Upper Tribunal
(Immigration and Asylum Chamber)

Samsam (EEA: revocation and retained rights) Syria [2011] UKUT 00165 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25 February 2011	.....

Before

THE PRESIDENT, MR. JUSTICE BLAKE

SENIOR IMMIGRATION JUDGE McGEACHY

Between

HUSSAM SAMSAM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr G Davidson instructed by Bajwa and Co Solicitors

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

1. Where the Secretary of State revokes a residence card before the expiry of its validity it falls on her to justify such revocation.

2. Regulation 10 of Immigration (EEA) Regulations 2006 requires the applicant to demonstrate that: a genuine marriage has lasted three years and the couple have spent one year together in the United Kingdom and that the EEA national spouse was exercising treaty rights at the time he ceased to be a family member.

DETERMINATION AND REASONS

Introduction

1.
This is an appeal against a decision of the First Tier Tribunal Immigration and Asylum Chamber (IJ Freestone) given on 30 July 2010 dismissing the present appellant's appeal against the decision of the Secretary of State who had revoked his residence card issued as a family member of a qualified person within the meaning of the Immigration (EEA) Regulations 2006.

2.
The material facts are as follows. The appellant is a Syrian national. On 6 September 2001 he married a Spanish national Isabel Gutierrez in Cheshire, England. Thereafter the appellant applied for a residence card to remain with his wife who was said to be exercising Treaty rights. On the 7 December 2002 this application was granted by an endorsement in the passport valid for a period of 5 years to 5 December 2007.

3.
The appellant made a subsequent application for a residence card that was received by the Home Office on 6 February 2007. By this time his marriage was in difficulty. A decree nisi of divorce was issued on 16 October 2006 and the decree was made absolute on 19 March 2007. In law he remained married to the EEA national at the time the application form was completed. The nature of this second application was not before the IJ and was not in the materials before us to prepare for this hearing.

4.
Mr Tarlow was able to produce the application form to us and it is apparent that it was an application for a further residence card on the grounds of marriage. Section 4 of the form dealt with the wife's economic activity and she is described as a waitress working 10 hours a week for Mediterranean of Chester Limited at a salary of £50.00 per week. The form indicates that at least one recent wage slip was provided although this does not appear to have been retained on file. Although such matters are meant to be decided promptly and within 6 months, it was not until 29 November 2007 that a further residence card was issued with a validity of a further five years. By this time the appellant was divorced.

5.
The appellant believed he was entitled to permanent residence and communicated with the Home Office to this effect. He was invited to re-apply for such status which he did on 13 January 2009 disclosing the divorce document and his present circumstances.

6.
On 5 August 2009 the Home Office wrote to the appellant asking for the following information:-

a.
"Evidence that you and your ex-wife… cohabited in the United Kingdom for one year during your marriage".

b.
"Evidence that your wife was exercising her Treaty rights in the United Kingdom from 2004 up until the date of divorce on 19 March 2007 ie wage slips, employment letters, P60s etc".

c.
"Evidence that you have exercised Treaty rights in the United Kingdom since the date of your divorce up until the present date".

7.
Some information was provided but it was not enough to satisfy the Secretary of State. Permanent residence was not granted, rather on 3 September 2009 the decision was made to revoke the existing residence card because:

"On 29 th November 2007 you were issued a residence card as confirmation of a right of residence in the United Kingdom as a family member of a qualified person. However, you have ceased to be the

family member of that person and no longer have a right of residence in the United Kingdom or the right to hold a residence card confirming that right".

8.
Accompanying this decision was a reasons for refusal letter that stated:

"You have failed to provide the documents that were requested by this department on 5 August 2009, therefore you do not qualify for permanent residence under retained right of residence".

9.
The IJ heard from the appellant and received some documents from him relating to the employment of his former wife in his restaurant business, and some evidence about the appellant's employment since his divorce. There was a bank statement in a joint account from December 2001. There were wage slips for the wife for February and March 2006; a P60 tax slip showing the wife had earned £358 to the year ending 5 April 2006 and no earnings the previous year and a P60 end of year certificate for the tax year to 5 April 2007. This showed the wife to have earned £3900, or an average of approximately £75 per week over a 52 week period.

