



**Upper Tribunal  
(Immigration and Asylum Chamber)  
IA/18167/2014**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 26 January 2016**

**Decision & Reasons  
Promulgated  
On 4 February 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE A M BLACK**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**H M S**

(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Ms Brocklesby-Weller, Home Office Presenting Officer  
For the Respondent: Mr Skinner, counsel

**DECISION AND REASONS**

1. The Secretary of State pursues this appeal against the decision of the First-Tier Tribunal to allow an appeal against the refusal to issue a residence card.
2. I maintain the descriptions of the parties as they were in the First-Tier Tribunal, namely as appellant and respondent, for ease of reference, notwithstanding it is the Secretary of State who pursues this appeal.
3. The appellant is a citizen of Pakistan who appealed against the decision of the respondent to refuse to issue a residence card under the *Immigration*

(*European Economic Area*) Regulations 2006 (as amended) (“the Regulations”). His appeal against that decision was allowed by Judge of the First-tier Tribunal McDade (“the FTTJ”) in a decision promulgated on 24 September 2015.

4. An anonymity direction was not made in the First-tier Tribunal but, given my references to the appellant’s personal circumstances, I make one now.
5. Permission to appeal was granted by FTTJ Foudy on 2 December 2015 in the following terms:

“2. The grounds argue that the Judge erred in his approach to the Regulations in that he found that the sponsor had spent time in the UK as a student when there was insufficient evidence so to find.

3. For an EEA national to exercise Treaty Rights as a student, regulation 4 of the Immigration (EEA) Regulations [sic] 2006 require the student to prove that she has comprehensive medical insurance in place for the relevant period and for her to sign a declaration that she holds sufficient funds not to become a financial burden on the state. It appears that neither of those requirements was satisfied in this appeal.

4. It is arguable that the Judge fell into an error of law.”

6. Thus the appeal has come before me.
7. In the grounds of appeal it is submitted for the respondent that the FTTJ, in finding that the sponsor had been either a worker or student for five continuous years, had failed to engage with the requirement of the Regulations, particularly regulation 4(1)(d), which detailed how student status was achieved. It was submitted that “the appellant has not provided evidence of comprehensive sickness insurance being in place while the sponsor was a student, the requirements of the Regulations have not been met and the appeal cannot succeed. By allowing the appeal the Judge has erred in law”.
8. Before me, Ms Brocklesby-Weller submitted that between September 2008 (when the last residence card had been issued) and 2012, when it was accepted the appellant’s former wife was employed, the appellant’s former wife was said to have been in full-time education; she would have been a qualified person only if she and the appellant had had sickness insurance cover. It was submitted that the FTTJ had not identified those criteria in the decision or that they had been met. Thus the FTTJ had erred in law in deciding that the Regulations had been met.
9. Mr Skinner, for the appellant, submitted that the terms of the reasons for refusal letter were such that the respondent could be said to have accepted the appellant’s former spouse had been a student at all material times. In any event, he submitted EEA nationals had reciprocal access to NHS services. This explained the FTTJ’s failure to make a finding on the issue, albeit he had noted the existence of the evidence of her studies.

Since the respondent had not raised the lack of comprehensive medical insurance or a declaration, the Judge had been entitled to assume it was not an issue.

10. Mr Skinner relied on the guidance in **AA (Nigeria) v SSHD [2015] EWCA Civ 1249** and **Das Gupta (error of law - proportionality - correct approach [2016] UKUT 00028 (IAC))**. This was, he submitted, a case of the respondent taking a point in the Upper Tribunal which she had been unable to raise in the First-tier Tribunal for lack of a Presenting Officer.
11. In response, Ms Brocklesby-Weller submitted that all issues were at large before the FTTJ. It was clear from the decision letter that no explicit concessions had been made to the effect that the student provisions had been met. It was accepted that the appellant's former spouse had been exercising Treaty rights in the latter period of residence, whilst working at Britannia.

### **Discussion and Findings**

12. The FTTJ notes in paragraph 1 that Regulation 15 requires the appellant to demonstrate inter alia "that he resided in the United Kingdom as [his former wife's] husband or ex-husband for a continuous period of five years while she was exercising treaty rights". However, he has not cited or referred to the Regulations to indicate how she might have exercised those rights, for example, as a student (with the associated requirements as to comprehensive medical insurance cover) or a worker.
13. Having identified specific evidence in an earlier paragraph, the FTTJ states "the documentary evidence I have referred to, together with the voluminous 307 page Appellant's bundle with much additional evidence is, in my judgement, ample to demonstrate that the Regulations have been satisfied". Further, at paragraph 5, he states "on the totality of the evidence before me, I find that the Appellant has discharged the burden of proof and reasons given by the Respondent do not justify the refusal. Therefore the Respondent's decision is not in accordance with the law and the applicable Immigration Rules [sic]". Given that the FTTJ has referred only to Regulation 15 in his decision, it can be inferred that the appeal was successful on the ground that the decision was in breach of that Regulation.
14. I note the oral submissions of the parties: they are at odds as to whether the respondent had, in effect, conceded that the appellant's former wife had been exercising Treaty rights as a student. It is instructive to set out the relevant passages of the reasons for refusal letter, as follows:

