Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02818/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 December 2017	**On 18 December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR FAISAL RIAZ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Richard Singer, Counsel instructed by Majestic Solicitors Ltd
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing his appeal against the decision of the Secretary of State to refuse to issue him with a permanent residence card as confirmation of him having a retained right of residence under Regulation 10, and of him having acquired a permanent right of residence under Regulation 15. The First-tier Tribunal did not

make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

The Reason for the Grant for Permission to Appeal

2. On 9 October 2017 First-tier Tribunal Judge Shimmin granted the appellant permission to appeal to the Upper Tribunal for the following reasons:

> It is arguable that the decision is perverse and irrational in that the judge failed to consider and make findings on a substantial proportion of the evidence relied on by the appellant.

Relevant Background

3. The appellant is a national of Pakistan, whose date of birth is 9 September 1986. On 6 May 2011 he applied for a residence card as the spouse of an EEA national exercising Treaty rights here. His application was refused on 1 September 2011, but the appellant successfully appealed against this decision, and he was issued with a five year residence card on 8 November 2011. On 14 April 2015, the appellant's marriage to "MC", a Polish national, was terminated by the issue of a *decree absolute.* On 22 May 2015, Shan Solicitors applied on the appellant's behalf for a residence card as confirmation of his continuing right to reside in the UK.

4. On 11 November 2015, the respondent gave her reasons for refusing the application. It was noted that the appellant had supplied a letter from Raei & Co Accountants, dated 26 November 2014. They claimed that they were MC's accountants, and that she had been self-employed since 6 April 2012. However, it was considered that the evidence of her self-employment from 6 April 2012 to the date of divorce was insufficient. The SA302 tax return calculations for 2012/13 and 2013/14 included information which had been captured by HMRC as the direct result of data that was provided to them from the self-employed person. This information was in no way verified by HMRC as being accurate and therefore it could not be considered on its own as being reliable evidence of self-employment. Also, there was no evidence of self-employment beyond December 2014, and as such the respondent could not confirm that his former EEA sponsor was exercising Treaty rights at the time of the divorce. It was decided to refuse the issue of the confirmation that the appellant sought under Regulation 15(1)(f), with reference to Regulation 10(5).

The Hearing Before, and the Decision of, the First-tier Tribunal

5. The appellant's appeal came before Judge Courtney sitting at Hatton Cross on 13 March 2017. Both parties were legally represented.

6. As was noted by the Judge at paragraph [16], the evidence produced by way of appeal included a letter dated 23 April 2015 from Raei & Co Accountants. They confirmed that they had been acting for MC for three years, and they gave details of her turnover from self-employment for each of these years, including a turnover of £9,142 for the tax year 2014/15. The Judge further noted that MC's business accounts

for the three financial years had been submitted, together with the tax calculations. She also observed that there was evidence to show that MC had paid self-employed Class 2 NI contributions in 2013 and 2014.

7. At paragraph [26] the Judge set out an extract from the Home Office Guidance on "*EEA nationals: Qualified Persons*" which addressed the question of what reasonable evidence of self-employment might include. At paragraph [28] the Judge held:

> Guidance as to the quality of evidence necessary to satisfy a test of a particular case is a matter of practicality rather than principle. I recognise the Regulations themselves do not specify evidence, and the guidance is at most an aid to construction. However, the burden of proof is on the appellant to produce relevant evidence to substantiate his claim. Mr Riaz has not provided any invoices, receipts, contracts, accounts or advertising relating to his ex-wife's claimed self-employment as a cleaner. This would show that she was actively trading. He states that the Sponsor was paid in cash, but negligible cash activity was shown in her bank account. The joint HSBC account reveals very few credits, and none that can be ascribed to [MC's] claimed self-employment as a cleaner. I am not satisfied, on the balance of probabilities, the EEA national sponsor was carrying out genuine economic activity in the UK as a self-employed person as at the date of the divorce. The appellant has not established that he is a family member who has retained right of residence after the termination of his marriage.

