



IAC-AH-CJ-V1

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

Appeal Number: IA/01449/2014

THE IMMIGRATION ACTS

**Heard at Royal Courts of Justice -
Belfast
On 26 October 2015**

Decision & Reasons Promulgated

On 30 November 2015

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS TETYANA GORDIYENKO

Respondent

Representation:

For the Appellant: Ms M O'Brian-Home Office Presenting Officer

For the Respondent: In Person

DECISION AND REASONS

1. The appellant in these proceedings is the Secretary of State. For convenience however, I refer to the parties as they were before the First-tier Tribunal.
2. The appellant is a citizen of Ukraine born on 9 October 1984. She applied on 2 August 2013 for a residence card on the basis that she is the family member of an EEA national exercising Treaty rights. The appellant's husband is the EEA national.

3. The respondent refused the application because of a question that arose about the validity of the appellant's Ukrainian passport. That was a matter that went to the question of the validity of the appeal under regulation 26 of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"), specifically regulation 26(2).
4. The matter came before First-tier Tribunal Judge Kempton at a hearing on 10 February 2015. At [10] of his decision he said that the issue to be decided was the preliminary issue of whether there was a valid appeal. That preliminary issue related to the validity of the Ukrainian passport. The judge resolved the matter of the validity of the passport in the appellant's favour. At [16] he said that he allowed the appeal "only on the preliminary point of validity". At [18] the same was repeated stating that the appeal was allowed on the preliminary point of validity and in the concluding part of the decision under the subheading "Notice of Decision" he stated as follows:

"The appeal is allowed only on the preliminary issue of the validity of the appeal. The respondent will now require (sic) to issue a fresh decision."
5. Incidentally, under the heading of "Fee award" it was said that as the appeal had been allowed no fee award would be made and the merits of the appeal had yet to be determined.
6. There is on the face of the judge's decision ambiguity in terms of whether he was dealing with a preliminary issue or whether he was deciding the appeal itself. It nevertheless seems clear to me, and was accepted on behalf of the respondent, that in fact this was a decision made only on the question of the validity of the appeal and not on its merits.
7. The other matters that needed to be resolved in terms of the requirements to be satisfied for the issue of a residence card were not dealt with by the judge because the matter before him was only the validity of the appeal.
8. The respondent sought, and was obviously granted, permission to appeal against the decision of the First-tier Tribunal. The grounds on behalf of the Secretary of State complain about the judge's conclusions as to the validity of the document produced, the judge concluding that it was a valid (international) passport.
9. Under section 11 of the Tribunals, Courts and Enforcement Act 2007 subparagraph (1) provides that for the purposes of subsection (2) the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision. In order to decide what is an excluded decision one needs to turn to the Appeals (Excluded Decisions) Order 2009. Article 3(m) of that Order includes in the definition of excluded decisions:

“Any procedural, ancillary or preliminary decision made in relation to an appeal against a decision under Section 40A of the British Nationality Act 1981, section 82, 83 or 83A of the Nationality, Immigration and Asylum Act 2002, or Regulation 26 of the Immigration (European Economic Area) Regulations 2006.”

10. It is accepted on behalf of the respondent that in fact this was a preliminary issue. It follows that the respondent was not entitled to appeal to the Upper Tribunal in relation to that decision which was an excluded decision.
11. Accordingly, the judge who granted permission to appeal had no jurisdiction to do so. It follows that the Upper Tribunal has no jurisdiction to deal with any appeal against the preliminary issue of the validity of the appeal. The consequence of all that is that there remains outstanding before the First-tier Tribunal an appeal against the refusal of a residence card. That is because First-tier Judge Kempton decided the validity of appeal point in the appellant’s favour. The Upper Tribunal therefore has no jurisdiction and the appeal remains outstanding before the First-tier Tribunal.
12. The appeal should be listed for hearing before the First-tier Tribunal before a judge other than First-tier Tribunal Judge Kempton.

Upper Tribunal Judge Kopieczek

26/11/15