



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/08983/2016

THE IMMIGRATION ACTS

Heard at Liverpool
On 14 August 2018

Decision & Reasons Promulgated
On 24 August 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR AMADOU FALL BETTY BA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr C Bates Senior Home Office Presenting Officer
For the Respondent: Mr Schwenk instructed by Broudie Jackson Canter (Manchester),
Solicitors

ERROR OF LAW FINDING AND REASONS

1. The Secretary of State appeals with permission a decision of the First-tier Tribunal Judge O R Williams who, in a decision promulgated on 27 April 2018, allowed the appeal against the decision to refuse to issue Mr Ba with a Residence Card in recognition of a right of permanent residence as the family member of an EEA national. The Secretary of State was not satisfied on the basis of the evidence provided that Mr Ba had provided sufficient evidence that the EEA sponsor was exercising treaty rights for a period of five years.

Error of law finding

2. Mr Ba is a citizen of Senegal born on 3 May 1973 who applied for a Permanent Residence Card.

3. The Judge finds at [11] that he was not satisfied the EEA national was exercising treaty rights in the UK for a five-year continuous period and could not meet the Regulations in relation to permanent residence. The appeal on the basis of an entitlement to a permanent residence card was therefore dismissed. There is no cross-appeal against this aspect of the decision.
4. The Judge found the EEA national is self-employed exercising treaty rights on the basis of evidence from HMRC at [12] of the decision which is written in the following terms:

“I am however satisfied that the EEA national is self-employed and exercising treaty rights. The HMRC record indicates that she was self-employed during the tax year 2015/16 and she gave satisfactory oral evidence that she has continued to work buying and selling/hairdressing and cleaning, the appellant has a specific skill as an African hairdresser and as a jobseeker seeking work as a French/English translator (she submitted a curriculum vitae to an online service). While separated, the EEA national and appellant remain married. I am satisfied therefore that the appellant should be allowed to maintain his current status as the family member of an EEA national exercising treaty rights.”

5. Ground 1 upon which the Secretary of State sought permission to appeal asserted the Judge had provided unclear and inadequate reasoning at [12] as to why the EEA national estranged spouse is a qualified person if not one with Permanent Rights of Residence and why it is relevant that the non-EEA, non-divorced applicant is a jobseeker. It is submitted that the First-tier Tribunal holds on thin reasoning that because the EEA spouse is here and self-employed then the estranged applicant is still a family member on Diatta principles. It is submitted the First-tier Tribunal did not mention the marginal and ancillary nature of the EEA national’s self-employment.
6. Both advocates accept that if the finding in [12] is sustainable and not infected by arguable legal error then the appeal must fail, as Mr Ba will be entitled to the Residence Card as a family member of an EEA national exercising treaty rights.
7. This is not a case, contrary to the submissions of Mr Bates, in which the Judge found the EEA national is exercising treaty rights solely on the basis of the evidence from HMRC, even though that evidence did confirm that at the date of the application the EEA national was self-employed. The Judge specifically refers, in addition, to the fact EEA national gave “satisfactory oral evidence”. The EEA national was questioned about exercising treaty rights. What the Record of Proceedings does not disclose, as submitted by Mr Schwenk, is that any issue in relation to whether the EEA national’s employment or self-employment was marginal and ancillary was raised by the Presenting Officer at the hearing before the First-tier Tribunal. It appears that this was not an issue taken at that stage and is a matter that only arises in the application for permission to appeal.
8. The Reasons for Refusal letter rejected Mr Ba’s application, stating “you have not provided any evidence of your EEA sponsor exercising treaty rights in the United Kingdom, as a result, this department is unable to establish whether your EEA sponsor has been exercising treaty rights in the United Kingdom for a continuous period of five years whilst employed/self-employed/jobseeker/self-sufficient/a student.

