



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

Appeal Number: IA/00505/2020

THE IMMIGRATION ACTS

**Heard at Field House
On 20 April 2022**

**Decision & Reasons Promulgated
On 04 May 2022**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**NOMAN QURESHI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Jesurum, Counsel, instructed by Zahra and Co Solicitors

For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the re-making of the decision in the Appellant's case following the earlier error of law decision made by a panel of the Upper Tribunal (Upper Tribunal Judge Norton-Taylor and Deputy Upper Tribunal Judge Monson), promulgated on 20 January 2022, by which the decision of the First-tier Tribunal was set aside. The full error of law decision is appended to this re-making decision.

2. The Appellant is a citizen of Pakistan, born in 1990. The essential factual background can be stated briefly. On 30 June 2015, he married Ms Vasile, a Romanian citizen, whilst they were both in Cyprus. She then came to the United Kingdom and he followed sometime after, arriving here in 2016. The Appellant claimed to have lived with Ms Vasile for approximately a year before they separated. Divorce proceedings were initiated on 24 May 2019 and the marriage was dissolved on 12 November 2019. On 9 January 2020 the Appellant applied for a residence card on the basis of a claimed retained right of residence in the United Kingdom, pursuant to regulation 10 of the Immigration (European Economic Area) Regulations 2016 ("the Regulations").
3. On appeal from the refusal of that application, the First-tier Tribunal was unimpressed with the evidence provided and concluded that: (a) the couple had never cohabited in the United Kingdom; and (b) the Appellant was not employed or self-employed at any material time. The judge went on to conclude that the Appellant did not have a retained right of residence and duly dismissed the appeal. It is to be noted that the Respondent had expressly conceded that Ms Vasile had been exercising Treaty rights in the United Kingdom.
4. The Upper Tribunal concluded that the judge had erred in law in two respects: first, that inadequate reasons had been provided to support the conclusion that the Appellant had produced contrived evidence relating to his claimed self-employment; second, that, contrary to the judge's view, there was no requirement for cohabitation in respect of regulation 10(5)(d)(i) of the Regulations. The finding that the Appellant and Ms Vasile had not in fact cohabited was expressly preserved.

The issues

5. The live issues identified in the error of law decision were: (a) whether the Appellant and Ms Vasile had resided in the United Kingdom at the same time for at least one year prior to the initiation of divorce proceedings on 24 May 2019, pursuant to regulation 10(5)(d)(i) of the Regulations; (b) whether the Appellant could show that he was, if he had been an EEA national, a worker, a self-employed person or a self-sufficient person, pursuant to regulation 10(6)(a) of the Regulations.
6. I record here that Mr Whitwell did not seek to go behind the concession previously made by the Respondent in respect of Ms Vasile's exercising of Treaty rights in the United Kingdom at all material times. Nor did he seek to argue that the Upper Tribunal's construction of regulation 10(5)(d)(i) of the Regulations was incorrect. In that regard I restate the conclusion that that particular provision does not require cohabitation, but merely that the EEA national and their non-EEA national spouse had resided in the United Kingdom at the same time for at least one year prior to the initiation of divorce proceedings.

7. When the construction of regulation 10(5)(d)(i) set out above was being considered in the error of law decision, the panel had not had its attention drawn to the decision of the Upper Tribunal in HS (EEA: revocation and retained rights) Syria [2011] UKUT 00165 (IAC), which, at paragraph 43, confirmed that this particular provision of the Regulations would be satisfied if “both spouses were living in the United Kingdom rather than living together in the same household in the United Kingdom.” This decision only reinforces the panel’s own view.

The documentary evidence

8. I have considered the relevant documentary evidence contained in:
- (a) the Respondent’s original appeal bundle, paginated 1-118;
 - (b) the Appellant’s consolidated appeal bundle, indexed and paginated 1-258;
 - (c) four payslips purporting to relate to Ms Vasile’s employment in 2018 and 2019
9. Certain items of evidence contained in the Appellant’s bundle and the payslips had not been before the First-tier Tribunal. His solicitors helpfully identified these and made what was in effect an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. Mr Whitwell made no objection to this new evidence being admitted. In all the circumstances, I concluded that it was appropriate to admit this evidence.
10. During the course of oral evidence I was asked to view the Appellant’s mobile telephone in order to see telephone call records purporting to have been made by the Appellant to Ms Vasile in recent months for the purposes of obtaining her payslips. Mr Whitwell made the legitimate point that there might be concerns as to the weight attributable to this evidence, but he did not have any objection in principle. I concluded that I should look at the telephone for the purposes requested. I ensure that Mr Whitwell saw precisely what I did and that a note was taken.
11. Before moving on, I need to make a couple of comments regarding the evidence. First, the index on the Appellant’s consolidated bundle was inadequate: it simply listed three groups of evidence; “witness statements”, “evidence of residence”, and “evidence of self-employment”. No attempt had been made to particularise the index, as it should have been. This did not assist anyone in making reference to specific items of relevant evidence at the hearing. The second point relates to the absence of an updated witness statement for the Appellant. It is quite clear to me that this should have been done, particularly in light of the clearly stated issues falling for consideration at the re-making stage. In the event, the

absence of a new witness statement resulted in over-lengthy and at times confusing oral evidence.

