Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03221/2018

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reason Promulgated**
On: 19 September 2019	**On 25 September 2019**

Before

UPPER TRIBUNAL JUDGE KEBEDE
UPPER TRIBUNAL JUDGE MARTIN

Between

NADEEM AKBAR GILL

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Iqbal, instructed by Rainbow Solicitors LLP
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Pakistan born on 10 April 1982 (also given as 10 June 1982 in his appeal forms). He arrived in the UK on 5 October 2010 with leave to enter as a Tier 4 student migrant valid until 22 February 2012. He was granted further leave to remain until 10 April 2015 on the same basis, but that leave was subsequently curtailed to expire on 27 September 2014. The appellant met his EEA sponsor, [GV], a Hungarian national, in February 2013 and they were married on 21 February 2014. On 11 April 2014 the appellant applied for an EEA residence card as the family member (spouse) of an EEA national. His application was

refused on 18 July 2014 on the basis that he was not the family member of an EEA national since he had entered into a marriage of convenience. That decision was based upon the outcome of a visit to the appellant's given address by immigration officers which concluded that neither the appellant nor his spouse had ever resided there.

2. The appellant appealed against that decision. His appeal was heard on 11 February 2015 before First-tier Tribunal Judge O'Garro. Neither the appellant nor his spouse attended to give oral evidence but they provided written statements, in which the appellant claimed to have moved to another address with his spouse shortly after making his application, in June 2014, and had forgotten to inform the respondent of his change of address. The judge accepted that the appellant and his spouse had been living together at the former address in February and March 2014 and at the new address since at least 4 July 2014. The judge concluded on the basis of that evidence that the appellant's marriage was genuine and she allowed the appeal, The respondent then issued the appellant with a residence card on 5 March 2015, valid for five years until 5 March 2020, as the family member of an EEA national.

3. Following an immigration enforcement visit made to the appellant's home on 17 August 2017, the visiting immigration officers considered there to be no satisfactory evidence of a subsisting relationship and they arrested the appellant and took him into detention. The appellant was served with a removal decision in accordance with section 10 of the Immigration and Asylum 1999 Act and pursuant to regulations 26(6)(a) and 32(2) of the EEA Regulations, dated 17 August 2017.

4. Subsequent to that decision, which had the effect of curtailing the appellant's right of residence under the EEA Regulations, the appellant made a further application for a residence card under the EEA Regulations on the basis of the same relationship, on 11 September 2017, by which time he had been released on bail. In that application he stated that he was separated from his sponsor and that divorce proceedings were being pursued. He produced a petition for divorce dated 4 September 2017. The application was refused on 11 December 2017, on the basis that he had failed to provide a valid ID card or passport for his sponsor and that his application could not be considered as one for a retained right of residence as there was no decree absolute. The decision was not an appealable one.

5. The appellant then made an application on 23 January 2018 for a residence card on the basis of retained rights upon divorce, following the issue of a decree absolute on 5 January 2018. That application was refused by the respondent in a decision dated 12 April 2018, on the basis that the appellant had not provided adequate evidence that his EEA national former spouse was a qualified person or had a right of permanent residence on the date of the termination of the marriage. The respondent considered that he could only be satisfied, from the evidence produced, that the sponsor was exercising treaty rights from 1 April 2014 to 19 August 2017, but not on the date of divorce on 5 January 2018.

6. The appellant appealed against both the removal decision of 17 August 2017 and the decision of 18 April 2018 and the appeals were linked and heard together before Judge Callow in the First-tier Tribunal on 9 November 2018, the former with appeal reference number EA/07335/2017 and the latter with the reference EA/03221/2018.

7. Judge Callow concluded, from the evidence in the immigration officers' notes of the enforcement visit of 17 August 2017, that the appellant's marriage was one of convenience and that the appellant had ceased to have a right to reside under the Regulations. The judge did not consider it necessary, in the circumstances, to address the second decision. He dismissed both appeals.

8. Following a grant of permission to appeal to the Upper Tribunal in regard to both appeals, the matter came before us on 2 August 2019. With respect to the first appeal, EA/07335/2017, we set aside Judge Callow's decision and re-made the decision by allowing the appeal on the basis that the respondent's decision was not in accordance with the EEA Regulations 2016. That decision is appended at the end of this decision as Appendix 1.

