



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/22749/2014**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 25 February 2016**

**Decision & Reasons
Promulgated
On 17 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**NADEEM AHMED
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondent: Mr P Richardson of Counsel (Direct Access)

DECISION AND REASONS

1. This is an appeal against the decision of Designated First-tier Tribunal Judge Manuell promulgated on 27 July 2015 in which he allowed Mr Ahmed's appeal against a decision of the Secretary of State for the Home Department refusing to issue a permanent residence card pursuant to the Immigration (European Economic Area) Regulations 2006.
2. Although before me the Secretary of State is the appellant and Mr Ahmed is the respondent, for the sake of consistency with the proceedings before

the First-tier Tribunal I shall hereafter refer to the Secretary of State as the Respondent and Mr Ahmed as the Appellant.

3. The Appellant's application for permanent residence was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 14 May 2014. The refusal was based essentially on two matters; one in relation to the circumstances of the Appellant's former partner, and one in relation to the Appellant's own circumstances. It is the latter matter that is the subject of consideration before the Upper Tribunal at the present time.

4. It was the Respondent's case that the Appellant had failed to demonstrate that he met the requirements of regulation 10(6)(a) - which is applicable by reason of regulation 10(5)(c) - and in those circumstances had not demonstrated an entitlement to a permanent residence card. In this regard the RFRL is in these terms:

"In addition to this in order to meet the requirements of regulation 10(6) you also need to provide evidence that since the date of your divorce you have been a worker, a self employed person or a self sufficient person. As evidence of this you have provided 3 brief tax calculations for years 2011, 2012 and 2013 and personal bank statements. This is insufficient evidence to show that you have been either a worker, a self employed person or a self sufficient person. Therefore you fail to meet the requirements of regulation 10(6)."

5. In this context it is important to note that the date of divorce - which is the date from which the Appellant needs to demonstrate that he himself was a worker, a self-employed person or a self-sufficient person - was 20 March 2013, and the supporting documents submitted with the application, in particular the tax documents, only went up to the end of the tax year in 2013 i.e. just a couple of weeks after the date of divorce.

6. It seems that the Appellant was alert to the evidential lacuna because in the grounds of appeal to the First-tier Tribunal in addressing regulation 10(6), it was pleaded on his behalf that he would endeavour to provide further evidence of his ongoing self-employment: see paragraphs 18-20 of the grounds. Whilst it was contended that the materials that he had submitted with his application were relevant *"fairly determinative confirmation of his ability to satisfy Regulation 10(6)"*, it seems to me that the phrase 'fairly determinative' is recognition that they were not completely and absolutely determinative.

7. Accordingly when the matter came before the First-tier Tribunal, regulation 10(6) was very much a live issue. It seems that the First-tier Tribunal Judge was alert to this because he says this at the end of paragraph 2, *"the Appellant had in any event failed to prove that he was a*

worker, self employed or self sufficient at the material time". That quotation appears in the context of the Judge setting out the basis of the Respondent's decision that he was considering on appeal.

8. Although some further reference is made in the First-tier Tribunal's decision to the Appellant's case that he was a self-employed builder throughout the relevant period, the First-tier Tribunal Judge made no express factual finding in that regard and, more particularly, made no subsequent analysis in his determination of the requirement of regulation 10(6). To that end, very properly and very fairly, Mr Richardson accepts that there was an error and that it was an error of law. However Mr Richardson suggests that in all of the circumstances it was not a material error because there was sufficient material before the First-tier Tribunal Judge such that he would inevitably, had he properly turned his mind to it, reached the conclusion that regulation 10(6) was satisfied. In this regard my attention is directed in particular to pages 100, 101, 102 and 103 of the Appellant's bundle before the First-tier Tribunal.
9. Page 100 provides a further tax calculation, for the year 2013/2014; the other pages provide evidence of national insurance contributions made in October 2013, March 2014 and October 2014. Over and above that, before the Upper Tribunal in preparedness for a finding of 'error of law', the Appellant has now submitted some further evidence in respect of his continuing self-employment by way of documents that take the matter beyond those documents before the First-tier Tribunal and almost up to the present time, including his tax calculation for the year 2014/2015.
10. In this context it is germane to note that the Appellant made his application for a residence card in the first instance in May 2009, and the residence card itself was issued in September 2010. It might be said that if the Appellant met the requirements of the Regulations at the time that he made his application in May 2009 then he would have completed five years' residence in May 2014. On the other hand it might be said that if the Appellant could only demonstrate that he met the requirements for a residence card by reference to its issue in September 2010 the five year period would run up to September 2015. No express finding was made in this regard by the First-tier Tribunal.
11. In those circumstances it seems to me that it is not inevitable that the First-tier Tribunal would have concluded on the basis of documents running up to April 2014 that the Appellant satisfied the requirements of 10(6) to an extent that it could be said that he had been resident for a full five years pursuant to the Regulations. In any event the production of the supporting documentary material would not inevitably have led to an acceptance of all of the circumstances said to be proven by those documents, and so on balance I take the view that the First-tier Tribunal Judge's error was indeed material. In any event, it seems to me that

where a matter that is absolutely core to the overall consideration has not been addressed at all this Tribunal should be very slow to consider that that cannot be properly characterised as a material error just because the case in support was very powerful on the evidence.

12. I conclude that the error was material, the decision of the First-tier Tribunal should be set aside, and necessarily the decision in the appeal requires to be re-made.
13. In respect of remaking the decision, Ms Everett does not concede the case but neither does she seek to make any particular submissions to challenge the authenticity of the documents that the Appellant has produced, and she does not seek to examine him in any way in respect of those documents. It seems to me that in those circumstances, on a balance of probabilities, it is no difficult task to simply accept the supporting documents as genuine and as demonstrating that the Appellant has been a self-employed person throughout the relevant period from the date of his divorce through May 2014 and through September 2015 to the extent that on balance I am satisfied that he has met the objections raised by the Secretary of State in the decision letter and is entitled to the issue of a permanent residence permit pursuant to the EEA Regulations.
14. For completeness I should just say that Mr Richardson raised a costs question in the Rule 24 response, but has indicated that he does not seek to pursue that issue.

Notice of Decision

15. The decision of the First-tier Tribunal contained a material error of law and is set aside. I remake the decision in the appeal.
16. The appeal is allowed.
17. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed:

Date: **7 March 2016**

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

The Appellant had already received the benefit of a fee award before the First-tier Tribunal and in as much as it is necessary to repeat that fee award herein I so do.

Signed:

Date: **7 March 2016**

Deputy Upper Tribunal Judge I A Lewis