



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

Appeal no: **EA/13167/2016**

THE IMMIGRATION ACTS

At Field House

**Decision & Reasons
Promulgated**

On 11.10.2018

On 23.11.2018

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Kamran SAQIB

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: Mr Arif Rehman, solicitor, Mayfair, Hounslow

For the respondent: Mr Steven Walker

DETERMINATION AND REASONS

This is an appeal, by the respondent to the original appeal against the decision of the First-tier Tribunal (Designated Judge Paul Shaerf), sitting at Taylor House on 19 February, on an EEA appeal by a citizen of Pakistan, born 1982. The judge had before him two appeals, which he heard together, against two decisions to refuse a residence card:

- (a) on 22 October 2016, on the basis of the appellant's retained right, following his divorce from a Polish citizen on 13 April that year; and
- (b) on 10 May 2017, on the basis of a permanent right, following five years' qualifying residence

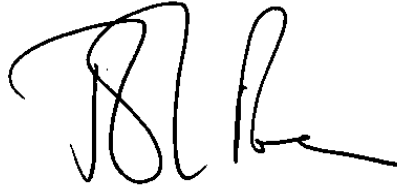
NOTE: (1) *no anonymity direction made at first instance will continue, unless extended by me.*

(2) *persons under 18 are referred to by initials, and must not be further identified.*

- 2.** Both decisions under appeal included an allegation by the respondent that the appellant's marriage had been one of convenience. After some discussion between the representatives, they came back and told the judge that the primary issue on both appeals was on that allegation. The judge found it not made out, and allowed the appeal on (a); but he dismissed the appeal on (b), which was not cross-appealed by the appellant.
- 3.** The reasons for decision (a) had included a statement that the appellant had failed to show his ex-wife was a 'qualified person' at the date of their divorce. On (b), that point was taken, and it was also pointed out that under reg. 10 (5) of the relevant EEA Regulations, the appellant needed to show evidence that he would have been a 'qualified person' himself if he had been an EEA citizen. The judge dismissed the permanent right of residence appeal (b), on the basis that the appellant had not shown that he had been in work since 9 February 2015.
- 4.** The judge gave detailed reasons at 32 for this decision, which could not be challenged on the evidence reviewed there. The Home Office appealed his decision on the retained right appeal (a), on the basis that the appellant had not shown that he would have been a 'qualified person' himself. This was a point raised in the notice of decision (b); but not in (a). However, the judge had had the point before him on the appeal, and found in favour of the respondent, who argued that his findings on (b) should have been carried over to (a).
- 5.** Mr Rehman complained that, because of the course the hearing had taken before the judge (see **2**), the appellant's representative (another member of his firm) had not had a proper opportunity to deal with this point. Mr Walker accepted that this had been so, and both of them invited me to consider it for myself. As it turned out, this was not necessary: Mr Walker had had an opportunity to do so before the hearing, and was prepared to accept that the evidence did show that the appellant would have been a 'qualified person' at the date of the hearing. It follows that the Home Office appeal against the judge's decision on (a), retained right of residence, is dismissed by consent.
- 6.** Mr Rehman went on, however, to argue that, on that evidence, the judge should have allowed the appeal on (b) permanent right of residence. The difficulty with that is that the appellant did not cross-appeal his decision on that. The point was first raised in Mr Rehman's r. 24 response, only provided on the date of the hearing; and its success was dependent on the necessary evidence being accepted by me (or, as it turned out, Mr Walker).
- 7.** On the evidence considered by the judge, this was not an obvious point, in terms of *Robinson* [1997] EWCA Civ 3090, or one with a strong prospect of success (see *AZ* (error of law: jurisdiction; PTA practice) [2018] UKUT 245 (IAC)). Nor should advocates be encouraged to expect to be able to overturn a judicial decision on the basis of a point raised only at this stage. For these reasons, the judge's decision on (b), permanent right of residence, also stands.

8. I should not leave this case without saying that the very experienced judge was clearly doing his best to resolve issues which were complicated by the existence of two separate decisions, to which the advocates before him had not given enough thought. The result in any case is that his decision on both (a) and (b) stands, if for slightly different reasons.

Home Office appeal on (a) dismissed:: first-tier decision stands on both (a) and (b)

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(a judge of the Upper
Tribunal)