10.
At paragraph 3 of her decision, the IJ stated that the burden of proof was on the appellant and the standard of proof was the balance of probabilities. She had concerns about a letter from a landlord stating when the couple had cohabited and some of the evidence of the appellant's present earnings. She noted that the appellant was the owner of Mediterranean of Chester Limited and that wage slips for the entirety of the marriage had not been provided. She had concerns about the reliability of some of the documents produced to show the appellant's employment since the divorce because wage slips for Moods Music Bar showed his monthly pay for August and October 2007 as £978.69. There was a letter from an employer (Beauty Lounge) indicating that the appellant was employed as a manager from 2008 and continuing. She concluded that the appellant had failed to provide credible evidence of the three matters that the Home Office had put in issue. She accordingly dismissed the appeal.

11.
Permission to appeal was granted by SIJ Storey on 17 September 2010 who observed that it was an arguable error for the IJ to have placed the burden of proof on the appellant in a revocation case.

The submissions of the parties

12.
The central submission of Mr Davidson for the appellant reflected the grounds on which permission had been granted by the SIJ. He had the disadvantage that his instructing solicitors had not provided him with a bundle of the materials provided to judge below; no fresh bundle had been prepared to support the contentions in the grounds of appeal and the appellant himself did not appear and so was not available to provide instruction. This was poor preparation by the solicitors in this case. The Tribunal and the advocates are entitled to expect that an appeal bundle of relevant material is prepared, indexed, paginated and supplied in good time before the appeal with some explanation in the grounds of appeal or a skeleton argument what the appellant's case is and why the materials are relevant to demonstrate it.

13.
Further, when the second application form was disclosed it was apparent that the appellant's team were acting on a misapprehension. The second residence permit was not issued as an

acknowledgement of a retained right of residence as a former spouse of EEA national but granted a further permit as a spouse. The Home Office were accordingly correct to identify that there had been a change of circumstances since its issue namely the termination of the marriage. If there had been a material change of circumstances then (subject to the issue of whether he had already acquired permanent residence by the time on his divorce: see below paragraphs 48 and following) the question to be decided in this appeal is whether the appellant had a retained right of residence following his divorce.

14.
In the event Mr Tarlow told us that his instructions were that it was accepted that in a revocation case the burden was on the Home Office to justify the revocation. We were not sure that the implications of this acceptance had been thought through in every aspect.

15.
Further, the present case was both an appeal against revocation of an existing residence card and a first application for permanent residence.

The power to revoke a residence card

16.
Regulation 20 of the EEA Regulations 2006 (the Regulations) provides:

“(1) The Secretary of State may refuse to issue, revoke or refuse to renew a registration certificate, a residence card, a document certifying permanent residence or a permanent residence card if the refusal or revocation is justified on grounds of public policy, public security or public health.

(2) The Secretary of State may revoke a registration certificate or a residence card or refuse to renew a residence card if the holder of the certificate or card has ceased to have a right to reside under these Regulations.

(3) The Secretary of State may revoke a document certifying permanent residence or a permanent residence card if the holder of the certificate or card has ceased to have a right of permanent residence under these Regulations.”

17.
In the case of DA (EEA, revocation of residence document) Algeria [2006] UKAIT 00027, the Asylum and Immigration Tribunal concluded that a power of revocation on grounds of absence of qualification for a right of residence was not inconsistent with the EP and Council Directive 2004/38/EC (the Directive) although no provision for revocation on such grounds was set out in the Directive. In that case there was no dispute that the appellant ceased to be a family member of a qualified person as it was common ground that the EEA spouse had left the United Kingdom on an indefinite basis. The Tribunal did not have to consider and did not address the issue of the burden of proof in a disputed case.

18.
It is trite that in EU law cases, the residence document is the evidence of the right and not the source of it. It is reflected in the language of Article 10 (1) of the Directive:

“The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called ‘Residence card of a family member of a Union citizen’ no later than six months from the date on which they submit the application”.

