



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/11417/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 20 July 2018

Decision & Reasons Promulgated  
On 11 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MR MUHAMMAD ADNAN  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr P Turner, counsel, instructed by Law Lane Solicitors  
For the Respondent: Mr T Lindsay, Senior Presenting Officer

**DECISION AND REASONS**

1. The Appellant, a national of Pakistan, date of birth 10 January 1986, applied on 5 June 2017 for a residence card as confirmation of a right to reside in the UK based on the

former marriage to an EEA national who was in the United Kingdom exercising treaty rights.

2. The matter was to be considered in accordance with Regulation 10(5) of the 2006 Immigration (European Economic Area) Regulations (the 2006 Regulations). The Appellant was refused on the single ground that the evidence did not show his former spouse was exercising treaty rights in the UK at the time of the divorce. The Respondent made inquiries of the EEA national's former employer in Poundland which confirmed as a fact that she had been employed and had left that employment on 10 March 2016.
3. The Appellant had initiated divorce proceedings effectively from 10 February 2016. In the light of the fact that the Respondent was not satisfied on that issue the refusal notice was issued and the Appellant appealed to the First-tier Tribunal. The matter came before First-tier Tribunal Judge Miles who on 1 February 2018 dismissed the appeal under the EEA Regulations because as he said

“In all those circumstances I am not satisfied that the Appellant's evidence and the pay advice slips for Poundland is sufficient, in the light of all those matters, to establish that the Sponsor (the EEA national) was exercising treaty rights through employment at the time of her divorce from the Appellant and on that basis therefore he has not established a retained right of residence under Regulation 10(5) of the 2006 Regulations. Accordingly therefore his appeal fails”.

4. Within the bundle of documents which was very extensive were pages of pay slips from Poundland for the EEA national, together with an end of year P60 for the tax year to April 2013.
5. The pay slips showed that from 2013, 2014, 2015 and up to February 2016 the EEA national had been working for Poundland. That is entirely consistent with the information that was given to the Secretary of State. The Secretary of State does not

take issue with the e-mail from Poundland, dated 8 August 2016, following a telephone call which confirmed that the EEA national no longer worked with Poundland but had left on 10 March 2016.

6. There is not one scintilla of evidence to suggest that between February 2016 and March 2016 the EEA national had not been working with Poundland or had only worked for one or two days and then not worked: If that was truly material to a distinction as a fact as to whether or not someone was truly exercising EEA rights. Were it for me to decide I would have concluded that the submission that the Secretary of State could not be satisfied that as at 10 February 2016, the date divorce proceedings were commenced, the EEA national was not working would simply be irrational.
7. Be that as it may the position has changed because of the decision in Baigazieva and the Secretary of State [2018] EWCA Civ 1088 which makes plain that it is not the date of divorce being made absolute or indeed nisi that is material. The relevant date is the date the divorce proceedings were initiated which is undisputed was on 10 February 2016.
8. In those circumstances there was no other issue to be addressed. The fact is the Secretary of State was not aware of the High Court's interpretation of the issue nor indeed was the Immigration Judge but by the time the matter came to me it is clear that there is no evident purpose served in this matter. The law was as stated to be in Baigazieva.
9. It followed that the Judge made a material error of law in assessing the evidence at the date of decree absolute. It also follows that the appropriate course is for me to conclude that the Original Tribunal's decision cannot stand and to substitute on the basis of the undisputed facts the conclusion that the appeal should have been allowed on the basis of the evidence that was before the Immigration Judge.

10. It is said that the Judge had some doubt about the reliability of the documentation, particularly the Poundland wage slips and that apparently was compounded by the absence of the Appellant at the hearing of the appeal. How that should have come to pass I do not know but, be that as it may, the Judge does not explain in what sense the pay slips could possibly be unreliable. Simply because they are photocopies, rather than the original that does not exclude them from being treated as evidence to discharge the burden of proof on a balance of probabilities that she was employed and earning the monies represented in the pay slip and paying the necessary deductions. Particularly in the context of the Respondent's communication with Poundland.
11. The fact is that payments were made to the EEA national and whether or not they tie in to the bank account of the EEA national is only part of the consideration as to how the EEA national may be dealing with her money. It also may reflect the fact that the Appellant was not seized of all the papers that belonged to the EEA national and, unless there was rational cause for concern to think otherwise, it would not be reasonable to expect a divorced husband or otherwise to have access to the bank statements of his former wife either at the time of the application but also at the time of the hearing of the appeal.
12. In the circumstances I did not find the Judge's reasoning was right in law. A 'doubt' about the pay slips is not sufficient bearing in mind not least that the HMRC position had been identified, as had the Secretary of State's inquiries of Poundland. In respect of the EEA national's employment the Secretary of State could hardly have accepted what Poundland said about the nature and length of her employment unless satisfied that that had been properly confirmed to them and that confirmation was in an acceptable form.
13. For these reasons therefore whatever reservations Mr Lindsay may express to me about the sufficiency of the evidence at the date the divorce was initiated, the fact is the Secretary of State never raised the validity of the Poundland payslips as an issue

of challenge and there was nothing to suggest there was any reasonable basis on which the matter might need to be re-examined by way of a further hearing.

14. The following decision is substituted. The appeal is allowed.
  
15. Accordingly in the light of the evidence that was provided to the Secretary of State bearing in mind the law as it should properly have been applied the Appellant would have been entitled to a residence card dated as at the date of decision at least of 7 September 2017.

**ANONYMITY**

No anonymity direction is made.

Signed

Date 20 August 2018

Deputy Upper Tribunal Judge Davey

**TO THE RESPONDENT**

**FEE AWARD**

The evidence was before the Judge, had he applied the law as it has been found to stand he should have allowed the appeal. I conclude the appeal should be allowed and a fee award of £140.00 is appropriate.

Signed

Date 20 August 2018

Deputy Upper Tribunal Judge