The oral evidence

- 12.** The Appellant and four supporting witnesses attended the hearing. All gave evidence with the assistance of an Urdu interpreter. This evidence is of course a matter of record and I do not propose to set out in any detail here.
- 13.** In summary, the Appellant adopted his previous witness statement (this was undated; another omission which should have been addressed by his representatives). He was asked at length about his employment and claimed self-employment history. The thrust of the responses was as follows. He had started self-employment as a trader (selling T-shirts) towards the end of 2018. This had continued (with some periods of inactivity due to moving around and the Covid-19 restrictions) until the present day. In addition, there had been employment at mobile telephone shops in Winchester (“Phone World”) in 2019 and then Bournemouth (“iCrack”) in 2020/2021, and as a pizza delivery driver, also in Bournemouth in 2020/2021 (“El Murrino”).
- 14.** In cross-examination, Mr Whitwell quite properly interrogated the issue of claimed self-employment, focusing on an absence of documentary evidence, what was said in the 2020 application form, a lack of clarity as to the T-shirt business, and the manner in which Ms Vasile’s payslips had been obtained.
- 15.** The four supporting witnesses all adopted their respective statements. Their evidence related to claimed knowledge of the Appellant and Ms Vasile in the United Kingdom, primarily in the years 2016 and 2017. Three of the four witnesses also attested to knowledge of the Appellant’s T-shirt-selling business.

Submissions

- 16.** Mr Whitwell relied on the Respondent’s decision letter, dated 23 June 2020, subject to what was said in the decisions of the First-tier Tribunal and the Upper Tribunal. As mentioned previously, he did not seek to argue that Ms Vasile had not been exercising Treaty rights, or that the construction given to regulation 10(5)(d)(i) of the Regulations was incorrect. He submitted that the Appellant had not provided evidence in a straightforward manner and that the witnesses were all his friends and perhaps had little to lose by either making up or exaggerating evidence in order to assist him. He also noted that they had stated that the Appellant

had cohabited with Ms Vasile, a state of affairs which the First-tier Tribunal had rejected. The lack of relevant documentary evidence was “striking”. There was no audit trail in respect of Ms Vasile’s payslips. More evidence from her could and should have been obtained.

17. On the issue of regulation 10(6) of the Regulations, Mr Whitwell submitted that there was no evidence of any tax having been paid, that the profit and loss account document was incomplete, and that there had been very limited evidence on the T-shirt business.
18. Mr Jesurum relied on his skeleton argument. The Respondent’s concession as to the exercise of Treaty rights by Ms Vasile was significant because that in effect placed her in the United Kingdom. The witnesses had been broadly consistent and had not embellished their evidence. The fact that they had all met Ms Vasile in this country had not been challenged. Reliance was also placed on money transfer receipts contained in the Appellant’s bundle. The payslips also placed her in this country. On the question of self-employment, it was clear enough that the Appellant had been, and was, a trader in T-shirts. There had been a mistake in the 2020 application form.

Findings and conclusions

19. Before setting out my specific findings on the two central issues in this appeal, I make the following more general observations. I am of course considering the evidence in the round and applying balance of probabilities to it. It is right to say that a greater amount of documentary evidence could potentially have been provided by the Appellant. It is also the case, however, that a failure to provide a more comprehensive evidential picture does not necessarily render the evidence which has been adduced unreliable. Some aspects of the Appellant oral evidence were, at times, somewhat confusing. I have had to consider whether this was because he was simply being untruthful, or, alternatively, whether he was just not a particularly strong witness. In respect of the witnesses, I have taken account of the fact that they are all friends of the Appellant and would no doubt have wished to assist him. That their evidence could be described as simply “self-serving” is not of itself a strong argument against its reliability: see, for example, R (on the application of SS) v SSHD (“self-serving” statements) [2017] UKUT 164 (IAC). Further, I have noted the fact that the witnesses’ evidence suggested, at least to an extent, that the Appellant and Ms Vasile had been cohabiting, contrary to the preserved finding of the First-tier Tribunal. That does create something of a tension. Having said that, the predominance of the questions put to them related to having met Ms Vasile in the United Kingdom, not specifically whether they knew the details of any claimed cohabitation as such.

The first issue: residence of the Appellant and Ms Vasile in the United Kingdom for at least a year prior to the initiation of divorce proceedings

20. Having regard to the observations stated in the preceding paragraph and the submissions made by the representatives, I find that the Appellant and Ms Vasile did in fact reside in the United Kingdom at the same time for at least one year following their marriage and prior to the initiation of divorce proceedings on 24 May 2019. My reasons for this finding are as follows.
21. There has never been any dispute that the Appellant and Ms Vasile in fact came to the United Kingdom after their marriage in Cyprus in 2015. Nor has there been any positive evidence that either of them left this country at any stage thereafter.
22. I agree with Mr Jesurum's point concerning the Respondent's concession as to Ms Vasile's exercise of Treaty rights. That concession originated in the decision letter of 23 June 2020, which referred to payslips covering the period 13 September 2019 to 8 November 2019. In fact, the concession as then stated does not assist the Appellant's case because the relevant date was not the termination of the marriage in November 2019, but the initiation of divorce proceedings in May of that year. However, at [15] of the First-tier Tribunal's decision (noted at [11] of the error of law decision), it is clear that the Respondent went on to concede that Ms Vasile had been exercising Treaty rights as at May 2019. In that form, the concession did indeed place Ms Vasile in the United Kingdom at that point in time. It is reasonable for me to infer that Ms Vasile had not just been working in May 2019, but that this was part of a continuum going back some time and reaching forward to at least November 2019.
23. I find the payslips relating to Ms Vasile and recently provided by the Appellant to be reliable documents. There has been no suggestion that they are forgeries. They appear on their face to be in a format commonly seen and they contain all the relevant information one would expect from a properly issued payslip (gross pay, tax deductions, NI contributions, pension contributions, and suchlike). I am prepared to accept the Appellant's evidence that he re-established contact with Ms Vasile through her sister. The evidence was not entirely clear, but I need not be convinced by it, simply satisfied on the balance of probabilities. It is more likely than not that the contact and number viewed on the Appellant's mobile telephone at the hearing was indeed Ms Vasile, notwithstanding the absence of direct evidence from her that this was the case. There was a lack of clarity as to the question of whether the full screenshots of the payslips (which I accept were sent to the Appellant through Facebook) were then passed on to the solicitors. In any event, I am satisfied that the documents have not been altered in relation to their content. There is nothing material in the apparent fact that although Ms Vasile seemingly lived in Liverpool at the time the payslips were issued, the Appellant had her saved as ("Adela London"): it seems (on the basis of documentary evidence in the Appellant's bundle) that she did indeed live in London in

