



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/02276/2017

THE IMMIGRATION ACTS

Heard at Manchester CJC
On 5 November 2018

Decision & Reasons Promulgated
On 30 November 2018

Before

UPPER TRIBUNAL JUDGE LANE

Between

ZAHID FAROOQ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Khan

For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Zahid Farooq, was born on 25 January 1985 and is a male citizen of Pakistan. By a decision dated 20 February 2017, the Secretary of State refused the appellant's application for a permanent residence card on the basis of retained rights of residence following his divorce from his former partner, an EEA national. The appellant appealed to the First-tier Tribunal (Judge Khawar), which, in a decision promulgated on 2 March 2018, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. The appellant's application to the respondent was made under the provisions of the Immigration (European Economic Area) Regulations 2016, paragraph 15:
 15. – (1) The following persons acquire the right to reside in the United Kingdom permanently –
 - (a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;
 - (b) a family member of an EEA national who is not an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;
 - (c) a worker or self-employed person who has ceased activity;
 - (d) the family member of a worker or self-employed person who has ceased activity, provided –
 - (i) the person was the family member of the worker or self-employed person at the point the worker or self-employed person ceased activity; and
 - (ii) at that point, the family member enjoyed a right to reside on the basis of being the family member of that worker or self-employed person;
 - (e) a person who was the family member of a worker or self-employed person where –
 - (i) the worker or self-employed person has died;
 - (ii) the family member resided with the worker or self-employed person immediately before the death; and
 - (iii) the worker or self-employed person had resided continuously in the United Kingdom for at least two years immediately before dying or the death was the result of an accident at work or an occupational disease;
 - (f) a person who –
 - (i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and
 - (ii) was, at the end of the period, a family member who has retained the right of residence.
 - (2) Residence in the United Kingdom as a result of a derivative right to reside does not constitute residence for the purpose of this regulation.
 - (3) The right of permanent residence under this regulation is lost through absence from the United Kingdom for a period exceeding two years.
 - (4) A person who satisfies the criteria in this regulation is not entitled to a right to permanent residence in the United Kingdom where the Secretary of State or an immigration officer has made a decision under regulation 23(6)(b), 24(1), 25(1), 26(3) or 31(1), or an order under regulation 23(5) (exclusion order) or 32(3) (deportation order), unless that decision or order, as the case may be, is set aside, revoked or otherwise no longer has effect.

3. At the hearing before the Upper Tribunal on 5 November 2018, Mr Diwnycz, who appeared for the Secretary of State, accepted that the judge incorrectly applied the provisions of paragraph 15(1)(a) rather than the provisions concerning retained rights of residence (paragraph 15(1)(f)). I note in passing that the judge has applied the 2006 Regulations rather than the correct 2016 Regulations. Further, the judge has sought to identify whether his former spouse had been exercising treaty rights for a period of 5 years prior to the date of application; the judge need only have considered whether the appellant was a family member who at the end of the 5 year period enjoyed a retained right of residence. In his conclusion at [20], Judge Khawar wrote:

“Therefore, on the above documentary evidence I am not satisfied the appellant established that his former spouse was exercising Treaty Rights for a continuous five year period because she clearly was not doing so. In addition, there was no evidence that she was actually in employment at the date of the decree absolute.”

4. The decree absolute is dated 16 August 2016. The couple married on 27 May 2011. The Secretary of State appears to have been unclear as to whether he had before him a decree nisi or a decree absolute but it appears that the same document was before the Secretary of State and that is categorially a decree absolute. Judge Khawar’s conclusion at [20] arguably addresses the test under paragraph 15(1)(a) and that in respect of retained residence. The parties now agree that what had to be proved by the appellant was that his former spouse was exercising treaty rights on 16 August 2016. Notwithstanding the “belt and braces” approach adopted by Judge Khawar, I am not satisfied that the judge has focused upon the correct test. I cannot be sure that the judge has separated the two tests; much of his analysis focuses on periods of time during which it was not necessary for the appellant to show that his former wife was exercising treaty rights. On account of that uncertainty, I have set aside the First-tier Tribunal’s decision and remade the decision.
5. Mr Khan drew my attention to a number of items of documentary evidence which, he submitted, showed that the former wife was exercising treaty rights as at 16 August 2016. At page 45 of the bundle there is an HMRC tax calculation summary for the tax year 2016/17 (the tax year in which 16 August 2016 falls). This shows that the former wife of the appellant was self-employed during that tax year and earned £7,039. She did not pay any income tax but did pay National Insurance. Mr Diwnycz did not seek to persuade me that this evidence fails to establish that the former wife of the appellant was exercising treaty rights as a self-employed person. Clearly, the sums shown in the tax calculation may have been generated by the former wife’s business prior to 16 August 2016 and that she may have not been operating her business actively earning money on that date. However, I am satisfied that the appellant has shown that it is more likely than not that his former wife’s business was in operation and that she was exercising treaty rights at the material date. Given that both parties accept that the appellant himself has resided in the United Kingdom for a continuous period of at least 5 years, it follows that he has established a right to the permanent residence card by virtue of retained rights of residence.

Notice of Decision

6. The decision of the First-tier Tribunal which was promulgated on 2 March 2018 is set aside. None of the findings of fact shall stand. I remake the decision. The appellant's appeal against the decision of the Secretary of State dated 20 February 2017 is allowed.
7. No anonymity direction is made.

Signed

Date 26 November 2018

Upper Tribunal Judge Lane