



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

Appeal Number: IA/38039/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 25 September 2015**

**Decision & Reasons Promulgated
On 30 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR DANIEL GEISLER
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr D S Walker, Home Office Presenting Officer

For the Respondent: Mr R Sharma, Counsel instructed by Kent Immigration & Visa Advice

DECISION AND REASONS

1. This is an appeal against a decision by First-tier Tribunal Judge Blake promulgated on 13th January 2015, in which he allowed the appeal of Mr. Daniel Geisler against the decision of the Secretary of State of 28th August 2014, to refuse to issue a Residence Card to Mr Geisler as confirmation of a right of residence as the family member of a British citizen who was previously working or self-employed in another EEA State.
2. This is one of two appeals that was filed by Mr Geisler and heard by First-tier Tribunal Judge Blake on the same date. The second (IA/38763/2014)

was an appeal against the decision of the Secretary of State of 16th September 2014 to refuse an application by Mr Geisler for leave to remain in the UK on family and private life grounds. As before First-tier Tribunal Judge Blake, the two appeals come before me separately and I have decided each appeal separately.

3. The appellant before me is the Secretary of State for the Home Department and the Respondent, is Mr. Daniel Geisler. However for ease of reference, in the course of this determination I shall adopt the parties' status as it was before the First-tier Tribunal. I shall in this determination, refer to Mr. Daniel Geisler as the appellant and the Secretary of State as the respondent.
4. Permission to appeal was granted by First-tier Tribunal Judge Hollingworth on 12th May 2015. Insofar as this appeal (*IA/38039/2014*) is concerned, he noted:

"In respect of IA/38039/2014, at paragraph 70 onwards an arguable error of law has arisen in relation to that which the Respondent was able to grant under the EEA Regulations. The Judge has referred to ILR under the EEA Regulations.

An arguable error of law has arisen in relation to the consideration of the correct Regulations."
5. The matter comes before me to consider whether or not the decision of First-tier Tribunal Judge Blake involved the making of a material error of law.

Background

6. The appellant is an Australian national. The factual background was not in issue before the First-tier Tribunal. It is useful to summarise the material chronology before I turn to the decision of the First-tier Tribunal and the grounds of appeal before me.
7. The appellant was born in Australia on 24th May 1989 and left Australia in October 2000 (*aged 11*) with his mother and siblings. The family had obtained Residence cards in France as dependant's of the appellant's stepfather, a British Citizen living in France and exercising treaty rights in France. The appellant started his schooling in France in January 2001 and graduated in France with an International Baccalaureate in May 2007.
8. On 27th September 2007, the appellant arrived in the UK with entry clearance as a student, valid from 21st September 2007 until 31st October 2011. In October 2008, the appellant's mother and brother came to the UK and they have remained in the UK since.

The decision of First-tier Tribunal Judge Blake in appeal IA/38039/2014 (*"The EEA appeal"*)

9. In his decision promulgated on 13th January 2015 in respect of the respondent's decision to refuse to issue the appellant with a residence card under the **Immigration (European Economic Area) Regulations 2006** ("*the 2006 EEA Regulations*"), First-tier Tribunal Judge Blake sets out at paragraphs [44] to [62], the submissions made on behalf of the appellant. Counsel for the appellant referred to the appellant's mother and brother having come to the UK and having been granted indefinite leave to remain on entry, because the requirements of Regulation 9 of the 2006 EEA Regulations were met. At paragraphs [57] and [58] of the decision, the Judge records:

"57. She submitted it was clearly evident that the Appellant's mother and brother had succeeded under the Regulations in 2008 and that because of their status they had been granted Residence Cards. She submitted therefore that the Appellant qualified.

58. She submitted that also in 2008 the Appellant had been exercising treaty rights. She submitted that his family members had returned to the UK in 2008 and that this event should have triggered the Appellant's status and that he should then have been granted ILR along with his mother and brother."

10. The Judge noted that the respondent did not challenge the appellant's evidence. In setting out his findings and conclusions, the Judge correctly referred to the material chronology at paragraphs [66] to [69]. It is what then follows, that is in issue in the appeal before me:

"70. I noted that in October 2008 the Appellant's family had travelled to the UK. I noted that on entry the Appellant's mother and brother had been given indefinite leave to remain because they had resided together with the Appellant's stepfather in France whilst he had been exercising treaty rights.

71. I noted that when the family had arrived in the UK they had all been granted ILR because of their status as family members of a British citizen who had lived lawfully in France.

72. I noted as a fact that the Secretary of State had failed to consider the position of the Appellant at this time as he was already in the UK as a student.

73. I accepted the Appellant's submissions that the Secretary of State should have granted him ILR under the EEA Regulations at that time but had failed to do so. I accepted that he had enjoyed the status to be granted ILR at the time his family had entered the UK in October 2008.

74. I accepted the submissions that on a consideration of Regulation 9(2) of the Immigration (EEA) Regulations, 2006, that the Appellant's stepfather did comply with Regulation 9(2)(a) and (c).