the past. I can see no sound reason why his decision to have saved her number with that geographical reference undermines the reliability of the payslips themselves. In light of the foregoing, I find that the payslips place Ms Vasile in the United Kingdom between February 2018 and November 2018, and again in March 2019.

- 24.** There is merit in Mr Jesurum's submission that the money transfer receipts also place Ms Vasile in the United Kingdom. These receipts (all from 2017) are reliable documents. I accept the evidence that Ms Vasile sent money to relatives of the Appellant on his behalf. It is more likely than not that she was in fact present in this country when the transfers were made.
- 25.** I turn to the witnesses' evidence in so far as it relates to the first issue in this appeal. In so doing, I bear in mind the observations made in paragraph 19, above. I treat their evidence with a degree of caution and I do not in any way consider that it displaces the preserved finding relating to the absence of cohabitation. It is clear that the witnesses gave consistent evidence about having met Ms Vasile in 2016 and/or 2017. In my judgment, there was no obvious attempt at embellishment or exaggeration on this particular issue. Contrary to Mr Whitwell's suggestion, the witnesses' status in the United Kingdom was of neutral effect (in any event, one of the witnesses was in fact a British citizen). Overall, I find that their collective evidence was supportive of the assertion that Ms Vasile was present in the United Kingdom in 2016 and 2017.
- 26.** I turn to the Appellant's residence in the United Kingdom at the relevant time. I treat his own evidence with caution, given the adverse credibility findings made by the First-tier Tribunal.
- 27.** The documentary evidence is supportive of his claim. There is medical evidence from 2016 which places the Appellant in the United Kingdom (41 of the Appellant's bundle). Bank statements for 2018 and 2019, which I accept relate to the Appellant, show numerous withdrawals which can only sensibly be put down to the Appellant being present in the United Kingdom: for example, payments for takeaway food and coffees, and cash withdrawals. In addition, a number of cash deposits are made, again indicating the presence of the Appellant here.
- 28.** As with Ms Vasile's presence in the United Kingdom, I find that the witnesses' evidence is supportive. Whilst the bulk of the questions put to them related to Ms Vasile's presence in the United Kingdom and the Appellant's claimed self-employment, their evidence as a whole also went to the issue of the Appellant's residence. Again, their evidence was consistent on the issue. I am satisfied from their evidence as a whole and, for example, a number of photographs in the Appellant bundle, that they are all genuine friends of the Appellant. Even taken account of their wish to assist the Appellant's case, I do not find that they have been untruthful about the basic fact of residence within the relevant period of 2016 to 2019.

29. All-told, I am satisfied that the Appellant was resident in the United Kingdom between 2016 and the initiation of divorce proceedings in May 2019.
30. I find that there was, between 2016 and May 2019, a period of at least one year in which the Appellant and Ms Vasile were both resident in the United Kingdom at the same time.
31. It follows from the above that I find the one year residence condition contained within regulation 10(5)(d)(i) of the Regulations to have been satisfied.

The second issue: the Appellant's employment and/or self-employment circumstances

32. Regulation 10(6) of the Regulations provided as follows:

“(6) The condition in this paragraph is that the person-

- (a) is not an EEA national but would, if the person were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6

...”

33. The judgment of the Court of Appeal in Ahmed [2017] EWCA Civ 99 (referred to in Mr Jesurum's skeleton argument) confirms one element of the correct approach. This case dealt with the question of whether regulation 10(6) complied with article 13(2) of Directive 2004/38. The Court of Appeal concluded that it did. One effect of this was that Mr Ahmed had to have shown that he was a “worker” at the date of his divorce.
34. It follows from Ahmed that the Appellant must show that he was either a worker or self-employed person as at 12 November 2019.
35. The employment at the mobile telephone shops and as a pizza delivery driver only came about in 2020 and I am not currently concerned with this.
36. The Appellant claims that he started his T-shirt selling business in late 2018. The fact that the section on self-employment in the 2020 application form was crossed out is a problem for the Appellant. He signed the application form and, despite effectively blaming his previous representatives for making a mistake in its completion, he has not made a formal complaint to that firm or the appropriate regulator. I find that this aspect of the evidence materially undermines the Appellant's claimed self-employment. It is not, however, fatal.
37. The unaudited accounts provided by Aaziz Accountants for the tax year 2019/2020 must be viewed with a degree of caution, given their status.

The net profit figures of £5946 for the year to 5 April 2020 and £3192 for the previous year, whilst fairly modest, are in my view capable of demonstrating meaningful self-employment, as opposed to mere inconsequential or ancillary earnings.