19.
It follows logically that in a case where there is a dispute as to whether a person has the right of residence, the real issue will be whether they in fact qualify for the right and not whether they do or do not hold a residence permit evidencing the right. We note that Rogers and Scannell “Free Movement of Persons in the Enlarged European Union” (2005) state at 11-33:

“The corollary to the proposition that residence permits are declaratory of the underlying rights to which they relate is that possession of a residence permit cannot be taken to be proof positive of the existence of a right to remain”

20.
The Court of Appeal in the case of Secretary of State for Work and Pensions v Maria Dias [2009] EWCA Civ 31 July 2009 reached much the same conclusion when considering the evidential value of a residence permit issued under previous legislation. It noted at [33]:

“It was accepted before us that European law, at the material time in Directive 68/360, gives the EU worker a right to reside in another member State whether or not the required residence permit has been issued: Royer , Case 48/75, [1976] ECR 497 , see especially paragraphs 31-33. But Mr Berry, for Ms Dias, contends that once the permit is granted the right exists through the permit. He says that Article 4(2) of Directive 68/360 (quoted above at paragraph 26(iv)), in speaking of the permit as proof of the right to reside, in effect means that the permit is conclusive proof of that right, at least unless and until it is revoked. The contrary contention of the Secretary of State is that the permit is proof only of the right which underlies it, and that that right is one which avails only a worker and not someone who no longer is.”

The submissions of the Secretary of State were preferred and at [38] the following observations were made:

“It is no doubt true that a permit can be revoked or withdrawn if the holder no longer meets the conditions of article 7 of Directive 2004/38, and that this one had not been. There was in fact no reason to consider revocation in 2003 because at that stage nothing of significance turned in the UK on the EU citizen's right to reside; it was only in 2004 that entitlement to income support began to turn on it. But in any event, to hold that the permit remained conclusive evidence of a right to reside unless revoked would impose a disproportionate burden of enquiry upon any host State, which would have to make constant intrusions into the life of the holder to see whether the conditions of article 7 were still being satisfied. Such enquiries of EU citizens, which would not be made of UK nationals, might well be considered discriminatory.”

A reference to the Court of Justice was made and we have seen the opinion of the Advocate General dated 17 February 2011 that agrees with this analysis. However the Court of Appeal had also noted at [36]:-

“To hold that article 16 requires five years' residence complying with the Directive, thus excluding residence when Ms Dias was not a worker within article 7, despite the existence of the permit, would not deprive the permit of any significance. It needs to be remembered that the provisions which successive Directives have made for the issue of residence permits have been designed to be suitable to the varying rules and regulations applying in the disparate Member States. Some Member States require persons within their borders to carry identification documents demonstrating their status. That the UK does not do so does not mean that the permit will not be an important document elsewhere. Nor is it without significance in the UK. Although it is true that the UK does not now

require EU citizens to pass through immigration controls beyond a passport check, that was not always so; the notes on the permit issued seem to be a remnant from earlier times. But even without immigration control or identity card use, the document clearly has utility as enabling the holder to demonstrate to any official or unofficial enquirer in what capacity he or she is present in the UK. In particular it enables the holder to demonstrate, for example to an employer, the right to be employed, which many other persons present, such as visitors and asylum seekers, do not have. A permit which says, in effect: "The holder has the right to be here to work" is by no means useless. And if official enquiry should, for some reason, be made into the legality of the presence of the holder in the UK, it is not useless to be able to demonstrate from the permit that there is the right to be here if working, and by reference to the employer that the condition of employment is met .”

21.
A residence permit performs two functions. It is evidence that the Secretary of State was satisfied at the time it was issued that the holder had rights of residence under EU law, and its continued validity serves to enable third parties to be satisfied of the holder’s status during the currency of the card. A non EU national family member may in particular need to prove who he is and that he has authority to work and reside in the United Kingdom for the time being.

22.
Residence documentation cannot be arbitrarily cancelled or revoked and for reasons noted by the Court of Appeal proof of continued existence of a right of residence cannot be demanded at frequent intervals during its currency. The Citizens Directive Article 11 contemplates that a residence card is valid for five years and the only specific contingency for loss of validity identified is absence for a substantial period of time. Article 14 (2) of the Directive provides that:

“Union citizens and their family members shall have the right of residence provided for in Articles 7, 12, and 13 as long as they meet the conditions therein. In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically”.

