps confirming his claimed periods of absence. He also produced a large lever arch file of documents relating to his presence in the UK during the period from March 2003 until the present. It included a tenancy agreement, bank accounts, credit card statements, telephone bills, Inland Revenue documents (including P60s) and a number of documents relating to courses of study. It is unnecessary to summarise the file's contents any further because having perused it Ms Tanner said that the respondent now fully accepted that the appellant had established continuous presence in the UK over the relevant period and that she no longer opposed the appellant's appeal.

6. In light of this concession it unnecessary for us to say anything more about the appellant's particular case, other than we are satisfied that on 23 April 2009 he had acquired a permanent right of residence and he has not since that date been absent from the UK for any period such as could disentitle him to that right. Accordingly, the respondent should have responded to his 15 November 2010 application by confirming that he had acquired a permanent right of residence under regulation 15(1)(b). This provision reads as follows:

"15(1) The following persons shall acquire the right to reside in the UK permanently –

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

(b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with those Regulations for a continuous period of five years."

7. Regulation 15(2) states that: “Once acquired, the right of permanent residence under this regulation shall be lost only through absence from the United Kingdom for a period exceeding two years”.

8. Given the issues that arose during this appeal, it may assist if we add the following general observations:

(a)
Typically, the focus in EEA appeals involving family members is on either or both (i) the nature of the relationship with the EEA national/Union citizen; and (ii) the question of whether the EEA national/ Union citizen has been exercising Treaty right in the UK over the relevant period. As can be seen from the facts of this case, however, what constitutes the relevant period may be a matter requiring particular consideration. It needs to be borne in mind that sometimes a family member may have acquired a right of permanent residence on the basis of historical facts. In the present case, for example, once the appellant had established that his wife was exercising Treaty rights for five continuous years since the date of marriage (and before he was divorced), then (subject to (d) below) he was from that date someone who had a right of permanent residence which could not be broken by absence from the UK unless in excess of two years.

(b)
Continuous residence in the UK of the applicant/appellant family member is also an essential requirement for proving permanent residence under the 2006 Regulations, as is clear from the wording of regulation 15(1)(b) which requires that to acquire such a right a family member must have “resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years”. In a similar vein, Article 16(2) of Directive 2004/38/EC extends the right of permanent residence to ”family members who are not nationals of a Member State and have legally resided with the Union citizen in the host state for a continuous period of five years.”

(c)
Whilst often it may not be in dispute that the applicant/appellant family member has been in the UK during the relevant period, that is not something which can be taken for granted and it may sometimes become necessary on appeal for the tribunal judge to make a finding on the matter based on the evidence. However, if, as here, it has not previously been raised by the respondent, then procedural fairness dictates that an appellant must be afforded a proper opportunity to deal with the issue. In this case, having found the IJ materially erred in law, the Tribunal put the appellant on notice of the need to produce evidence relating to his residence in the UK and, as we have seen, the evidence he produced in response more than sufficed to persuade the respondent to concede the appeal.

(d)
Further, when assessing whether the applicant/appellant family member has resided in the UK continuously for the purposes of qualifying for permanent residence, it must be recalled that regulation 3(2) of the 2006 Regulations provides that continuity of residence is not affected by (a) periods of absence from the United Kingdom which do not exceed six months in total in any year; (b) periods of absence from the United Kingdom on military service; or (c) any one absence from the United Kingdom not exceeding twelve months for an important reason such as pregnancy, childbirth, serious illness, study or vocational training or an overseas posting. Article 16(3) of the Directive is to similar effect. Hence in the instant case the fact that there was nothing on the face of the evidence

which suggested that the appellant had had a period of absence anywhere near six months long made the IJ's decision to query the matter on his own initiative even more curious.

(e)
Finally, once a right of permanent residence has been acquired, it can be lost only through the absence from the host Member State "for a period exceeding two consecutive years" (regulation 15(2) of the 2006 Regulations; Article 16(4) of the Directive).

9. For the above reasons the First-tier Tribunal materially erred in law and its decision is set aside.

10. The decision we re-make is to allow the appellant's appeal.

Signed

Upper Tribunal Judge Storey

Immigration and Asylum Chamber