



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

**Appeal Number: EA/10408/2021
(UI-2022-000480)**

THE IMMIGRATION ACTS

**Heard at Bradford IAC
On the 27 July 2022**

**Decision & Reasons Promulgated
On the 05 October 2022**

Before

**UPPER TRIBUNAL JUDGE REEDS
DEPUTY UPPER TRIBUNAL JUDGE ALIS**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MISS BETTY AMENZE OMOKARO
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr Atuegbe, Legal Representative

For the Respondent: Ms Young, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Although the Secretary of State for the Home Department is referred to as the Appellant in these proceedings, due to the fact he is the party appealing the First-tier decision, we intend hereafter to refer to the parties as they were in the First-tier Tribunal with Miss Omokaro being referred to as the Appellant and the Secretary of State for the Home Department as the Respondent.

2. The Appellant, a Nigerian national, resides in the United Kingdom with her daughter, G, born 30 August 2018.
3. On 15 July 2020 she submitted an application under the EU Settlement Scheme as a person with a derivative right, but her application was refused by the Respondent on 26 April 2021 because the Appellant had failed to demonstrate that she was a person with a derivative right to reside in this country as she had not provided any evidence to demonstrate her daughter was a Spanish national.
4. The Appellant appealed this decision on 7 May 2021 stating her daughter was Spanish and that for the reasons provided to the Respondent both in writing and on the telephone she was unable to obtain the documents requested by the Respondent.
5. Her appeal came before Judge of the First-tier Tribunal Turner (hereinafter referred to as the FTT Judge) on 11 January 2022 and in a decision promulgated on 15 January 2022 her appeal was allowed. Permission to appeal was submitted and Judge of the First-tier Tribunal Beach found there was an arguable error in law on 15 March 2022 stating:

“Although the FTT Judge had considered the Respondent’s guidance as well as all the other evidence, including the child’s father’s passport, before making her decision it was arguable the FTT Judge was entitled to find the Appellant had done all she could to obtain evidence from her ex-partner nevertheless there was no evidence before the FTT Judge with regard to Spanish law. Permission to appeal is granted on all grounds.”

DOCUMENTS

6. We had a 174 page bundle that included the original bundles that were before the First-tier Tribunal together with the FTT Judge’s determination, grounds of appeal and the grant of permission.
7. Whilst the representatives did not have the same digital bundle that we had they both confirmed that they did have access to the same documents.

PRELIMINARY ISSUE

8. The Appellant’s representative had also submitted to us an extract from the Spanish Consular’s website as to the process necessary for a person, not resident in Spain, to register a birth and the representative’s email seeking guidance from the Consular as to the most appropriate way to register the birth. No application had been made to adduce this evidence for the error of law hearing and Mr Atuegbe agreed this evidence would only be relevant if an error of law were found.

SUBMISSIONS ON ERROR IN LAW

MS YOUNG'S SUBMISSIONS

9. Ms Young adopted the grounds of appeal and the reasons given in the grant of permission and submitted the FTT Judge had erred in allowing the appeal.
10. Ms Young referred us to the first ground of appeal which she argued was a misdirection by the FTT Judge. At paragraph [40] the FTT Judge found the Respondent should have exercised discretion, but Ms Young pointed out that no alternative evidence of identity had been placed before the FTT Judge. There was therefore no evidence before the FTT Judge that an approach to the Consular had been made and Ms Young submitted it was not unreasonable to expect the Appellant to have done this. If this had been done and if the evidence had been placed before the FTT Judge then the FTT Judge's decision may have been sustainable, but this was not the case. Additionally, at paragraph [42], of the FTT Judge's decision, there was no adequate reasoning for the finding the child had Spanish nationality. The final two sentences of paragraph [42] of the FTT Judge's decision had no legal basis because the fact that a child was born in this country did not mean he/she was entitled to a British passport. The FTT Judge materially erred on these issues.
11. Ms Young's second ground of appeal was that the FTT Judge had misdirected herself in finding that all other requirements of the EUSS Rules and the Immigration (EEA) Regulations 2016 had been met.
12. Whilst she acknowledged the Respondent's representative before the First-tier Tribunal had wrongly conceded that the only issue was nationality it was incumbent on the FTT Judge to ensure all the requirements of the Rules were met. The FTT Judge had to be satisfied and demonstrate how the Appellant satisfied the definition of a person with derivative right to reside and if she was seeking permanent residence she had to show she had a qualifying period of five years.
13. EU11 of Appendix EU to the Immigration Rules could not have been satisfied because the Appellant's child was only born in 2018 and in order to satisfy EU14 of Appendix EU to the Immigration Rules the Appellant had to demonstrate she met the definition of "person with a derivative right to reside" as defined in Annex 1 to Appendix EU of Appendix EU to the Immigration Rules. Ms Young submitted this had not been considered by the FTT Judge and consequently the FTT Judge had erred.

