



IAC-BFD- MD

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/47365/2014

**THE IMMIGRATION ACTS**

**Heard at Bradford  
On 12<sup>th</sup> August 2015**

**Decision & Reasons Promulgated  
On 8<sup>th</sup> September 2015**

**Before**

**UPPER TRIBUNAL JUDGE ROBERTS**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**MR EZENWA CHRISTOPHER NJOKU  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mrs R Pettersen, Home Office Presenting Officer  
For the Respondent: Miss R Pickering of Counsel, instructed by Sheffield  
Citizens Advice

**DECISION AND REASONS**

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Judge Ince) promulgated on 13<sup>th</sup> April 2014 in which it allowed the appeal of Ezenwa Christopher Njoku against the Secretary of State's refusal to grant him permanent residence in the UK, under Regulation 15(1)(b) of the EEA Regulations 2006.
2. For the purposes of this decision, I shall refer to the Secretary of State as "the Respondent" and Mr Njoku as "the Appellant", which reflects their respective positions before the FtT.

3. The chronology setting out the background facts to this matter is unchallenged and I set out here the relevant findings extracted from Judge Ince's decision.

"The Appellant was born on 9 April 1973 in Nigeria – he is now aged 41 years old. He arrived in the UK on 22 April 2003.

His future wife, Oghogho Ugokwe (the Sponsor), born in Nigeria but then, and now, an Austrian national, arrived in the UK on 16 March 2003. The Respondent has accepted that she has been exercising treaty rights in the UK as an employed person since then.

The couple began living together in early 2008. Southern Electricity gas bills, addressed to them as joint account holders at the same address, show that they were cohabiting from at least 28 July 2008. Furthermore, they made an enquiry at the Sheffield Registry Office regarding marriage and received a written reply, a letter addressed to them at the same address dated 16 September 2008. I pause there to note that in his evidence to me the Appellant stated that in fact they began living together in 2007 but had no documentation to demonstrate this.

On 13 August 2009 the couple were married according to a customary traditional ceremony in Benin City in Nigeria.

In 2010 the Appellant applied for a Residence Card as the unmarried partner of an EEA national, the customary Nigerian marriage not being accepted as a valid marriage. That application was granted and the Appellant was issued with a Residence card as the unmarried partner of an EEA national on 3 August 2010."

Judge Ince then records that he heard submissions from both representatives. Miss Pickering (who also represented the Appellant before the FtT) referred him to the case of *Idezuna (EEA – permanent residence) Nigeria* [2011] UKUT 00474 (IAC).

4. The Judge then noted at [23],

"In particular, Ms Pickering argued that the issuing of the Residence Card in August 2010 was evidence of a right that already existed under EEA law and the case of **Idezuna** confirmed that a person can acquire as right of residence on the basis of historical fact."

5. Before analysing the evidence submitted to him, he noted two other issues which were raised and discounted.

- that the Appellant and his Sponsor had been lawfully married since 2009 on the basis of a Nigerian customary marriage. He declined to make a finding on that matter.
- the Appellant and his Sponsor had now separated and are estranged but so far have not divorced. That remains the present position.

As far as the Judge was aware, at the date of the hearing before him, the Sponsor continued to exercise Treaty rights as an employed person.

6. Judge Ince allowed the appeal on this basis. As the Appellant had been granted a Residence Card as the unmarried partner of an EEA national on

3<sup>rd</sup> August 2010, this must mean that it was accepted by the Respondent that the Appellant and his Sponsor had been cohabiting as unmarried partners since at least, the 3<sup>rd</sup> August 2008 (2 year qualifying period for grant of a residence card). He decided therefore that the 3<sup>rd</sup> August 2008 could be historically factored in to Regulation 15(1) (b), even though the Appellant's residence card was only issued in August 2010. He concluded that the 'five year period' required for permanent residence would be met by 3<sup>rd</sup> August 2013. He allowed the appeal.