75. I found that the Appellant's stepfather was a British citizen who had been residing in an EEA State as a worker and had been so residing before returning to the United Kingdom. I also found, on the basis of the evidence, that the centre of the Appellant's stepfather's life had transferred to the EEA State where he had resided as a worker.

76. I noted that it was on this basis that the Appellant's mother and brother had succeeded under the Regulations in 2008 and had been issued

with Residence Cards. I considered that on such facts the Appellant did qualify under the Regulations.

77. I found that the family members return to the UK in 2008 should have triggered the Appellants status and that he should also have been granted a Residence Card along with that of his mother and brother.

78. I further found on the facts before me that the Appellant had been in the UK in excess of five years with the status of being a British citizen's EEA family member. In this respect I took into account Regulation 15. I found that under this, he qualified for a right of residence on the basis of his five year's continuous residence in the UK.

79. In the light of my findings, I considered that the Appellant was entitled to the grant of a Residence Card. In the circumstances I direct that the Appellant should be granted indefinite leave to remain in the UK in line with that of his family's grant of ILR given in 2008.

The Grounds of Appeal in appeal IA/38039/2014 ("The EEA appeal")

11. The respondent appeals the decision on the ground that the Judge misunderstood or was misdirected as to the facts. The appellant's family (*his mother and brother*) could not have been granted ILR under the 2006 EEA Regulations. In fact, they were granted leave to enter the UK under the immigration rules then in force as the spouse and dependent child of a British citizen. They were subsequently granted ILR under the immigration rules in force at the material time. The suggestion therefore at paragraph [73] that the appellant "enjoyed the status to be granted ILR at the time his family had entered the UK in October 2008" is wholly misconceived. The appellant had made no application under the immigration rules for leave to enter or remain in the UK as a dependant, in line with the applications made by his mother and brother, and in the absence of such an application it is not clear why the respondent ought to have granted ILR to the appellant.
12. The respondent submits that the error is repeated at paragraph [76] of the decision. The Judge notes that the Appellant's mother and brother had succeeded under the Regulations in 2008 and had been issued with Residence Cards and finds that on such facts, the appellant qualified under the Regulations. The Respondent submits that the Judge appears to conflate the entry clearance that was issued to the family under the immigration rules, with residence cards issued under the 2006 EEA Regulations.
13. Furthermore, the decision discloses a material error of law in the approach adopted by the Judge. Notwithstanding the finding that the appellant's stepfather met the requirements of Regulation 9(2)(a) and (c) of the 2006 EEA Regulations, the judge was bound to consider the question of whether or not the appellant was in fact a family member within the meaning of regulation 7, at the date of the hearing. Whatever the position might previously have been, as at the date of the hearing, the appellant's mother and stepfather had divorced and the appellant could no longer establish that he is a family member of a person exercising treaty rights.

14. To the extent that the judge allowed the appeal on the basis that the appellant may once have had a right under the 2006 EEA Regulations, and that although he did not make any application for such a right to be recognised while it was held, he now retains such a right notwithstanding the divorce of his step-stepfather and mother, the judge has failed to give any reasons as to how such a right has been retained.
15. Finally, the respondent submits that the direction given by the judge at paragraph [79] that the appellant should be granted indefinite leave to remain in the UK in line with that of his family's grant of ILR given in 2008, is one that cannot be complied with. The direction is made on the basis that the Judge considered that the appellant was entitled to the grant of a Residence Card. The appellant's family were not granted ILR in 2008 and entitlement to a residence card does not confer an entitlement to a grant of ILR.
16. The respondent submits that the degree to which the Judge has been misdirected primarily by the confusion over "ILR" and the 2006 EEA Regulations, is such that the determination is fundamentally flawed.

The hearing before me on 25th September 2015

17. At the hearing before me, Mr Walker on behalf of the respondent adopted the respondents grounds of appeal and submitted that a proper reading of paragraphs [71] and [73] of the decision demonstrate the Judge's misunderstanding of the true position as to the events in 2008. Neither the appellant nor his family could have been granted ILR under the 2006 EEA Regulations. The appellant's mother and brother were both admitted to the UK following applications made under the immigration rules then in force. They did not enter the UK exercising rights under the 2006 EEA Regulations.
18. On behalf of the appellant, Mr Sharma accepted that in several paragraphs of his decision, the Judge refers to a grant of ILR having been made under the 2006 EEA Regulations. He submits that the Judge simply adopted the incorrect terminology, and that if one were to substitute the references in the decision to "ILR" for "leave to remain under HC395", the decision makes perfect sense and does not contain any material error of law. He submits that the references to ILR having been granted under the Regulations are immaterial because the Judge was satisfied that the requirements of Regulation 9(2)(a) and (c) of the 2006 EEA Regulations, were met by the appellant. He submits that the question is whether the judge was entitled to conclude, as he did at paragraph [79], that the appellant was entitled to the grant of a Residence Card. He submits that I should simply correct any slip made by the Judge. Mr Sharma submits that the decision contains a semantic error but it is not a material error capable of affecting the outcome of the appeal.

