



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/48923/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 16 June 2014

Determination Promulgated  
On 3 July 2014

Before  
DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And  
NADIR DANI  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr S Kandola, Home Office Presenting Officer.  
For the Respondent: Ms C Lichfield, Counsel, instructed by E U Migration Services,  
Solicitors.

**DETERMINATION AND REASONS**

**Introduction**

1. The Appellant in this appeal was the Respondent at the First-tier Tribunal hearing on 7 February 2014. However, for ease of reference, the Appellant and Respondent are hereafter referred to as they were before the First-tier Tribunal. Therefore Mr Dani is referred to as the Appellant and the Secretary of State is referred to as the Respondent.
2. The Respondent appeals against the decision of First-tier Tribunal Judge Mahmood (the Judge) to allow the Appellant's appeal against the decision of the Respondent to refuse to issue him with a permanent residence card pursuant to the provisions of

Regulations 10 and 15 (f) of the Immigration (European Economic Area) Regulations 2006, as amended (the EEA Regulations). The Judge found that the Appellant had adduced sufficient evidence to establish that he met the provisions of Regulations 10(5)(a) 10(5)(b), 10(6) and 15(f) of the EEA Regulations. The date of application is 8 July 2013, the date of decision is 12 November 2013 and the date of hearing was 25 March 2014.

3. In the grounds of application the Respondent submits that the Judge:
  - a. Made a mistake as to fact which could be established by uncontentious evidence before the Judge. The date of the termination of the marriage was inconsistently recorded in the determination. He accepts the evidence of a decree absolute to establish that it ended on 25 July 2013 but also states that the decree nisi and decree absolute took taken place in the summer of 2012. The date of termination of the marriage is material to the substantive issue because of the need to establish whether the EEA national was working at the date of the divorce for the relevant five year period;
  - b. Materially misdirected himself in law because, in concluding that the Appellant is entitled to a permanent residence card, he fails to engage with Regulation 15 (1)(f) which requires the Appellant to have been residing in the UK for a period of 5 years in accordance with the regulations. The date of divorce was ambiguous and it was not possible to establish if the EEA national was working at the date of divorce. The Judge relies on the Residence card that was issued to him in 2009 but this is only indicative of the Appellant having established that his EEA national spouse was exercising Treaty rights in the UK at the date of grant of that residence card. The Judge failed to make findings as to how the EEA national was a qualified person at the date of termination of the marriage and the Appellant's evidence did not establish how the EEA national was exercising treaty rights; and
  - c. Erred in failing to give adequate reasons for findings on material matters because there was a lack of evidence from the Appellant as to his own self-employment in spite of which the Judge found that he was self-employed up to and including the date of hearing and adequate reasons were not given for this finding.
4. In granting permission, Judge Hemmingway indicated the strength of the grounds as follows:
5. The Judge had clearly stated the date of the decree absolute at [23] and was therefore not confused as to the date of termination of the marriage and gave adequate reasons at [31] for his finding that the Appellant was self-employed. However, it was arguable that:
  - a. The Judge erred in concluding that the Appellant had lived in the UK in accordance with the Regulations at the time of termination of the marriage merely because the Respondent had issued him with a residence card [25]; and

- b. The Judge erred in failing to make a clear finding as to whether the Appellant had been residing in the UK in accordance with the Regulations for a five year period as required by Regulation 15.

### **The Hearing**

6. Mr Kandola submitted that although the Judge had directed himself to the relevant provisions within the reasons for refusal letter at [9 – 10], he was required to consider whether the Appellant had provided sufficient evidence to establish that his wife, the EEA national, was exercising Treaty rights at the date of termination of the marriage and that the Appellant had a retained right of residence from that date. The Judge had considered the evidence that the Appellant's wife had been employed as a nanny for the period 2011 – 2012 at [12]. The Judge then asked if there were any documents relating to her employment subsequently but the Appellant's evidence was that there were no payslips and she was paid cash in hand. There was no evidence that the EEA national was exercising Treaty rights at the date of termination and his appeal was bound to have failed.
7. In the alternative, he submitted that insufficient findings had been made regarding the EEA national's employment because: the Judge referred to the issue, in 2009, of the residence card for a five year period to the Appellant on the basis of an application in 2008 [24]. However, the card merely confirmed that at the date of issue, the Appellant's EEA national Sponsor was exercising Treaty rights. To establish a permanent right to reside, he would have to establish that she had been exercising Treaty rights throughout the five year period.
8. Mr Kandola also submitted that it was raised in the grounds of application that the Judge referred to the limited documentary evidence provided by the Appellant as to his own self-employment and that no evidence of NI contributions was provided [31]. In the absence of documentary evidence, the Judge failed to give adequate reasons for finding that the Appellant was self-employed.
9. Ms Lichfield submitted that:
  - a. The Judge had found that there was sufficient evidence before him to establish that the EEA national was exercising Treaty rights to at the date of termination of the marriage. The date of termination was 25 June 2013. The Appellant was required to demonstrate that he had been residing in accordance with the Regulations from 25 June 2008 to 25 June 2013. The Appellant applied for a residence card in November 2008 [24] and it was granted in 2009. At the date of grant, the Appellant must have satisfied the Respondent that the EEA national was exercising Treaty rights otherwise the residence card would not have been issued.
  - b. Then there was evidence for the period 2010-2013 in the Appellant's bundle to which the Judge was referred, which was:
    - i. at p 31, there was evidence of her NI records for the period 2010 – 2011;