9. In relation to this appeal, arising from the decision of 12 April 2018, it was agreed that the Tribunal had still to be satisfied that the appellant's EEA national sponsor was exercising treaty rights from 20 August 2017 to 4 September 2017 (it was noted that the respondent had accepted, in the refusal decision of 12 April 2018, that the sponsor was exercising treaty rights until 19 August 2017). We therefore we set aside Judge Callow's decision in the appellant's appeal against the respondent's decision of 12 April 2018, owing to his failure to deal with the matters relevant to the question of the appellant having retained a right of residence upon divorce, and directed that the matter be listed for a resumed hearing on another date. Both parties were directed to produce skeleton arguments addressing the issue of the appellant's retained rights of residence, with specific reference to the sponsor's employment during the relevant period of 20 August 2017 to 4 September 2017 and the sponsor's ability to meet the primary earnings threshold (PET), a matter that had been raised before Judge Callow, but not addressed by him. That decision is appended at the end of this decision as Appendix 2 (referenced as EA/03221/2017 in error).

10. The matter then came before us on 19 September 2019.

11. In his skeleton argument produced for the hearing Mr Iqbal submitted that the only issue remaining to be determined was whether the sponsor's employment, from 20 August to 4 September 2017, was considered to be sufficient for her to be accepted as a "worker" under the EEA Regulations, given that she was earning less than the PET. He relied upon the case of D.M. Levin v Staatssecretaris van Justitie [1982] EUECJ R-53/81 in submitting that marginal income was sufficient to satisfy the requirements of the EEA Regulations, provided that the employment from which it was derived was effective and genuine. He submitted that it had already been accepted by the respondent that the sponsor's employment and self-

employment were effective and genuine. He based that conclusion upon the concession made by the Home Office Presenting Officer before First-tier Tribunal Judge Callow, as recorded at [11] of the judge's decision, whereby the Presenting Officer apparently accepted that the divorce proceedings had been instituted at a time when the sponsor was in employment. Mr Iqbal submitted that Mr Bramble's understanding of the only outstanding issue, in his skeleton argument, namely whether the sponsor was exercising treaty rights as a worker from 20 August 2017 to 4 September 2017, was therefore incorrect as it ignored the concession previously made by the respondent.

12. We asked Mr Bramble to clarify whether there had been a formal concession by the respondent on that basis, as Judge Callow's record of the submissions, at [11], was not entirely clear to us. It was not initially clear from Mr Bramble's submissions whether the respondent's position was that the sponsor was self-employed at the relevant time but had failed to show that her employment was genuine and effective, or whether it was not accepted at all that she was self-employed. Mr Bramble clarified that the respondent's position was that the appellant had failed to show that his ex-spouse was employed from 20 August 2017 until 4 September 2017. He referred to the HMRC statement dated 21 November 2017 at pages 12 and 13 of the appellant's bundle of documents which confirmed no self-assessment tax record being held for the sponsor for the tax years 2015 to 2017 and no current employment record subsequent to the sponsor ceasing employment on 31 July 2017. He also referred to the HMRC statement dated 22 June 2018 at pages 91 and 92 of the bundle confirming no HMRC self-assessment tax record held for the sponsor for the tax year 2017-18 and referring to the sponsor's income of £3164.84 in the tax year 2017-18 from the employment which had ended on 31 July 2017. With regard to the £4,676 income from self-employment declared in the tax return at page 13 and 24, Mr Bramble submitted that that was not supported by any evidence in the form of wage slips, bank statements, business accounts or billing invoices. Mr Bramble submitted that there was no acceptable evidence of employment or self-employment after 31 July 2017, but given the concession in the refusal letter referring to the date of 19 August 2017 (which appeared simply to be the date of the bank statements produced), he was prepared to accept the relevant disputed period as beginning on 20 August 2017. He did not agree that any clear concession was made before Judge Callow, but that if there was a concession he would resile from it.

13. Mr Iqbal's submission was that the sponsor's HMRC records confirmed that she had earned £4,676 from self-employment in the tax year 2017 to 2018. The total from employment and self-employment, £7,840, averaged out at £150.70 a week, which was below the PET level of £162. Although the amount earned was below the threshold, the relevant issue was whether the employment was effective and genuine, and that was what had been argued before Judge Callow. There was no reason to conclude that the income from self-employment was not from genuine employment and therefore the sponsor was exercising treaty rights at the relevant time and the appellant met the requirements of the EEA Regulations. In so far as Mr Bramble was calling into question the reliability of the sponsor's tax returns,

the burden of proof lay upon the respondent to make out an allegation of false documents and that burden had not been met on the basis of an inference, as it could have been that the sponsor's returns submitted on 15 May 2018 had simply not yet shown up in the HMRC's records when the HMRC statement of 22 June 2018 at page 91 was issued.

