



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

Appeal Numbers: IA/13137/2014
IA/13373/2014
IA/13374/2014
IA/13375/2014
IA/13372/2014
IA/13376/2014

THE IMMIGRATION ACTS

Heard at Field House London

On 17 February 2015

**Determination
Promulgated**

On 19 May 2015

Before

**THE HON. MRS JUSTICE THIRLWALL
DEPUTY UPPER TRIBUNAL JUDGE McCARTHY**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**CELLOU DIALLO (1)
FATOUMATA DIALLO (2)
ALPHA OUMAR DIALLO (3)
ELHADJ MAMADOU DIALLO (4)
AMADOU DIALLO (5)
TAHIROU DIALLO (6)**

Respondents

Representation:

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer

For the Respondent: Ms E Rutherford, instructed by Fursden Knapper Solicitors

DECISION AND REASONS

- 1.** At the end of the hearing we announced that the First-tier Tribunal was without jurisdiction to determine the appeals that were before it and therefore its decision and reasons statement was legally flawed and had to be set aside. This statement contains our reasons.
- 2.** The Secretary of State appeals against the decision of First-tier Tribunal Judge Coleman, promulgated on 12 November 2014, on two main grounds, as confirmed by Mr Wilding, who not only presented the appeal on behalf of the Secretary of State, but who also settled the grounds.
- 3.** The first ground is that once the judge had found that the lead appellant was unable to provide evidence of his claimed French nationality, she was without jurisdiction because none of the appellants could meet the provisions of regulations 26(2) or 26(3) of the Immigration (European Economic Area) Regulations 2006. The second ground of appeal is that Judge Coleman erred in law by considering whether the appellants were entitled to benefit from article 8 of the human rights convention.
- 4.** We decided that the first ground is made out and therefore could make no findings in relation to the second ground because we too are without jurisdiction. Our reasons for finding that we have no jurisdiction are as follow.
- 5.** Judge Coleman made a clear finding that the lead appellant had failed to establish that he remained a French national and her finding is unchallenged. Indeed, in answer to our enquiries, Ms Rutherford admitted that on the basis of the evidence presented to the First-tier Tribunal no other conclusion was open to her. When pressed, Ms Rutherford admitted that in pure legal terms her clients had no rights of appeal. Her argument centred on the premise that because the Secretary of State had failed to raise the issue of jurisdiction in the First-tier Tribunal it was too late to do so now.
- 6.** We disagree. Ms Rutherford sought to rely on two judgments from the Court of Appeal but in our view neither supports her contention. In Anwar and another v SSHD [2010] EWCA Civ 1275, guidance was given as to the constitutive and adjudicative functions of a tribunal. In our view, the question of whether the lead appellant was a French national was an issue that had to be resolved to determine whether there was an appeal at all, that is, whether the constitutive function of the First-tier Tribunal was engaged. As we reminded the parties, a similar approach had been necessary in the recent past in relation to family visitor appeals where the relationship had to be identified to determine whether there was an appeal.

- 7.** In R (Nirula) v FtT(IAC) and another [2012] EWCA Civ 1436, the Court of Appeal commented at the end of paragraph 32.

“If a tribunal gives a decision without anybody considering the jurisdictional position, the decision may be precarious but ... the decision stands until set aside. It will become less precarious once the time for applying for permission to appeal has expired.”

It is clear from this passage, particularly in the context where it is to be found, that the Court of Appeal did not restrict consideration of jurisdiction to the First-tier Tribunal. The Court of Appeal identified that a tribunal’s decision might stand even though there were no jurisdiction if no jurisdictional issue were pursued. But such a decision would be precarious and if the issue of jurisdiction were raised before the period for applying for permission to appeal had ended, then the issue would need to be considered.

- 8.** In light of the above, we conclude that Judge Coleman was right first to reach a decision on whether the lead appellant was a French national. However, she erred in failing to consider the effect that finding had on her jurisdiction. As a matter of law, she had no jurisdiction.
- 9.** Although not raised by the parties, because we recognise the serious consequence of finding there is no jurisdiction, we have considered for ourselves whether the restrictions on the right of appeal in regulation 26 comply with the procedural safeguards in the Citizen's Directive (2004/38/EC).
- 10.** It is trite EU law that only a Union citizen and certain of their relatives can benefit from the free movement provisions enshrined in article 20 of the Treaty on the Functioning of the European Union. In these appeals none of the appellants is shown to be a Union citizen and therefore none can be a relative of such a person. It is from these fundamental principles that the rights of free movement and residence that are described in the Citizen's Directive are transposed into British law by the 2006 Regulations. The administrative requirements to establish that a person seeking to benefit from these provisions are set out in article 8 of the Citizen's Directive and it is these that regulation 26 transposes. They include the requirement to produce a valid identity card or passport as proof of EEA nationality.
- 11.** We are satisfied, therefore, that the restriction on the right of appeal complies with EU law.
- 12.** Of course, it remains open to the appellants to make fresh applications if evidence of the French nationality of the lead appellant is obtained. Alternatively, it is open to the appellants to make applications to the Secretary of State under the immigration rules and the human rights convention. In relation to this alternative, both representatives asked us

to comment about what standing Judge Coleman’s findings with regard to the appellants’ private and family life rights might have. We decline to do so other than to point out the obvious: they are judicial observations which appear to be well reasoned.

Decision

The Secretary of State’s appeal to the Upper Tribunal is allowed because the First-tier Tribunal’s decision contains an error on a point of law.

We set aside the First-tier Tribunal’s decision and remake it to find that there is no jurisdiction.

Signed

Date

Judge McCarthy, Deputy Judge of the Upper Tribunal