"In your completed EEA4 application form you have stated that your EEA National sponsor was employed and a student during your marriage and exercised her treaty rights for a continuous period of 5 years. You have provided an employer letter from 'Costcutter', dated 12 November 2007, 2 student letters from 'St Martin's Business School', dated 12 December 2008 and 28 April 2010, a student letter from 'South Quay College', dated 03 June 2011 and a print screen of

'Britannia Residential Properties' website. This department deemed this evidence alone insufficient in demonstrating that while you were married to your former EEA family member, she had exercised her treaty rights in the United Kingdom for a continuous period of 5 years.

Due to the evidence provided being deemed insufficient, this department conducted an inter-departmental check in order to fully verify whether your EEA National sponsor was employed - as you claim, or self-employed in the United Kingdom for a continuous period of 5 years prior to your divorce, while also being a student from January 2008- May 2011. The inter-departmental check was unable to trace [the EEA national] and therefore it cannot be accepted that she was employed or self-employed in the United Kingdom for a continuous period of 5 years.

You have failed to provide evidence that you meet the requirements of regulation 10(5) and you have therefore not retained a right of residence following divorce. Also your EEA National former family member has not exercised treaty rights under the regulations for 5 continuous years prior to divorce to in order for to qualify for permanent residence [sic]."

15. The evidence submitted in support of the application is listed in the reasons for refusal letter. The FTTJ had more evidence before him than did the respondent at the date of decision. In particular, he had evidence of a further period of study than that covered by the evidence submitted to the respondent in support of the application.
16. The reasons given in the refusal letter are unclear and inadequate. The letter identifies all the evidence produced by the appellant (both relating to his former wife's studies and to her claimed employment, eg South Quay College and Britannia) and the decision-maker then states that this is insufficient to show the appellant's former wife has been exercising Treaty rights for a continuous period of 5 years. The nature of this insufficiency is not explained in any way. It is not clear, for example, whether it relates to part or all of the evidence, the quality of that evidence and/or whether further evidence is required.
17. In passing, I note the reference to the appellant having submitted a screen print of the Britannia Residential Properties website. A reasonable explanation for the deemed insufficiency of the evidence might be that this screenprint was not evidence of employment. Such an interpretation would be consistent with the fact that the appellant states in the application form that he does not know the period of his former wife's employment by that company. As it happens, the appellant's claim that his former wife was employed by that company was satisfactorily evidenced by the appellant before the FTTJ, a finding which is not now challenged by the respondent.
18. The respondent then goes on to say in the reasons for refusal that, because of that [unspecified] insufficiency, an inter-department check was

carried out to check whether the EEA national “was employed ... or self-employed ... for a continuous period of 5 years prior to your divorce, **whilst also being a student from January 2008 - May 2011**” (my emphasis). Taking the letter as a whole, the inference from the use of this phrase is that the respondent accepted the appellant’s former spouse had been exercising Treaty rights as a student until May 2011 but that, nonetheless, in the absence of adequate evidence covering the whole five year period, the respondent had also conducted a check with other government departments to establish whether she had also been working during that period. This is consistent with the appellant’s having provided little evidence of his former wife’s claimed employment between June 2011 and the date of application (not an uncommon situation where parties had divorced acrimoniously). Furthermore, such an interpretation is also consistent with the fact that the respondent had accepted the appellant’s former wife was a qualified person, a student, in August 2008 and had issued a residence card to the appellant, valid until 17 June 2013. There is no evidence that card had been revoked or cancelled. It is also relevant that the appellant’s former wife continued, for a period, to study at the same institution as that where she had been studying at the date of issue of his residence card, a factor which the respondent would have taken into account in concluding that there were no concerns about the period to May 2011.

19. On the frontsheet to the respondent’s bundle, there is reference to the evidence of studies and employment submitted by the appellant with his application, as follows:

“Treaty rights evidence: 1 Employer letter from Costcutter, dated 2007, 2 student letters from “St. Martin’s Business School’, dated 2008 and 2010, 1 student letter from ‘South Quay College’, dated 2011, 1 online print screen of **claimed** EEA employment - ‘Britannia Residential Properties’.” [my emphasis]

These descriptions match those in the reasons for refusal letter (second page). This again suggests that the respondent had concerns about the period of claimed employment but not the period of claimed studies.