Discussion and conclusions

14. The basis for the appellant's application for a residence card being refused was that he could not satisfy the requirements of regulation 10(5)(b) of the EEA Regulations 2016, that he "*was residing in the United Kingdom in accordance with these Regulations at the date of the termination;*", the date of termination being accepted as 4 September 2017. The reason for that was that he could not show that his former EEA national spouse was exercising treaty rights, and thus was a qualified person, or that she had acquired a permanent right of residence at that time. The respondent accepted, in his letter of 12 April 2018, that the sponsor was exercising treaty rights from 1 April 2014 to 19 August 2017 but not thereafter. The date of 19 August 2017 appears to have been taken from the date of the Nationwide statements produced for the sponsor (page 84) with no indication as to how that demonstrated the exercise of treaty rights at that time, but we have nevertheless taken that date as the start date of the relevant period under consideration, as Mr Bramble accepted.

15. It is not in dispute that the sponsor ceased PAYE employment on 31 July 2017. That is confirmed in the HMRC statements from Roger Drew, of 21 November 2017 and 22 June 2018, at pages 12/13 and 91/92 of the Tribunal bundle, whereby it is stated that the sponsor's employment for Javehd Akhtar & Minesh Patel ended on that date. The sponsor's income of £3164.84 from that employment, for the tax year 2018-18 is confirmed at page 92. The P60s at pages 52 and 53, and the salary slips preceding the P60s, together with the income and national insurance statement at page 55, confirm that Javehd Akhtar & Minesh Patel traded as Krystal Express Cannon Street.

16. What is in dispute is the appellant's claim that the sponsor took up self-employment as a cleaner following the cessation of her employment with Krystal Express Cannon Street. Mr Iqbal submits that [11] of Judge Callow's decision confirms that that was in fact accepted by the Home Office Presenting Officer in his submissions at the hearing and that the only issue arising in that respect was whether the employment was genuine and effective, given that the level of income fell below the PET. However we do not consider that we, or the Secretary of State, are bound by any formal concession made by the Home Office Presenting Officer before Judge Callow as to the sponsor exercising treaty rights at the time divorce proceedings were commenced. Firstly, we do not consider that any such concession was made. Judge Callow's record of the Presenting Officer's submission at [11] is far from clear and unambiguous. There is no other record of a concession having been made. Judge Callow did not determine the issue and, in any event, his decision has been set aside. There would, furthermore, be no basis

for such a concession as there is nothing that Mr Bramble is able to identify that would have led the respondent to concede the matter and we note that the Presenting Office in fact raised concerns about a lack of supporting evidence. Secondly, we consider that even if there was some form of concession Mr Bramble is able to resile from it, given the lack of clarity as to the nature of the concession and the evidence available to the Tribunal.

17. The only evidence that has been produced to support the sponsor's claimed self-employment, aside from the appellant's own assertion in his statement, is the tax return and confirmation of receipt at pages 14 to 27 of the Tribunal bundle showing the 2018 tax return apparently filed subsequent to the refusal decision of 12 April 2018. The filing of such a tax return with HMRC is, however, contradicted by the statement of Roger Drew at page 91 confirming that no HMRC self-assessment tax record was held for [GV] for the tax year 2017-18. Mr Iqbal submitted that the Tribunal could not conclude that the respondent had proved that the tax return was false purely on the basis of an inference arising from Roger Drew's statement, as it could be that HMRC records had not yet been updated by that time. However we consider the statement from Mr Drew to be strong and cogent evidence that the HMRC documents at pages 14 to 27 were not reliable evidence. The appellant claims that the tax return was sent to him by email from his ex-spouse, but there is no evidence of that and there is therefore no evidence as to how he came to have the tax records.

18. In any event the tax return, even if actually filed, is no more than the sponsor's statement about her circumstances, and pages 14 and 27 are simply confirmation by the HMRC of receipt of the information from the sponsor. The information provided in the tax return is limited, and we note for example that on page 8/11 of the form (page 23 of the Tribunal bundle) at question 2 there is no business address and at question 5, there is no entry for a commencement date for the business. There is, furthermore, not one item of supporting evidence of the business. There are no receipts, no business accounts, no bank statements showing deposits specifically attributable to a business. Indeed the appellant's evidence during the immigration enforcement visit to his home on 17 August 2017 was that at that time his wife was working for Krystal Express, whereas the evidence now available from HMRC shows that she left that employment on 31 July 2017. He sought to explain that in his statement, by claiming that he had only found out about her self-employment subsequent to the enforcement visit, but we reject that claim. The appellant has proved himself to be a wholly unreliable witness, having clearly lied to the immigration officers during the enforcement visit, and we therefore give no weight to his statement.