MR ATUEGBE'S SUBMISSIONS

14. Mr Atuegbe invited us to find there was no error in law. He submitted the FTT Judge found the Appellant to be an honest and credible witness and paragraphs [40] and [43] set out the FTT Judge's thought process.
15. Whilst he acknowledged the Appellant had not approached the Spanish authorities directly she had made enquiries about her partner and was

aware that she needed to submit his passport to show one of their child's parents was a Spanish national. The findings at paragraph [42] were based on what the FTT Judge accepted although he conceded, when challenged, that there was no documentary/objective evidence to support the findings made in paragraph [42] of the FTT Judge's decision although he submitted that there was evidence of her trying to contact the child's father. Mr Atuegbe submitted there had been little point in the Appellant approaching the Consular as she knew it was a lost cause. He submitted the FTT Judge was entitled to conclude the child was a Spanish national.

16. With regard to the second ground of appeal, Mr Atuegbe accepted the FTT Judge had not made an determination on whether the requirements of either EU 11 or EU14 of Appendix EU to the Immigration Rules had been met but this was because the representatives informed her that nationality was the only issue. He submitted that the Appellant must have had EU status because she had been here for five years prior to the application but he accepted that she had not demonstrated she had met the requirements of "person with a derivative right to reside".

MS YOUNG'S RESPONSE

17. Ms Young submitted the Appellant should have approached the Spanish authorities to obtain the relevant information which is what the Consular's own website stated.
18. Ms Young did not accept the Appellant had demonstrated she had EU status because she came here as the family member of an EU national (her father) in 2012 but he had been removed from this country in 2014. She had not legally extended her stay in this country and had failed to demonstrate she had resided here in accordance with the Immigration (EEA) Regulations 2016.

DISCUSSION AND FINDINGS

19. Having heard submissions from both representatives we reserved our decision, but indicated that if there was an error in law we would remit this appeal back to the First-tier Tribunal for further evidence to be served and given. Both representatives agreed this was the correct course of action.
20. This appeal was brought on two grounds namely the FTT Judge's acceptance the Appellant's child was a Spanish national and the failure by the FTT Judge to make findings on whether the Appellant had a derivative right to remain in this country. The second ground was raised by Ms Young despite her colleague's agreement, in the First-tier Tribunal, that nationality was the only issue. Permission to appeal had been granted on both grounds.
21. We are satisfied the FTT Judge did materially err on both of the grounds, and we now set out why we have reached that conclusion.

22. The Appellant had made an application to remain here under the EUSS Rules and the FTT Judge set out in her decision the relevant legislation between paragraphs [27] and [28] of her decision.

23. In allowing the appeal the FTT Judge said the following:

42. Overall, I find that the Appellant has produced all evidence that she was able to provide to show that her daughter is Spanish. Whilst acknowledging that the Appellant has not been able to produce a Spanish passport or ID card, that does not make her daughter any less Spanish. Mr Aniето submits that to make a finding that the Appellant's daughter is Spanish before approaching the Spanish authorities is the equivalent of someone approaching the Spanish authorities to determine if someone is British. I do not agree. A person may be born in the UK but may not have applied for a UK passport. That does not make them any less British.

43. Given the history of domestic violence and controlling behaviour, I accept the Appellant's evidence that she, together with the local authority, have done all that is reasonable in these circumstances to resolve the Appellant's daughter's nationality. I find that the evidence produced by the Appellant should have been considered sufficient by the Respondent to evidence that the Appellant's daughter is Spanish, and thus an EEA citizen."