20. Significantly, the respondent makes no specific mention at all in her reasons for refusal letter to the appellant having failed to provide evidence of comprehensive insurance cover or any declaration of self-sufficiency. This is despite the respondent appreciating the appellant’s claim that his former wife had been a full-time student until May 2011, ie a period post-dating the last issue of a residence card in 2008. It can be inferred from this that this was not a matter of concern to the respondent, at least for the period of study claimed at the date of application. At that time, the appellant did not seek to suggest that his former wife had been studying after May 2011 (according to his application form).
21. Given these factors, it would not have been unreasonable for the FTTJ to conclude from the terms of the reasons for refusal letter that the respondent had no concerns arising from the appellant’s former wife’s

claimed status as a student under the Regulations in the period January 2008 – May 2011. The FTTJ did not have the benefit of hearing from a Home Office Presenting Officer and was entitled to draw his own conclusions as to the nature and extent of the issues between the parties (provided they were sustainable on the content of the reasons for refusal letter). The FTTJ was entitled to assume that, its not having been brought specifically to the attention of either the appellant or the First-tier Tribunal, there was no need to make findings on the appellant's claim that his former wife had been exercising Treaty rights as a student between January 2008 and May 2011 and that the sole issue was whether or not the appellant's former wife had been exercising treaty rights after that date.

22. The FTTJ has noted additional evidence which was adduced at the hearing and which had not been before the respondent at the date of decision. This includes "a document from Thames College, Berkshire, where she had undertaken an advanced Diploma in Business Management and studied there between September 2011 and July 2013. It is not in dispute now that the appellant's former wife worked at Britannia Residential Properties from August 2012 until December 2013. Thus the FTTJ made findings with regard to a period outwith the perceived concession in the reasons for refusal letter. It is clear from the application form and the reasons for refusal letter that the appellant had not applied on the basis of his former wife being a student during this period and that therefore, the respondent had not considered this. Given that the respondent had not herself addressed this issue, the FTTJ should have considered and made a finding as to whether the appellant's former wife had been exercising Treaty rights as a student during the period May 2011 – August 2012. This required consideration of the factors in Regulation 4 and whether there was sufficient evidence to satisfy them.
23. I turn to the issue of materiality. In paragraph 6 of the grounds of appeal, the respondent asserts that the appellant had not provided evidence of comprehensive sickness insurance being in place while the sponsor was a student and that the FTTJ had erred in law as a result in allowing the appeal. This is not disputed by the appellant. The respondent makes no reference in the grounds to the need for a declaration and I do not address this therefore. In **Ahmad v SSHD [2014] EWCA Civ 988**, it was held that where an EEA citizen resided in the UK but was not economically active, the right of the EEA citizen's spouse to permanent residence was conditional, under Article 7(1) of Directive 2004/38/EC, upon the EEA citizen holding comprehensive sickness insurance cover. That condition had to be strictly complied with, and could not be satisfied by the EEA citizen's entitlement to free healthcare under the NHS.
24. It can be inferred from the decision and reasons, that the FTTJ made his decision under Regulation 15, there being no reference to any other regulation, such as Regulation 10. It was therefore a material error of law for the FTTJ to fail to address whether the appellant had demonstrated that his former wife was a qualified person during the five year period (as required by Regulations 15(1)(b) and 4, including 4(1)(d)(ii) and (iii)).

25. Mr Skinner submitted that, in such circumstances, the decision should be remade and that, irrespective of his client's claim to be entitled to a residence card as a permanent resident, he should consider whether he would be entitled to a residence card under Regulation 10, as a family member who has retained the right of residence. Ms Brocklesby-Weller, not unreasonably, submitted that this was an issue on which she had not been given any notice, there being no mention of it in the appellant's R24 reply. She said that she would need time to prepare appropriate submissions on the issue.
26. In the light of this disadvantage to the respondent, both parties agreed that the appropriate way forward was for the hearing to be adjourned in the Upper Tribunal for a resumed hearing on the appellant's entitlement to a residence card either under Regulation 15 or Regulation 10. I endorse that proposal, given the unfairness to the respondent of remaking the decision now. I preserve the findings of the FTTJ as they relate to the periods outside May 2011-August 2012. Given the terms of paragraph 6 of the grounds of appeal and Ms Brocklesby-Weller's oral submissions, I find that there remains outstanding the issue of whether the appellant has demonstrated that he fulfils the criteria in Regulation 4(1)(ii) and 4(2)(b), namely the existence of comprehensive sickness insurance cover for his former wife and himself. In the light of my findings above, the relevant period for such cover is May 2011 - August 2012. This issue is to be decided at a resumed hearing in the Upper Tribunal.

### **Error of Law Decision**

27. The making of the decision of the First-tier Tribunal did involve the making of a material error on a point of law.
28. I preserve the findings of the First Tier Tribunal Judge.
29. I set aside the decision of the First-tier Tribunal Judge for a fresh decision to be taken at a resumed hearing in this Tribunal.

Signed **A M Black**

Deputy Upper Tribunal Judge A M Black

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed **A M Black**

Deputy Upper Tribunal Judge A M Black