7. Permission to appeal against Judge Ince's decision was granted on 10<sup>th</sup> June 2015.

### **The UT Hearing**

8. Before me Mrs Pettersen in her submissions kept chiefly to the lines of the grounds seeking permission. She expanded those only to emphasise that the Judge had applied the wrong test in concluding as he did that the start date for cohabitation was the point from which the 5 year qualifying period ran. This is not what the regulation says.
9. Miss Pickering responded by rehearsing the arguments she raised before Judge Ince. She relied upon *Idezuna* for the proposition that the qualifying period of five years mentioned in Regulation 15(1)(b) could be based on historical facts and therefore the clock started to run in this Appellant's case from the commencement of co-habitation between the parties and not as Respondent asserts from August 2010 when he was issued with his Residence Card. She submitted that the FtT had not erred and the decision allowing the Appellant's appeal should stand.
10. Both parties were in agreement that this matter involved the construction of "family member" within Regulation 15(1)(b). Both also agreed that should I find the Judge had erred I would be in a position to remake the decision.

### **Consideration: Has the Judge Erred?**

11. I am satisfied that Judge Ince's decision discloses an error of law, such that it must be set aside and the decision remade.
12. I find that the Judge was wrong on two counts.
  - (i) To conclude that the period of co-habitation prior to the grant of the Residence Card in 2010 counted towards the five year qualifying period for permanent residence.
  - (ii) The reliance placed on *Idezuna* was misconceived.
13. The relevant provisions in Regulation 15 read as follows:
 

**"15.—(1)** The following persons shall acquire the right to reside in the United Kingdom 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 these Regulations for a continuous period of five years;"

14. What constitutes a "Family member" is found in Regulation 7 of the 2006 Regulations.

**"7.—(1)** Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person—

(a) his spouse or his civil partner;

(b) direct descendants of his, his spouse or his civil partner who are—

(i) under 21; or

(ii) dependants of his, his spouse or his civil partner;

(c) dependant direct relatives in his ascending line or that of his spouse or his civil partner;

(d) a person who is to be treated as the family member of that other person under paragraph (3).

(2) A person shall not be treated under paragraph (1)(b) or (c) as the family member of a student residing in the United Kingdom after the period of three months beginning on the date on which the student is admitted to the United Kingdom unless—

(a) in the case of paragraph (b), the person is the dependent child of the student or of his spouse or civil partner; or

(b) the student also falls within one of the other categories of qualified persons mentioned in regulation 6(1).

(3) Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked.

(4) Where the relevant EEA national is a student, the extended family member shall only be treated as the family member of that national under paragraph (3) if either the EEA family permit was issued under regulation 12(2), the registration certificate was issued under regulation 16(5) or the residence card was issued under regulation 17(4)."

15. I find that Regulation 7 paragraph 3 quite clearly states that in order to be treated as a family member, an extended family member is someone who has been issued (my emphasis) with an EEA Family Permit, a Registration Certificate or Residence Card. There is an additional proviso which says that such a person will only be treated as a family member for as long he continues to satisfy the conditions in Regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked. That signifies to me the issue of the Residence card is the start date in the process of acquiring permanent residency. Therefore in this Appellant's case the clock starts to run from August 2010. Of course, any other conditions, necessary to a grant of permanent residence will also have to be met. For that to happen the Respondent will no doubt need to make the relevant enquiries and be satisfied those conditions are met.
16. That should be sufficient to dispose of this matter but it is correct that reliance was also placed on the case of *Idezuna*. Whilst I accept that *Idezuna* is good law for the proposition that historical facts maybe included when assessing what amounts to a continuous period of five years within Regulation 15, it does not say that historical facts can be looked at 'in isolation' from the rest of Regulation 15. In *Idezuna* the appeal revolved around what constituted the 5 year qualifying period after the issue of the residence card (on marriage). Nowhere does it say that historical facts can count as qualifying time **before** the issue of a residence card.
17. For the foregoing reasons, I find that the decision of Judge Ince contains an error of law such that the FtT's decision must be set aside and remade.

### **Decision**

18. The appeal of the Secretary of State is allowed. I substitute the following decision. The appeal of Mr Ezenwa Christopher Njoku against the Secretary of State's refusal to issue a permanent Residence Card under the EEA Regulations 2006 is dismissed.

No anonymity direction is made

**Signature**

**Dated**

Judge of the Upper Tribunal

### **Fee Award**

I have dismissed the original appeal and upheld the Secretary of States appeal there can be no fee award to Mr Njoku.

**Signature**

**Dated**

Judge of the Upper Tribunal