



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/07330/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 25<sup>th</sup> March 2019

Decision & Reasons Promulgated  
On 29<sup>th</sup> April 2019

Before

UPPER TRIBUNAL JUDGE KING TD  
UPPER TRIBUNAL JUDGE LINDSLEY

Between

MR UMAR HAYAT  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr H Kannangara, Counsel, instructed by Ahmad & Williams  
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Pakistan seeking to appeal against a decision dated 28<sup>th</sup> July 2017, refusing to grant him a residence card as a former spouse of an EEA national exercising treaty rights in the United Kingdom.
2. The appellant contracted a valid marriage to an EEA citizen on 19<sup>th</sup> July 2013. They separated in September 2015. Proceedings for divorce were issued on 19<sup>th</sup> April 2016 and a decree absolute granted on 20<sup>th</sup> February 2017.

3. The reasons for refusal were that the appellant had provided inadequate evidence that he had retained a right of residence in the United Kingdom following the end of his marriage to the EEA national partner. It was further said that he had failed to provide evidence that the EEA national family member was a qualified person in the United Kingdom at the time of the termination of the marriage.
4. The appellant sought to appeal against that decision, and his appeal came before First-tier Tribunal Judge Wylie at a hearing on 25<sup>th</sup> June 2018. In a decision promulgated on 3<sup>rd</sup> July 2018 the Judge made a clear finding in paragraphs 17 and 18 of the determination that the appellant's wife was working and exercising treaty rights at the time of the termination of the marriage. Further, sufficient and reliable evidence had also been provided to show that the appellant was working throughout and thus that Regulation 10(6) of the Immigration (European Economic Area) Regulations 2016 (henceforth the EEA Regulations) was met.
5. However, it was the finding of the First-tier Tribunal Judge that the appellant failed to meet the requirement set out in at 10(5)(d)(i) of the EEA Regulations and accordingly the appeal was dismissed.
6. A challenge was made to that decision on the basis that it was unfair that the appellant should be prejudiced in his entitlement to remain in the United Kingdom by reason of the date upon which divorce proceedings were instituted. It was contended that interpretation was in any event in contravention of the relevant European Union legislation.
7. It was accepted on behalf of the respondent by Ms Isherwood that there was a possible conflict and/or ambiguity within the framework of Regulation 10(5) of the EEA Regulations such that the decision of the First-tier Tribunal should be set aside and the matter be reheard.
8. Thus the appeal came before us to determine that issue.
9. Regulation 10(5) gives a retained right of residence to a person who had
  - (a) ceased to be a family member of a qualified person ... on the termination of the marriage;
  - (b) was residing in the United Kingdom in accordance with these Regulations at the date of termination;
  - (c) satisfied the condition in paragraph (6); and
  - (d) (i) prior to the initiation proceedings for the termination of the marriage the marriage had lasted for at least three years and the parties to the marriage

had resided in the United Kingdom for at least one year during its duration.

10. That particular paragraph was considered in detail by the Court of Appeal in the decision of **Baigazieva [2018] EWCA Civ 1088**. Lord Justice Singh considered the context in which this provision of the EEA Regulations came to be framed, that being Article 13(2) of the Directive 2004/38/EC.
11. Directive 2004/38/EC at Article 13(2)(a) indicates in clear terms that prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership must have lasted at least three years, including one year in the host member state.
12. It is clear to us and seemingly accepted by all parties before us that Regulation 10(5) is a faithful transposition of what is set out in Article 13(2). Indeed, the Court of Appeal noted that Article 13(2) had been properly transposed into domestic law by Regulation 10 of the EEA Regulations.
13. There can be little doubt as to when divorce proceedings were instituted and that of course was by the filing of the divorce petition and its registration with the appropriate court on 19<sup>th</sup> April 2016.
14. Mr Kannangara sought to argue on behalf of the appellant that the date of the divorce proceedings should be when the certificate of entitlement to a decree was issued, that being 28<sup>th</sup> October 2016.
15. For our purposes we can see no merit in that submission. Clearly that was a finding made by the Family Court at Bury St Edmunds on the basis of what had been provided in the petition. It is the divorce petition that was lodged which we find instituted these proceedings.
16. It is unfortunate indeed that the appellant fails to meet the requisite three year period prior to the institution proceedings by some two months. Had his wife delayed in presenting her petition by a few months then the requirement in Regulation 10(5) would indeed have been met, but that did not happen in this case.
17. The possibility of a tension between the various sub-clauses in Article 13(2) was considered by the Court of Appeal in **Baigazieva**, particularly at paragraph 12 thereof, but the Court of Appeal concluded that there was in fact no tension. Article 13(2) takes effect upon divorce but the precondition for its taking effect is set out as dating back from the institution of divorce proceedings. As the Court of Appeal indicated there is no great evidential difficulty in determining when divorce proceedings had been initiated.

18. Unfortunately for the appellant he fails to meet the precondition. Accordingly he fails to satisfy all the requirements as set out in the appropriate Regulation.
19. In those circumstances the appellant's appeal before the Upper Tribunal under the EEA Regulations is dismissed.

No anonymity direction is made.

Signed *Fiona Lindsley*

Date 24<sup>th</sup> April 2019

p.p. Upper Tribunal Judge King TD