



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

Appeal Number: IA/25825/2015

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 5 July 2017**

**Decision & Reasons  
Promulgated  
On 12 July 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**MAKHAN SINGH  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr S Karim, Counsel, instructed by Chris Alexander Solicitors

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Mathews (the judge), promulgated on 31 October 2016, in which she dismissed the Appellant's appeal. That appeal had been against the Respondent's decision of 8 July 2015, refusing to issue the Appellant with

a permanent residence card under the Immigration (European Economic Area) Regulations 2006 (the Regulations).

2. The Appellant had married a Slovakian national on 10 April 2010. He had subsequently been issued with a residence card running for the usual five-year period. By an application made on 19 February 2015 the Appellant sought a permanent residence card. The Respondent's refusal of the application was based upon the fact that at that time the Appellant was not in fact divorced from his wife and therefore Regulation 10(5) of the Regulations could not apply. In addition, it was said that there was insufficient evidence relating to the EEA national's exercising of Treaty rights over the requisite five-year period.

### **The judge's decision**

3. The judge accepts that on the evidence then before her the Appellant had divorced the EEA national on 27 November 2013 (see paragraphs 10 and 14). At paragraph 15 she notes the absence of any direct evidence from the ex-wife (by way of witness statement or indeed live evidence). There was no evidence from mutual friends either. At paragraph 16 the judge notes that there were no original documents before her. She says that she was not persuaded by the copy documents, and in the absence of evidence from the ex-wife the judge was not satisfied that the EEA national had ever worked. In paragraph 17 the judge concludes that the Appellant himself had not shown that he had worked during a five-year period of residence.

### **The grounds of appeal and grant of permission**

4. The grounds of appeal assert that the judge failed to make findings on the evidence before her. They assert that the original documents were available at the hearing but the judge had failed to ask to see them. It is also stated that the Appellant's employment history over the course of a five-year period was not a requirement of the Regulations.
5. Permission was granted by First-tier Tribunal Judge Nightingale on 15 March 2017.

### **The hearing before me**

6. At the outset of the hearing I indicated to both representatives that my preliminary view was there were errors of law in the judge's decision, based upon what was said in the grounds.

7. Mr Tarlow confirmed that whilst he was resisting the Appellant's appeal, this was not done so in strong terms. He noted that questions of weight were a matter for the First-tier Tribunal.
8. In the circumstances I did not need to hear from Mr Karim.

### **Decision on error of law**

9. I conclude that there are material errors of law in the judge's decision. This is so for the following reasons.
10. First, it was the Appellant's evidence (not deemed to be unreliable by the judge) that his divorce from the EEA national had not been amicable. This formed a material element of the way in which the Appellant's case had been put. At paragraph 15 in my view the judge has either effectively required there to be direct evidence from the ex-wife, or has placed impermissible weight upon the absence of such evidence, or has failed to provide adequate reasons as to why such evidence would have been reasonably forthcoming in light of the circumstances of the case.
11. Second, as Judge Nightingale commented in her grant of permission, it would have been better for the Appellant's representative to have proactively placed the original documents before the judge at the hearing. Having said that, I am satisfied that the original documents were at court on the day and I see nothing in the papers before me (including the Record of Proceedings) to indicate that any request was made by either the judge or the Presenting Officer to inspect the originals of any documents submitted by the Appellant. In addition, at no stage, as far as I can see, has the Respondent asserted that any of the copied documents submitted by the Appellant were false. I cannot see any indication on the face of the papers before me that the judge put the Appellant's representative on notice that she was not prepared to attach any or any material weight upon copy documents, nor that sight of original documents was requested. If this indication had been given or a request made, it is extremely likely that the original documents (which were in fact at court) would have been placed before her. There was procedural unfairness in relation to the original documents.
12. Third, the judge has failed to explain by way of reasoning why she was not prepared to place any weight (as appears to be the case) on the copy documents. In addition to what I have said in the preceding paragraph, the copy documents were still evidence and their rejection required reasons to be given beyond stating the fact that they were copies of originals.
13. Fourth, there are no findings on the evidence of the Appellant himself (in relation to what he had said in writing and orally). There is no indication that the judge found the Appellant to be a generally unreliable witness,

and his evidence was just that: evidence. It required to be assessed in the same way as any other source of evidence. The Appellant's evidence included the assertion that his ex-wife had been working previously, and had been working at the time of divorce. The failure to make findings on material evidence is an error.

14. Fifth, the judge has also erred in apparently imposing a requirement that the Appellant himself had to show that he had been working for a period of five years in accordance with the Regulations. No such requirement exists.
15. For all these reasons I set aside the judge's decision.

