



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/08401/2016

**THE IMMIGRATION ACTS**

Heard at Manchester  
On 3 August 2018

Decision & Reasons Promulgated  
On 6 September 2018

Before

THE HON. MR JUSTICE LANE, PRESIDENT

Between

MOHAMED RAIK ABDUL SAMAD  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mrs C Johnrose, Counsel instructed by Compass Immigration Law Ltd

For the Respondent: Mr Bates, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal brought with permission granted by the First-tier Tribunal to challenge the decision of First-tier Tribunal Judge Lloyd-Smith, who in a determination produced in October 2017, dismissed the appellant's appeal under the Immigration (EEA) Regulations 2006 against the respondent's refusal to issue him with a permanent residence card as confirmation of a right to reside in the United Kingdom.

2. The point at issue is a narrow one. It relates to the status of the appellant's wife, from whom he had separated but not divorced. In order to be issued with a permanent residence card the appellant needs to show that his wife is a qualified person. In order for his wife to be a qualified person, she needs to be exercising EU Treaty rights in the United Kingdom or to have obtained pursuant to the Regulations a right of permanent residence in this country.
3. There was before the First-tier Tribunal Judge an absence of evidence to show that the wife was a qualified person, in that she was working; was in receipt of jobseekers' allowance; or was a student. There was, however, before the judge a record of the decision of the First-tier Tribunal in August 2011, which concerned the appellant's appeal against a decision to deport him from the United Kingdom as a foreign criminal. Judge Lloyd-Smith noted that in the 2011 decision, the Tribunal stated: "It is common ground that she [that is to the wife] has been exercising Treaty rights as an EEA national as a worker in the UK since 2005".
4. The grounds of challenge to Judge Lloyd-Smith's decision contend that the judge ignored that highly significant matter. If it was the case that the wife had acquired the right of permanent residence in 2011, then it mattered not whether she had since that time been working, receiving job seekers' allowance or studying. The appellant therefore submits that the First-tier Tribunal was wrong to ignore that evidence. Indeed, Mrs Johnrose submits that it is determinative of the matter.
5. For the respondent, Mr Bates submits that the finding of the First-tier Tribunal in 2011 is not accepted by the respondent as being determinative of the wife's status. He points out that the wife has never made an application to be recognised as a permanent resident in the United Kingdom. Mr Bates acknowledges, however, that this is not necessarily indicative of the fact that the wife does not consider herself to be in a position to obtain formal recognition of that right.
6. I remind myself that rights of this kind are not conferred by the documentation referred to in the Regulations; rather, the rights arise under EU Treaty law. Mrs Johnrose, in reply to Mr Bates, points out the following. Although at paragraph 17 of its decision, the First-tier Tribunal in 2011 was dealing with a case whereby the power of removal was governed by what they described as "Tier 1", that is to say, not by reference to a right of permanent residence, the Tribunal nevertheless can be taken from paragraph 20 as indicating that that was in substance what they were doing. She says that, because the Tribunal cited with approval the case of Bulale v Secretary of State for the Home Department [2008] EWCA Civ 806. This was a case that concerned the operation of the EEA Regulations in relation to someone who was in that position; namely, who enjoyed a permanent right of residence.
7. I find there is force in that submission. In my view it was plainly an error of law for the judge in the present case to ignore the Tribunal's finding in 2011 regarding the wife.

8. On its face, the fact that the Tribunal said it was “common ground [my emphasis] that (the wife) had been exercising Treaty rights as an EEA national as a worker in the UK since 2005” meant there must have been an acknowledgement by the Secretary of State that the wife had acquired a permanent right of residence. I do not accept that that categorical statement in paragraph 3 falls to be qualified in the way that Mr Bates suggested it should.
9. In my view, it is immaterial whether or not the Tribunal in 2011 expressly or by implication took on board the ramifications of that finding, insofar as it impacted on the mechanism by which the respondent could deport the appellant. A finding of this kind by a Tribunal is not lightly to be set aside or downplayed.
10. For these reasons, there is a material error of law in the decision and I proceed to re-make the decision in the appeal. In view of what I have said, I consider it manifest that there is evidence before the Tribunal to satisfy me, on the balance of probabilities, that the appellant satisfies the requirements of the Rules and I therefore re-make the appeal by allowing it.

### **Decision**

The appeal is allowed.

No anonymity direction is made.

Signed

Date 2 September 2018

The Hon. Mr Justice Lane  
President of the Upper Tribunal  
Immigration and Asylum Chamber