



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/01935/2017

THE IMMIGRATION ACTS

Heard at Field House
On 9th July 2018

Determination Promulgated
On 16th July 2018

Before

UPPER TRIBUNAL JUDGE COKER

Between

SYED ASIF WAQAR

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Iqbal, instructed by West Ham solicitors

For the Respondent: Ms K Pal, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant sought, in a combined application, a retained right of residence and permanent residence as the former spouse of an EU national exercising Treaty Rights. The application was refused by the respondent on 9th February 2017 because, according to her:
 - (a) He had not resided in accordance with the 2006 regulations for a continuous period of 5 years and retained a right of residence as the former spouse of an EEA national; and
 - (b) As a family member of an EEA national residing for a continuous period of five years, he had not provided sufficient evidence that his EEA spouse

resided in the UK in accordance with the Regulations during that 5 year period.

2. Mr Waqar appealed the decision. His appeal was dismissed by First-tier Tribunal Judge Telford for reasons set out in a decision promulgated on 22nd March 2018.

Background

3. Mr Waqar entered the UK as a Tier 4 student on 28th January 2010. On 29th November 2010 he married Ms De Pina Lima, a Portuguese national. On 16th May 2011 he was given a residence card as the family member of an EU citizen, valid until 16 May 2016. The couple separated on 7th October 2015 and on 26th November 2015 Mr Waqar instituted divorce proceedings.

4. By application made on 9th May 2016 to the respondent, Mr Waqar sought a residence permit under regulation 10 (retained right of residence) and 15 (permanent right of residence) of the 2006 Regulations. In his application he drew attention to the Home Office policy v13.0 published on 1 October 2015. He gave the former matrimonial home address, his current address and stated that he and his wife were no longer in contact. In support of his application he provided various documents. The respondent took the view that Mr Waqar had provided insufficient evidence to show that his (now former) spouse was exercising Treaty rights for a continuous period of 5 years whilst employed and self-employed. She did not take issue with the evidence provided for the period up to 31 January 2013. She took issue with the following evidence relating to the spouse's income:

- (i) The P60 dated 5th April 2014 showing earnings of £1487 was too low to hit the primary earnings threshold for a year's employment;
- (ii) The three HMRC self-assessment letters dated 30th April 2013 (tax return filing reminder), September 2014 (notification of late filing penalty of £200 for 12/13 and 13/14) and 8th September 2015 (tax due of £3244.25 including late filing penalty and tax due brought forward from previous statement on 18 June 2015 of £2626.27) were insufficient to demonstrate genuine and effective self-employment.

5. A P45 for month 9 dated 23rd December 2014 for Mr Waqar's spouse showed pay to that date of £3430.

6. Mr Waqar's evidence of gross income showed

- 2013/14 £9274
- 2014/15 £16860
- 2015/16 £25405
- 2016/17 £6483

A letter from his employers dated 11 May 2016 stated that Mr Waqar was paid £7.20 per hour and worked an average of 55 hours per week – this equates to approximately £20,592 gross per annum.

7. The First-tier Tribunal judge did not, in his decision make clear what documents he was referring to i.e. whether they were documents relating to the appellant's income or whether they were documents relating to his former spouse's income although it can be surmised by reference to documents that were produced to the respondent and in the First-tier Tribunal bundle what he is referring to. First-tier Tribunal Judge Telford stated that there was "no evidence from 31st January 2013 onwards" of income. This is incorrect - see above.

Regulation 10, retained rights of residence

8. Although at the date of application and date of decision, Mr Waqar was not divorced, by the date of the hearing he was divorced (decree absolute pronounced on 15th May 2017) and the respondent no longer relied upon that lack of divorce in support of her decision to refuse his application for a retained right of residence. The respondent had not considered the application for retained rights of residence other than in the context of the divorce.
9. *Baigazieva* [2018] EWCA 1088 (Civ) held that for a third country national to retain a right of residence in reliance upon regulation 10(5), s/he does not need to show that their former EU spouse exercised treaty rights as a qualified person until the divorce itself but that it is sufficient to show that the former EEA spouse exercised treaty rights until divorce proceedings were instituted.
10. In order to successfully claim a retained right of residence, Mr Waqar would have to show that the marriage has lasted at least three years, including one year in the host member state; that his spouse was a qualified person or an EU national with a permanent right of residence on 26th November 2015; that he was residing in the UK in accordance with the Regulations on the date of institution of divorce proceedings on 26th November 2015 and that if he were an EU national he would be a worker, self-employed or self-sufficient under regulation 6. Mr Waqar can show that the marriage lasted at least three years and that one year has been spent in the UK. That is not disputed by the respondent. Mr Waqar also showed that at the date of institution of divorce proceedings he was a worker (and had been for at least the previous two years).
11. There was no assertion by the respondent that Mr Waqar's spouse was not a worker; rather the assertion was that she did not meet a "minimum earnings threshold". The "minimum earnings threshold" does not appear to have been identified as a particular figure.
12. The First-tier Tribunal Judge stated;
 19.2013/2014 showed no income. By p 80 there was a bill sent to her from HMRC 8 September 2015 for unpaid tax and late filing. This was in

relation to self -assessment for self-employment. There were penalties for late filing in 11/12 and 12/13 also. This tends to support the submission that she was not in the UK at this time rather than support a submission that she was in fact working as a self-employed person.