Error of Law decision in appeal IA/38039/2014 ("The EEA appeal")

19. I reject the submission made by Mr Sharma that the decision contains a semantic error but it is not a material error capable of affecting the outcome of the appeal. It is plain from a careful reading of the Judge's findings and conclusions that are set out at paragraphs [70] to [79] of the decision, that the Judge repeatedly conflates a right of residence under the 2006 EEA Regulations and indefinite leave to remain in the UK that is granted in accordance with the requirements of the immigration rules HC395. Similarly a careful reading of the Judge's findings and conclusions makes it plain that the mistaken understanding that the appellant's mother and brother had been granted indefinite leave to remain in the UK in 2008 under the 2006 EEA Regulations, weighed heavily in the decision of the Judge.
20. At paragraph [73], the Judge appears to accept that the respondent should have granted the appellant ILR under the 2006 EEA Regulations, but failed to do so. The Judge states "I accepted that he had enjoyed the status to be granted ILR at the time his family had entered the UK in October 2008". There was no application made by the appellant for either an EEA residence card or for leave to remain in the UK as a dependant under the Immigration Rules. It is difficult to establish the basis upon which the Judge could properly conclude that the appellant enjoyed the status to be granted ILR at the time his family entered the UK in October 2008 given that no such application had been made.
21. Notwithstanding the fact that there was no application before the respondent, the respondent could not have granted the appellant ILR under the 2006 EEA Regulations as appears to be suggested by the Judge. If the appellant could establish a right of residence under the 2006 EEA Regulations, the most he could have expected was a residence card. He would certainly not have been entitled to ILR nor for that matter, a grant of leave to remain for a limited period.
22. If, as Mr Sharma submits, I were to substitute the words "ILR under the EEA Regulations" with the words "LTR under the Immigration Rules HC395", into various paragraphs of the decision, that would also require the decision to be read on the basis that there was an application made by the appellant for LTR under the immigration rules HC395. For example, paragraphs [73] of the decision as amended would read:

"I accepted the Appellant's submissions that the Secretary of State should have granted him LTR under the Immigration Rules HC395 at the time but had failed to do so. I accepted that he had enjoyed the status to be granted *LTR* at the time his family had entered the UK in October 2008."

Amending the decision in this way pre-supposes that there was an application before the respondent made by the appellant in 2008 for leave to remain under the immigration rules and some relevant failure on the part of the respondent to properly decide that application. The same could be said of paragraphs [76] and [77]. The fact is, there was no such application and amending the decision in this way is therefore entirely artificial.

23. In my judgement, the entire thrust of the decision is premised upon the misunderstanding that the appellant's mother and brother had been granted ILR when they arrived in the UK in 2008 because they could successfully meet the requirements of the 2006 EEA Regulations. The requirements of the 2006 EEA Regulations are quite different to the requirements for leave to enter or remain set out in the Immigration Rules.
24. Contrary to what is said by the Judge at paragraph [76], the appellant's mother and brother had not been granted Residence Cards. They had been granted leave to enter under the immigration rules.
25. The Judge's focus appears to have been upon whether or not the appellant qualified under the 2006 EEA Regulations, and at paragraph [77] the Judge states "I found that the family members return to the UK in 2008 should have triggered the Appellants status and that he should also have been granted a Residence Card along with that of his mother and brother.". The appellant's mother and brother were not granted a residence card, and so the appellant could not be granted a residence card alongside his mother and brother.
26. The conclusion at paragraph [79] that the appellant was entitled to the grant of a residence card, follows from the findings made by the Judge. In my judgement, those findings are based upon a misunderstanding and or a misdirection as to the facts.
27. An error of law can be established where there has been a mistake as to an existing fact. It is uncontroversial that the grant of ILR to the appellant's brother and mother followed a grant of leave to enter the UK under the Immigration Rules and not because the criteria set out in the 2006 EEA Regulations were met. The Judge cannot be criticised for his erroneous understanding of the facts. The misunderstanding as to the facts appears to have arisen because there appeared to be no issue as to the facts and in the submissions recorded at paragraphs [48] to [62], it was repeatedly submitted on behalf of the appellant that the appellant's mother and brother had been granted ILR in accordance with the 2006 EEA Regulations. In my judgment, for the reasons set out above, the mistake of fact played a material (not necessarily decisive) part in the Judge's reasoning.
28. It follows that, in my judgement, the decision of the Judge discloses a material error of law. The appeal to the Upper Tribunal is allowed to the extent that the decision of the First-tier Tribunal is set aside and the appeal is remitted, to the First-tier Tribunal, with no findings of fact preserved.

Notice of Decision

29. The decision of the First-tier Tribunal is set aside and the appeal is remitted to the First-tier Tribunal.

30. No anonymity direction is applied for and none is made.

Signed

Date

Deputy Upper Tribunal Judge Mandalia

FEE AWARD

1. The First-tier Tribunal made a fee award. As I have allowed the respondent's appeal, the fee award is set aside.

Signed

Date

Deputy Upper Tribunal Judge Mandalia