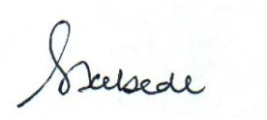
19. In the circumstances we find there to be no reliable evidence of the sponsor working beyond 31 July 2017. We do not accept that she was self-employed as a cleaner after leaving Krystal Express and we reject the claim that she was exercising treaty rights between 20 August 2017 and 4 September 2017. We do not accept that she was either a qualified person or had acquired permanent residence at the time of the commencement of divorce proceedings. Indeed we cannot even

be satisfied that she remained in the UK, given the appellant's claim at the time of the enforcement visit that she was in Hungary at that time and the lack of any reliable evidence that she had returned to the UK.

20. Accordingly the appellant has failed to show that he is able to meet the requirements of regulation 10(5)(b) of the EEA Regulations 2016. We do not accept that he is a family member who has retained a right of residence in the UK. His appeal against the respondent's decision of 12 April 2018 is therefore dismissed.

DECISION

21. The original Tribunal was found to have made an error of law and the decision has been set aside. We re-make the decision by dismissing the appellant's appeal under the EEA Regulations 2016.

Signed:  Dated: 23 September 2019

Upper Tribunal Judge Kebede

APPENDIX 1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07335/2017

THE IMMIGRATION ACTS

Heard at: Field House
On: 2 August 2019

Decision Promulgated

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Before

UPPER TRIBUNAL JUDGE KEBEDE
UPPER TRIBUNAL JUDGE MARTIN

Between

NADEEM AKBAR GILL

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Iqbal, instructed by Rainbow Solicitors LLP
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. **This appeal is linked to another appeal, EA/03221/2018, to the extent that the decisions in both appeals relate to the same appellant and were both heard, together, before First-tier Tribunal Judge Callow on 9 November 2018. This appeal relates to the first of the respondent's decisions, dated 17 August 2017, to remove the appellant from the UK under the Immigration (European Economic**

Area) Regulations 2016 in accordance with section 10 of the Immigration and Asylum Act 1999, by virtue of regulations 23(6)(a) and 32(2), and pursuant to regulation 36 of the Regulations. EA/03221/2018 relates to a subsequent decision of the respondent, dated 12 April 2018, to refuse to issue the appellant with an EEA residence card as the former family member of an EEA national who had retained a right of residence in the UK upon divorce. For reasons which are apparent from the decisions we have made, we have issued separate decisions for each appeal. Both should, however, be read together.

2. The appellant is a national of Pakistan born on 10 June 1982. He arrived in the UK on 5 October 2010 with leave to enter as a Tier 4 student migrant valid until 22 February 2012. He was granted further leave to remain until 10 April 2015 on the same basis, but that leave was subsequently curtailed to expire on 27 September 2014. The appellant met his EEA sponsor, [GV], a Hungarian national, in February 2013 and they were married on 21 February 2014. On 11 April 2014 the appellant applied for an EEA residence card as the family member (spouse) of an EEA national. His application was refused on 18 July 2014 on the basis that he was not the family member of an EEA national, since he had entered into a marriage of convenience. That decision was based upon the outcome of a visit to the appellant's given address by immigration officers which concluded that neither the appellant nor his spouse had ever resided there.

3. The appellant appealed against that decision. His appeal was heard on 11 February 2015 before First-tier Tribunal Judge O'Garro. Neither the appellant nor his spouse attended to give oral evidence but they provided written statements, in which the appellant claimed to have moved to another address with his spouse shortly after making his application, in June 2014, and had forgotten to inform the respondent of his change of address. He produced evidence of their residence at both addresses. The judge accepted, from that evidence, that the appellant and his spouse had been living together at the former address in February and March 2014 and at the new address since at least 4 July 2014. The judge concluded on the basis of that evidence that the appellant's marriage was genuine and she allowed the appeal.

4. There is no evidence before us to show that the respondent sought to appeal that decision and a residence card was issued to the appellant on 5 March 2015, valid for five years until 5 March 2020.

5. On 17 August 2017 a visit was made by immigration officers to the appellant's home. The notes of that visit have been produced. The immigration officers noted no evidence of the EEA national's presence in the property. They noted that the appellant was sharing a room with another male and there was no evidence of any female clothing or belongings in the room. The immigration officers considered that messages on the appellant's mobile telephone from his wife were not affectionate and did not appear to be messages between partners but gave the impression of an arrangement. The appellant claimed that his wife had gone to Hungary for a visit and was due back on 22 August 2017 and that they were still

together. The immigration officers considered there to be no satisfactory evidence of a subsisting relationship. They arrested the appellant and took him into detention. The appellant was served with removal papers under section 10 of the 1999 Act on the basis that he did not have, or had ceased to have, a right to reside under the 2016 Regulations.

6. The notice of liability to removal served on the appellant confirmed that removal was considered on the basis that he was:

> "A) by virtue of regulations 23(6)(a) and 32(2) a person in respect of whom removal directions may be given in accordance with section 10 of the Immigration and Asylum Act 1999 as:
>
> a person who does not have or who has ceased to have a right to reside under the Immigration (European Economic Area) Regulations 2016."