24. Whilst it was open to the FTT Judge to make a finding the child was Spanish it was incumbent on the FTT Judge to demonstrate why such a finding was made. She attempted to do this paragraph [34] of her decision and relied on the fact she had a birth certificate which had F E as the child's father and a copy of the father's passport, but the mistake the FTT Judge made was not to consider what the Spanish authorities required. She effectively applied English law to a Spanish problem. For the child to be recognised as Spanish the FTT Judge had to have evidence from the Spanish authorities that they accepted the child was Spanish. This acceptance was not before the FTT Judge because no approach had been made to the Spanish authorities. Even at the appeal before us this had not been done.

25. The Spanish authorities may have a procedure to depart from their stated requirements where the information cannot be provided and the FTT Judge should have considered whether this had been done before making the finding the child was entitled to Spanish nationality. Ironically, the evidence which Mr Atuegbe now seeks to introduce demonstrated that what they had adduced, namely a name on a birth certificate and a passport, would be insufficient to grant a person Spanish nationality.

26. The fact the Appellant was not in contact with the child's father overlooked the fact the Appellant had to approach the Spanish authorities in much the same way that an Appellant would have to persuade the UK authorities they had a good reason not to be able to provide the required documentation.

27. Matters of foreign law should be proved by expert evidence. This principle was recently restated by the Upper Tribunal in *Hussein and Another* (Status of passports: foreign law) [2020] UKUT 00250 (IAC) where the following was held, at paragraph 9 of the Vice President's decision: [...] foreign law is a matter of fact and must be proved by evidence. It is not sufficient to produce Tanzanian statutes and assert that the statute represents the whole of the law on the subject. A moment's consideration shows why that is so: it is absurd to suggest that a person who had access to the Queen's Printer's copy of the British Nationality Act 1981 would be able to deduce reliably from it the status of any postulant for nationality: it has been subject to numerous amendments, and it says nothing about the operation of policy or prerogative. Foreign law needs to be proved by expert evidence directed precisely to the questions under consideration, so that the Tribunal can reach an informed view in the same way as anybody taking advice on an unfamiliar area of law. [...]
28. The FTT Judge's approach in respect of nationality was therefore flawed and the decision would have to be set aside for this reason alone.
29. However, the FTT Judge also materially erred for the reason set out in the second ground of appeal although we acknowledge that she was not helped by either representative at the First-tier hearing.
30. Both representatives misinterpreted what the Respondent's decision maker was saying in the decision letter. The application had been refused because nationality could not be demonstrated but the Respondent caseworker did not consider the application further because that basic requirement was not met. If the FTT Judge was satisfied the child was Spanish she had to consider whether a derivative right to reside had been demonstrated. Mr Atuegbe conceded the FTT Judge had not done this .
31. We are satisfied that even if the FTT Judge had been right in her approach to nationality she then had to demonstrate that the requirements of the Rules had been met. This issue was not considered and Mr Atuegbe's submission that the Appellant clearly had EU status was also incorrect because her reason for being here as an EU family member ended when her father was removed in 2014 and her application for permanent residence under 2016 Regulations had been refused in November 2017. A further application to remain as the extended family member of F E was refused in May 2018 and a further application lodged in May 2018 was refused by the respondent and her appeal against this decision was dismissed by the Tribunal on 1 August 2019.
32. Although Mr Atuegbe submitted she had EU status it seems this was not the case. Assuming the Appellant can demonstrate the child is Spanish she still has to demonstrate she had a derivative right to remain if she was to be allowed to remain under EU law. We were satisfied this had not been demonstrated we find the FTT Judge also erred as set out in ground 2 of the grounds of appeal.

33. Paragraph 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the “Practice Statements”) recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:
- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party’s case to be put to and considered by the First-tier Tribunal; or
 - (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.
34. In our judgment, given that it is necessary for all the issues in this case to be considered afresh on the merits, this case falls within para 7.2 (a) because further evidence will need to be served, further oral evidence is likely and findings of fact on both issues will need to be made.

NOTICE OF DECISION

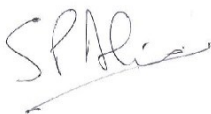
The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision is set aside in its entirety.

This case is remitted to the First-tier Tribunal for a fresh hearing on all issues on the merits by a Judge other than Judge of the First-tier Tribunal Turner.

No anonymity direction is made.

Signed

Date 12 August 2022

A handwritten signature in blue ink that reads "SPAR" with a flourish underneath.

Deputy Upper Tribunal Judge Alis