Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA 42242 2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 September 2015	**On 16 October 2015**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SYED SAQIB ABBAS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer
For the Respondent: Mr G Davison, Counsel, instructed by Zenith Solicitors

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State against a decision of First-tier Tribunal Judge Majid who allowed an appeal by the respondent, a citizen of Pakistan, against a decision of the Secretary of State refusing him leave to remain in the United Kingdom under the European Economic Area Regulations.
2. I begin by looking at the Secretary of State's refusal letter. This set out three bullet points which identified things that the Respondent (hereinafter "the claimant") had to prove.
3. Firstly he had to prove that he based his case on rights of residence established during the time that he was married to an EEA national. The Secretary of State said that the Claimant had to provide evidence that his former spouse, who was accepted to be a national of an EEA state, was exercising free movement rights in the United Kingdom at the time of the divorce.

4. Secondly the claimant had to prove that his marriage had lasted for at least three years and that for at least one of those years he and his former spouse had lived together in the United Kingdom.

5. Thirdly the claimant had to prove that he was currently employed or self-employed or self-sufficient as if he were himself an EEA national.

6. This summary is not the extent of the letter which also makes it clear that in order to meet the requirements of Regulation 10(6), and so qualify for permanent residence, the claimant had to provide evidence that since the date of divorce he had been a "worker" (as is suggested above) and, additionally, that he had to prove that he had retained rights of residence following the divorce or that he had resided under the Regulations for five continuous years. The need for five years continuous residence before becoming entitled to reside permanently is important and it is something which appears to have been overlooked.

7. Dr Majid is well-known to the Tribunal and his Decisions have a distinctive style. Here he has made findings, particularly at paragraph 13. No doubt thinking of the bullet points identified in the refusal letter he noted, and, I am satisfied, noted in a way that must amount to a finding, that the claimant had been married for more than three years, that at least twelve months of those three years had been spent in the United Kingdom and, and this is the crucial, at paragraph 13(c), that the [claimant's] bundle contained the wage slips (in May 2014 when the divorce took place), a form P60 relating to the claimant's former spouse and a letter from the claimant's landlady confirming that the claimant's now divorced wife was working when the divorce took place.

8. None of the evidence identified there was completely conclusive but it was perfectly cogent evidence in the form of a statement or a letter or apparently genuine wage slips or copies thereof, and there is no basis for criticising the First-tier Tribunal Judge for believing that part of the evidence. The Secretary of State's grounds mount a challenge but they are wrong. For example they suggest at point 9 that it was incumbent upon the Tribunal to make an Amos direction (see **Amos v SSHD** [2011] EWCA Civ 55)**.** It was not. The appeal was not about the Tribunal making investigations but about the claimant proving his case. It was incumbent upon the Secretary of State to turn up and argue her case and if she chose not to do that she cannot complain if apparently cogent evidence is accepted at face value without more. Believing such evidence was not a fault on the part of the First-tier Tribunal Judge and I am satisfied that the evidence was accepted and the judge necessarily, by implication if not expressly, made findings, and the findings were that at the time of the divorce both parties were in regular work, that since the divorce the claimant has continued to be in regular work and the claimant's wife was in regular work from 3 October 2013. All of foregoing is proved by documents which I am satisfied the First-tier Tribunal Judge accepted rationally.

9. The difficulty is that that these are not sufficient reasons for allowing the appeal. The difficulty, as is indicated in the refusal letter although not emphasised, is that the claimant had to show that he had resided in

accordance with the Regulations for five years, not merely that he had resided for five years. The period of five years can include time when the claimant had a continuing right of residence after the divorce but he cannot rely on *his* work before the divorce, he has to rely on his wife's work. The evidence does not establish that the claimant's wife was exercising treaty rights earlier than October 2013 and that is just not long enough to establish the five years which is necessary to qualify under the Rules.

10. It is right to say that there is evidence before the Tribunal which hinted at the possibility of the claimant's wife. There were letters referring to a tax code identifying an employer by name but not by the employer's trading name, but they equivocal. They might be a reference to the job that the claimant's wife started in October; certainly the tax code is the same, in which case she would appear to have been unemployed for most of 2013. It might be that she took a job in 2013 with the employer name on the document but for whatever reason the job was unsatisfactory and she was only employed for a short time before taking a different in October. We do not know. Any analysis would be entirely speculative. I cannot find anything in the evidence which would support a finding, even on its most generous interpretation, that the claimant's wife was exercising treaty rights at that relevant time. She may have been. That is all that can be said with any confidence and is not enough to support a conclusion that she was probably working.

11. It follows therefore that the First-tier Tribunal not only neglected to make a finding on a point of fundamental importance but the evidence before the First-tier Tribunal did not support the conclusion that would have been necessary to have allowed the appeal.

12. It follows therefore that I set aside the decision of the First-tier Tribunal.

13. That said, I emphasise that I see no basis for going behind the findings of fact that the First-tier Tribunal Judge made. It follows that this claimant has established a continuing right of residence from his divorce and it may well be that the time is not very far away when he would become entitled to a permanent right of residence based on time that he has accumulated but that time has not come yet. That is something about which I am confident Mr Davison will give clear advice.

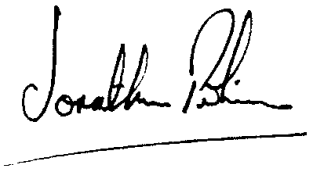
14. I make it plain that I find that the First-tier Tribunal Judge's findings were that the claimant has established a right of residence under Regulation 41(3) of the Immigration (EEA) Regulations 2006 and that he was entitled to reach that conclusion. It remains my decision that I should dismiss his appeal against the Secretary of State's decision. I simply draw attention to the finding that has already been made by the Tribunal.

15. It follows therefore that I set aside the decision of the First-tier Tribunal. I substitute a decision dismissing the claimant's appeal against the refusal of a residence card recognising a permanent right of residence but I indicate that I emphasise that I have approved findings which show that the claimant has established a continuous right of residence.

Notice of Decision

16. I allow the Secretary of State's appeal. I substitute a decision dismissing the claimant's appeal against the Secretary of State's decision to refuse to grant him a Residence Card.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 9 October 2015