



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

Appeal Number: IA/29836/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 12<sup>th</sup> November 2015**

**Decision & Reasons  
Promulgated  
On 7<sup>th</sup> December 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GRIMES**

**Between**

**SHAHID MAHMOOD  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms A Mohsin, Counsel instructed by Abbott Solicitors

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant, a national of Pakistan, appealed to the First-tier Tribunal against a decision of the Secretary of State dated 15<sup>th</sup> July 2014 to refuse to grant him a residence card as confirmation of a right to reside in the UK with a retained right of residence following a divorce from an EEA national in accordance with Regulation 10 of the Immigration (EEA) Regulations 2006 (the EEA Regulations). Judge of the First-tier Tribunal Ford dismissed the Appellant's appeal in a decision dated 15<sup>th</sup> April 2015. The Appellant now appeals with permission to this Tribunal.

2. The background to this appeal is that the Appellant married an Irish national in 1999. The couple separated and the decree absolute was issued on 14<sup>th</sup> January 2014. On 26<sup>th</sup> February 2014 the Appellant applied for a permanent residence card as a family member under the EEA Regulations.
3. With his application the Appellant provided evidence in relation to his former wife's self-employment. However, the Secretary of State stated in the reasons for refusal letter that *"Interdepartmental checks conducted by this department have highlighted that there are no employment records for your Sponsor during the period between 2009 - 2013, and no evidence of any tax payments or national insurance have been confirmed"*. The Secretary of State stated then; *"This department is of the opinion that the wage slips and documentation provided in support of your ex-spouse's employment are fraudulent and deceitful"* and that she did not accept that the Appellant's former spouse exercised treaty rights for a period of five years or that she was exercising treaty rights at the time of the divorce.
4. The First-tier Tribunal Judge considered Regulations 10 and 15 of the EEA Regulations. The First-tier Tribunal Judge said at paragraph 14 that the Appellant must show *"that the EEA national was a qualified person for a continuous period of five years in order to qualify either as her family member or a former family member with a retained right of residence"*. The judge went on to say: *"I am not satisfied on the evidence before me that the EEA national was exercising treaty rights for a continuous period of five years at any time during the marriage"*[14].

#### Error of Law

5. I accept the contention in the Grounds of Appeal that the judge applied the wrong test in paragraph 14. At paragraph 7 of the determination the judge properly identifies that the Appellant's case is that he has an entitlement under Regulation 10 and Regulation 15 of the EEA Regulations. At paragraph 14 the judge said *:"whether the Appellant claims a right of permanent residence under Regulation 10 or Regulation 15, he must show that the EEA national was a qualified person for a continuous period of five years in order to qualify either as her family member or a former family member with a retained right of residence"*. However this is an erroneous statement of the law and it seems to me that at paragraph 7 and again at paragraph 14 the judge conflated the requirements under Regulations 10 and 15. Regulation 10 provides, inter alia, for a retained right of residence following divorce. Regulation 15 provides for entitlement to permanent residence.
6. Regulation 10 of the EEA Regulations provides as follows:
  - "10. - (1) In these Regulations, 'family member who has retained the right of residence' means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).
  - ...
  - (5) A person satisfies the conditions in this paragraph if -

- (a) he ceased to be a family member of a qualified person or of an EEA national with a permanent right of residence on the termination of the marriage or civil partnership of that person;
- (b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;
- (c) he satisfies the condition in paragraph (6); and
- (d) either -
  - (i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

- ...
- (6) The condition in this paragraph is that the person -
    - (a) is not an EEA national but would, if he were an EEA national, be a worker, a self-employed person or a self-sufficient person under Regulation 6; or
    - (b) is the family member of a person who falls within paragraph (a)."

7. In considering Regulation 10 the question for the judge was therefore whether the Appellant had demonstrated that at the date of termination of the marriage his ex-wife was a qualified person (or had a right of permanent residence) and whether she was residing in the UK in accordance with the Regulations at that time. The judge therefore erred in requiring that the Appellant demonstrate that his ex-wife was exercising treaty rights for a continuous period of five years at any time during the marriage. This is what would have been required if it had to be demonstrated that the Appellant's ex-wife had permanent residence. In fact all that had to be demonstrated in relation to Regulation 10 is that the Appellant's ex-wife was a *qualified person* at the time of termination of the marriage, in other words that she was self-employed at the relevant time. I find that the judge made a material misdirection of law in relation to the application of Regulation 10 of the EEA Regulations and I set the decision of the First-tier Tribunal aside.

