Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/02754/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 April 2018	**On 11 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR NAVEED AHMAD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Mustapha, Counsel instructed by Freeman Chambers Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who is a national of Pakistan, appeals from the decision of the First-tier Tribunal (Judge Bennett sitting at Hendon Magistrates' Court on 30 June 2017) dismissing his appeal against the decision to refuse to issue him with a permanent residence card as the former spouse of an EEA national who had exercised Treaty rights in the United Kingdom. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

The Reasons for Granting Permission to Appeal

2. On 11 January 2018, First-tier Tribunal Judge Foudy granted the appellant permission to appeal for the following reasons: *"(ii) the grounds argue that the Judge erred in his calculation of the period of time which the appellant was married to his former spouse. (iii) In the decision the Judge calculated that the marriage came to an end when the*

parties separated rather than at decree absolute. It is arguable that this was an error under EU Law."

Relevant Background

3. The appellant married 'Mrs B', a national of Portugal, in the London Borough of Ealing on 27 November 2009. On 28 October 2010 the appellant was issued with a residence card as the spouse of an EEA national exercising Treaty rights in the United Kingdom. This card was valid until 28 October 2015. On 15 September 2015 the appellant applied for a permanent residence card.

4. On 18 February 2016 the Secretary of State gave her reasons for refusing the application. She was not satisfied that, at the date of divorce on 8 January 2016, Mrs B had been a qualified person, or that the appellant had been residing in the UK for five years in accordance with the 2006 Regulations.

The Hearing Before, and the Decision of, the First-tier Tribunal

5. At the hearing before Judge Bennett, both parties were legally represented.

6. The appellant's evidence on appeal was that he and Mrs B had lived together from the date of their marriage until 18 February 2015, when Mrs B left him. He had had no contact with her until late February 2017, when she telephoned him because she heard that he was suffering from kidney stones. In the course of that telephone call, he asked her to send him documentary evidence showing her income and the work she had done in the period up to 8 January 2016. It was after that telephone conversation that Mrs B had sent him some tax calculations.

7. The appellant produced documents relating to Navtrader UK Ltd, a company which he said carried on the business of online selling, and in respect of which he was the "*Sole Trader*". The appellant said that, as well as working as a self-employed cleaner, Mrs B had also worked for Navtrader UK Ltd as a self-employed person and she had been the Secretary of the Company at all times from its incorporation on 9 April 2014 until 18 February 2015. She had not received any remuneration or wages from the Company. Instead, she had received a dividend from the Company.

8. The Judge gave his reasons for dismissing the appeal in a 31-page decision which was promulgated on 17 July 2017.

9. At paragraphs [24] and [25] (pages 18 and 19) the Judge gave detailed reasons for not being satisfied that during the tax years 2010/11, 2011/12 or 2012/13 Mrs B was carrying on business on a self-employed basis, either as a self-employed cleaner or in any other capacity.

10. At paragraph [26] (pages 20 and 21), the Judge gave detailed reasons for not being satisfied that Mrs B was exercising Treaty rights in subsequent years, including in the period leading up to the date of divorce on 8 January 2016.

11. At paragraphs [27]-[30] (pages 22-26), the Judge gave even more detailed reasons for rejecting the appellant's evidence that he and Mrs B had separated on 18 February

2015, and for finding that in truth they had separated on or about 17 July 2014; and for rejecting the appellant's evidence that Mrs B had exercised Treaty rights as a worker or a self-employed person for or on behalf of Navtrader UK, despite it being officially recorded that Mrs B was appointed as a Secretary of the Company on 9 April 2014 and that she resigned from this office on 12 March 2015.

The Hearing in the Upper Tribunal

12. At the hearing before me to determine whether an error of law was made out, Mr Mustapha (who did not appear below) developed the case advanced in the grounds of appeal to the Upper Tribunal. In reply, Ms Isherwood submitted that the findings which the Judge had made were reasonably open to him on the evidence, and no material error of law was made out.

Discussion

Ground 1

13. Ground 1 is that the Judge was wrong to treat the appellant as having ceased to be a family member of an EEA national at the point of separation, rather than at the point of divorce.

14. At paragraph [34] (page 28) the Judge summarised his conclusions. These were: (i) that there was not any continuous period of five years before (or ending on) 8 January 2016 throughout which Mrs B was a qualified person; and (ii) that the appellant and Mrs B had not lived together for more than about four years and eight months following their marriage on 27 November 2009.

15. He was also not satisfied: (iii) that the appellant had resided in the United Kingdom with Mrs B after 27 November 2009 in accordance with the 2006 Regulations for a continuous period of five years, or (iv) that Mrs B was a qualified person on 8 January 2016 or that she was an EEA national with a permanent right of residence on 8 January 2016.

