



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

Appeal Number: IA/27465/2013

THE IMMIGRATION ACTS

Heard at Birmingham

On 9 June 2014

Determination

Promulgated

On 10 June 2014

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PRISCILLA JLAY

Respondent

Representation:

For the Appellant: Mr Hibbs, Home Office Presenting Officer

For the Respondent: Ms Rutherford, instructed by TRP Solicitors

DETERMINATION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal Judge Hawden-Beale who in a determination promulgated on 25 March 2014 allowed the respondent's appeal against a decision to refuse her a residence permit as the family member of an EEA national.

2. For the purposes of this decision I refer to the Secretary of State as the respondent and to Ms Jlay as the appellant, reflecting their positions as they were before the First-tier Tribunal.
3. The background to this matter is that the appellant is married to an EEA national but the couple have separated. They are not divorced. The appellant applied for a residence permit as a family member under Regulation 7 of the EEA Regulations Immigration (European Economic Area) Regulations 2006.
4. The appellant maintains that domestic violence played a part in the separation. As part of her application for a residence permit as a family member under Regulation 7 of the Immigration (European Economic Area) Regulations 2006 (the EEA Regulations) she submitted evidence of domestic violence, in particular police logs, GP records and a report dated 11 January 2013 from Narthex, a domestic violence counselling charity.
5. The respondent does not dispute that those materials were before her at the date of the decision and that she did not take them into account. She maintains that even though that is so they were not material and could not have made a difference to the outcome of the appeal.
6. At the appeal before the First-tier Tribunal, set out at [11] and [12] of the decision, Judge Hawden-Beale adjourned a hearing in order for the respondent to make enquiries under her European Operational Policy Notice 10/2011 (the 'Pragmatic Policy'). It is not in dispute that the respondent did not do so; see [13].
7. The Pragmatic Policy was relied upon by the appellant as it can, in certain circumstances, lead to the respondent making enquiries about whether an EEA national is a qualified person in circumstances where the applicant cannot be expected to or simply cannot do so. In this appeal the appellant maintains that she cannot contact her husband for information about his situation because of the domestic violence she claims she suffered.
8. I accept that Judge Hawden-Beale was not in a position to direct the respondent to apply the Pragmatic Policy but she was in a position to direct the respondent to consider whether to do so where she had entirely failed in that regard despite being specifically requested to do so by the appellant. The material before the respondent clearly had the potential to engage the policy. This was accepted by the respondent's representative at the first hearing before Judge Hawden-Beale; see [12].
9. As [13] and [14] show, the respondent's approach to the direction given by the First-tier Tribunal to consider the policy appears to have been misconceived. The terms of the Pragmatic Policy do not require someone to have been found to be a victim of domestic violence. It is for the respondent to consider whether there is evidence of domestic violence sufficient to indicate that she should seek to ascertain information about the EEA partner rather than an applicant having to do so. As at [14], the

respondent also referred to the wrong information about the appellant when refusing to address the Pragmatic Policy.

10. Where the respondent did not consider the Pragmatic Policy, Judge Hawden-Beale went on to allow the appeal at [15].
11. The respondent's grounds of appeal challenge the decision as there were no findings made in relation to the applicability of the policy or the EEA Regulations. Mr Hibbs argued that the failure to consider the Pragmatic Policy could not be material as there was no evidence that could have led to the respondent making enquiries about the appellant's husband.
12. It was my view that there was material before the respondent that was capable of leading her to applying her Pragmatic Policy, that material being the policy logs, GP records, hospital records and Narthex report. Her failure to consider whether those materials should lead her to follow the Pragmatic Policy and seek information about the status of the appellant's husband was unlawful and amounted to a material error of law in this matter.
13. To the extent that this was also the conclusion of Judge Hawden-Beal at [15], no error arises. The difficulty is that she allowed the appeal under the EEA Regulations. This may have been an oversight but I cannot be certain that is so and do not feel sufficiently confident in so finding where the outcome of the appeal as stated by Judge Hawden-Beal would lead to the respondent having to issue the appellant with a residence permit rather than re-making the decision.
14. Allowing the appeal under the EEA Regulations was, in my judgement, an obvious and material error in the determination such that it had to be set aside to the extent of the correct disposal was made.
15. I therefore found that the appeal being allowed under the EEA Regulations amounted to an error on a point of law that should be set aside and the decision re-made.
16. Following the reasoning above, the appeal is allowed as not in accordance with the law. It is now for the respondent to make a fresh decision on the application, that decision including a proper assessment of whether the Pragmatic Policy applies here and, if the answer is affirmative, the outcome of any enquiries about the appellant's husband.

Decision

17. The decision of the First-tier Tribunal disclosed an error on a point of law such that it is set aside as regards the final disposal only.
18. I re-make the appeal by allowing it as not in accordance with the law.

Signed: 
Upper Tribunal Judge Pitt

Date: 9 June 2014