



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: UI-2021-000320
on appeal from EA/03428/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 28 July 2022**

**Decision & Reasons Promulgated
On 16 September 2022**

Before

**UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE FROMM**

Between

**MS MEHWASH RIAZ
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sohail Mohamed, Counsel with Kingston Law,
appearing by Direct Access

For the Respondent: Ms Amrika Nolan, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing her appeal against the respondent's refusal to grant her a residence card on the basis of a retained right of residence pursuant to Regulations 10, 21 and 42 of the Immigration (European Economic Area) Regulations 2016 (as saved), following the end of her marriage to Nasar Mohammad Kaneez (the husband), a Spanish citizen and thus an EEA national.

2. The appellant is a citizen of Pakistan. She was unable to demonstrate continuous exercise of Treaty rights by the husband up to the date when she commenced divorce proceedings (19 January 2016) nor could she show that she had herself exercised Treaty rights thereafter, up to and including the date of application for indefinite leave to remain under Regulation 10.

First-tier Tribunal decision

3. The First-tier Judge recorded at [20] that he had ‘applied my mind to the representations advanced by the representatives, as well as the documentary evidence before me’.
4. He held that the evidence to show that the husband had exercised Treaty rights in the United Kingdom was insufficient. HMRC evidence showed no paid employment by him after the 2012/2013 tax year. The appellant relied on evidence about her husband working at the Top Tain takeaway in Scotland, supporting it by evidence from Mr Mehboob Rafiq (Mr Rafiq) and Mr Nazar Hussain. It was the appellant’s case that the husband was working at Top Tain ‘off the books’ at the material times.
5. Mr Rafiq gave oral evidence, adopting his witness statement. The respondent did not cross-examine him on his evidence.
6. The First-tier Tribunal’s conclusions about the appellant’s oral and documentary evidence are summarised at [24]-[25]:
 - “24. Despite Mr Mohammed’s best efforts to persuade me, I am not satisfied, even after bringing together all the strands of the evidence, that [the husband] was a qualified person at the time divorce proceedings were initiated. I have weighed the evidence from the HMRC against the largely circumstantial evidence presented by the Appellant, and find that the evidence relied upon by the Appellant does not outweigh the conclusive and clear evidence I have before me from the HMRC.
 25. At best the Appellant’s case is that [the husband] was working off the books. However, even if I were to accept this, there is no evidence before me as to the nature of this work. There is no evidence of how many hours he may or may not have worked. There is no evidence of what remuneration, if any, he received. In accordance with established principles of EU law, I would need to be satisfied that the work is genuine and effective, in order to determine whether or not [the husband] satisfied the then definition of ‘worker’ at the relevant time and thus whether or not he was a qualified person. I simply am not persuaded by the evidence before me that he was engaged in genuine and effective employment”.
7. The First-tier Judge dismissed the appeal.
8. The appellant appealed to the Upper Tribunal.

Permission to appeal

9. Permission to appeal was granted by Upper Tribunal Judge Gill on the basis that it was arguable that the judge had not engaged with the evidence of Mr Mehboob Rafiq, the husband's cousin, in his unchallenged witness statement, or explained what weight he gave to it, before preferring HMRC evidence that the husband was not working after 2012/2013.

Rule 24 Reply

10. The respondent filed a Rule 24 Reply, the core of which is at [3]:

“3. The grounds are a disagreement with the findings of the judge. The burden was on the appellant to establish that her ex-partner had been exercising Treaty rights. The judge recognised that, due to the claimed difficulties in communication with the ex-partner, the appellant faced a challenge in acquiring the appropriate evidence. The determination shows that the judge considered the evidence, including that from Mr Rafiq, in the round and concluded that the appellant had not discharged the burden to show that the ex-partner had been working at the appropriate time. This was clearly a conclusion open to the judge on the evidence. ”

11. That is the basis on which the appeal came before us today.

Upper Tribunal hearing

12. We have considered the assistance which the First-tier Judge could have obtained from Mr Rafiq's unchallenged evidence about the husband's status at Top Tain. Mr Rafiq knows the husband well: he was involved in arranging the marriage. When the marriage failed, Mr Rafiq helped the husband find a new place to stay, at a nearby business called Top Tain, located about an hour from his own restaurant in Scotland.
13. Mr Rafiq's evidence is that he had telephone conversations with the husband after he moved to Top Tain. The husband told Mr Rafiq that he received accommodation and food at Top Tain and helped out with the restaurant. There is no suggestion in the statement that Mr Rafiq had direct knowledge of money changing hands between the husband and Top Tain as his employers.
14. That is as far as the evidence of Mr Rafiq can assist the appellant.

Analysis

15. We note that at [20] of the First-tier Judge's decision, he stated that he took into account all the evidence before him, which would have included the oral evidence of the appellant and Mr Rafiq, before finding that he was not satisfied that the husband had been a 'worker' as defined in the Regulations at the material times. It is not in dispute that neither Top Tain nor the husband reported any income to HMRC as they should have done, if employment was intended. No employment contract or payslips have been produced.

16. The appellant asks the Upper Tribunal to interfere with findings of fact and credibility to the effect that he was not a 'worker' at the material times. The question for us is whether the unchallenged evidence of Mr Rafiq, if considered in greater detail, would have led the First-tier Judge to reach a different conclusion as to that factual finding. We are satisfied that the totality of the evidence before the First-tier Tribunal falls well short of showing that there was an arrangement amounting to employment and the exercise of Treaty rights by the husband at the material times.
17. The Upper Tribunal may interfere with findings of fact and credibility by a fact-finding judge who has seen and heard the evidence only in very narrow circumstances. The challenged finding or findings must be irrational or unreasonable in the *Wednesbury* sense, or wholly unsupported by the evidence: see *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [90(2)].
18. That high bar is not reached. On the evidence before the judge, including the witness evidence of Mr Rafiq, it was unarguably open to him to find that there was insufficient evidence to show that the husband was a 'worker'.
19. Accordingly, there is no error of law, material or otherwise, in the decision of the First-tier Tribunal.
20. This appeal must be dismissed.

DECISION

21. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of no error on a point of law.

We do not set aside the decision but order that it shall stand.

Signed [Judith AJC Gleeson](#)
Upper Tribunal Judge Gleeson

Date: 5 August 2022