



IAC-AH-KEW-V1

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

Appeal Number: IA/28832/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 15 December 2015**

**Decision & Reasons Promulgated  
On 6 January 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**MR SAIF ULLAH RAB NAWAZ  
(ANONYMITY DIRECTION NOT MADE)**

**Appellant**

**and**

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

**Respondent**

**Representation:**

For the Appellant: Ms Asma Nizimi, Counsel, instructed by Morgan Mark Solicitors  
For the Respondent: Mr Lawrence Tarlow, Specialist Appeals Team

**DECISION AND REASONS**

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Hosie) sitting at Hatton Cross on 11 March 2015 dismissing his appeal against the decision of the Secretary of State to refuse to issue him with a residence card as confirmation that he had a retained right of residence following his divorce from an EEA national. His application for a permanent residence card was refused, and upheld by the First-tier Tribunal, on the ground that he had failed to provide the required information to prove that his former wife was exercising treaty

rights at the date of divorce. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires to be accorded anonymity for these proceedings in the Upper Tribunal.

### **Relevant Background**

2. The appellant is a national of Pakistan. He first entered the United Kingdom on 11 September 2006 with valid entry clearance as a student. On 13 September 2009 he married Ms Solar, an EEA national. On 9 August 2011 he was granted a five year residence card valid until 9 August 2016 as the spouse of an EEA national. On 13 January 2014 his marriage to Ms Solar was dissolved. On 26 February 2014 solicitors applied on his behalf for a residence card as confirmation of his right to reside permanently in the United Kingdom.
3. The application was refused on 2 July 2014 on the grounds that he had not provided sufficient evidence that his ex-spouse was exercising treaty rights at the date of divorce. He had provided letters from HMRC which indicated self-employed status of his former spouse, and these letters indicated she was paying class 2 national insurance contributions. But the latest HMRC letter and payment was dated 30 March 2013 whereas the date of his divorce was 13 January 2014.

### **The Hearing before, and the Decision of, the First-tier Tribunal**

4. At the hearing before Judge Hosie, both parties were legally represented. Ms Nizimi of Counsel appeared on behalf of the appellant. As evidence that his ex-spouse was exercising treaty rights at the date of divorce, the appellant relied on the documents provided with the application and the following additional documents:
  - (a) a demand for unpaid national insurance contributions issued by HMRC on 29 March 2014 to Ms Solar at the matrimonial address stating that her outstanding liability period ran from 7 April 2013 to 5 April 2014;
  - (b) a demand for self-employed class 2 national insurance contributions issued by HMRC on 4 October 2014 to Ms Solar at the matrimonial address, in respect of an outstanding liability running from 6 April 2014 to 11 October 2014; and
  - (c) a tax return for Ms Solar for the tax year 6 April 2013 to 5 April 2014.
5. Each page of the tax return was stamped with the following rubric:

Copy only.

Do not send to HMRC.
6. In the tax return, Ms Solar declared total taxable profits for the year of £8,845. She was thus not liable to pay any income tax.
7. The appellant adopted as his evidence-in-chief a witness statement in which he said that he was not in a position to obtain evidence relating to his ex-wife's self-employment. His relationship ended acrimoniously and he had made every effort to provide the required documents. But it was beyond his control to provide

information that his EEA sponsor had been working and exercising treaty rights in the UK after their separation and divorce.

8. Counsel asked the appellant about a letter which he had written to his ex-spouse on 6 February 2015. The appellant confirmed that the purpose of the letter was to ask her to give him some documents to show that she was working and exercising her treaty rights. Counsel asked him what had happened. He answered that she had met him and given him the recent national insurance contribution documents and the tax return.
9. In cross-examination, the appellant was asked whether he had any evidence that the 2014 tax return had been filed. It was put to him that if his ex-wife had submitted the tax return, she would have been given a receipt. The appellant said he did not know. She had simply given him these documents. He was questioned as to how he had obtained these documents when he said in his witness statement that he could not get documents because of the acrimonious divorce. The appellant indicated that things were acrimonious “before putting my case” but that when he had asked his ex-spouse to provide documentary evidence, she had been happy to oblige.
10. In closing submissions, the respondent’s representative asked the judge to give little weight to the ex-spouse’s 2014 tax return as the appellant was unable to provide evidence that she had filed this tax return online. Given what he had said in his witness statement that the marriage had ended acrimoniously, the representative submitted that the authenticity of the 2014 tax return was highly in doubt.
11. In reply, Ms Nizimi submitted that the tax return showed that the ex-spouse was a self-employed cleaner until 6 April 2014. As regards the lack of production of a receipt for an online tax return submission, the judge was asked to note that the document was an original and would only be produced if the application was filed online. The judge was also asked to consider the fact that the national insurance contributions at pages 27 and 28 were stamped, indicating that bills were paid. It was a serious allegation, she submitted, to doubt the authenticity of a tax return and the judge was asked to attach little weight to that suggestion.
12. In his subsequent decision, the judge extensively rehearsed the evidence that he had received and the submissions of the representatives. He gave his reasons for dismissing an appeal at paragraphs [17] and [18] which I reproduce below:

