



**Upper Tribunal  
(Immigration and Asylum Chamber)  
EA/09930/2016**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On April 11, 2018**

**Decision & Reasons  
Promulgated  
On April 16, 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ALIS**

**Between**

**MR FAROUK SELMANE  
(NO ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Burrett, Counsel, instructed by JD Spicer Zeb Solicitors  
For the Respondent: Mr Deller, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. I do not make an anonymity order.
2. The appellant is a national of Algeria. He entered the United Kingdom in the or around February 2000 and on August 5, 2010 he applied for a residence card as the spouse of an EEA national. He was issued with a residence card which was valid until December 2, 2015.
3. On February 15, 2016 he applied for a document certifying permanent residence under Regulation 10(5) of the Immigration (European Economic Area) Regulations 2006.

4. The respondent refused his application on August 10, 2016 on the basis (a) he had not provided evidence that he and his former wife had demonstrated they had resided in accordance with the Regulations for a continuous period of five years (Regulation 15(1)(f) of the 2006 Regulations) and (b) he had failed to provide evidence that he had continue to reside in accordance with the Regulations since the decree absolute (October 22, 2014).
5. The appellant lodged grounds of appeal on August 15, 2016 under Regulation 26 of the Immigration (European Economic Area) Regulations 2006 and Section 82(1) of the Nationality, Immigration and Asylum Act 2002.
6. Their appeals came before Judge of the First-tier Tribunal Hussain (hereinafter called "the Judge") on December 21, 2017 and in a decision promulgated on January 10, 2018 the Judge rejected the appellant's appeal finding that the appellant had failed to demonstrate that his former spouse had been exercising treaty rights throughout the period leading up to the decree absolute.
7. The appellant applied for permission to appeal on January 22, 2018 and on February 9, 2018 Judge of the First-tier Tribunal Pooler granted permission to appeal because he found it arguable the Judge had erred by requiring the appellant to prove the exercising treaty rights five years by his former spouse.
8. When the matter came before on the above-date the two representatives agreed that when the First-tier Tribunal heard the appeal the Judge made two significant findings of fact:
  - (a) The former spouse had been exercising treaty rights at the date of the decree absolute; and
  - (b) The appellant had been working since the date of the decree absolute.
9. Mr Deller agreed that the appellant was, in those circumstances, entitled to a retained right of residence. By failing to confirm the appellant's right of residence Mr Burrett submitted the Judge had erred. The Judge had not specifically been asked to make such a finding and on his application form the appellant had stated he was seeking permanent residence. However, in order to be granted permanent residence based on a retained right of residence the Judge had to satisfy himself that the appellant was so entitled and bearing in mind the two findings above it is clear that the appellant did satisfy Regulation 10 of the 2006 Regulations.
10. The only issue was whether the appellant was entitled to permanent residence based on that retained right.
11. The representatives agreed with me that the Tribunal was concerned with the period December 21, 2012 to October 22, 2014 with the latter date being the date of the decree absolute.

12. If the appellant could demonstrate that his former spouse had exercised treaty rights during those dates then he would be entitled to permanent residence under Regulation 15(1)(f) of the 2006 Regulations.
13. I referred the parties to pages 106 and 107 of the appellant's bundle. This bundle had been before the First-tier Tribunal.
14. The Judge made reference to a record from the authorities setting out the appellant's former wife's income up to and including July 2015. Those records showed that the appellant's former wife was not working in late 2012 but commenced employment in early January 2013. She continued in her job until April 28, 2013 whereupon there was a short gap until August 8, 2013. Her employment was continuous after August 8, 2013 until the date of the letter.
15. Mr Burrett submitted the Tribunal should have looked at the evidence holistically and against the background that the appellant and his former wife were no longer together. He submitted the Judge not only applied the wrong test when considering which period of time the appellant's wife had been exercising treaty rights but had then applied too high a standard of evidential requirements.
16. He submitted that the former spouse did not have to demonstrate that she had been working but merely that she had been exercising treaty rights and that included, if necessary, looking for work. It did not prevent from going away or taking a short period out from employment.
17. Mr Deller, for his part, agreed with this approach and conceded that the evidence contained within the bundle, taken as a whole, supported Mr Burrett's submission that the former wife had complied with the 2006 Regulations and the appellant was entitled to permanent residence as claimed.
18. Having considered the evidence and whilst noting some gaps in the appellant's former wife's employment I agree that the evidence had to be considered against a background that she had demonstrated an exercise of treaty rights.
19. In an ideal world there would be no gaps in employment or if there were an explanation would be provided but taking into account the documents that had been adduced I agreed the appellant had demonstrated both he and his former wife aggregately had exercised treaty rights for a continuous period of at five years from December 21, 2012.
20. Whilst the Judge was entitled to make observations about a lack of funds at certain times I am satisfied that he materially erred because at paragraph 9 of his decision he wrongly stated the appellant's wife had to show she had exercised treaty rights for five years.
21. As the appellant had demonstrated he had been exercising treaty rights as a former family member since the date of the decree absolute until the date of the Tribunal hearing, a period of 38 months, he merely had to

show that his former wife had exercised treaty rights for a continuous period of 22 months immediately predating the date of the decree absolute. Mr Deller conceded that she had.

22. I therefore find that the Regulations were met and not only was the appellant entitled to a retained right of residence under Regulation 10 but he was also entitled to permanent residence under Regulation 15 of the 2006 Regulations.

**DECISION**

23. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
24. I have set aside the original decision and I remake the decision by finding the appellant has a retained right of residence and is entitled to permanent residence in the United Kingdom.

Signed

Date 11/04/2018



Deputy Upper Tribunal Judge Alis

**TO THE RESPONDENT**  
**FEE AWARD**

I do not make a fee award because the appeal was allowed based on the evidence placed before the Tribunal.

Signed

Date 11/04/2018



Deputy Upper Tribunal Judge Alis