7. The "Specific Statement of Reasons" given in the notice of liability to removal served on the appellant stated as follows:

> "You are specifically considered a person who has engaged in conduct which appears to be intended to circumvent the requirement to be a qualified person, because you were granted leave on the basis of a relationship with an EU national, when encountered you were unable to give a credible account of any subsisting relationship with the claimed partner. You also failed to give satisfactory evidence of the claimed relationship or the absence of your partner."

8. That was followed by a Decision to Remove in accordance with section 10 of the 1999 Act, which applied by virtue of regulations 26(6)(a) and 32(2) of the EEA Regulations, dated 17 August 2017, the first decision under appeal.

9. Subsequent to that decision, which had the effect of curtailing the appellant's right of residence under the EEA Regulations, the appellant made a further application for a residence card under the EEA Regulations on the basis of the same relationship, on 11 September 2017, by which time he had been released on bail. In that application he stated that he was separated from his sponsor and that divorce proceedings were being pursued. He produced a petition for divorce dated 4 September 2017. The application was refused on 11 December 2017, on the basis that he had failed to provide a valid ID card or passport for his sponsor and that his application could not be considered as one for a retained right of residence as there was no decree absolute. The decision was not an appealable one.

10. The appellant then made an application on 23 January 2018 for a residence card on the basis of retained rights upon divorce, following the issue of a decree absolute on 5 January 2018. That application was refused by the respondent in a decision dated 12 April 2018, which is the second decision under appeal in the case of EA/03221/2018. In that decision the respondent noted that the evidence demonstrated that the appellant's marriage had lasted over three years and that he

and the EEA national sponsor had both lived in the UK for at least one year during their marriage. The respondent was also satisfied that the appellant had continued to exercise treaty rights as an EEA national since the date of the divorce. However the respondent considered that the appellant had not provided adequate evidence that his EEA national former spouse was a qualified person or had a right of permanent residence on the date of the termination of the marriage. The respondent considered that he could only be satisfied, from the evidence produced, that the sponsor was exercising treaty rights from 1 April 2014 to 19 August 2017 but not on the date of divorce on 5 January 2018. The respondent made it clear that the genuineness of the former relationship had not been considered, given that the application failed on the first basis, but noting that the appellant had an outstanding appeal in regard to the genuineness of the former relationship.

11. The appellant appealed against both decisions and, as stated above, the appeals were linked and heard together before Judge Callow in the First-tier Tribunal on 9 November 2018.

12. Judge Callow considered the appeals on the basis that it was apparent, from the respondent's decision, based upon the immigration officers' note, that the respondent believed the appellant's marriage to be one of convenience. The judge noted from the appellant's statement that he was claiming to have separated from his wife on 15 July 2017 and that that was the reason why she was not present at the immigration officers' visit in August 2017. The judge rejected that claim and concluded, from the evidence in the immigration officers' note, that the marriage was one of convenience and that the appellant had ceased to have a right to reside under the Regulations. The judge did not consider it necessary to address the second decision, given his finding that the marriage was one of convenience. He dismissed both appeals.

13. The appellant sought permission to appeal to the Upper Tribunal in regard to both appeals on the basis that it was not open to the judge to find that the marriage was one of convenience. The grounds assert that the respondent had only stated that the marriage was not subsisting on 17 August 2017 and there had been no consideration by the judge of the appellant's intentions at the time of the marriage.

14. Permission was refused in the First-tier Tribunal but was subsequently granted in the Upper Tribunal on 20 March 2019 by Judge Chalkley.

15. The matter then came before us. We made some initial observations before hearing from the parties in relation to both appeals. As each raises different issues, we address in this decision only the matters related to the appeal against the removal decision of 17 August 2017.

16. We put it to Mr Bramble that we could not see how he was able to defend the respondent's decision of 17 August 2017. The decision had been made with reference to regulation 23(6)(a) on the basis that "*that person does not have or ceases*

to have a right to reside under these Regulations". The reason given for the decision was that it was not accepted that the appellant's relationship was subsisting, but that was not a requirement of the EEA Regulations. The relevant issue under the Regulations was whether the marriage, when entered into, had been one of convenience at that time, and the Tribunal had previously found that it was not. Mr Iqbal confirmed that that was the appellant's case in the appeal before us.