### **Remaking the decision**

16. Both representatives were agreed that I could remake the decision based upon the evidence before me. This I now do.
17. I asked to see and was shown the originals of all of the relevant documents before the First-tier Tribunal.
18. Mr Karim confirmed that the Appellant had been issued a residence card by the Respondent previously and referred me to C2 of the Respondent's bundle. He relied upon the Upper Tribunal decision in HS [2011] UKUT 00165 (IAC), at paragraph 60. In respect of the EEA national's employment history, I was referred to payslips for the years 2010 and 2011 contained in the Respondent's bundle. In respect of the Appellant's bundle (which was before the judge) I was referred to P60s for the tax years 2010/2011 (at page 34) and 2011/2012 (at page 35). Payslips for the year 2012 were contained at pages 24 onwards, and at pages 29 to 33A there are payslips for 2013, the last of these being dated 30 August of that year. Mr Karim accepted that there was no documentary evidence for the ex-wife's employment as at the date of the termination of the marriage, that being 27 November 2013. He submitted that I should accept the Appellant's witness statement evidence in conjunction with the EEA national's good employment history over the course of a number of years, including that prior to 2010. I should also bear in mind that because the divorce was not amicable it had been very difficult for the Appellant to obtain all relevant documentary evidence from his ex-wife. In respect of the Appellant's position I was referred to page 64 onwards of the Appellant's bundle, and in particular to page 72 where there is a payslip dated 17 July 2015, postdating the five year period following the Appellant's marriage to the EEA national. It was submitted that the Appellant had acquired a permanent right of residence as at 10 April 2015 and he had not lost this right subsequently.
19. Mr Tarlow took no issue with the documentary evidence to which I have been referred, but submitted that the Appellant's witness statement

evidence alone was insufficient to justify a finding that the Appellant's ex-wife had been exercising Treaty rights as at the date of the termination of the marriage.

20. In light of the evidence as a whole and on the balance of probabilities I make the following findings of fact.
21. I find that the Appellant married the EEA national on 10 April 2010. I find that he was issued a residence card by the Respondent on 29 October 2010. This was valid until 29 October 2015. I find that the Respondent was satisfied that the EEA national had been exercising Treaty rights at that stage. There is no evidence to suggest that any revocation action was ever taken by the Respondent.
22. I find that the marriage was terminated on 27 November 2013.
23. I find that the EEA national was in fact in continuous employment from 2008 until at least the date of the termination of the marriage in 2013. I have had regard to all of the documentary evidence (both the copies and the originals). The payslips in fact go back to 2008 and run through 2009, 2010, 2011, 2012, and up to 30 August 2013. In addition I have P60s for two relevant tax years. I find all of this evidence to be reliable. It clearly shows a good employment history over the course of several years. There is, of course, a shortfall in the documentary evidence. The latest payslip is from August 2013, and the marriage was terminated in November of that year. Mr Karim submits that the gap can be filled by the Appellant's own evidence in the context of all the evidence before me and Mr Tarlow submits that this is not the case. I am persuaded by Mr Karim's submission. There is a good employment history. The documentary evidence runs up to some three months only prior to the date of the termination. There has been no express challenge to the credibility of the Appellant's evidence, and I have no particular reason to doubt it. I find that he is credible and I place weight upon what he says in his witness statement about his ex-wife's employment up until and indeed beyond the date of the termination of the marriage. I combine this with the supportive documentary evidence and I infer, on perfectly reasonable grounds, in my view, that the EEA national was in fact working as at 27 February 2013.
24. At that point and thereafter I find that the Appellant himself has been working. Pages 64 onwards of the Appellant's bundle provide documentary support for this, with particular relevance being attached to pages 69 to 72. It is right that there is not a great deal of documentary evidence concerning the Appellant's employment. However, I have found him to be credible and I accept what he has said in his witness statement. That is combined with the documentary evidence to which I have referred and in addition the self-billing invoices contained from pages 73 onwards (all relating to 2015). I also take into account what is said by the Upper Tribunal at paragraph 60(f) of HS.

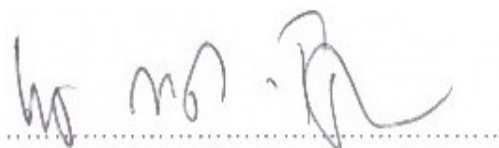
25. Taking the above findings into account I conclude that the Appellant had a retained right of residence as from the date of the termination of the marriage on 27 November 2013. This retained right of residence has continued thereafter. The relevant five-year period in relation to the acquisition of a permanent right of residence ran from the date of the marriage, being 10 April 2010 to 10 April 2015. Bearing in mind the EEA national's employment history and the continuation of the Appellant's retained right of residence, I find that that five-year period has been accrued in accordance with the Regulations, and therefore a permanent right of residence was acquired on 10 April 2015.
26. There is no evidence or suggestion that the Appellant has lost that permanent right of residence subsequently, and I conclude that he has not.
27. In light of the above the appeal is allowed. The Appellant is entitled to be issued with a permanent residence card.

### **Notice of Decision**

**The First-tier Tribunal's decision contained material errors of law and I therefore set it aside.**

**I re-make the decision by allowing the Appellant's appeal on the grounds that the Respondent's decision breached his EU law rights.**

**No anonymity direction is made.**



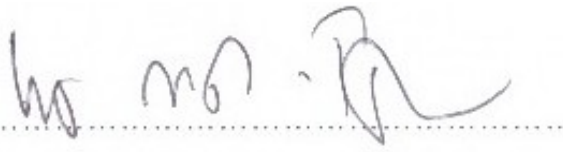
Signed

Date: 11 July 2017

Deputy Upper Tribunal Judge Norton-Taylor

### **TO THE RESPONDENT** **FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award. This appeal clearly required adjudication on contentious matters, and the Appellant has not provided all the documentary evidence he might have.

A handwritten signature in black ink, appearing to read 'Norton-Taylor', is written over a horizontal dotted line.

Signed

Date: 11 July 2017

Deputy Upper Tribunal Judge Norton-Taylor