- 38.** The accountant's covering letter, dated 12 August 2020 and relating to the tax year 2019/2020, confirms that they were acting for the Appellant, that he was a trader of garments, and that the profit for the tax year was £5946. Whilst the letter quite rightly stated that this information was correct to the best of the firm's knowledge and could not be guaranteed, it has not been suggested that the letter was a forgery, or that the author was acting in bad faith. The accompanying tax return contains figures consistent with the unaudited accounts. There is also a confirmation that the return was filed with HMRC on 12 August 2020. The nil figure in respect of any tax liability for that tax year is consistent with the net profit being below the relevant personal allowance threshold. In all the circumstances, I do attach weight to the evidence from the accountants and the tax return.
- 39.** I take Mr Whitwell's point as to the apparent absence of rent for the stall and the cost of buying the T-shirts wholesale from the expenses stated in the profit and loss document. Having said that, Mr Jesurum's retort to this has some merit: if anything, the Appellant had underreported relevant expenses, which would have been to his financial detriment and could not be said to have been in order to reduce any tax liability.
- 40.** I turn to the receipts which caused the First-tier Tribunal concern. It is of course the case that these were provided by the Appellant only after his 2020 application had been refused. This gives rise to a degree of scepticism as to their reliability. It does not, however, necessarily follow that they are unreliable.
- 41.** It is a fact that a number of the sums stated in invoices correspond with cash deposits going into the Appellant's account. It is also indisputable that some of the invoices and deposits pre-date the refusal of the 2020 application and so cannot have been in some way concocted as a post-refusal attempt to bolster an appeal. There are three receipts which do post-date the refusal, but these are in the clear minority. Having considered these receipts in the context of the evidence as a whole, and applying an appropriate degree of caution, I find that they are (a) genuine documents (in that they are not simple forgeries), (b) reliable as to their content (in that they support the existence of payments made for services rendered), and (c) that they also support the claimed self-employment of trading in T-shirts.
- 42.** Although I was not specifically referred to them at the hearing, there are a number of social media "chats" (either on WhatsApp or Facebook) contained in the Appellant's bundle. There is no evidence to show for certain that these conversations took place through the Appellant's mobile telephone, but it is in my view unlikely that he would have been willing

and/or able to obtain them from somebody else's device. The conversations appear to involve a number of different individuals and all relate, on their face, to enquiries about the purchase of T-shirts. This evidence is consistent with the claimed self-employment.

- 43.** The Appellant's evidence about the rent paid for the stall in central London was less than entirely clear: he appeared to agree with annual and weekly figures which did not correspond with the amount of days he claimed to be actually working. Further, some of his oral evidence related to his current situation, when his activities in previous years were also relevant.
- 44.** Having reflected back on my note of the oral evidence, I find that certain aspects of it were not perhaps as problematic as I first thought. For example, the Appellant did not in fact state that he had actually paid £13,000 in rent for a year: he had simply stated that this would have been the figure for an annual renting of the stall space. His evidence was that he had only worked for part of any given week, specifically Fridays, Saturdays, and Sundays, and that the rental payments would therefore have been much less. This is plausible. Further, the apparent vagueness in respect of the name of the Appellant's supplier ("Frank") was not significant when the context of the business is considered in the round.
- 45.** The Appellant told me that the stall was based in a shop owned/rented by a friend, Asif, in the Trocadero centre just off Piccadilly Circus. The particular location of the stall was corroborated by three of the four witnesses. One of the witnesses also confirmed the name of the owner of the shop. As with other aspects of their collective evidence, I do place weight on what they have said about the stall.
- 46.** The Appellant's cases that he has traded on a cash basis. In and of itself, there is nothing implausible about that. Provided that everything is properly accounted for in respect of the HMRC, it is perfectly proper to deal in cash, both in respect of wholesalers and retail customers.
- 47.** Mr Whitwell raised the question of an apparently unpaid penalty issued by HMRC for the late filing of a tax return. In fact, that penalty related to a late return from 2018/2019. Whether or not the penalty was paid is really nothing to the point. Indeed, that penalty notice actually supports the Appellant's case that he had been engaging in self-employment in the tax year 2018/2019 (it being the case that a tax return was in fact filed, which in turn suggests that this was done by virtue of some form of economic activity).
- 48.** Mr Whitwell also relied on the absence of additional documentary evidence. He may have a point here: the Appellant probably could have adduced more. However, the appropriate standard of proof is a balance of probabilities and no more.
- 49.** Having regard to all the considerations set out above, I find that the Appellant did begin self-employment as a trader in T-shirts in late 2018, as

claimed. I also find that he remained engaged in this self-employment as at the termination of his marriage to Ms Vasile on 12 November 2019.

50. The final question is whether the Appellant must also show that he has continued to be economically active within the meaning of regulation 10(6) of the Regulations *after* the termination of the marriage.

51. I have considered the decision of a Presidential panel in Gauswami (retained right of residence: jobseekers) India [2018] UKUT 275 (IAC). Although I was not referred to this by either representative at the hearing, I am bound to take it into account. The primary issue with which the Tribunal was concerned related to whether the categories of person described in regulation 10(6) included a jobseeker. The Tribunal concluded that it did. In addition, the Tribunal considered the temporal scope of that provision. Having confirmed that an individual claiming to have retained a right of residence must show that they satisfied regulation 10(6) as at the date of termination of the marriage and not the initiation of divorce proceedings, the Tribunal went on to say the following at paragraphs 32 to 35:

“32. The tenses used in regulation 10(5) and (6) are significant. Regulation 10(5)(a) and (b) are in the past tense, whereas regulation 10(6) and regulation 10(5)(c), which introduces sub-paragraph (6), are in the present tense.

33. In order to understand the significance of this, one needs to refer to the text of Article 14. Article 14.2 (a), (b), (c) and (d) set out requirements to be met in order to retain the right of residence. These requirements are essentially backward-looking in nature. So too, as we now know, is the requirement regarding the status of the qualified person.