13. The judge failed to have regard to the evidence that was in fact before him. The spouse's P60 for the tax year 2013/14 showed earnings of £1487. Mr Waqar's earnings for that year were £9274. The First-tier Tribunal judge erred in law in finding there was no income for the tax year 2013/14.
14. The 8 September 2015 bill refers to the spouse's unpaid tax of £2626.27 brought forward from June 2015. That can only have related to tax due since she registered self-employed during the tax year 2012/13 i.e. for the two-year period 2012/13 and 2013/14. Given that tax is not payable on at least the first £10000 of her income, her self-employed income would have been significantly more than that sum for the two years in question. There was a P45 i.e. cessation of employment dated December 2014 showing gross pay of £3430. The speculation by the First-tier Tribunal judge that the evidence supported a submission she was not in the UK is not only not supported by the evidence but plainly wrong. The judge has erred in law.
15. In paragraph 23 of his decision, First-tier Tribunal Judge stated:

....work has to be effective so that low paid workers are not automatically effectively in work if they cannot show it is work which does not find itself outweighed by other state benefits for example such as working tax credit. With only a low amount of income per month compared to potential benefits that is a distinct possibility here. The full work, tax and national insurance position for the full duration of stay in the UK by the sponsor is not shown to me in this appeal.

24. The requirement of being a worker meant that the work should be effective for the purposes of providing a living. Here the evidence is contradictory.
16. First-tier Tribunal Judge Telford stated the evidence is both contradictory and non-existent. It is unclear what he means. Furthermore, he appeared to find that the spouse's work was not effective. Yet the evidence before him was that she was employed, then became self-employed, had both the status of worker and self-employed person at some period, that she had self-employed income of at least £10000 over a two-year period plus earnings in excess of £5000 and her husband, Mr Waqar was employed during that period. There was no evidence they were claiming benefits and in any event claiming some benefits does not disqualify an individual from being a worker. First-tier Tribunal Judge Telford mischaracterised 'effective' employment. As held in *Barry* [2008] EWCA Civ 1440, the term worker has a very wide interpretation. The spouse's work was genuine and real and there was no suggestion by the respondent that it was not; the respondent's case was based on her lack of earnings which was itself based upon a failure to consider the documentation provided properly. There is no basis upon which her employment can be characterised as illusory. The First-tier Tribunal judge

erred in law in finding Mr Waqar had been unable to establish he had a retained right of residence.

17. It is evident from the above that the failure of the First-tier Tribunal judge to take account of relevant documentary evidence is material. I set aside the First-tier Tribunal Judge's decision dismissing the appeal on retained rights of residence.

Regulation 15(1)(b) – permanent right of residence.

18. To show he had acquired a permanent right of residence, Mr Waqar must show, as a family member of an EEA national who is not himself an EEA national, that he has resided in the United Kingdom with the EEA national in accordance with the regulations for a continuous period of five years.
19. The respondent does not take issue with the spouse exercising Treaty rights until 31st January 2013. The couple were married on 29th November 2010. Although he was not issued with a residence card until 16 May 2016, the issue of a residence card is declaratory of status and not a grant of status. There is no challenge by the respondent to the assertion that the couple have been residing together between 29th November 2010 and that his wife was exercising Treaty rights at least until 31st January 2013. To establish a permanent right of residence Mr Waqar must show that his spouse was exercising Treaty Rights for five years from 29th November 2010 i.e. until 29th November 2015. On his own evidence, Mr Waqar and his wife separated on 7th October 2015 and he instituted divorce proceedings on 26th November 2015. Although his wife, by now, may have acquired a permanent right of residence and may well have done so by 29th November 2015, Mr Waqar does not meet the criteria set out in the regulation: he has not been residing with his wife for five years. There is no material error of law by the First-tier Tribunal that Mr Waqar had not acquired permanent residence.

Remaking the decision on retained rights of residence

20. I do not propose to set out again the evidence relied upon by Mr Waqar which I have described above. The respondent does not dispute that the spouse was exercising Treaty Rights up to 31st January 2013. Mr Waqar must show that from 31st January 2013 his spouse was a qualified person.
21. A letter from HMRC dated 3 April 2018 provides detail of his spouse's earned income as follows:

Income for tax year ended 2013	£14850
Income for the tax year ended 2014	£1487
Income for the tax year ended 2015	£3430
Income for the tax year ended 2016	£17818

The spouse was also self-employed and she is recorded by HMRC as tax due (less the penalties for late filing) of £2626.72 in a statement brought

forward from June 2015. As noted above, this would reflect an income of at least £10000 if not significantly more during at least the tax year ended 2015.

The combined income for the couple was as follows:

Tax year ended 2014 of the spouse)	£10761 (+ any self-employed income
Tax year ended 2015 of the spouse)	£20290 (+any self-employed income
Tax year ended 2016	£43223

22. It is plain the spouse was working as both a worker and self-employed. It cannot be sustainably argued that her income was minimal or that her employment/self-employment was ineffective. Although the respondent relied upon what is termed a Minimum Earnings Threshold there is no indication what that figure should have been or even whether it applies or applied to this couple.
23. I am satisfied based on the documents provided that Mr Waqar was a family member of a qualified person at the date of termination of his marriage, that he was residing in the UK in accordance with the Regulations and although not an EEA national would, if he were an EEA national, be a worker under regulation 6.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision in so far as the First-tier Tribunal judge found the appellant had not retained rights of residence.

I re-make the decision in the appeal by allowing it.

Date 12th July 2018



Upper Tribunal Judge Coker