- ii. at p 33 there was a record of income tax for the period 2011-2012;
  - iii. at p 27 there was a letter from HMRC dated 24 November 2013 establishing her liability to pay income tax for the period 8 April 2012 to 5 October 2013; and
  - iv. at p 28 there is a letter dated 20 December 2013 which confirms that the EEA national's Sponsor asked her agent to request a SA302 calculation which confirms the amount due at 31 January 2014 and at p 30 there is the tax assessment for 2012 - 2013 .
- c. The Judge stated that he was taken through the documentary evidence [18] and this was referred to at [11 - 12] as having been put to the Appellant. The Judge had these in mind when he made his findings and there was sufficient evidence on which to find that the Appellant's EEA Sponsor had been exercising Treaty rights up to the date of termination of the marriage. When asked whether there was evidence that the Appellant's EEA Sponsor had been exercising Treaty rights between the grant of the residence card in 2009 and the start of the documentary evidence as to self-employment in 2010, Ms Lichfield stated that there was no documentary evidence but there was sufficient evidence on the balance of probabilities to conclude that she had been so employed from 2008 through to when the documentary evidence of employment in 2010 commenced.
  - d. As to the Judge having made insufficient findings of fact in relation to the Appellant's self employment, Ms Lichfield submitted that there was a substantial amount of evidence before the Judge; although there was no evidence from HMRC as to his NI contributions, he had provided evidence in 97 - 99 of AB, which was referred to at [14]. Ms Lichfield handed up the original of a document which was handed up to the Judge confirming that he had overpaid income tax for the period 2010 - 2011 and this was repaid on 12 August 2011. There was further evidence that he had overpaid income tax which was returned to him in June 2012 at p 98 of AB and on 9 May 2013, at p 99 of AB. Therefore, whilst there was no evidence from HMRC, there was sufficient other evidence to confirm self-employment to the date of hearing, this being March 2014.
10. In reply, Mr Kandola submitted that the Judge stated at [34] that the Appellant was entitled to a permanent right of residence card. However, whilst there may be sufficient evidence to establish that the Appellant was entitled to a residence card on the basis of a retained right of residence, there was little evidence that the Appellant's EEA Sponsor was exercising Treaty rights for a five year period from the evidence at p 27 of the Appellant's bundle. The liability of £17.20 may be marginal and ancillary and insufficient to establish that she was exercising Treaty rights. He may have a good case to say that his EEA Sponsor was exercising treaty rights for the purposes of Regulation 10(5) but insufficient to establish that he was entitled to a permanent right of residence card.
  11. Miss Lichfield had with her the Appellant's HMRC records, which were not before the Judge. She supplied copies to Mr Kandola, and he accepted that if an error of law

were found, these records confirmed that the Appellant had been in employment from the termination of the marriage to date. I indicated to the parties that if there was insufficient evidence before the Judge that the Appellant was entitled to a permanent residence card at the date of decision, it may well be that a period of residence in accordance with the Regulations prior to the date of termination, coupled with a period of time with a retained right of residence by the date of this hearing would qualify the Appellant for a permanent residence card. Both parties accepted that if I found that there was a material error of law in the determination of the Judge, I had sufficient evidence before me to remake the decision without the need for a resumed hearing. I reserved my decision.

### **Decision and Reasons**

12. The provisions of Regulation 10(5)(c) were not in issue before me; that is, it was not disputed that the Appellant had been married to his EEA national spouse for at least three years, and that they had lived together in the UK for at least one year before the termination of the marriage.
13. Miss Lichfield's submission was that the Appellant's EEA national had in fact been exercising Treaty rights from November 2008, when the Appellant first submitted his application for a residence card which was granted on 5 October 2009, and from that date to the date of application on the basis of the documentary evidence supplied, and that this evidence was before the Judge when he made his findings of fact.
14. The problem, as I see it, is that whilst this may be the case, when the Judge gave reasons for his finding that the Appellant had been living in accordance with the Regulations for the five year period between 5 October 2009 and the date of hearing, he referred only to the residence card [24]. The Judge states:

“...In my judgement it is clear that the Appellant had a five years' residence card. He had applied for that on 27 November 2008. He was then granted a five years' residence card as a partner of an EEA national. That was valid from 5 October 2009 until 5 October 2014. It is referred to within the Respondent's documents but also in the Appellant's bundle. In my Judgement therefore Regulation 10(5)(b) is also satisfied because the Appellant has been residing in the United Kingdom in accordance with these Regulations at the date of termination of the marriage. This is because in July 2013 the Appellant still had a valid residence card. That is not due to expire until October 2014'.