#### Remaking the decision

8. The judge considered the all of the evidence and found that the documents provided by the Appellant in relation to his ex-wife's self-employment were reliable in themselves [16]. He decided that they did not assert that the Appellant's ex-wife was paying tax and national insurance. They showed that she was contracted to provide cleaning services to Submission UK, All Seasons Dry Cleaners and White Rose Dry Cleaners. He says that the obligation to pay tax and national insurance was her obligation and the documents supplied confirmed that this is the case. The judge found:

*"In the absence of further enquiries by the Respondent with All Seasons Dry Cleaners, White Rose Dry Cleaners or Submission UK, I am not satisfied that this Appellant has submitted false documents or*

*attempted to deceive merely on the basis that the Appellant's ex-wife did not pay her tax and national insurance on self-employment earnings."* [16].

9. The judge therefore found on the evidence before him that the evidence established that the Appellant's ex-wife was self-employed at the time indicated on the letters submitted. There is no challenge to that finding.
10. The judge referred to the fact that the Secretary of State had not submitted the evidence referred to in the Reasons for Refusal letter which appeared to indicate that the Appellant's ex-wife had not paid tax or national insurance on her self-employment earnings. At the hearing before me Ms Isherwood submitted that she has now access to the HMRC documents referred to in the Reasons for Refusal letter and sought permission to admit them in the context of my remaking the decision.
11. Ms Mohsin objected to the submission of the documents given that the Home Office had had the opportunity to submit such documents at the First-tier Tribunal and in any event the Home Office could have sought permission to admit the documents in relation to the proceedings in the Upper Tribunal. She submitted in the alternative that, even if there is evidence that the Appellant's ex-wife failed to make tax or national insurance contributions at a particular point in time, this does not mean that she was not self-employed as claimed. It could be that she made those contributions at a later time. In any event the judge found that the documents showing her employment were not false.
12. Ms Isherwood submitted that the evidence that she had was to the effect of the assertion in the Reasons for Refusal letter that the check showed that no evidence of tax or national insurance payments had been paid as of 24<sup>th</sup> June 2014.
13. In the circumstances I refused to admit the further evidence given that the Secretary of State had not complied with the Procedure Rules in relation to this matter and had an opportunity to submit these to the First-tier Tribunal. In any event I was satisfied that the findings of the First-tier Tribunal Judge in relation to the validity of the documents from White Rose Dry Cleaners (dated 14<sup>th</sup> February 2014) and All Seasons Dry Cleaners (dated 20<sup>th</sup> February 2014) were sufficient to demonstrate that, at the date of the termination of the marriage (14<sup>th</sup> January 2014), the Appellant's ex-wife was self-employed as claimed. The Appellant has therefore demonstrated that he meets the requirements of Regulation 10 (5) (a) and (b).
14. The Appellant's marriage lasted longer than 3 years and I am satisfied on the evidence submitted with the application that the couple resided in the UK for at least one year. The Appellant has therefore demonstrated that he meets the requirements of Regulation 10 (5) (d) (i).
15. In these circumstances I considered the application of Regulation 10(6). This requires that the Appellant demonstrate that, if he were an EEA national, he would be considered to be a worker, a self-employed person

or a self-sufficient person under Regulation 6. The evidence already submitted before the First-tier Tribunal demonstrates that the Appellant himself was employed at all material times. I am satisfied on the basis of the payslips and the P60s that the Appellant himself was employed at all relevant times. On the basis of this evidence I am satisfied that the Appellant has demonstrated that he meets the requirements of Regulation 10 (5) (c) and (6).

16. The Appellant has therefore demonstrated that he is a family member who has retained the right of residence in accordance with Regulation 10. I find that the Appellant has not shown that he resided in the UK in accordance with the Regulations for a continuous period of five years and has not therefore shown that he is entitled to permanent residence under Regulation 15.
17. I therefore remake the decision by allowing the appeal under Regulation 10 of the EEA Regulations.

### **Notice of Decision**

The decision of the First-tier Tribunal contained a material error of law. I set aside that decision and remake it by allowing it under the EEA Regulations.

No anonymity direction is made.

Signed

Date: 30<sup>th</sup> November 2015

Deputy Upper Tribunal Judge Grimes

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

No fee is paid or payable and therefore there can be no fee award.

Signed

Date: 30<sup>th</sup> November 2015

Deputy Upper Tribunal Judge Grimes