34. By contrast, the paragraph that follows sub-paragraph (d) ("Before acquiring the right of permanent residence ...") is of a present or ongoing nature. This is because a person who retains the right of residence has to be a worker/self-employed/self-sufficient and insured person (or a family member of such a person) at all times up to the point that he or she acquires the right of permanent residence; that is to say, acquires a right that is no longer retained from a previous relationship with a relevant EU citizen. In short, the meaning of the words "Before acquiring ..." would perhaps be better conveyed in English by saying "Until the right of permanent residence has been acquired ...".

35. Regulation 10(6) is how the United Kingdom has decided to give domestic legislative effect to that paragraph in Article 14. As will be seen, we conclude that regulation 10(6) does not give proper or at least sufficiently clear effect to that Article, so far as concerns what is meant by being a "worker". But, so far as its temporal aspect is concerned, regulation 10(6) is entirely right. So far as the appellant is concerned, the requirements of that provision must be satisfied both on and after the date of the decree absolute.”

52. The effect of this in the Appellant case is that he must also show that he has been a worker or self-employed person following the termination of his

marriage. This is because he has not yet acquired a permanent right of residence (this possibility has not been the subject of any argument for me and I am not prepared to extend my fact-finding and conclusions to encompass this issue. It *may* be that he has indeed acquired such a right).

53. Taking the self-employment element first, I am satisfied that this economic activity has continued over the course of time, albeit with periods in which meaningful trading was difficult or indeed impossible due in large part to the Covid pandemic. Some of the receipts relate to activity in 2020. The witness Mr Kunwar stated that he had personally seen the Appellant at his stall on the Easter weekend this year. This evidence was not specifically challenged. In any event, I find that it was given truthfully. Further, I consider the evidence in the round and this context provides a picture of an individual who has sought to support himself over the course of time, albeit only at a relatively modest level.
54. There is also the evidence of employment, specifically relating to “iCrack” and “El Murrino”. Payments made for this work can be seen going into the Appellant’s bank account during the course of 2020 and 2021. I find that the Appellant was in fact employed in these capacities. This employment is consistent with what would have been an obvious downturn in the T-shirt business during the height of the Covid restrictions and during their knock-on effects. It goes to indicate a willingness and ability to maintain economic activity on a consistent basis.
55. On balance, the evidence is sufficient to satisfy me as to the Appellant’s ongoing status as a non-EEA national who has been self-employed and, for a period in 2020 to 2021, employed.
56. Bringing my findings and conclusions together, the Appellant satisfied all of the relevant requirements of regulation 10 of the Regulations. He has a retained right of residence in the United Kingdom. On this basis, his appeal succeeds.

Anonymity

57. The First-tier Tribunal made no direction. There has been no request that I should do so and there are in any event no sound reasons to take such a step. No direction is made.

Notice of Decision

58. **The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.**

59. I re-make the decision by allowing the appeal on the ground that the Respondent's decision reaches the Appellant's EU law rights, with specific reference to the Immigration (European Economic Area) Regulations 2016.

Signed: H Norton-Taylor Date: 21 April 2022

Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

I have decided to make a reduced fee award of £70.00 in this case. Much of the relevant evidence was not put before the Respondent at the outset.

Signed: H Norton-Taylor Date: 21 April 2022

Upper Tribunal Judge Norton-Taylor

APPENDIX: ERROR OF LAW DECISION

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

Appeal Number: IA/00505/2020

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On 7 January 2022

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Before

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE MONSON**

Between

NOMAN QURESHI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Jesurum, Counsel instructed by Zahra & Co Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant, who is a national of Pakistan, appeals from the decision of the First-tier Tribunal (Judge Beg sitting remotely at Taylor House on 20 April 2021) dismissing his appeal against the decision of the respondent to refuse to issue him with a residence card as confirmation that he has a retained right of residence under Regulations 10(5) and 10(6) of the Immigration (EEA) Regulations 2016 as the former spouse of an EEA national.

Relevant legal framework

2. For the purposes of this appeal, it is only necessary to set out the following provisions in Regulation 10:

- (5) The condition in this paragraph is that the person (“A”)-
- (a) ceased to be a family member of a qualified person or an EEA national with a permanent right of residence on the termination of the marriage or civil partnership of A;
 - (b) was residing in the United Kingdom in accordance with these Regulations at the date of termination;
 - (c) satisfies the condition in paragraph (6); and
 - (d) either-
 - (i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership, the marriage or civil partnership had lasted for more than three years and the parties to the marriage had resided in the United Kingdom for at least one year during its duration
- (6) The condition in this paragraph is that the person-
- (a) is not an EEA national but would, if the person were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6

Relevant Background

- 3.** On 9 January 2020 the appellant applied for a residence card to confirm that he was the former member of an EEA national exercising Treaty rights in the UK who had retained a right of residence following the end of his marriage to Adela Georgiana Vasile, a national of Romania. In his application form, he said that he had been born in Karachi, Pakistan, on 22 January 1990. He was currently living in Walthamstow, whereas his former spouse was living in Liverpool. They had met on the internet in 2014, and they had decided to get married on 1 February 2015. They had got married in Nicosia, Cyprus, on 30 June 2015. They had lived together in Cyprus from 20 February 2015 until 19 February 2016. They had lived together in the UK at 12A Hartly Avenue, London E6 from 3 December 2016 until 2 December 2017. They had then separated, and legal proceedings to end the marriage had begun on 24 May 2019. The marriage had been dissolved on 12 November 2019. Both of them were living in the UK at the date of divorce. At the date of divorce, he had been living in the UK for three years, and his sponsor had been living in the UK for four years.
- 4.** At section F of the application form, the appellant was asked to specify his status in the UK. The appellant said that he had had retained worker

status - "*involuntarily unemployed and looking for work*" - from 2016 until the present day.