9. The Judge had the advantage of seeing both Mr Ba and the EEA national give evidence, in addition to considering the documentary material. It is not made out the conclusion the EEA national is exercising treaty rights as a self-employed person within the United Kingdom is outside the range of findings reasonably open to the Judge on the evidence. Accordingly, the Secretary of State fails to establish the existence of an arguable legal error material to the decision to allow the appeal.
10. Although not strictly required at this stage in light of the finding above, the Secretary State relied upon two further grounds of challenge to the Judge's decision. Ground 2 submitted that the Judges analysis of Mr Ba's eligibility under Regulation 15A(3)/(4) is incorrect as the First-tier Tribunal had found that the EEA national is an "exempt person" under Regulation 15(6)(c)(i) as she enjoys a right under another part of the Regulations and therefore Mr Ba cannot be a primary carer by sharing care with her.
11. Ground 3 asserts a procedural irregularity in that in coming to the findings pursuant to Regulation 15A the Judge committed a procedural irregularity by considering a 'new matter' as the matter of eligibility for a derived right had not been raised previously with the Secretary of State.
12. The Judge in the decision under challenge went on to consider any eligibility to a Derived right of residence from [13] of the decision under challenge. Mr Bates highlighted a number of difficulties with the approach adopted by the Judge in the way in which the Regulation was applied; which may amount to arguable legal errors.
13. The fundamental issue is, however, whether there is any merit in the assertion of a procedural irregularity. Although the Grounds refer to section 84 of the Nationality, Immigration and Asylum Act 2002 the correct statutory provision is section 85.
14. It was not argued that the current version of section 85 is not applicable to this appeal. Mr Schwenk in his skeleton argument raised the issue of an entitlement to a Derived right of residence but it does not appear that either of the advocates nor the Judge considered whether this was a 'new matter'.
15. Section 85(5) specifically prevents the Tribunal considering a 'new matter' unless the Secretary of State has given the Tribunal consent to do so. Section 85 (6) defines when a matter is a "new matter" which in relation to the requirement for it to constitute a ground of appeal of a kind listed in section 84 and for it to be a matter the Secretary of State has not previously considered in the context of the decision mentioned in section 82(1), or statement made by the appellant under section 120, it is not argued that the derived right of residence aspect does not constitute a ground of appeal and it is not disputed that the Secretary State has not previously considered the matter. Indeed, a reading of the Reasons for Refusal shows it was not part of Mr Ba's case previously.
16. The judge granting permission to appeal to the Secretary State refers to the decision of the Upper Tribunal in *Mahmud (S85 NIAA 2002 - "new matters")* [2017] UKUT 488 in which it was held that whether something is or is not a new matter goes to the jurisdiction of the First-tier Tribunal and that that Tribunal must therefore determine for itself the issue. It was found that the matter must be factually distinct from that previously raised by an appellant as opposed to

further or better evidence of an existing matter which will be a fact sensitive assessment.

17. In this case, the derived right argument is a new matter which is factually distinct from the basis on which Mr Ba claimed an entitlement to a Residence Card in his application. That constituted a “new matter” which should have alerted the Judge to the requirements of section 85(5). Failure to do so is an arguable legal error.
18. Mr Schwenk submitted that even though the Judge erred in this respect it was not material as this issue was not raised at the hearing and the Judge went on to determine the merits of Mr Ba’s claim under this heading. Mr Schwenk submitted that it can be inferred that the Judge considered he had jurisdiction and that the Presenting Officer consented to the new matter being raised. The difficulty with that argument is that there is no basis to support such a contention. The section specifically excludes the First-tier Tribunal from considering a new matter unless the Secretary of State has given the Tribunal consent to do so. This is matter on which unless such consent was given there was no jurisdictional basis upon which the Tribunal could have considered the new matter. In cases where these points are raised Presenting Officers ordinarily consult with a Senior Presenting Officer, indicating their own guidance indicates a set procedure to enable such matters to be considered. Such procedure was considered by the Upper Tribunal in *Qaudoo (new matter: procedure/process) [2018] UKUT 00087* in which was found that if the Secretary States representative applies for an adjournment for further time to consider whether to give such consent it would generally be appropriate to grant such an adjournment rather than proceed without consideration of the new matter.
19. Any argument it was too late at this stage to raise this matter in the grounds of appeal has no arguable merit. A failure to appreciate the law and to obtain the requisite consent of the Secretary of State does not confer jurisdiction upon the First-tier Tribunal to consider a new matter. Mistake or misunderstanding of practice and procedure cannot override the statutory restriction. The point of jurisdiction can be taken by the Upper Tribunal at any stage in the proceedings even if not taken by the First-tier Tribunal. See, for example, *Virk v Secretary State the Home Department [2013] EWCA Civ 652* in which was found that “*Statutory jurisdiction cannot be conferred by waiver or agreement; or by the failure of the parties or the tribunal to be alive to the point.*”
20. I find the Secretary State makes out the challenge on Ground 3 and set aside the decision of the Judge in relation to the findings from [13 – 23] of the decision under challenge and the conclusion Mr Ba is entitled to a derived right of residence.
21. I do not go on to remake the decision on this particular point as it remains a “new matter” and in light of the core finding that the Secretary of State’s appeal is dismissed on the basis that the decision to allow the appeal as a family member of an EEA national exercising treaty rights has not been shown to be affected by arguable legal error. The reference in the refusal letter to the fact Mr Ba and the EEA national are separated does not establish arguable legal error as they remain spouses, having not commenced any proceedings to dissolve the marriage at the applicable dates.

Decision

- 22. There is no material error of law in the Immigration Judge’s decision. The determination shall stand.**

Anonymity.

23. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 15 August 2018