



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/08584/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 21<sup>st</sup> September 2017

Decision & Reasons Promulgated  
On 27<sup>th</sup> September 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

OLEKSANDR RYEZNIKOV  
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms P Solanki of Counsel instructed by LS Legal Immigration Solicitors

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction and Background**

1. The Appellant is a male Ukrainian citizen born 20<sup>th</sup> August 1984 who appealed against a decision of Judge Miller of the First-tier Tribunal (the FtT) promulgated on 20<sup>th</sup> September 2016.

2. On 12<sup>th</sup> June 2010 the Appellant married an EEA national. On 4<sup>th</sup> January 2011 he was issued with a residence card as a family member of an EEA national, which was valid until 4<sup>th</sup> January 2016.
3. The marriage ended in divorce on 25<sup>th</sup> February 2015. On 5<sup>th</sup> May 2015 the Appellant applied for a retained right of residence which the Respondent granted on 23<sup>rd</sup> October 2015 valid until 23<sup>rd</sup> October 2020.
4. On 15<sup>th</sup> January 2016 the Appellant applied for permanent residence. This was refused on 29<sup>th</sup> June 2016 with reference to regulation 15(1)(f) of The Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations). In the reasons for refusal letter the Respondent also referred to regulation 10(5) of the 2006 Regulations. The Respondent noted that the Appellant had been granted retained rights of residence on 23<sup>rd</sup> October 2015 valid until 23<sup>rd</sup> October 2020. It was accepted that the Appellant was divorced and that he had been exercising treaty rights since the date of divorce. The application was refused because it was not accepted that evidence had been submitted to prove that the Appellant's former spouse (the Sponsor) had been residing in the UK in accordance with the 2006 Regulations for a continuous five year period.
5. It was accepted that some evidence had been submitted in relation to the former spouse exercising treaty rights, such as word processed invoices between June 2010 – March 2015, three national insurance documents relating to August 2010, March 2014, and October 2014, HMRC tax returns for the tax years ending 2011, 2012, 2013, and 2014, and seven pay slips from Lakerthorne Group Services dated August 2014 – February 2015.
6. The Respondent did not accept that sufficient evidence had been provided to prove that the former spouse was exercising treaty rights between June 2010 and March 2015 as claimed.
7. The Appellant requesting the appeal to be decided on the papers. The FtT acceded to that request, decided the appeal on the papers, noting that the Appellant had submitted a bundle comprising 656 pages.
8. The FtT was not satisfied that the documentary evidence discharged the burden of proof, in relation to the Sponsor exercising treaty rights for a continuous five year period up to the date of divorce and the appeal was dismissed.
9. The Appellant applied for, and was granted, permission to appeal by Upper Tribunal Judge Lindsley.

#### **Error of Law**

10. At a hearing before me on 4<sup>th</sup> May 2017 I heard submissions from both parties regarding error of law. Full details of the grant of permission, and the submissions made, are contained in my error of law decision promulgated on 17<sup>th</sup> May 2017. I set

out below my conclusions and reasons for finding an error of law and setting aside the decision of the FtT;

18. The FtT failed to analyse and consider material evidence. For example, there is evidence that at the date of divorce, that being 25<sup>th</sup> February 2015, the Sponsor was exercising treaty rights. There is an invoice at page 146 of the Appellant's bundle for £205, reflected in the Sponsor's bank statement at page 186 of the bundle. The money was deposited in the account on 3<sup>rd</sup> March 2015. A pay slip dated 5<sup>th</sup> February 2015 at page 147 of the Appellant's bundle in the sum of £703.84 is reflected in the Sponsor's bank statement at page 185 of the bundle, the funds being deposited on 10<sup>th</sup> February 2015.
19. It is not evident from the FtT decision, that the documentary evidence relating to the Sponsor exercising treaty rights, was analysed and considered.
20. The FtT did not consider the guidance in Samsam, particularly at paragraphs 26 and 59, although it must be said that the FtT was not greatly assisted by the parties in this appeal, and I could not locate specific reference to Samsam by either party. There was however reference to section 40 of the UK Borders Act 2007 in the Grounds of Appeal, which enables the Secretary of State to make appropriate enquiries with HMRC in order to establish whether an EEA national is exercising treaty rights. This is a point made in paragraph 26 of Samsam. In paragraph 59 it is noted that in marriage breakdown cases, an EEA national spouse may not wish to cooperate in providing evidence and a material consideration may be whether the Respondent has previously accepted the EEA national was working or otherwise exercising treaty rights.
21. Linked to the above point, is a failure to consider the acceptance by the Respondent that on the basis of evidence provided by the Appellant in May 2015, it was accepted that he was entitled to a retained right of residence on divorce and a residence card was issued on 23<sup>rd</sup> October 2015.
22. With reference to adequacy of reasoning I set out below the headnote to Budhathoki (reasons for decision) [2014] UKUT 00341 (IAC);

It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost.