16. The Judge was wrong to treat marital cohabitation for a continuous period of five years as being a relevant requirement of either Regulation 10 or Regulation 15. However, the Judge's error in this regard was not material, as in the course of his lengthy decision he also addressed the right questions; and he gave comprehensive reasons for making the following two crucial findings: (a) that the appellant had not discharged the burden of proving on the balance of probabilities that Mrs B was exercising Treaty rights at the date of divorce, and was thereby a qualified person at the date of divorce; or (b) that Mrs B had continuously exercised Treaty rights for a period of five years so as to have acquired a permanent right of residence by 8 January 2016.

Ground 2

17. There is no challenge in the grounds of appeal to the Judge's adverse credibility findings on the issue of the ex-spouse's alleged involvement in Navtrader UK Ltd.

18. At paragraphs [21] to [23] (page 17), the Judge gave detailed reasons for finding that the ex-spouse's claimed employment with Brasilian Dreams Ltd in the tax years 2009/2010 and 2010/2011 was not genuine. There is also no error of law challenge to this finding.

19. However, in line with what is effectively Ground 2, Mr Mustapha submits that the Judge was wrong to find that the ex-spouse had not exercised Treaty rights as a self-employed cleaner for a continuous period of five years.

20. The appellant claimed that Mrs B had been a self-employed cleaner since 12 May 2010. On the basis of her returns to HMRC, Mrs B declared a profit from self-employment as a cleaner of £5,200 in the year 2013/14, a profit of just over £6,000 in the year 2014/15, and a profit of £5,457 in the year 2015/16.

21. As the Judge observed at paragraph [24], there was no documentary evidence to show that Mrs B had carried on business as a self-employed cleaner in the tax years 2010/11, 2011/12 or 2012/13. There was also no evidence of any net profit or loss from self-employment having been declared by Mrs B to HMRC for those tax years.

22. I consider that the Judge gave adequate reasons for finding that the appellant had not discharged the burden of proving that Mrs B was exercising Treaty rights as a cleaner at all in those three tax years.

23. It therefore follows that, even if she was exercising Treaty rights thereafter, it was not possible for her to have exercised Treaty rights for a continuous period of five years prior to the date of divorce. Thus, on any view, she had not acquired a permanent right of residence by the date of divorce.

24. Whilst acknowledging that the evidence relating to the last three tax years was stronger, the Judge was nonetheless not satisfied that the ex-spouse had been in genuine self-employment as a cleaner; or, if she was, that her activity was "*effective and genuine*" rather than being "*clearly marginal and ancillary*"; or (in the further alternative), if her activities were effective and genuine, that they had been conducted <u>continuously</u> throughout each relevant tax year.

25. The Judge's reasoning included the fact that there was no detail of how the net profit figures for the three tax years were calculated and arrived at: specifically, what the gross turnover was in each of those years; what the totals of those expenses incurred were in each of those three years; and how those expenses were broken down. It was to be expected that she would have given those details in the tax returns for those three tax years, and there would have been a Profit and Loss account drawn up by an accountant.

26. The same lines of reasoning underlay the Judge's conclusion that the appellant had not discharged the burden of proving that his ex-spouse was exercising Treaty rights as a cleaner at the date of divorce.

27. Mr Mustapha submits that the Judge erred in law in treating the declared profits for the last three tax years as being purely marginal and ancillary; and that he had also

erred in law in not treating them as being generated throughout the year, with the consequence that the ex-spouse was probably exercising Treaty rights at the date of divorce. However, Mr Mustapha's error of law challenge ignores the fact that the Judge did not accept that the ex-spouse had in fact genuinely earned any of the net profits which she had declared to HMRC.

28. It was unarguably open to the Judge to find, for the extensive reasons which he gave, that the net profits declared to HMRC - which were not at a level which would trigger a liability to tax - were not reliable evidence of the ex-spouse having genuinely carried on economic activity in those tax years as a self-employed cleaner.

Ground 3

29. Ground 3 is that the Judge made contradictory findings at paragraphs [19] and [20] concerning the appellant. This ground was not developed before me by Mr Mustapha, and it has no merit. At paragraph [19], the Judge held that the appellant was not in employment at the date of divorce. But he accepted at paragraph [20] that, both before and after 8 January 2016, the appellant was working on a self-employed basis as a driver for Uber.

Ground 4

30. Ground 4 is that the Judge erred in law in not taking into account that it had been open to the respondent to contact HMRC in order to secure further evidence to make an informed decision on the appellant's application. This ground also has no merit for two reasons. Firstly, on the appellant's account, the ex-spouse had cooperated with him in providing some documentary evidence relating to her asserted self-employment as a cleaner. Secondly, it was only Mrs B, not HMRC, who was in the position to provide documentary proof that the net profit figures declared to HMRC were reliable.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed Date 5 May 2018

Judge Monson
Deputy Upper Tribunal Judge