17. We gave Mr Bramble some time to consider our observations. He accepted that Judge Callow had erred in law by failing to bring the findings of the previous Tribunal into play in regard to the marriage not being one of convenience, but he submitted that the case should be remitted to the First-tier Tribunal for the decision to be re-made. His response to our view of the respondent's removal decision itself was that the decision was based on a misuse of rights. Although he agreed that the reasons given differed from a conclusion of a marriage of convenience, he submitted that the reasons stated as much indirectly and that the inference had to be that the refusal was made on the basis of the marriage being one of convenience. We did not agree with Mr Bramble and we proceeded to make a decision setting aside Judge Callow's decision and re-making the decision by allowing the appeal. Our reasons, as we explained to Mr Bramble, are as follows.

The relevant legal provisions

18. So far as is relevant, the EEA Regulations 2016 state as follows:

> **"Exclusion and removal from the United Kingdom**
>
> **23.—**
>
> (6) Subject to paragraphs (7) and (8), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if—
>
> (a) that person does not have or ceases to have a right to reside under these Regulations;
>
> (b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27; or
>
> (c) the Secretary of State has decided that the person's removal is justified on grounds of misuse of rights under regulation 26(3)."
>
> **"Misuse of a right to reside**
>
> **26.—**
>
> (3) The Secretary of State may take an EEA decision on the grounds of misuse of rights where there are reasonable grounds to suspect the misuse of a right to reside and it is proportionate to do so. "
>
> **"Person subject to removal**
>
> **32.—**

> (2) Where a decision is taken to remove a person under regulation 23(6)(a) or (c), the person is to be treated as if the person were a person to whom section 10(1) of the 1999 Act applies, and section 10 of that Act (removal of certain persons unlawfully in the United Kingdom) is to apply accordingly."

Findings and reasons

19. Whilst the notice of immigration decision dated 17 August 2017 giving rise to the appeal refers to regulations 23(6)(a)/23(6)(c) pursuant to regulation 26(3) and 32(2) of the EEA Regulations as alternatives, the notice of liability to removal makes it absolutely clear that the decision was made under 23(6)(a) of the Regulations (ceasing to have a right to reside) and not 23(6)(c) (misuse of rights). Therefore we cannot accept Mr Bramble's suggestion that this was a misuse of rights decision.

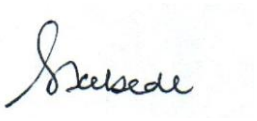
20. Neither can we accept his suggestion that the inference of the decision is that the refusal was based on the appellant's marriage being one of convenience, when the wording of the decision is clearly focussed on the question of a subsisting relationship. We do not dispute that the respondent was entitled to have concerns about the appellant's relationship given the apparently inconsistent evidence about his wife's whereabouts and his living arrangements. However the decision was made on the basis of the appellant's current circumstances, with no reference to the marriage initially entered into having been one of convenience. Had the decision been one made under the immigration rules the question of the subsisting nature of the relationship would of course have been entirely relevant to the appellant's eligibility for continued leave to remain in the UK. However that was not a relevant consideration under the EEA Regulations, where the appellant was entitled to continue to reside in the UK whatever the state of his relationship, provided that he was still married to his EEA national sponsor and that the marriage itself had not been one of convenience when entered into. It may be that the respondent has proper reasons for concluding that the marriage was one of convenience, and that the previous decision of Judge O'Garro based on the evidence before her has been displaced by further evidence relating to the marriage at the time it was entered into, but that was not the case before the judge, it was not provided as the basis for the removal decision and it cannot simply be inferred from the reasons given in the removal decision.

21. Accordingly it seems to us that the respondent's decision was not one which was correctly and lawfully made under the EEA Regulations and that the decision is simply unsustainable and indefensible. Judge Callow erred in law by considering it to be one lawfully made under the EEA Regulations and by considering that a decision, that the marriage was one of convenience, was open to him to make, when it clearly was not.

22. For all these reasons we set aside Judge Callow's decision and re-make the decision by allowing the appellant's appeal on the basis that the respondent's decision was not in accordance with the EEA Regulations 2016.

DECISION

23. The making of the decision of the First-tier Tribunal involved an error on a point of law. We set aside the decision and allow the appellant's appeal under the EEA Regulations 2016.

Signed:  Dated: 5 August 2019

Upper Tribunal Judge Kebede

APPENDIX 2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03221/2017

THE IMMIGRATION ACTS

Heard at: Field House
On: 2 August 2019

Decision Promulgated

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Before

UPPER TRIBUNAL JUDGE KEBEDE
UPPER TRIBUNAL JUDGE MARTIN

Between

NADEEM AKBAR GILL

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Iqbal, instructed by Rainbow Solicitors LLP
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. **This appeal is linked to another appeal, EA/07335/2017, to the extent that the decisions in both appeals relate to the same appellant and were both heard, together, before First-tier Tribunal Judge Callow on 9 November 2018. This appeal relates to the second of the respondent's decisions, dated 12 April 2018, to refuse to issue the appellant with an EEA residence card as the former family**

member of an EEA national who had retained a right of residence in the UK upon divorce. EA/07335/2017 relates to a previous decision of the respondent, dated 17 August 2017, to remove the appellant from the UK under the Immigration (European Economic Area) Regulations 2016 in accordance with section 10 of the Immigration and Asylum Act 1999, by virtue of regulations 23(6)(a) and 32(2), and pursuant to regulation 36 of the Regulations. For reasons which are apparent from the decisions we have made, we have issued separate decisions for each appeal. Both should, however, be read together.

