



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/00424/2016

THE IMMIGRATION ACTS

Heard at Field House
On 2 July 2018

Decision & Reasons Promulgated
On 13 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

MUHAMMAD KHALID

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R. Jesuram of Counsel instructed by DJ Webb & Co.,
Solicitors

For the Respondent: Ms J. Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistani who was born on 21 April 1980. He appeals against the determination of First-tier Tribunal Judge Cassel promulgated on 17 July 2017 dismissing his appeal. The judge describes the decision as a refusal of a residence card and goes on, in paragraph 1 of the determination to make reference to reg.10 (5) of the Immigration (European Economic Area) Regulations 2006.
2. In paragraph 2 of the determination, the judge stated:

He was told that in order to meet the requirements of reg. 10(6), he also needed to provide evidence that since the date of his divorce he had been a worker, a self-employed person or a self-sufficient person and a decision to refuse his application was made under reg. 15 (1) (f) with reference to reg. 10 (5).

3. In appearing to elide the terms of reg. 10 (a retained right of residence) and the terms of reg. 15 (a permanent right of residence), the judge appears to have misunderstood the nature of the appeals that he had before him. That amounted to an error of law.
4. It would have been helpful if the judge had set out the relevant regulations in which event he would have immediately seen that a retained right of residence is quite distinct from a permanent right of residence. A retained right of residence has nothing to do with the requirements of reg. 15 and the requirement to have spent five years in the United Kingdom either in the capacity of a qualified person, as defined, or as a dependent spouse of such a person. In contrast, a permanent right of residence is a distinct right acquired by a 5-year presence in the UK (albeit the relevant period may include a period spent as the beneficiary of a retained right of residence).
5. Reg. 10 (5) and (6) set out the requirements for a retained right of residence notwithstanding the fact that the claimant is no longer, after his divorce from a Union citizen, able to rely upon her exercise of Treaty rights as the means of remaining lawfully within the United Kingdom:

“Family member who has retained the right of residence”

10. – (1) In these Regulations, “family member who has retained the right of residence” means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).

(5) A person satisfies the conditions in this paragraph if –

(a) he ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person;

(b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;

(c) he satisfies the condition in paragraph (6); and

(d) either –

(i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

(6) The condition in this paragraph is that the person –

(a) is not an EEA national but would, if he were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6;

6. In contrast, reg. 15 sets out the requirements for a permanent right of residence crystallising in a state of permanency the right of residence that the spouse of a Union citizen acquires after five years lawful EU presence in the United Kingdom:

Permanent right of residence

15. –(1) The following persons shall acquire the right to reside in the United Kingdom permanently –

(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;

(f) a person who –

(i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and

(ii) was, at the end of that period, a family member who has retained the right of residence.

Note that the 5-year period may include a period during which the claimant enjoyed a retained right of residence.

7. The omission in drawing this distinction led the First-tier Tribunal Judge's failure to recognise that the appeal before him contained two distinct appeals, each being satisfied by different criteria or requirements.
8. Sight of the two decision letters each dated 22 December 2015 makes it clear that the Secretary of State drew the proper distinction although, regrettably, one of the decision letters contains at least one passage which may have caused confusion. The longer of the two decision letters refers expressly to the appellant's application to be recognised as a person who qualified for a retained right of residence following his divorce from a Union citizen in accordance with reg. 10 (5) of the 2006 Regulations. It was accepted that the applicant had produced a decree absolute determining his marriage on 5 May 2015. No issue was made that the marriage had lasted for three years and that 12 months of that period had been spent residing in the United Kingdom. It remains common ground that the appellant was married to a Romanian citizen on 31 August 2011.
9. The reg. 10 decision records (page 2 of 5) that the appellant had provided evidence of his wife's employment in the form of P 60s for the years 2013, 2014 and 2015 but had failed to provide evidence of her employment from 1 April 2012 to 31 March 2013, although a P60 had been provided. The focus of an application under reg. 10, however, is whether the appellant's wife was exercising treaty rights at the date of divorce, 5 May 2015. The decision letter went on to consider the requirement of reg. 10 (6) that the appellant needed to provide evidence that, since the date of his divorce, the appellant had been a qualified person. In fact, as we have seen, the requirement of reg. 10 (6) is

somewhat different: *'is not an EEA national but would, if he were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6'*.

10. The decision-maker then goes on to make the further misleading elision between regs. 10 (5) and 15 by saying

You have failed to provide evidence that you meet the requirements of regulation 10 (5) and you have therefore not retained the right of residence following divorce, or that you have resided under the regulations for five continuous years to qualify for permanent residence. Therefore it has been decided to refuse to issue the confirmation that you seek under regulation 15 (1) (f), with reference to regulation 10 (5).