5. The appellant was asked to state whether he had been working or whether he had been self-employed. The self-employment provision was crossed out, but the employment provision was completed. The appellant said that he had been employed by Masala Zone in Camden Town, London NW1 from December 2011 until August 2013. He went on to indicate that the reason why his employment had ended was because his visa had expired.
6. The application was supported by a divorce certificate issued by the Family Court in Liverpool and by payslips issued to Mrs Vasile by her employer between 13 September 2019 and 8 November 2019.
7. On 23 June 2020 the appellant's application was refused on two grounds. The respondent was prepared to assume that his EEA national sponsor was continuing to exercise her Treaty rights as a worker when the marriage was terminated four days after the last payslip. However, from the date of the termination of their marriage he was required to provide evidence that he had been a worker, self-employed person or self-sufficient person. He had not provided any evidence to show that he met this requirement.
8. He also needed to demonstrate that the marriage had lasted at least three years, and that the parties to the marriage had resided in the UK for at least one year during its duration. The tenancy agreement for himself and his EEA national sponsor dated 3 December 2016 had been provided, but this only confirmed their intention to rent a property.

The Decision of the First-tier Tribunal

9. The hearing before Judge Beg took place on the Cloud Video Platform. Both parties were legally represented, and the appellant gave oral evidence. The appellant said that he had arrived in the UK with his former wife on 28 July 2016. As to the condition in Regulation 10(6), the appellant maintained the position that he had taken in his grounds of appeal, which was that he had in fact been self-employed since 2018 selling garments.
10. In her subsequent decision giving reasons for dismissing the appeal, Judge Beg set out at paragraphs [5]-[9] the case advanced by the respondent in the respondent's review. The respondent noted that the appellant had provided a tenancy agreement and some handwritten receipts as evidence of residence in the UK prior to the breakdown of the marriage in 2017, but on their own they were not reliable evidence of residence in the UK or of cohabitation. It was notable that the appellant's bank statements only started on 2 December 2018, which did not support his claim that he had been resident in the UK from 2016. The appellant's claim that he had been self-employed since 2018 selling garments was inconsistent with his application form dated 7 January 2020, where he described his status as unemployed and looking for work since 2016, and later in the application form where he crossed out the section requesting details of his self-

employment. While there was correspondence from HMRC and a tax submission receipt, the documents post-dated the refusal and did not necessarily prove that the appellant had been self-employed since 2018. The respondent concluded that, in the light of the serious inconsistencies, little weight was put on other evidence such as invoices, which were self-generated.

- 11.** At paragraphs [12]-[32] of her decision, Judge Beg gave her reasons for dismissing the appeal. At paragraph [15], she noted a concession by Ms Murray on behalf of the respondent that the appellant's former spouse was exercising Treaty rights in the UK at the date when the divorce proceedings were initiated. The Judge went on to direct herself as follows:

“The issues therefore before me are whether the appellant and his former spouse were living together for at least a year in the United Kingdom and whether the appellant was working and therefore exercising Treaty rights as if he were an EEA national at the date of divorce.”

- 12.** At paragraphs [16]-[25], the Judge gave detailed reasons for reaching the conclusion in paragraph [32] that the appellant and his former spouse were not living together for at least one year in the UK in accordance with the Regulations.

- 13.** At paragraph [26], the Judge turned to consider the other issue raised in the RFRL. She found that the appellant's solicitors would have taken instructions from the appellant before completing the application form, and hence the information in the application form directly contradicted the appellant's evidence that he had been working in the UK on a self-employed basis. She noted that in his witness statement the appellant said that following his return to the UK in 2016, he had worked when he had been able to and “*to the extent my immigration status allowed.*” However, in cross-examination, the appellant accepted that he was aware that as a spouse of an EEA national he had no restriction on his right to work. The Judge found that what he said in his witness statement therefore cast further doubt upon his overall credibility.

- 14.** At paragraph [29], the Judge found that the receipts of the appellant's business were self-generated. The Judge noted that the appellant's accountants reported that he had made a profit of £3,192 in 2019 and a profit of £5,946 in 2020, but found that the accounts were unaudited. The Judge continued in paragraph [30]:

“Ms Jones on the appellant's behalf referred to a number of invoices such as invoice number 20 which shows that a sale of £179 was made on 15 October 2019. She said the corresponding payment was deposited into the appellant's bank account on the same date. I find that the receipts of business and bank statements are post decision evidence. The appellant has had an opportunity following the respondent's refusal to generate receipts of business and pay small amounts of funds into his bank account to correspond with the claimed receipts of business.”

- 15.** At paragraph [31], the Judge said that she found it incredible that on the same day that the appellant sold a garment, he would have immediately paid the funds into his bank account. She observed that there were other deposits going into the appellant's bank account which were unexplained, because the appellant was not asked questions about them in cross-examination, for example the sum of £500 paid to him by Rafiq Mohsin on 1 July. The Judge said that, taking the evidence in the round, she did not find that the appellant had a genuine, self-employed business. She found that he had been unemployed, as he had stated in his application form, from 2016; and he was therefore not exercising Treaty rights as if he were an EEA national at the date of divorce.

The Application for Permission to Appeal

- 16.** The application for permission to appeal was settled by Counsel who represented the appellant before Judge Beg. Ms Jones submitted that the Judge was referred to a number of invoices and matching bank statement entries over the period at which the divorce was "*commenced*" (sic) in November 2019. She went on to list six invoices dated between 15 October 2019 and 15 January 2020, and six corresponding bank statement entries which were made on the same date as the invoices. She submitted that the Judge had therefore erred in concluding that the evidence of the receipts of the business and funds into his bank account could have been created after the respondent's refusal on 23 June 2020:

"There is no way in which the appellant could have generated this evidence about his bank statements in 2019 after the refusal in June 2020."