2. The appellant is a national of Pakistan born on 10 June 1982. He arrived in the UK on 5 October 2010 with leave to enter as a Tier 4 student migrant valid until 22 February 2012. He was granted further leave to remain until 10 April 2015 on the same basis, but that leave was subsequently curtailed to expire on 27 September 2014. The appellant met his EEA sponsor, [GV], a Hungarian national, in February 2013 and they were married on 21 February 2014. On 11 April 2014 the appellant applied for an EEA residence card as the family member (spouse) of an EEA national. His application was refused on 18 July 2014 on the basis that he was not the family member of an EEA national since he had entered into a marriage of convenience. That decision was based upon the outcome of a visit to the appellant's given address by immigration officers which concluded that neither the appellant nor his spouse had ever resided there.

3. The appellant appealed against that decision. His appeal was heard on 11 February 2015 before First-tier Tribunal Judge O'Garro. Neither the appellant nor his spouse attended to give oral evidence but they provided written statements, in which the appellant claimed to have moved to another address with his spouse shortly after making his application, in June 2014, and had forgotten to inform the respondent of his change of address. He produced evidence of their residence at both addresses. The judge accepted, from that evidence, that the appellant and his spouse had been living together at the former address in February and March 2014 and at the new address since at least 4 July 2014. The judge concluded on the basis of that evidence that the appellant's marriage was genuine and she allowed the appeal.

4. There is no evidence before us to show that the respondent sought to appeal that decision and a residence card was issued to the appellant on 5 March 2015, valid for five years until 5 March 2020.

5. On 17 August 2017 a visit was made by immigration officers to the appellant's home. The notes of that visit have been produced. The immigration officers noted no evidence of the EEA national's presence in the property. They noted that the appellant was sharing a room with another male and there was no evidence of any female clothing or belongings in the room. The immigration officers considered that messages on the appellant's mobile telephone from his wife were not affectionate and did not appear to be messages between partners but gave the impression of an arrangement. The appellant claimed that his wife had gone to Hungary for a visit and was due back on 22 August 2017 and that they were still

together. The immigration officers considered there to be no satisfactory evidence of a subsisting relationship. They arrested the appellant and took him into detention. The appellant was served with removal papers under section 10 of the 1999 Act on the basis that he did not have, or had ceased to have, a right to reside under the 2016 Regulations.

6. The notice of liability to removal served on the appellant confirmed that removal was considered on the basis that he was:

> "A) by virtue of regulations 23(6)(a) and 32(2) a person in respect of whom removal directions may be given in accordance with section 10 of the Immigration and Asylum Act 1999 as:
>
> a person who does not have or who has ceased to have a right to reside under the Immigration (European Economic Area) Regulations 2016."

7. The "Specific Statement of Reasons" given in the notice of liability to removal served on the appellant stated as follows:

> "You are specifically considered a person who has engaged in conduct which appears to be intended to circumvent the requirement to be a qualified person, because you were granted leave on the basis of a relationship with an EU national, when encountered you were unable to give a credible account of any subsisting relationship with the claimed partner. You also failed to give satisfactory evidence of the claimed relationship or the absence of your partner."

8. That was followed by a Decision to Remove in accordance with section 10 of the 1999 Act, which applied by virtue of regulations 26(6)(a) and 32(2) of the EEA Regulations, dated 17 August 2017, the first decision under appeal, in EA/07335/2017.

9. Subsequent to that decision, which had the effect of curtailing the appellant's right of residence under the EEA Regulations, the appellant made a further application for a residence card under the EEA Regulations on the basis of the same relationship, on 11 September 2017, by which time he had been released on bail. In that application he stated that he was separated from his sponsor and that divorce proceedings were being pursued. He produced a petition for divorce dated 4 September 2017. The application was refused on 11 December 2017, on the basis that he had failed to provide a valid ID card or passport for his sponsor and that his application could not be considered as one for a retained right of residence as there was no decree absolute. The decision was not an appealable one.