23. The FtT decision has been described as brief, but that in itself is not a fault. The error, in my view, is a failure to provide adequate reasons, and a failure to consider and analyse material evidence.
11. The hearing was then adjourned at the request of the Appellant's representative, so that further evidence could be given and the decision re-made. The Appellant had not attended the error of law hearing, and the representative did not have instructions as to why not.

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12. At the commencement of the hearing I ascertained that I had received all documentation upon which the parties intended to rely, and that each party had served the other with any documentation upon which reliance was to be placed. Ms Solanki submitted a skeleton argument. In addition to the 695 page bundle that had been before the FtT, the Appellant's representatives had served a supplementary bundle comprising 54 pages, and a witness statement of Jasmin Bugg, a trainee solicitor, dated 20<sup>th</sup> September 2017, explaining why the evidence at pages 47-52 of the supplementary bundle, had not been submitted to the FtT, and was submitted for the first time in the supplementary bundle, which was received by the Upper Tribunal on 7<sup>th</sup> September 2017. The hearing was put back to give Mr Tarlow an opportunity to consider the supplementary bundle.
13. When the hearing resumed Mr Tarlow stated that he did not object to the evidence at pages 47-52 of the supplementary bundle being admitted into evidence as it was clearly relevant. Mr Tarlow accepted the authenticity of that evidence, and stated that in view of that evidence, the Appellant's appeal was not opposed by the Respondent.
14. In view of that, Ms Solanki questioned whether I needed to hear oral submissions from her, and confirmed that she relied upon her skeleton argument. The content of the skeleton argument is comprehensive, and I therefore indicated that I did not need to hear oral submissions.
15. I then reserved my decision to allow me to consider further the documentary evidence.

**My Conclusions and Reasons**

16. The burden of proof is on the Appellant, and the standard of proof is a balance of probability.
17. The only issue that I was asked to consider, was whether sufficient evidence had been submitted to prove that the Appellant's former spouse was exercising treaty rights for the period between June 2010 when the marriage took place, and 25<sup>th</sup> February 2015 when the divorce was finalised.
18. I accept that some documentary evidence was submitted with the application, and that there is further documentary evidence contained within the initial bundle presented to the FtT. As noted in my conclusions when finding an error of law, there was some evidence within that bundle, referred to at paragraph 18 of my error of law decision, to indicate that the Sponsor was exercising treaty rights at the date of divorce. It is the Appellant's case that the Sponsor has been exercising treaty rights throughout the period of their marriage, as an employee, and also in self-employment.

19. I find that there is evidence within the bundle that at the date of divorce in February 2015, the former spouse was undertaking both self-employment and employment, as reflected in an invoice for £205 which was deposited into her bank account, and a pay slip in the sum of £703.84, which was also deposited into her bank account.
20. The evidence that should have been placed before the FtT and was not, for which the Appellant's solicitors take responsibility (and the author of the witness statement could not be at fault, as she was not employed by the firm at the relevant time), is the evidence considered by Mr Tarlow, and which is contained in the supplementary bundle at pages 47-52.
21. I find that this evidence supplements the evidence that was submitted with the original application, and the evidence contained within the initial bundle which was before the FtT, and which is referred to in my error of law decision. The additional evidence has been produced by HMRC and are documents referred to as SA302. These documents relate to the Appellant's former spouse, and are HMRC tax calculations in relation to self-employment. They relate to the tax years ending April 2012, 2013, 2014, 2015, and 2016. The tax calculation ending April 2016 relates to a period after the divorce which took place in February 2015.
22. These documents prove self-employment by the Appellant's former spouse. They therefore show that she was exercising treaty rights as a self-employed person, which means that she was a qualified person as defined by regulation 6 of the 2006 Regulations. They do not cover a period prior to the tax year ending April 2012, and these documents alone do not prove five years' self-employment. However, the important point is that these documents supplement documentary evidence which had previously been supplied, covering a period between June 2010 and April 2011, which is the period not covered by these HMRC documents. The evidence already submitted included invoices and HMRC tax returns.
23. Mr Tarlow inspected the documents and was satisfied as to their authenticity and was satisfied that in totality, the documentary evidence proved that the former spouse had been exercising treaty rights for a continuous five year period. For that reason he did not oppose the appeal. I am satisfied that the documentary evidence submitted does prove that the former spouse was exercising treaty rights for the duration of the marriage, that being between June 2010 and February 2015. I therefore conclude that the Appellant has discharged the burden of proof and is entitled to permanent residence.

### **Notice of Decision**

The decision of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision. The appeal is allowed.

**Anonymity**

No anonymity direction was made by the First-tier Tribunal. There has been no request for anonymity made to the Upper Tribunal and I see no need to make an anonymity order.

Signed

Date

22<sup>nd</sup> September 2017

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT  
FEE AWARD**

Because I have allowed the appeal I have considered whether to make a fee award. I make no award. This is because the required evidence was not submitted with the application.

Signed

Date

22<sup>nd</sup> September 2017

Deputy Upper Tribunal Judge M A Hall