



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

Appeal Number: EA/05327/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 29 October 2018**

**Decision & Reasons  
Promulgated  
On 3 December 2018**

**Before**

**UPPER TRIBUNAL JUDGE GLEESON**

**Between**

**DAOUD AMINI  
[NO ANONYMITY ORDER]**

Appellant

**and**

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

Respondent

Representation:

For the appellant: Ms Linda Appiah, instructed by Vine Court Chambers

For the respondent: Mr Andrew McVeety, a Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals with permission against the decision of the First-tier Tribunal at Hatton Cross dismissing his appeal against the respondent's decision to refuse him a permanent right of residence in the United Kingdom on the basis of retained rights of residence pursuant to Regulation 10 of the Immigration (European Economic Area) Regulations 2016.
2. The appellant is a citizen of Afghanistan and was formerly married to a French citizen. Her exercise of Treaty rights in the United Kingdom is based on her employment by a company of which the appellant is the proprietor. The respondent does not dispute that the wife was paid by the appellant's company, nor that she received payslips which match the sums paid to her bank account. The respondent contended that the employment may not be genuine.
3. The relevant paragraphs in the refusal letter were as follows:

"As evidence of your sponsor's Treaty rights, you have provided an accountant's letter stating that the EEA national was employed for Comaksecure Limited between 1 July 2015 and 9 August 2016, and printed payslips dated between April 2016 and August 2016 from Comaksecure Ltd. However, as stated in your application form, you are the Director of Comaksecure Ltd, as confirmed on Companies House. As such, it is reasonable to assume that you would be able to submit further evidence of your sponsor's employment at Comaksecure Ltd, such as copies of P60s, employment contracts etc. You have not provided any evidence of how your sponsor has exercised Treaty rights between the date you were issued a residence card and 1 July 2015.

You must also provide evidence that since the date of your divorce you have been a worker, a self-employed person or a self sufficient person. You have stated in your application that since 2013 you have been self employed. You have provided a letter from Security Industry Authority as evidence. Whilst it is accepted that you have applied for your security licence, the evidence provided does not confirm that your application has been accepted. As such, this department is unable to verify whether you have the required qualifications to legally provide your private security services. "

4. There were no invoices correlating with payments received in the appellant's bank account, and no HMRC evidence in respect either of the appellant or his sponsor spouse.

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

5. The First-tier Tribunal in a decision sent to the parties on 5 June 2018 approached the decision in this appeal on the basis that the date on which the appellant must show that his former wife was exercising Treaty rights was the date of decree absolute, 29 June 2016. However, that decision takes no account of the guidance of Lord Justice Singh, sitting alone in the Court of Appeal in *Baigazieva v Secretary of State for the Home Department* [2018] EWCA Civ 1088 on 20 April 2018, that the relevant date is the date of issue of the divorce proceedings, not the date of decree absolute.

6. The *Baigazieva* judgment had been handed down well before the First-tier Tribunal decision and accordingly, there is an error of law in the Judge's approach. That error may well be material: the evidence before me does not address itself to the *Baigazieva* date and by agreement, this appeal was adjourned to enable that to be done.
7. By a letter dated 8 November 2018, the respondent confirmed that he had been provided with evidence of the *Baigazieva* date, but not any or any adequate evidence of the exercise of Treaty rights by the appellant's former wife. The respondent stated that he 'continues to rely on the points made in the refusal letter that the appellant, as [his wife's] ex-employer, should be in a position to be able to provide adequate evidence of her employment at the relevant date'.

## Discussion

8. The evidence before the First-tier Tribunal was insufficient to establish that the appellant's spouse was exercising Treaty rights for a period of 5 years before the application for a permanent right of residence under Regulation 15(1) of the Immigration (European Economic Area) Regulations 2016 on 2 November 2016. All of the evidence required by the respondent to establish the appellant's entitlement to a permanent right of residence under the Regulations is set out in the refusal letter and is in the custody or control of the appellant but, it seems, he still has not provided it.
9. The appellant has been given ample opportunity to provide relevant evidence, which, unusually in a retained rights of residence case, is all available to the appellant, who is both spouse and employer. The evidence provided was inadequate and remains so.
10. The Tribunal does not consider that a further oral hearing is required to dispose of this appeal.
11. This appeal is dismissed.

## DECISION

12. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law  
I set aside the previous decision. I substitute a decision dismissing this appeal.

Date: 28 November 2018

**Gleeson**

Tribunal Judge Gleeson

Signed **Judith AJC**

Upper