The Reasons for Granting Permission to Appeal

- 17.** Permission to appeal was initially refused on the ground that, even if there was an error, the outcome would have been the same as the Judge also found that the appellant and his former spouse had not resided together for the required 12 months, and no error of law was argued in relation to that finding.
- 18.** Following a renewed application, Upper Tribunal Judge Plimmer granted permission to appeal as it was (just) arguable that the credibility findings regarding the appellant's exercise of Treaty rights might have adversely impacted upon the findings regarding the appellant and his spouse living together; and in these circumstances she was prepared to find by a small margin that the grounds of appeal raised an arguable material error of law.

The Hearing

- 19.** At the hearing before us to determine whether an error of law was made out, Mr Jesurum submitted that the Judge had plainly erred in what she had said at paragraph [30] of the decision. It would have required the appellant to use a time machine to go back in time in order to arrange for small amounts of funds to be placed into his bank account before the refusal decision was made in June 2020. Although there was no error of

law challenge to the Judge's finding on the issue of cohabitation, the Judge's error in paragraph [30] was material because the Judge had misdirected herself at paragraph [15]. While it was true that the appellant had advanced a positive case that he and his former spouse were living together for at least one year in the UK, in order to qualify for a retained right of residence the appellant only needed to show that both of them were living in the UK for at least one year during their marriage. Mr Jesurum cited **ML (Nigeria) [2013] EWCA Civ 844** in support of the submission that where there is any doubt as to whether or not an incorrect fact is material to the conclusion, that doubt is to be resolved in favour of the individual who complains of the error.

- 20.** Mr Lindsay submitted that, on a fair reading of paragraph [30], the Judge was not saying that the appellant had retrospectively placed small amounts into his bank account. It was open to the Judge to find that the appellant had only produced evidence of his claimed self-employed business activity after the refusal decision had been made, and thus to characterise all of this evidence as being post-decision evidence. What the Judge meant in the final sentence was that all the invoices had been concocted and that as far as the later bank statement entries were concerned - those which were made after the refusal decision - small sums had been placed into the bank account to correspond with the claimed receipts of business. Mr Lindsay cited **KM [2021] EWCA Civ 693** at [77] for the proposition that judicial restraint should be exercised when the reasons that a Tribunal gives for its decision are being examined, and the Appellate Court should not assume too readily that the Tribunal misdirected itself just because not every step in its reasoning is fully set out.
- 21.** Alternatively, if there was an error in the Judge's reasoning, the error was not material to the outcome, because there was no error of law challenge to the Judge's finding on the issue of residency during the marriage.
- 22.** In reply, Mr Jesurum submitted that the Judge had not made a clear finding as to whether she accepted that the appellant and the sponsor had both been present in the UK for at least one year during their marriage.
- 23.** After a brief adjournment in order to confer, we came back into court to announce our decision, which is that we are persuaded that a material error of law is made out, for the reasons which we develop below, and that the decision of the First-tier Tribunal should be set aside and retained by the Upper Tribunal for remaking. We also indicated that the directions for the remaking of the decision would include a direction that the Judge's finding that the appellant and his former spouse were not living together for at least one year in the UK would be preserved.

Discussion and Conclusions

- 24.** We exercise restraint before interfering with the Judge's decision, with reference to recent observations made by the Court of Appeal in **KM**

[2021] EWCA Civ 693, at paragraph [77]. In particular, we acknowledge that she was not required to set out each and every step in the reasoning process.

- 25.** The Judge had reminded herself at paragraph [3] that the date of refusal was 23 June 2020. We consider that it is unlikely therefore that she was not mindful of the date of refusal when she was assessing the documentary evidence relied on by way of appeal as demonstrating that the appellant was carrying on a self-employed business at the time of the divorce in November 2019, and was continuing to exercise Treaty rights as a self-employed businessman in accordance with Regulation 10(6). Consistent with the principle that an adverse inference should not be readily drawn, we consider that her finding in the penultimate sentence of paragraph [30] that the receipts of business and the corresponding bank statements constitute post-decision evidence is not in itself problematic, as it can be taken to mean no more than that the appellant had only produced all the relevant evidence relied upon, including the bank statements, after the refusal decision was made.
- 26.** However, the final sentence of paragraph [30] raises an insuperable difficulty, as the Judge advances a case theory which is only sustainable in respect of bank statement entries made after the refusal decision on 23 June 2020, whereas, in order to demonstrate that Regulation 10(5)(c) was met, the appellant relied on bank statement entries made between 15 October 2019 and 15 January 2020. Indeed, the Judge herself refers to the first relevant entry relied upon. This was a cash deposit of £179 made on 15 October 2019, which the appellant said corresponded to Invoice 20. While it was open to the Judge to find that the appellant would have had an opportunity following the respondent's refusal to generate receipts of business, she could not sustainably also find that he had made a cash deposit of £179 into his bank account on 15 October 2019 in order to correspond with invoice 20; or, more generally, that he had placed or caused to be placed small amounts of money into his bank account to correspond with his claimed receipts of business on any other date before 23 June 2020.
- 27.** At paragraph [31], the Judge goes on to observe that there are other deposits in the appellant's bank account which are unexplained, from which we infer that they were not put forward as having been generated by a garment sale, such as the sum of £500 that was paid to the appellant by Rafiq Mohsin on 5 July 2020. The observation made by the Judge in paragraph [31] points to a subsidiary and overlapping case theory that before the refusal decision – and also after it (as on 5 July 2020) – there were by happenstance small amounts of money being deposited into the appellant's bank account, and that the appellant had generated false receipts of business in order to correspond with some, but not all, of these cash deposits and payments that were originally made for reasons unconnected with garment sales. However, this subsidiary case theory is merely hinted at and the contents of paragraph [31] cannot be said to

meet the requirement of adequately explaining to the reader why the pre-decision bank statement evidence is being given no weight.