15. As submitted by Mr Kandola, a residence card is only evidence that at the point at which the residence card was issued, the Respondent was satisfied that the Appellant's EEA national was exercising Treaty rights. The Judge made no reference to whether he accepted that the Appellant's EEA national was exercising Treaty rights throughout the whole period of time between 2008 and when the card was issued in October 2009, and then between 2009 and the date of the hearing. This period between November 2008 and October 2009 would need to be examined particularly because the start date of the Sponsor's employment with Paula Craft-Pegg is given as 1 September 2009 (p 31 of AB), and there was no evidence before the Judge as to how the Appellant's EEA Sponsor was employed prior to that date. The

Judge made no reference to having accepted the detailed submissions made by Ms Lichfield on the evidence before him as confirming that it was established that the EEA national was exercising Treaty rights for the whole of the period under examination.

16. I therefore find that adequate reasons were not given by the Judge for his finding that the Appellant was exercising Treaty rights for the period that Miss Lichfield submitted fell to be considered and therefore that adequate reasons were not given for his finding that the Appellant had lived in the UK in accordance with the Regulations for the five year period required by Regulation 15.
17. The parties accepted that the date of termination of the marriage was 25 June 2013. Although the Judge has referred to the decree absolute as being granted in the 'summer of 2012', this is, in my view, merely a typographical error.
18. As to the remaking of the decision, on the basis of the evidence before me, I find as follows:
  - a. There is little evidence before me that the Appellant's EEA national was exercising Treaty rights for the whole of the 1 year period from 27 November 2008 to 5 October 2009, which was when the residence card was granted; the finding only finding I can make is that at the date of issue, the Appellant's EEA national was exercising Treaty rights.
  - b. I accept Miss Lichfield's submission that the start date for the employment of the Appellant's EEA national with Paula Craft-Pegg is 1 September 2009, as stated in the document at p 31 of AB.
  - c. There is sufficient evidence before me, as submitted by Miss Lichfield and recorded by me above, to establish that the Appellant's EEA national was exercising treaty rights at the date of termination of the marriage, this being 25 June 2013. I have considered the documentary evidence that Ms Lichfield referred to as evidence before the Judge at 9(b) (i) - (vi) and Mr Kandola's submission that the evidence at p27 did not confirm that the EEA national was exercising Treaty rights between 8 April 2012 and 5 October 2013 because the activity may be merely marginal or ancillary. However, the document at p 30 confirms the income earned between 2012 and 2013, and this indicates the low level of income tax payable. There has in recent years been an increase in the level of pay on which no tax is paid which would account for the low level of income tax referred to at p 27. There was, therefore sufficient evidence before the Judge to confirm that the Appellant's EEA national was exercising Treaty rights up to the date of termination of the marriage.
  - d. As submitted by Miss Lichfield and accepted by Mr Kandola, the Appellant has adduced sufficient evidence to confirm that he has been employed both before the date of termination (as established by letters from HMRC confirming repayment of overpaid tax for the periods 2010 to May 2013 and the HMRC records provided at the hearing).

19. The period of time for which it is established that the Appellant has been living in the UK in accordance with the regulations is 1 September 2009 to the date of hearing, this being 16 June 2014. This is a period of four years and nine months. This entitles the Appellant to the grant of a residence card on the basis of retained rights of residence but not to a permanent residence card under Regulation 15, which requires the Appellant to establish that he has been residing in accordance with the Regulations for a period of five years.

**Decision**

20. There is a material error of law in the determination of the Judge. I therefore set aside his decision. I remake the decision to dismiss the Appellant's appeal under Regulation 15, making it clear that he is entitled to a residence card on the basis of his retained rights of residence and, if he remains working in the UK he will be entitled to make an application for a permanent residence card on 1 September 2014.

21. The Respondent's appeal is allowed.

**Anonymity**

22. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and immigration Tribunal (Procedure) Rules 2005 and we see no reason why an order should be made pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed

Date

Manjinder Robertson  
Sitting as Deputy Judge of the Upper Tribunal

TO THE RESPONDENT  
FEE AWARD

No fee was paid or is payable and no fee award is therefore made.

Signed

Dated

M Robertson  
Deputy Upper Tribunal Judge