23.
In the cases of both DA and Dias the facts were agreed and the absence of a right of residence was clear. What is the position if the facts are not clear and the Secretary of State seeks to revoke a residence card party-way through its period of validity?

24.
Where a right of residence is being revoked under regulation 20(1) on public policy grounds, the circumstances are likely be similar to deportation on conducive grounds or general grounds of refusal of entry where it is clear that the burden lies on the Secretary of State to establish on the civil standard the facts justifying revocation see JC (Part 9 HC 395-burden of proof) China [2007] UKAIT 0007.

25.
But a residence card can clearly be revoked on broader grounds than conduct making cancellation of the card and removal from the United Kingdom appropriate. If a card is obtained by fraud or misrepresentation then it would be open to the issuing authority to cancel it but again the onus would be on the Secretary of State. But if it could be shown that a card was issued in error by administrative mistake, we see no reason why it should be revoked even if the holder has no right of residence.

26.
Loss of the right of residence during the currency of the card would be another circumstance entitling the Secretary of State to revoke the card, even though there appears to be no procedure for inquiring afresh into the existence of a residence right in the absence of reasonable grounds to suspect that no such right exists. We are conscious that the Home Office will be able in certain cases to access the tax and social records of individuals to check to see if any economic activity is continuing. In those circumstances as well, we would expect the basis of the reasonable suspicion to be demonstrated by the Home Office and so there is some evidential burden to raise a sufficient doubt to justify further inquiry.

27.
In immigration decisions made outside the context of EU law, the onus of justifying revocation or curtailment of limited leave, indefinite leave or a particular status would fall on the authority taking the action in question. The ordinary meaning of the word in this context is “to annul, repeal, rescind to cancel”. It is a different decision from a refusal to grant in the first place. As a matter of general principle, we would agree with the appellant’s submission and the respondent’s concession that where the sole issue in an appeal is whether the Secretary of State has lawfully revoked residence documentation on the ground of lack of qualification, the onus to justify the cancellation is on the revoking authority. It would be sufficient to justify such revocation if there has been a change of circumstances since issue that removes the right of residence.

28.
However, this conclusion does not contradict the following two propositions:-

a.
In making an application for a residence document or permanent right of residence the burden of demonstrating eligibility falls on the applicant.

b.
The mere fact that a residence permit has been issued in the past does not enable the applicant to satisfy the Secretary of State that he has a right of residence at the time of the application, or that he exercised a right of residence throughout the period of the validity of the permit.

29.
However, our conclusions on this topic do not decide the different question of the evidential value of possession of a residence permit when a person seeks to renew it or obtain permanent residence on the strength of it. It is plain that if the facts reveal that a person was not exercising Treaty rights then the existence of a residence card cannot assist. It is not conclusive proof. It may, however, be some evidence of past lawful status if there is some evidence to support the exercise of Treaty rights, nothing to contradict and the historic position can longer be established with precision.

<u>Did Mr Sansam have a right of residence following his divorce?</u>

30.
In this case the appellant was the spouse of an EU national and a family member under Article 2(2)(a) of the Directive. He was therefore entitled to the issue of a first residence card on presentation of his valid passport, a marriage certificate, and “the registration certificate or any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining” (Article 10 of the Directive).

31.
He satisfied the Secretary of State of these matters in 2002 when his first residence card was issued for five years as required by Article 11 (1) of the Directive. The wife's registration certificate as an EU worker or self employed person would have been sufficient evidence of her status although other means of proving it are permitted. The 2007 application form, now before us shows that at least one wage slip for the wife was presented that was sufficient to satisfy the Home Office that the wife was continuing to exercise a Treaty right as a worker and hence a further residence card was issued for five years in November 2007. This is, therefore, not a case of an applicant arguing that he can prove that he was exercising residence rights in 2007 merely on the strength of having been issued with a card in 2002.

32.
Following his divorce in March 2007 there were potentially two routes to the appellant retaining a right of residence under EU law: the retained right of residence and a right of permanent residence.

