



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/02724/2016

**THE IMMIGRATION ACTS**

Heard at FIELD HOUSE  
On 28<sup>th</sup> March 2018

Decision & Reasons Promulgated  
On 11<sup>th</sup> April 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

MR MUHAMMAD ZEESHAN SHAFIQUE  
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr I Kumi (Counsel)  
For the Respondent: Mr Bramble (Home Office Presenting Officer)

**ERROR OF LAW DECISION AND REASONS**

1. The appellant appeals against the decision of the First-tier Tribunal (Judge N Haria) (FtT) promulgated on 31<sup>st</sup> July 2017, in which the appeal against the Respondent's decision dated 17.2.2016 refusing the application for a permanent residence card (Regulations 10 & 15 EEA Regulations 2006), was dismissed.

**Background**

2. The Appellant is a citizen of Pakistan. He claims to have entered the UK on 19.9.2006 although the respondent has no record of the entry. He was issued with a residence card valid until 18.10.2015. On 12.10.2015 he applied for permanent residence. The respondent refused the application on the grounds that the appellant failed to provide evidence of his spouse having exercised free movement at the time of the divorce (decree absolute dated 9.9.2015), of the marriage lasting for 3 years, of one

year's residence in the UK and that the appellant was exercising Treaty rights as if an EEA national.

### **First-tier Tribunal decision**

3. The FtT found that the marriage had lasted for 3 years and that the appellant resided in the UK for one year [24]. The FtT had evidence of the spouse's tax documentation which showed that she was employed from 2010 – 2015. In addition there was an SA 302 for the tax year ending in April 2012 showing income of £7545.00 and NI contributions made, and a letter from HMRC confirming NI was paid for periods from 2011 to 2013 [27]. In addition the appellant produced invoices for 2010 – 2015 contract for cleaning services and bank statements. The FtT found that the spouse was working as a cleaner [28] but that the documentary evidence was insufficient to show that the spouse was working at the date of divorce [37]. The most upto date evidence was upto 31st August 2015 and the credit of a cheque into the bank account on 2.9.2015 [37].

### **Grounds of appeal**

4. In grounds of appeal the appellant argued that the FtT erred by failing to take into account the EEA Regulations applicable to the application that was for permanent residence as distinct from a retained right of residence (**OA (EEA - retained right of residence ) Nigeria [2010] UKAIT 00003**).
5. In any event the FtT erred in its approach to Regulation 10(5) in that no reason was given for concluding that Regulation 10(5) was not met [40]. The appellant argued that the 5 year period was met from the date of marriage on 9.11.2009 to November 2014 and there was documentary evidence for that period.
6. The FtT erred by failing to look at the 5 year period from the date of marriage and considering instead the 5 years preceding the divorce. The evidence adduced and that relating to the 2012 period showed that the EEA spouse was working during the 5 year period from the marriage (**Iza Tom Idezuna (EEA- permanent residence) Nigeria [2011] UKUT 00474 (IAT)**).

### **Permission to appeal**

7. Permission to appeal to the Upper Tribunal (UT) was granted by Designated Judge of the FTT Macdonald on 24.1.2018. It was arguable that it was an error in law for the FtT not to consider material evidence.

### **Submissions**

8. At the hearing before me Mr Kumi submitted a skeleton argument and submitted that the FtT failed to determine the core issue namely whether or not the appellant had lived in the UK for a period of 5 years in accordance with the EEA Regulations and that he was a family member with a retained right of residence. The Respondent and the FtT were wrong to focus on Regulation 10(5). There was evidence before the FtT to show that the spouse was working.

9. In response Mr Bramble contended that it was difficult to see how the appeal was presented on the day in the FtT and whether the Judge had been made aware of the accrued 5 year period from November 2009? Although this was a clear error, Mr Bramble argued that this Tribunal was not in position to re make the decision on the available evidence if the starting date was taken from November 2009 as there was a gap of some months from 9.11.2009 - 1.3.2010 for the spouse's employment and there were concerns that the income was so low that this could not be genuine employment.
10. Mr Kumi responded that there was documentary evidence to show that the regulations were met, including the HMRC documentation and it was irrational to raise the issue of low income in the circumstances.

### **Discussion and conclusion**

11. There is a material error of law in the decision which shall be set aside save for the preserved findings made below. The FtT failed to apply the correct approach to the relevant EEA regulations. This was an application for permanent residence under Regulation 15(f) EEA Regs. which the FtT failed to apply to the facts and focused on the requirements under Regulation 10. It was accepted that the appellant married on 9.11.2009 and divorced on 9.9.2015. He made his application for permanent residence on 12.10.2015 at which stage had had lived in the UK for just under 6 years. If the period of residence is taken from the date of marriage then he satisfied the residence requirements of Regulation 15 as at 9.11.2014 and thereafter once divorced he was a family member with a retained right of residence. There was no issue raised as to the continuity of residence. In the circumstances it was open to the appellant to apply for right of residence either on the basis of a retained right of residence or a right of permanent residence (**Samsan (EEA:revocation and retained rights) Syria [2011] UKUT 00165 (IAC) paragraphs 48-53**). Although it was unclear to me whether it was argued at the FtT hearing that the start date was the date of marriage, nevertheless there was an error in the failure to consider Regulation 15(1)(f) in this context. I preserve the findings made by the FtT as to the genuineness of the bank statements [32], the level of income [39], the length of marriage and residence in the UK [24], the appellant's employment [25], the spouse's employment as a cleaner [30].

### **Re making**

12. I go on to remake the decision. I am satisfied that the appellant has shown evidence that his wife was exercising Treaty rights during the period of the marriage up until 9.11.2014 and that the appellant himself was self employed up to and since the date of the divorce. This evidence included the affidavit of the ex spouse, a statement from her former employer and the appellant's own witness statement all of which are consistent evidence as to the exercise of Treaty rights. This evidence meets the requirements of Regulation 15(i)(f). Taking the start date as the date of marriage the appellant has met the five year continuous residence at 9.11.2014 and that at the end of that period the appellant was a family member who has a retained right of residence. I find documentary evidence consistent with the appellant's wife being employed as a cleaner including the period 2012 and that there is no strong argument that the low earnings in 2010 are not capable of amounting to genuine and effective employment when considered in the context of the financial/employment evidence

as a whole. This was considered by the FtT in any event. I am satisfied that the appellant has produced evidence that his wife was working during the relevant 5 year period. The profit and loss account is for the year ending March 2010 and which would include from April 2009 and the invoice for the same month is number 25 which suggests previous invoices at earlier dates (G63) and there is a form SA 1035 for April 2009 to 2010 (F6). The period that the FtT found to be lacking was at the time of the divorce [35] which is beyond the 5 year period. In considering Regulation 15 the respondent made no reference to any circumstances why the appellant should not be issued with a permanent residence card.

**Decision**

13. The decision that I re make is to allow the appellant's appeal.

Signed Date 9.4.2018

GA Black  
Deputy Judge of the Upper Tribunal

NO ANONYMITY ORDER

NO FEE AWARD

Signed Date 9.4.2018

GA Black  
Deputy Judge of the Upper Tribunal