



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

Appeal Number: EA/01322/2016

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre On 5 October 2017	Decision promulgated On 6 October 2017	and	Reasons
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Before

UPPER TRIBUNAL JUDGE HANSON

Between

**FAISAL QADEER CHAUDHARY
(anonymity direction not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Mahmood, Counsel.

For the Respondent: Mr C Bates - Senior Home Office Presenting Officer.

ERROR OF LAW FINDING - DECISION AND REASONS

1. This is an appeal against a decision of First-tier Judge Hawden-Beal promulgated on 24 January 2017 in which the Judge dismissed the appellant's appeal against the refusal to issue a Permanent Residence Card pursuant to the Immigration (European Economic Area) Regulations 2006.

Background

2. The appellant, a citizen of Pakistan, applied for a residence card as confirmation of his right to reside permanently in the United Kingdom on the basis that he had retained his right of residence after his divorce from an EEA national.
3. Having considered the evidence with the required degree of anxious scrutiny the Judge found she was satisfied that the appellant was entitled to a residence card before proceeding to consider whether it should be a permanent residence card.
4. The Judges overall conclusions are set out at [22 - 23] of the decision under challenge in the following terms:

“22. Therefore, although I am satisfied that the appellant is entitled to a residence card on the basis that he has retained his rights, I am not satisfied that he can show that he has been residing in accordance with the regulations for a continuous period of five years prior to the date of the divorce because there are gaps in the evidence showing that his ex-wife was exercising her treaty rights for that same continuous period of five years.

23. I therefore find that the appellant has not discharged the burden of proof and has not demonstrated that he meets all the requirements of Regulation 15(1) (f) for a permanent residence card. I am satisfied that the decision of the respondent appealed against in this regard is in accordance with the 2006 EEA regulations.”

5. The appellant sought permission to appeal asserting the Judge erred in law. The relevant paragraphs of the application for permission to appeal are in the following terms:

“3. The FTTJ erred in failing to have proper regard to and apply the sole ground of appeal for EEA appeals as set out in the 2006 Regs Schedule 1 namely whether the decision breaches the appellant’s rights under the EU Treaties in respect of his entry to all residence in the UK.

4. The FTTJ erred and misdirected himself in determining this EEA ground in contention. As the FTTJ found that the Appellant retained his right of residence and was entitled to a residence card, he erred in omitting to find that the Respondent’s refusal to issue a residence card to the Appellant under reg 10 breached the Appellant’s rights under EU Treaties. The FTTJ erred in omitting to allow the appeal on the EEA ground in respect of reg 10.

5. The Tribunal is invited to consider whether in the light of the FTT’s set finding the decision can be corrected under the slip rule - so as to read appeal allowed rather than dismissed. Alternatively it is submitted that the Appellant should be granted leave to appeal and his appeal allowed.”

6. Permission to appeal was granted by a Designated Judge of the First-tier Tribunal the operative part of the grant being in the following terms:

“It is arguable that paragraph 22 is ambiguous. I would not agree that it is a typographical error that the Judge dismissed the appeal since the use of the word “although” in paragraph 22 suggests that the Judge was proceeding on the basis that there were two separate limbs to the application, retaining

rights and residing in accordance with the regulations. Arguably however the one implied the other and to differentiate them as the Judge did was an error of law. All grounds may be argued.”

Error of law

7. Although a Rule 24 response has been filed, dated 1 September 2017, opposing the appeal Mr Bates adopted a far more realistic approach before the Upper Tribunal in accepting that the Judge had erred in law in the manner made out in the application for permission to appeal to the Upper Tribunal.
8. This is an EEA appeal in relation to which the appellant is asserting he is entitled to a residence card in recognition of a right already conferred upon him by European law. It is not disputed the appellant was lawfully married to the EEA national on 24 February 2010 or that their marriage ended in divorce on 2 January 2015. There is no cross-appeal by the respondent to the finding of the Judge that at the date of the dissolution of the marriage the EEA national was exercising treaty rights in the United Kingdom and it was also accepted by the respondent that the marriage had lasted for more than three years and that the parties had resided together in the UK for at least one year.
9. The application for permission to appeal refers to Schedule 1 of the 2006 Regulations which is in the following terms:

“SCHEDULE 1 Regulation 26(7)

APPEALS TO THE _1FIRST-TIER TRIBUNAL_

1. The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the _1First-tier Tribunal or Upper Tribunal_ as if it were an appeal against an immigration decision under section 82(1) of that Act:

section 84(1)(a), except paragraphs (a) and (f);
sections 85 to 87;

section 105 and any regulations made under that section; and
section 106 and any rules made under that section(b).

2. Tribunal Procedure Rules have effect in relation to appeals under these Regulations.”

10. The situation in this appeal is very similar to that considered by the Tribunal in *MDB and others (Article 12, 1612/68) Italy [2010] UKUT 161 (IAC)* in which it was held that in a case concerned with an EEA decision the tribunal judge is obliged by s.84(1)(d) of the Nationality, Immigration and Asylum Act 2002 to decide whether the decision breaches any of the appellants’ rights under the Community Treaties in respect of their entry to or residence in the United Kingdom; see also s.109(3). Where the decision is a refusal to issue a permanent residence card that may necessitate, in the event that refusal is found

correct, considering whether the appellant was entitled nonetheless to an extended right of residence.

11. The finding by the Judge that the appellant is not entitled to a Residence Card as confirmation of the right to permanently reside in the United Kingdom is not the subject of this appeal although Mr Mahmood his skeleton argument makes comment about this aspect of the decision too.
12. What is clear is that the finding by the Judge that the appellant was entitled to a residence card, is clearly a finding that the refusal by the Secretary of State to issue this document breaches the appellant's rights under Community Treaties which arguably supports the contention that the correct decision in this matter is that, although dismissing the appeal against the refusal to issue a Permanent Residence Card, the Judge should have allowed the appeal in relation to the alternative finding of an entitlement to a Residence Card.
13. This tribunal therefore finds the Judge materially erred in law in a manner material to the decision to dismiss the appeal. That decision is set aside although all findings contained therein are preserved other than the decision to dismiss the appeal.
14. The Upper Tribunal substitutes a decision to allow the appeal. The nature of the relief to be granted, in light of the preserved findings, appears to be limited to the issue of a residence card and not to a permanent residence card.

Decision

15. **The Immigration Judge materially erred in law. I set aside the decision of the original Immigration Judge. I remake the decision as follows. This appeal is allowed.**

Anonymity.

16. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Signed.....
Judge of the Upper Tribunal Hanson

Dated the 5 October 2017