Retained right of residence

33.
Article 13 (1) of the Directive provides for the right of retained right of residence for family members who are nationals of a Member State in the event of divorce. Article 13 (2) applies to family members who are not nationals of a Member State, such as the appellant and the primary qualification route is subject to the fulfilment of conditions in the second sub-paragraph.

34.
In this case, the primary qualifying condition is that set out in Article 13(2)(a):

"prior to the initiation of the divorce…the marriage…has lasted three years, including one year in the host Member State".

The summary of the facts in the introduction to this judgment demonstrates that this requirement was met. The parties were married in the UK in 2001 and divorce proceedings were commenced before October 2006 in the UK. There is no information to suggest that the wife left the UK at all during this time, although only lengthy or permanent absences would have an effect on the appellant's right of residence. The reference to marriage does not mean matrimonial cohabitation: (see the decision of the Court of Justice on the legislative predecessor of the right of residence for spouses in Diatta v Land Berlin [1985] ECR 567).

35.
The second sub paragraph of Article 13 of the Directive provides:

"Before acquiring the right of permanent residence, the right of residence of the person concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or…… or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements ……Such family members shall retain their right of residence exclusively on personal basis". (Our emphasis)

36.
This language is quite compressed. Although it refers to "permanent residence" it must be discussing the retained right of residence rather than making an advance reference to the right of permanent residence addressed in Article 16 of the Directive. It may well be that the duration of what we shall call "indefinite residence" is permanent depending on the circumstances of its acquisition. Duration of

Article 13 rights is, however, specifically addressed by Article 14, and entitlement to a permanent residence document on the basis of Article 13 (2) is considered in Article 18 (see paragraph [3] below).

37.
When considering whether a retained right of residence exists the person concerned must be the spouse of a former spouse who exercised the relevant Treaty right. The overall sense of this seems to be that in the case of a family member seeking to acquire a retained right of residence, such a person must show that the EU national remains a worker etc at the time that the right of residence is claimed to accrue (here the time of the divorce) and if so the family member (and in the case of death or divorce, former family members) has a personal right of retained residence.

38.
Strictly, whether the wife was a worker is not the same as whether the wife was working at that time, as exemplified by Article 7 (3) of the Directive which provides that the status of a worker is retained if any temporary inability to work was through illness, accident, involuntary employment or relevant vocational training. This is not a relevant consideration in the present case, but it demonstrates the dangers of drawing inferences from gaps in wage slips alone.

39.
Regulation 10 (5) and (6) of the EEA Regulations 2006 transposes these provisions into national law. It requires an applicant who has divorced to satisfy 10 (5)(a), (b), (c) and (d). Two of these provisions require particular attention:

a.
Regulation 10(5)(b) requires the applicant to show “he was residing in the United Kingdom in accordance with these Regulations at the date of termination ”. In simple terms this means that at the date of the termination of the marriage he was residing in the UK as the spouse of an EU national who was working at that date. This correctly identifies the focus as being on the spouse’s status as a worker at the date of the divorce.

b.
Regulation 10(5) (c) requires the applicant to satisfy regulation 10(6). Regulation 10(6) imposes two conditions either one of which should be met: the 10(6)(a) requirement is that the non EEA national would be a worker, self employed or a self sufficient person if he were an EEA national. The alternative requirement is 10(6)(b) that the person is the family member of a person within paragraph (a).

40.
If construed literally regulation 10(6) may give rise to problems. On divorce, a person ceases to be a family member by reason of marriage. That does not cause the right of residence to cease however as regulation 10(5)(a) makes plain. Family member with a retained right of residence in regulation 10 and regulation 14 (3) must be a term of art and mean a person who comes within regulation 10(2) to (5). Further a non EEA family member does not have to be economically active during the marriage and nor is there any indication in Article 13 of the Directive that they have to be economically active on their own account on termination of the marriage.

41.
In Article 13 second paragraph of the Directive the reference to “the person concerned” is to the EEA national whose exercise of Treaty rights gives rise to a right of residence of the former family member

and not the family members themselves. It is doubtful whether regulation 10 (6) adds to regulation 10 (5)(b) as we have construed it, as it is sufficient to be the former family member of a person who was working at the time of the divorce.