10. The appellant then made an application on 23 January 2018 for a residence card on the basis of retained rights upon divorce, following the issue of a decree absolute on 5 January 2018. That application was refused by the respondent in a decision dated 12 April 2018, which is the second decision under appeal and is the subject of this appeal. In that decision the respondent noted that the evidence

demonstrated that the appellant's marriage had lasted over three years and that he and the EEA national sponsor had both lived in the UK for at least one year during their marriage. The respondent was also satisfied that the appellant had continued to exercise treaty rights as an EEA national since the date of the divorce. However the respondent considered that the appellant had not provided adequate evidence that his EEA national former spouse was a qualified person or had a right of permanent residence on the date of the termination of the marriage. The respondent considered that he could only be satisfied, from the evidence produced, that the sponsor was exercising treaty rights from 1 April 2014 to 19 August 2017 but not on the date of divorce on 5 January 2018. The respondent made it clear that the genuineness of the former relationship had not been considered, given that the application failed on the first basis, but noting that the appellant had an outstanding appeal in regard to the genuineness of the former relationship.

11. The appellant appealed against both decisions and, as stated above, the appeals were linked and heard together before Judge Callow in the First-tier Tribunal on 9 November 2018.

12. Judge Callow considered the appeals on the basis that it was apparent, from the respondent's decision, based upon the immigration officers' note, that the respondent believed the appellant's marriage to be one of convenience. The judge noted from the appellant's statement that he was claiming to have separated from his wife on 15 July 2017 and that that was the reason why she was not present at the immigration officers' visit in August 2017. The judge rejected that claim and concluded, from the evidence in the immigration officers' note, that the marriage was one of convenience and that the appellant had ceased to have a right to reside under the Regulations. The judge did not consider it necessary to address the second decision, given his finding that the marriage was one of convenience. He dismissed both appeals.

13. The appellant sought permission to appeal to the Upper Tribunal in regard to both appeals on the basis that it was not open to the judge to find that the marriage was one of convenience. The grounds assert that the respondent had only stated that the marriage was not subsisting on 17 August 2017 and there had been no consideration by the judge of the appellant's intentions at the time of the marriage.

14. Permission was refused in the First-tier Tribunal but was subsequently granted in the Upper Tribunal on 20 March 2019 by Judge Chalkley.

15. The matter then came before us. We made some initial observations before hearing from the parties in relation to both appeals. The observations we made relevant to the respondent's first decision of 17 August 2017 are set out in detail in our decision in EA/07335/2017. In that decision, we set aside Judge Callow's decision and re-made the decision by allowing the appeal on the basis that the respondent's decision was not in accordance with the EEA Regulations 2016.

16. In relation to this appeal, arising from the decision of 12 April 2018, both parties agreed that there were separate issues still to be determined which were not affected by our decision in EA/07335/2017 and which had not been dealt with by Judge Callow.

17. Mr Bramble submitted that the Tribunal had still to be satisfied that the appellant's EEA national sponsor was exercising treaty rights from July 2017 to 4 September 2017 when the divorce proceedings were initiated. Mr Iqbal submitted that the respondent, in the refusal decision, had wrongly considered the date of the decree absolute, 5 January 2018, as the relevant date, whereas the relevant date was 4 September 2017. He submitted that the starting point for the relevant period to be considered was not July 2017 but was 19 August 2017, since the respondent had accepted, in the refusal decision of 12 April 2018, that the sponsor was exercising treaty rights until that date. The judge had failed to deal with the respondent's submission, at the hearing, that the sponsor had not met the "primary earnings threshold" in accordance with the Home Office guidance of 24 July 2018 referred to at [11] of his decision. Mr Iqbal asked that the decision be re-made at a resumed hearing to enable him to submit further evidence in that regard.

18. Accordingly we set aside Judge Callow's decision in the appellant's appeal against the respondent's decision of 12 April 2018, since he had failed to deal with the matters relevant to the question of the appellant having retained a right of residence upon divorce. The matter will be listed for a resumed hearing on 19 September 2019, for the decision to be re-made in the appellant's appeal.

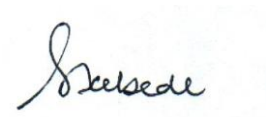
19. We make the following directions for the resumed hearing:

Directions

Not later than 14 days before the resumed hearing:

a. Any further evidence relied upon by either party is to be filed with the Upper Tribunal and served upon the other party in a consolidated, indexed and paginated bundle

b. Both parties are to file with the Upper Tribunal, and serve on the other party, a skeleton argument addressing the issue of the appellant's retained rights of residence, with specific reference to the sponsor's employment during the relevant period of 20 August 2017 to 4 September 2017 and the sponsor's ability to meet the primary earnings threshold.

Signed:  Dated: 5 August 2019

Upper Tribunal Judge Kebede