



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

Appeal Number: IA/29009/2013

**THE IMMIGRATION ACTS**

**Heard at Belfast**

**On 13 January 2015**

**Decision & Reasons  
Promulgated**

**On 16 February 2015**

**Before**

**UPPER TRIBUNAL JUDGE KING TD**

**Between**

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

Appellant

**and**

**TOUFIK TISMELANE**

Respondent/Claimant

**Representation:**

For the Appellant: Mr M Shilliday, Home Office Presenting Officer

For the Respondent: Mr S McTaggart, Counsel, instructed by Andrew Russell & Co

**DECISION AND REASONS**

1. The claimant is a national of Algeria born on 26 January 1972.
2. He had been granted a residence card from 14 March 2007 to 14 March 2012 on the basis that he was a family member of an EEA national, namely his wife, Mrs Sheila McEvoy. They married on 19 June 2006 and divorced on 2 March 2012.

3. On 23 April 2012 an application was made for the grant of permanent residence on the basis that his former spouse had exercised treaty rights up until the point of divorce so as to make him qualified person under the Regulations.
4. The Judge considered a number of financial documents and concluded that indeed the appellant's wife had been exercising treaty rights, certainly shortly before the divorce and most likely at the time of the divorce, so by virtue of the Regulations she would still be treated as a worker. The Judge found the evidence of the claimant to be credible and accordingly allowed the appeal under the EEA Regulations.
5. Challenge was made to that decision by the Secretary of State for the Home Department, essentially on the basis that there was no documentary evidence to establish that which the Judge purported to find and that essentially it was a matter of speculation. It was argued that on that basis the claimant did not retain a right of the residence under Regulation 10(5) and could not qualify for permanent residence with reference to Regulation 15 of the EEA Regulations.
6. Permission to appeal was granted on that basis and thus the matter comes before me in pursuance of that grant.
7. There was some uncertainty as between the parties initially as to what documents had been seen by the Judge. Those documents which are within my file were disclosed to the parties for them to consider.
8. I note at paragraph 15 of the determination that the P60 forms for the two years to 5 April 2006, to 5 April 2007 to 5 April 2008 were produced. Those P60 forms together with other materials indicated that the appellant's wife worked full-time.
9. It was the evidence of the claimant, which was accepted by the Judge, that although he had no other documentation, because it was difficult to obtain that from her, she had nevertheless worked until shortly before the divorce. She had then stopped working in order for remarriage.
10. The first issue, which was most helpfully clarified as between the parties, was that the Judge perhaps had rather adopted a cumbersome route to the grant of permanent residence. Under the Regulations the claimant could claim permanent residence if his spouse had been exercising treaty rights as at the time of the divorce and that they had lived together for at least three years in any period prior to that divorce. Alternatively, that right would accrue if the claimant's spouse had previously gained a permanent night of residence because she had been exercising treaty rights for five years or more.
11. As Mr Shilliday most fairly pointed out, the evidence that was presented was that she had been working certainly from 5 April 2006 until shortly

before the divorce in 2012. If that evidence was correct and reliable it would mean that she had exercised treaty rights for more five years and accordingly under the Regulations particularly Regulation 15 of the EEA Regulations she qualified for permanent residence and so would her spouse, the claimant.

12. Nevertheless Mr Shiliday, on behalf of the Secretary of State, submitted that even on that basis it was quite wrong for the Judge to dispense with the requirement of documentary evidence to establish those important facts. The only documents that were produced were those up until 2008. There was a paucity of any other documents relating to later employment up until the date of divorce or shortly before. He invited me to find that it was simply not acceptable that findings based on speculation should be made. Although he most fairly conceded that the appropriate Regulations did not specify the documentation, whereas others did, nevertheless the burden of proof and the balance of probabilities demanded some material and not just oral evidence.
13. Mr Taggart, who represents the claimant, submitted that was not correct. Evidence given by an appellant if accepted and found to be credible is as much evidence as documentation. The lack of documentation may be a factor which influences what weight can be given to the evidence but that is a matter for the Judge. In this case there had been a sound basis for employment set out in documentation which was carried forward by oral evidence. He invited me to find that in all the circumstances it was open to the Judge to accept that evidence and make the findings which were made.
14. I agree. Judges of course have to be careful as to the nature of the evidence that is received. There may be occasions where the absence of documentation gives rise in commonsense to real concerns as to the truthfulness of the evidence. There may be occasions, however, where the testimony of a witness can be accepted, the witness being found both to be reliable and a witness of truth. This was clearly the case as can be seen in this case at paragraph 17. It seems to me and I so find that the Judge was entitled to rely on part documentation and part oral evidence in coming to the conclusion that certainly from 2006 until 2012 the sponsor had worked for at least five years, thereby entitling the claimant to the relief that is sought.
15. In those circumstances I find no error of law. The appeal by the Secretary of State for the Home Department is dismissed before the Upper Tribunal. The original decision of the First-tier Tribunal Judge stands, namely that the appeal under the EEA Regulations is allowed.

Signed

Date **13 January 2015**

Upper Tribunal Judge King TD