42.
When it responded to the appellant's application for permanent residence in 2009, the Home Office asked for evidence of three issues and it was the appellant's failure to provide satisfactory evidence of each that led to the refusal.

43.
The first thing it sought was evidence of one year's matrimonial cohabitation. This was an error as this is not a requirement for the retained right of residence under Article 13 of the Directive or regulation 10 (5) (d) of the Regulations. It is sufficient if both spouses were living in the United Kingdom rather than living together in the same household in the United Kingdom.

44.
Second, it sought evidence that the wife had worked from 2004 to 2007. Our analysis of regulation 10 (5) indicates that the focus is whether the wife retained the status of worker at the time of the divorce and not on whether she had that status throughout the three years preceding the divorce. Where the Regulations impose a requirement of qualification throughout a relevant period they say so (contrast regulation 15(1)(a)). There is no such requirement in regulation 10(5). We can see nothing in Article 13 of the Citizens Directive to require a different reading. Further, the UK regulations can make for more favourable treatment (see Article 37 of the Directive) and what the regulations require the applicant to satisfy the Secretary of State about is the status of the spouse as working (or otherwise exercising Treaty rights) at the time of the termination of the marriage and not continuously throughout the preceding three years.

45.
In any event, retaining the status of worker is not the same thing as actually working and there is no requirement on a person claiming a retained right of residence to retrospectively supply wage slips and related documentation throughout the marriage. If the Home Office have reason to believe that the wife has been voluntarily unemployed and not exercising other treaty rights of residence in the United Kingdom and this is relevant to the grant of a residence card, it can raise the issue from its own inquiries. There was no reason here to believe that the wife has ceased exercising Treaty rights during the currency of the appellant's residence card and for reasons we give below we are satisfied that the appellant established that she was exercising treaty rights at the end of it. We conclude that even if continuity of exercise of Treaty rights was a precondition for the grant of a permanent right of residence there was no duty on the appellant to have to prove historic working by the wife 2004 to 2007 which was for a period before the grant of the second residence card.

46.
Third, it sought evidence of the appellant's exercise of Treaty rights from the date of divorce to the date of the application. If this meant evidence of continuous employment we cannot see how such a requirement is consistent with EU law. If the appellant obtained a retained right of residence on divorce because of the duration of his marriage and his wife's status as a worker he did not lose it subsequently because he ceased to be employed or self employed.

47.
In brief, if the Secretary of State was asking for documents that it was not necessary to produce to demonstrate the retained right of residence and was imposing conditions that the appellant was not

required to meet it cannot be a lawful conclusion that the appellant did not have the retained right of residence by reason of his failure to satisfy the Secretary of State. The appellant was required to demonstrate that he satisfied the requirements of regulation 10 to obtain such a right of residence and this he had done. There was no Presenting Officer at the hearing before the IJ and no submission made that the evidence of the appellant's employment post divorce was unsatisfactory and/or contradicted by other information.

Permanent residence

48.
Article 16 (1) affords the right of permanent residence, not subject to the conditions of Article 14, to Union citizens who legally resided in the host Member State for a continuous period of five years. Thus if the appellant's wife had resided in accordance with EU law for five years as a worker she would be entitled to permanent residence.

49.
A similar right is afforded under Article 16(2) to non-national family members who have legally resided with the Union citizen in the host Member State for a continuous period of five years.

50.
It can be noted that the words "resided with" do not apply to spouses who are nationals of an EU state in Article 16(1). In the case of PM (EEA spouse-residing with-Turkey) [2011] UKUT 89 IAC the Tribunal concluded that the term in both the Directive and the EEA Regulations meant residing in the same country as rather than cohabitating as spouses. Thus for both the retained right of residence and the acquisition of the permanent right of residence proof of cohabitation is not strictly necessary. It may be a relevant question to ask to rebut any suggestion of marriage of convenience or that the spouse has permanently left the United Kingdom but neither issue is raised in the present case. As long as both parties remain in the UK, and remain married, and the EEA spouse is exercising Treaty rights the non EA spouse obtains a right of residence.