- 28.** At paragraph [30] the Judge expressly committed herself to a single case theory whereby the appellant placed small amounts of funds into his bank account to correspond with the claimed receipts of business, and this single case theory does not provide a rational ground for discounting the bank statement evidence that was produced by the appellant to show that he was actively engaged in self-employed business activity at the time of his divorce from the sponsor.
- 29.** If the Judge's unchallenged finding on the residency issue had been dispositive of the appeal, arguably the Judge's error on the exercise of Treaty rights by the appellant would not have been material. However, as submitted by Mr Jesurum, the appellant can still have a retained right of residence even though he did not reside in the same household in the UK as his former spouse for at least a year during their marriage. The requirement in Regulation 10(5)(d)(i) is that, prior to the initiation of the proceedings for the termination of the marriage or civil partnership, the marriage or civil partnership has lasted for at least three years and the parties to the marriage or civil partnership have resided in the UK for at least one year during its duration.
- 30.** This reflects Article 13(2) of Directive 2004/8/EC which stipulates that divorce shall not entail loss of a right of residence of a Union citizen's family members who are not members of a Member state where:

“(a) prior to initiation the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member state ...”

- 31.** In **PM (EEA - spouse - “residing with”) Turkey [2011] UKUT 89 (IAC)** a Presidential Panel considered whether Article 16(2) of Directive 2004/8/EC and the corresponding provision in Regulation 15(1)(b) imposed on the non-EEA family member a requirement to reside both with the EEA national and in the same host state for a continuous period of five years in order to qualify for a right of permanent residence. The panel concluded that the requirement for non-EEA family members to have “*resided with*” the Union citizen in the host member State for a continuous period of five years did not import a requirement that the non-EEA family member should have resided in the same household as the Union member.
- 32.** In his judgment, Blake J addressed the implications of this conclusion for married couples:

“34. We recognise that the fact that spouses or civil partners decide not to love together in a common household, may sometimes invite inquiry into the nature of the relationship.

35. No such inquiry could possibly arise in this case, where there has been some genuine matrimonial cohabitation for some time ...

36. ... As recital 28 of the Citizens Directive makes clear, a marriage of convenience is an abuse of rights but it is a term strictly limited to relationships “contracted for the sole purpose” of enjoying free movement rights and with no effective social nexus between the parties. An inference of marriage of convenience cannot arise solely because a married couple are not living in the same household.”

33. The reasoning and conclusion of the Presidential Panel in **PM** on the construction of “*resided with*” reinforces our finding that the “*resided in*” requirement in Regulation 10(5)(d)(i) does not import a requirement for the parties to the marriage to have resided together in a common household in the UK for at least one year. If the phrase “*resided with*” does not denote cohabitation, it would in our judgment be anomalous if “*resided in*” the UK did. While the Judge was right to engage with the positive case of the appellant that he had cohabited with his EEA national sponsor in a genuine and subsisting marital relationship for a period of one year in the UK before separating in 2017, she also had to address the question of whether both parties to the marriage had nonetheless resided in the UK during their marriage for at least one year.

34. For the above reasons, we find that there is a material error in the Judge’s reasoning such that we must set the First-tier Tribunal Judge’s decision aside, while preserving her finding that the appellant and his former spouse did not cohabit in the UK for at least one year.

Disposal

35. With reference to paragraph 7.2 of the Senior President’s Practice Statement, we consider that it is appropriate that the Upper Tribunal remakes the First-tier Tribunal’s decision which has been set aside.

36. The Judge’s findings on the issue of cohabitation in the UK have not been the subject of challenge by the appellant, and there is no need to disturb these findings. The central questions to be addressed at the resumed hearing are: (1) whether the appellant and his former spouse had resided in the UK during their marriage for at least one year prior to the initiation of proceedings for divorce; and (2) whether the condition in Regulation 10(6) is met and was met at the date of the termination of the marriage.

Anonymity

37. The Judge did not make an anonymity direction, and we have not been asked to do so. We consider that there is no good reason to impose an anonymity direction, having regard in particular to the importance of open justice and the Presidential Guidance Note No.1 2013.

Notice of Decision

The decision of the First-tier Tribunal contained a material error of law, and accordingly the decision is set aside.

The decision in this appeal will be re-made by the Upper Tribunal following a resumed hearing, to be listed in due course.

Directions to the Parties

- 1) **No later than 4pm on 1 February 2022**, the Appellant shall file and serve in electronic and physical form a consolidated bundle of all evidence relied on his appeal. Any evidence not before the First-tier Tribunal shall be the subject of an application under rule 15(2)(A) of the Tribunal Procedure (Upper Tribunal) Rules 2008;
- 2) **No later than 4 pm on 15 February 2022**, the Appellant shall file and serve in electronic and physical form a skeleton argument;
- 3) **No later than 4 pm on 1 March 2022**, the Respondent shall file and serve in electronic and physical form a skeleton argument;
- 4) **No later than five days** before the resumed hearing, the Appellant may file and serve a Reply to the Respondent's skeleton argument;
- 5) With liberty to apply

Signed Andrew Monson

Date 18 January 2022

Deputy Upper Tribunal Judge Monson