“17. I accept that the Appellant is employed as is shown by his P60 for the year end April 2014. Evidence of his employment is also shown at pages 43-48. In terms of his former wife’s tax return contained at pages 23-26 this has been completed in type and no supporting evidence has been produced. It may or may not have been lodged. In terms of the National Insurance contribution documentation at pages 27 and 28 this shows that payments have been made. I took into consideration the length of the marriage and the circumstances. There appeared to be a rapid change of heart in the relationship in the space of a month in July 2013. This was the Appellant’s evidence. I also took into account the inability of the Appellant to produce the documentation at the time of application and then the production of it later on. Why would his former wife produce personal

documentation to her former husband (in an acrimonious marriage break-up) which could be used for any purpose. I noted that she was not present to speak to her documents though she appeared to be willing to meet with the Appellant and to hand over all her personal and financial details in spite of a bitter marriage break-up. I was not convinced in the circumstances as to why she would have suddenly become helpful and be prepared to assist her former husband. She was not however prepared to come to the tribunal and speak on his behalf.

18. On balance, I was not convinced that the Appellant's wife submitted her tax return for the year ended 2014 online in the absence of an Inland Revenue receipt, signature or authentication. It stands alone as an inconclusive document which does not prove the Appellant's case. I was not satisfied that the payment of her national insurance contributions, necessarily meant that she was self-employed in the absence of receipted tax returns or other Inland Revenue confirmation. National Insurance contributions for self-employed persons are levied at a set rate and are not based on proof of earnings. As a result I was not satisfied that she was self-employed and exercising Treaty rights in the UK at the time of her divorce from the Appellant. The burden of proof is on the Appellant and he has failed to provide the necessary evidence to support his appeal. The end result of this is that the Appellant's appeal must fail in terms of the Immigration Rules."

### **The Application for Permission to Appeal**

13. Paul Richardson of Counsel settled the appellant's application for permission to appeal to the Upper Tribunal. Ground 1 was that it was arguable there was no requirement for the appellant to demonstrate that his wife was exercising treaty rights on the day of his divorce in order to qualify for retained right of residence, following **NA (Pakistan) [2014] EWCA Civ 995**. Ground 2 was that it was arguably an error of law for the respondent, who could have verified the evidence in hours, to allege forgery without first doing so. Ground 3 was that the judge's conclusion in paragraph [18] that national insurance evidence submitted by the appellant did not "necessarily" mean his wife was self-employed was flawed, and revealed that the judge imposed too high a burden of proof on an already disadvantaged appellant. Ground 4 was the judge had erred in paragraph [17] by drawing an adverse inference on the inability of the appellant to produce the evidence at the time of his application but to produce it later on. The reality was that the appellant had produced national insurance and HMRC documents in relation to his ex-wife at the time of his application.

### **The Initial Refusal of Permission**

14. Permission to appeal was initially refused for, *inter alia*, the following reasons:

"The case proceeded on the basis that it had to be shown that at the date of the divorce the appellant's ex-wife was exercising treaty rights. The production of limited documentation does not necessarily discharge a burden of proof. That has to be assessed by the judge. Whilst the terminology used might have been more exact it is clear that the judge did not accept that a reliable picture had been given and was entitled to find that the burden had not been discharged."

### **The Eventual Grant of Permission to Appeal**

15. On a renewed application for permission to appeal to the Upper Tribunal, a Deputy Upper Tribunal Judge granted permission to appeal on 19 August 2015 for the following reasons:

“Refusal by the First-tier Tribunal Judge was on the sole ground that the judge could not establish that on the date of his decree absolute his wife was exercising treaty rights in the UK. As stated in ground 1 of the permission to appeal, this issue has been referred to the Court of Justice of the European Union by the Court of Appeal in **NA (Pakistan) [2014] EWCA Civ 995**. The ground of appeal is arguable.

The remaining grounds stand or fall with the first ground and in view of the grant of permission in relation to ground 1 all grounds are arguable.”