51.
Here the parties were married in February 2001. Both were in the United Kingdom for the next five years. The Home Office were satisfied that the wife was exercising Treaty rights by economic activity in 2002 and 2007 and issued residence permits to that effect. On the documents he produced he could not show that the wife had worked continuously for five years, although it may be in a small family business no or limited wages were paid out in the early years. There would appear to be a case that before the date of the divorce the appellant had already acquired a right of permanent residence under this route.

52.
Article 18 of the Directive provides that:

"Without prejudice to Article 17, the family members of a Union citizen to whom Articles 12 (2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State".

53.
This provides an alternative route for the appellant to acquire permanent residence. It is accurately reflected in regulation 15(f) of the 2006 Regulations and requires the appellant to have resided for five years in accordance with these regulations and was "at the end of that period a family member

who has retained the right of residence". "Family member" here must mean former family member as you cease to be a family member if your spouse dies or divorces you. Residence in accordance with these Regulations contemplates residence acquired under any of the rights recognised by the regulations and there is no need to have resided a continuous period of five years in only one category, either as a spouse or a former spouse.

54.
Thus if it could not be shown that the appellant's spouse had continually worked for five years during the marriage, the appellant would appear to qualify for permanent residence in his own right if he had the retained right of residence on divorce and nothing has happened to deprive him of it.

Error of Law

55.
There are two errors of law in this case:

a)
In so far as this was an appeal against the decision to revoke, the IJ erred in not identifying that the burden of justifying the revocation was on the Home Office. Although it is now clear that there was a change of circumstance between the 2007 residence permit and the appellant's permanent residence application, it was not a material one if the appellant in fact qualified for the retained right of residence.

b)
In so far as this was a case concerned with whether the appellant had a right of residence at the time of his divorce and thereafter, the IJ erred in failing to identifying the relevant requirements for the right of residence. If this had been done it would have been recognised that not everything the Home Office was asking was necessary for establishing the retained right of residence.

Both were material errors in this case, as the facts were not agreed.

We therefore set aside the decision of the IJ and remake it.

Remaking the decision :

56.
Mr Tarlow did not disagree with any of the propositions noted above when we raised them with him. He did not seek an adjournment for the Home Office to make investigations with the tax and social security authorities as to the status of the wife or appellant. He made no submission to the effect that false documentary evidence had been presented by the appellant.

57.
It was clear to us by the end of the hearing that the wife was a worker under the Community law at the time of the divorce:-

a.
The wife had worked for the appellant's business during the marriage as isolated wage slips demonstrated.

b.
The Home Office had been satisfied by evidence presented to them in 2002 and 2007 that the wife was exercising Treaty rights.

c.
The 2007 application was based on 10 hours work per week as a waitress and recent wage slip evidence was apparently produced at the time to satisfy the Home Office of this.

d.
The P60 for the Year Ending April 2007 indicated that the wife must have been working for longer hours and/or higher pay previously in the tax year.

58.
Here the appellant and former husband was the employer and could produce relevant wage slips and the Tax Code for 2007. We understand that the business ceased on the divorce and it may not be surprising that tax documents for the previous five years were not complete. We do not know precisely what evidence was presented to the Home Office in 2001/2002. We have seen nothing to positively suggest that the wife was not a worker throughout the marriage.

59.
In marriage breakdown cases, the EEA national spouse may not wish to cooperate with the non-national former family member in providing evidence of the retained right of residence. This may cause problems if the burden lies fully on the applicant in making a first application for a residence document or permanent residence. A material consideration to whether the applicant can discharge the burden of proof is whether the Home Office had previously accepted that the relevant person was working or otherwise exercising Treaty rights. Disclosure of such applications should be made in appellate proceedings as the applicant may not always have taken the precaution of keeping a copy. The 2007 application has proved important in determining the outcome of this case.