Reasons for Finding and Error of Law

8. The Judge misdirected herself in paragraph [28] in stating that Mr Riaz had not provided any accounts relating to his ex-wife's claimed self-employment as a cleaner. Not only had he provided accounts for the three completed tax years, but he had also provided letters from MC's accountants confirming the accuracy of the information given in the accounts which they had prepared.

9. Mr Kotas sought to defend the decision on the ground that there was in fact no specific documentary evidence relating to the ex-spouse's exercise of Treaty rights after 5 April 2015, whereas the date of the divorce was 17 April 2015. However, this was not a distinction which was drawn by the Judge. Her reasoning was entirely based upon the proposition that the absence of "*any invoices, receipts, contracts, accounts or advertising*" relating to the ex-wife's claimed self-employment as a cleaner in the period leading up to the divorce meant that it had not been shown that she had been actively trading at any point; and hence it had not been shown that she was actively trading at the point of divorce.

10. The Judge was not bound to find that the evidence emanating from MC's accountants was sufficient to discharge the burden of proof. But in failing to address such evidence, the Judge did not give adequate reasons for finding against the appellant.

The Re-making of the Decision

11. Mr Singer and Mr Kotas were in agreement that it was open to me to re-make the decision on the evidence that was before the First-tier Tribunal. Mr Kotas repeated his earlier submission that there was no documentary evidence to show that the ex-spouse was exercising Treaty rights at the point of divorce, which was 12 days after the end of the tax year covered by the most recent disclosed accounts. Mr Kotas also submitted that it might be the case that the ex-spouse had ceased self-employment as a cleaner in December 2014. Without disclosure of the underlying information which the accountants had drawn on to prepare the accounts for the tax year ending 5 April 2015, it was a matter of conjecture whether the ex-spouse had carried on working until the end of the tax year.

12. On behalf of the appellant, Mr Singer submitted that the level of turnover disclosed in the 2015 accounts was on a par with the turnover in the preceding two tax years, and so it was not a reasonable inference that the ex-spouse had ceased her economic activity before the end of the tax year. He also invited me to place some weight on the fact that the latest letter from the accountants was dated 23 April 2015, which was six days after the decree absolute was issued. In the letter of 23 April 2015, the accountants confirmed that the ex-spouse continued to be self-employed as a cleaner.

13. There is no suggestion that the ex-spouse's accountants are not competent and appropriately qualified professionals. The implication of the letter of 23 April 2015 is that the ex-spouse has continued to engage in self-employed activity throughout the most recent tax year; and that, so far as the accountants are aware, the ex-spouse has not ceased such activity. I accept that there is no specific documentary evidence covering the period between 5 April 2015 and 17 April 2015. However, given the background of three years' continuous self-employed activity as a cleaner, and the fact that MC could no longer rely on the appellant's earnings to supplement her income, it is unlikely that she would have ceased self-employment immediately before the decree absolute was issued.

14. For the above reasons, I find that the appellant had discharged the burden of proving on the balance of probabilities that his ex-wife was exercising Treaty rights as a self-employed person at the point of divorce, and hence he has a retained right of residence under Regulation 10(5).

15. After I had ruled in the appellant's favour under Regulation 10(5), Mr Singer raised the question of whether the appellant also qualified for a permanent residence card under Regulation 15. He submitted that there was no issue as to the appellant meeting the requirements of Regulation 10(6), and he invited me to find that the appellant had also discharged the burden of proving that, as at the date of the hearing before me, he had resided in the UK for a continuous period of five years in accordance with the Regulations. Mr Kotas did not raise any opposition to Mr Singer's proposal, and so I also find in the appellant's favour on the issue of his entitlement to a permanent residence card.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the appellant's appeal is allowed under Regulation 10 and Regulation 15 of the Regulations 2006.

I make no anonymity direction.

Signed Date 16 December 2017

Judge Monson

Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As I have allowed this appeal, I have given consideration as to whether to make a fee award in respect of any fee which has been paid or is payable, and I have decided to make no fee award, as the appellant needed to bring forward further documentary evidence by way of appeal in order to succeed in his appeal.

Signed Date 16 December 2017

Judge Monson

Deputy Upper Tribunal Judge