### **Discussion**

16. As I informed the parties at the outset of the hearing before me in the Upper Tribunal, there is no merit whatsoever in ground 1. Firstly, it was not part of the case advanced by Counsel at the hearing in the First-tier Tribunal that the appellant did not need to show that his ex-wife was exercising treaty rights at the date of divorce. Secondly, the case of **NA Pakistan** did not decide the point. The Court of Appeal merely recognised that it was arguable that the Regulations 2006 were incompatible with the Citizens’ Directive in stipulating unequivocally that the ex-spouse must be exercising treaty rights at the date of divorce. The decision of the Court of Justice European Union is awaited on this issue. In the meantime, judges must apply the law as it stands, not the law as it might be in the future. There was no error in the judge proceeding on the agreed premise that the appellant had to satisfy all the relevant requirements of Regulation 10 in order to qualify for a retained right of residence.
17. As I explored with Ms Nizimi at the hearing, the grant of permission in respect of the remaining grounds is problematic as the reason given for granting permission on the remaining grounds does not stand up to scrutiny. As Ms Nizimi readily concurred, the remaining grounds do not stand or fall with the outcome of ground 1. On the contrary, the premise which underlies ground 1 is precisely the opposite of that which underlies the remaining grounds. Ground 1 is directed at the proposition that the appellant does not need to show that his ex-spouse was exercising treaty rights at the date of divorce, whereas the other grounds are based on the contrary premise, which is that proof of the ex-spouse’s exercise of treaty rights at the date of divorce is an essential requirement.
18. However, as permission had been granted for the remaining grounds, I allowed Ms Nizimi to develop them. This was helpful, as Ms Nizimi was thus able to confirm that there was no version of the 2014 tax return before Judge Hosie which did not specify that it was only a copy which should not be sent to HMRC.
19. I consider the error of law challenge overlooks this vital consideration. The effect of the document being stamped with this rubric deprives it of any significant probative

value. The document informs the reader that it was not sent to HMRC. It also tells the reader that it is not a *copy* of a tax return that was filed with HMRC, because such a tax return (whether in an original or copy form) would not have stamped on it the message that it was a copy only that should not be sent to HMRC.

20. As I pointed out in the course of oral argument, on the first page there is a section headed "How to file your return." This says that most people file online, and informs the reader that they must go to a named website to do this. On the other hand, if the reader wishes to file on paper, he is asked to fill in "this form". Ms Nizimi submitted to the First-tier Tribunal Judge that the ex-spouse had submitted her return online. This was complete speculation: there was not a shred of evidence to substantiate such a claim, and it ran counter to the information given on the first page of the document relied on. For the fact that the ex-spouse had purportedly completed a *paper* return, albeit a version which was not to be sent to HMRC, pointed away from her having filed a return *online*, as it was not necessary to complete a paper return in order to file an online return.
21. In conclusion, the judge gave adequate reasons in paragraphs [17] and [18] for finding that the appellant had not discharged the burden of proof.
22. Ms Nizimi submits that the appellant has been a victim of procedural unfairness as the respondent did not raise an issue about the authenticity of the tax return until the hearing, rather than taking steps in advance of the hearing to establish whether the tax return had been filed. But the burden always rested with the appellant to prove his case, and the tax return document was self-evidently a weak piece of evidence for the reasons which I have given earlier in this decision. It should have come as no surprise that the Presenting Officer would query the reliability of the tax return as proving the exercise of treaty rights by the ex-spouse in the absence of other, and more persuasive, evidence.
23. Turning to ground 3, the judge has not applied too high a standard of proof. One of the grounds for finding that the appellant had not discharged the burden of proof on the balance of probabilities was that the payment of her national insurance contributions did not "necessarily" mean that she was self-employed in the absence of receipted tax returns or other Inland Revenue confirmation. As a result of this consideration, together with other considerations, the judge was not satisfied on the balance of probabilities that the ex-spouse was self-employed and exercising treaty rights in the UK at the time of her divorce from the appellant. Viewed in isolation, the use of the word "necessarily" might arguably import that the judge was applying a higher standard of proof than the balance of probabilities. But viewed in context, it is clear the judge was not applying the wrong standard of proof to his assessment of the evidence.
24. Ground 4 is vexatious. The judge had recognised earlier in his decision that the appellant had produced some documentation at the time of his application. But it was out of date, as was pointed out in the refusal letter. The evidence which was now relied on before him to discharge the burden of proof had only recently been

produced. So the sentence in paragraph [17] about which complaint is made in ground 4 is neither materially inaccurate nor unfair. The judge was entitled to draw an adverse inference about the late production of the evidence now relied on in circumstances where the appellant had previously claimed that he had been unable to obtain any evidence from his ex-spouse due to the acrimonious nature of their divorce.

**Notice of Decision**

The decision of the First-tier Tribunal does not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Monson