60.
Applying the language of regulation 10(5) to these facts:-

a.
The wife was a qualified person at the inception of the marriage (2002 residence permit).

b.
The appellant ceased to be the family member of a qualified person on divorce in March 2007.

c.
The appellant was residing in the UK in accordance with the Regulations as the husband of a qualified person at the time of the divorce as there was evidence that the wife had been working part time throughout the previous year.

d.
Prior to the initiation of the divorce proceedings the marriage has lasted three years and the parties had resided in the United Kingdom during the marriage for at least a year.

e.
The Home Office were twice satisfied that the wife had been exercising Treaty rights in 2002 and 2007, and there was nothing to suggest that satisfaction was based on material misconception of fact. There was some evidence that the wife was a worker at earlier periods in the marriage

f.
At the time of the 2009 application there was evidence that the appellant was working. There is no indication that this was disputed by the Home Office or that the appellant had had recourse to public

funds. If regulation 10(6)(a) is a legitimate requirement the evidence indicates that the appellant met it, although our reading of the Directive is that evidence of post divorce employment is not necessary to enable the non-national former spouse to acquire and keep the retained right of residence.

61.
The appellant has resided in the United Kingdom as the husband and former husband of an EEA national for nearly 10 years. That residence has been under the authority of two residence permits. The issue of the residence permits is evidence that the Home Office was satisfied that the spouse had been exercising Treaty rights in 2002 and 2007.

62.
Although there has been a change of circumstance since the residence card was issued in November 2007 in our judgment it is a not a change material to the issue of whether the appellant had a retained right of residence on the termination of his marriage. Accordingly the residence card valid to 2012 should not have been revoked.

63.
We will remit the question of whether the appellant is now entitled to a permanent residence card under regulation 15 (1)(f) to the respondent to determine. On the most austere view of the facts he probably does because:

a.
He resided in accordance with the Regulations as the spouse of a worker from February 2006 to February 2007.

b.
He acquired the retained right of residence on divorce in March 2007.

c.
He has resided for four subsequent years in the United Kingdom with that retained right of residence to February 2011 and has been employed and self-sufficient since then.

d.
He was accordingly a person who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years and at the end of that period has the retained right of residence.

64.
A less austere view of the facts may also be appropriate having regard to the issue of two residence cards in 2002 and 2007, and the total duration of the appellant's residence in the UK as a spouse and former spouse of a qualified person. In his opinion in Dias the Advocate General concluded:

"121. In summary, it can be concluded that a period of residence of a Union citizen in a host Member State, which is not based on Directive 2004/38 or its predecessor provisions, but only on a residence permit granted by the national authorities, does not constitute legal residence within the meaning of Article 16(1) of that directive and cannot therefore be taken into account for the acquisition of a right of permanent residence. It is however open to the Member States to provide for a rule according to which such periods are taken into account.

122. If a Union citizen has however resided before 30 April 2006 in accordance with the conditions of the predecessor provisions to Directive 2004/38 legally and for a continuous period of more than five

years in the host Member State, a right of permanent residence under Article 16 of Directive 2004/38 also comes into force where that residence was followed by another period of residence which, while not legal residence within the meaning of Article 16(1) of Directive 2004/38, took place on the basis of a valid residence permit issued by the national authorities."

65.
If this opinion finds favour with the Court of Justice, or the Home Office has evidence of the spouse's economic activity prior to February 2006 it is likely that the appellant acquired a permanent right of residence long before this.

66.
We are conscious that this judgment has travelled a long way from the arguments addressed to us in the hearing, essentially on who had the onus of justifying revocation of a residence permit. In our judgment that permit should not have been revoked for the reasons given by the Home Office. We accordingly conclude that that residence permit should now be restored to him.

67.
If it is now contended that any of the documentary material presented by the appellant to demonstrate a retained right of residence is false or that the wife is alleged not to have been a worker throughout the marriage, and/or that despite our reasoning on the requirements of regulation 10 above, admittedly reached without the benefit of informed submissions from the Home Office, it is contended that the appellant did and does not have either a retained or permanent right of residence a fresh decision can be taken explaining why.

68.
In the circumstances, we will remake the decision by:-

a.
Allowing the appellant's appeal against the revocation of the appellant's 2007 residence card.

b.
Declaring the residence card remains valid unless and until revoked

c.
Directing that the respondent reconsider the application for permanent residence in accordance with this judgment.

Signed Date

March 2011

President of the Upper Tribunal