11. As I have said earlier, this fails to appreciate that there were two different applications and in a decision which was expressly made under reg. 10 (5), an application for a retained right of residence, any reference to an application for a permanent right of residence had no place. Indeed, by a separate decision entitled a refusal to issue a permanent residence card also dated 22 December 2015 the decision-maker stated that in December 2015 the appellant had failed to establish that he had resided in the United Kingdom with the EEA national in accordance with the 2006 regulations for a continuous period of five years.
12. Given that the appellant was married to his spouse on 31 August 2011, it was indeed correct that the appellant did not qualify for a permanent right of residence at the date of the decision made by the Secretary of State. However, when the appeal came before the First-tier Tribunal Judge on 29 June 2017 a period of five years had indeed elapsed since the marriage and it was then necessary for the judge to consider whether during any period of the marriage the appellant had acquired a permanent right of residence either as the dependent of his spouse or in his own right as a qualified person with a retained right of residence or a combination of the two.
13. The difficulties presented with the determination of the First-tier Tribunal stem from the judge's failure to draw the distinction between the two applications. Furthermore, whilst Mr Chaudhry, on behalf of the Secretary of State, pointed out that there were no original payslips that covered 5 May 2015, this was in error as there was such a payslip. He also pointed out that there were no bank statements showing payments into the account. However, it is not a requirement of the regulations that a bank statement was required. If, by the production of payslips and P60s the relevant employment is demonstrated, that is an end of the matter. In my judgement, Mr Chaudhry was simply wrong in submitting that little weight should be given to the payslips without any supporting information, presumably in the form of bank statements showing the receipt of income. Unless it was suggested that the relevant payslips and P60s were forgeries (presumably requiring the issue of deceit to be put to the appellant in cross examination) there was little reason to doubt the authenticity of the payslips. Of course, payslips may be forged but so too, banknotes. That

is not generally a reason to refuse a banknote unless there is some other reason for doing so. The First-tier Tribunal Judge does not appear to have considered whether he could properly reject the authenticity of the payslips (the "originals" of which were produced to him).

14. The judge rejected the appeal notwithstanding the wage slips and p 60s because there was "*no evidence that it relates to genuine employment on the part of the sponsor at the time of their divorce in May 2015*".
15. I have seen the relevant P 60s and payslips and have considered the evidence provided by the appellant that he had managed to obtain these documents from his former mother-in-law who had supplied them to him but had felt that she could not provide bank statements demonstrating the contents of her daughter's bank account without compromising her privacy. Doubtless, there may have been applications that the appellant might have made for a witness summons or for an order that the HMRC produce documentation. Accordingly, it is undoubtedly the case that further evidence might have been obtained using procedural measures available under the Rules. However, the issue before the judge was whether the material that had been produced and the evidence of the appellant as to its provenance could properly be rejected without adverse credibility findings, none of which were made. The internal evidence of the payslips contains no suggestion that they were inauthentic.
16. In the Immigration *pro forma* (the ECD.3138) it is recorded that the appellant applied for a residence card on 5 September 2011. The application was refused but his appeal against that decision was allowed on 12 March 2012. Given the apparent acceptance that the appellant was married on 31 August 2011, it is possible to infer that this First-tier Tribunal judge was satisfied this was a genuine marriage and that his spouse was exercising Treaty rights, at least at the date the appeal was allowed. The result must have been that the appellant was granted with a residence card in accordance with the judgment.
17. Thereafter, the bundle before the First-tier Tribunal Judge in the appeal before me contains payslips which cover the uninterrupted period from 30 April 2012 to 31 May 2015. It would have been a formidable task for a forger to create the sequence of these documents, making appropriate calculations for total pay, taxable pay, NI contributions from employer and employee, deductions for tax, NI, gross pay, net pay, applying a stated tax code, [pages 30 to 69]. Each of the 39 pages would then have to be carried over to the next with adjustments to the cumulative totals. Relevant P60s cover the period 5 April 2012 to 5 April 2015, [pages 57, 44 and 29]. There were tax returns and, at p.90, a document from HMRC.
18. In the circumstances I am satisfied that the reasoning of the First-tier Tribunal Judge discloses an error of law and I set aside the determination.

19. Properly, Ms Isherwood did not suggest that the relevant payslips were forgeries or that there was not evidence that covered the appellant's wife's employment on 5 May 2015. Looking at the totality of the evidence in support of the appellant's claim that his wife was employed continuously until the date of divorce and, absent any suggestion that the entirety of this documentation was a forgery, it is not permissible to reject the material as unreliable. It is nothing to the point that other evidence might have been provided. Accordingly, the only live issue before the first-tier Tribunal and for me in relation to regs. 10 (5) and 10(6) is whether the appellant established on balance of probabilities that his wife was working on 5 May 2015. I am satisfied that she was. The appeal is accordingly allowed under reg. 10 (5).
20. This has a positive impact upon his claim under reg.15. The appellant is able to rely upon the previous determination and the continuous record of employment of his spouse to cover the period 31 August 2011 to 5 May 2015, a period of less than four years. Thereafter, he was entitled to a retained right of residence whether or not he had been granted the residence card (which recognises that entitlement but does not create it). Consequently, his work which is fully documented between the period 5 May 2015 and 31 August 2016 (on which date he had spent five years in the United Kingdom exercising rights) resulted in his acquiring a permanent right of residence. This was clear from the material before the First-tier Tribunal Judge when he determined the appeal on 29 June 2017.
21. Accordingly, I am satisfied that the appellant is also entitled to a permanent right of residence because he meets the requirements of reg.15 (1) (f). I allow the appeal against the respondent's refusal to issue a permanent residence card.

DECISION

- (i) The First-tier Tribunal Judge made a material error of law and I set aside his determination of the appeal.
- (ii) I substitute a decision allowing the appellant's appeal against the refusal of the respondent to issue the appellant with a residence card acknowledging his right to a retained right of residence pursuant to regs 10 (5) and (6).
- (iii) I substitute a decision allowing the appellant's appeal against the refusal of the respondent to issue the appellant with a permanent residence card pursuant to regulation 15 (1) (f).

ANDREW JORDAN
DEPUTY UPPER TRIBUNAL JUDGE
10 July 2018