



IAC-FH-AR-V1

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

Appeal Number: IA/18513/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 12 October 2015**

**Decision & Reasons Promulgated
On 28 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**SUSUANA NAA AHIMA ATTOH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, Counsel, instructed by Mensons & Associates
Solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Following a hearing on 8 September 2015 I found that First-tier Tribunal Judge Mayall had made a material error of law in dismissing the Appellant's appeal. The error of law was that the First-tier Tribunal Judge had failed to consider whether the Appellant had a right to reside in the United Kingdom under the Immigration (European Economic Area) Regulations 2006 other than upon that which her original application had been based.

2. The full error of law decision is annexed to my remake decision.
3. Having announced my error of law decision at the last hearing, I adjourned the matter for a resumed hearing, which then came before me again on 9 October. In the interim period the Appellant's solicitors served additional evidence relating to the employment of Mr Lalande, the Appellant's partner. The additional evidence consists of a bundle, indexed and paginated 1 - 55, and in addition a Bank of Scotland bank statement covering the period 29 July 2015 to 23 September 2015.

Remake decision

4. As set out in my error of law decision, the sole issue to be determined on the remake hearing was whether or not Mr Lalande was a worker and therefore a qualified person within the meaning of Regulation 6 of the 2006 Regulations.
5. At the hearing before me Mr Tufan very fairly acknowledged that the further evidence appeared on its face to show that Mr Lalande was indeed exercising Treaty rights in the United Kingdom. Having carefully considered the further evidence myself, I find that Mr Lalande is in fact in employment with two companies, they being Complete Cleaning and Noonan. As evidenced by the information provided at pages 3-55 of the new bundle, and the bank statement referred to previously, I find that Mr Lalande is a worker and therefore a qualified person, and therefore is exercising Treaty rights in the United Kingdom.
6. As discussed at the error of law hearing, whilst there was an issue as to whether the Appellant and Mr Lalande were in fact validly married by virtue of a proxy marriage which occurred some years ago, Mr Karim was content that I deal with the matter on the basis that the Appellant and Mr Lalande were in a "durable relationship" within the meaning of Regulation 8(5) of the 2006 Regulations. There was no dispute from the Secretary of State that such a durable relationship did in fact exist.
7. Therefore in light of the agreed issues and further evidence before me, I find that the Appellant is the extended family member of a qualified EEA national and I allow the appeal of the Appellant.
8. I allow the appeal only to the extent that the Secretary of State's original decision was not otherwise in accordance with the law because of course there is a discretion under Regulation 17(4) of the 2006 Regulations as to whether a residence card is issued to the Appellant or not. This discretion has yet to be exercised by the Secretary of State and she must be the decision-maker who first exercises that discretion.
9. In light of the foregoing, the Appellant's EEA application remains outstanding before the Secretary of State awaiting the exercise of discretion under Regulation 17(4) of the 2006 Regulations and a fresh decision in due course. The Secretary of State will of course bear in mind

the contents of my decision on error of law and the remake decision when exercising her discretion.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I re-make the decision by allowing the appeal to the extent that the Respondent's decision was not otherwise in accordance with the law, and the Appellant's EEA application remains outstanding before the Respondent awaiting a lawful decision.

No anonymity direction is made.

Signed
Deputy Upper Tribunal Judge Norton-Taylor

Date: 26 October 2015

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award. This is because the appeal, although successful, required a hearing in order for a proper resolution.

Signed
Deputy Upper Tribunal Judge Norton-Taylor

Date: 26 October 2015

ANNEX A: Error of Law decision



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

Appeal Number: IA/18513/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 8 September 2015**

**Decision & Reasons
Promulgated**

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Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**MS SUSUANA NAA AHIMA ATTOH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, Counsel, instructed by Mensons and Associates Solicitors

For the Respondent: Mr S Whitwell, Senior Home Officer Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge D Mayall (Judge Mayall), promulgated on 8 January 2015, in which he dismissed the Appellant's appeal. That appeal was against the

Respondent's decision of 9 April 2014 to refuse to issue a permanent residence card under the Immigration (European Economic Area) Regulations 2006 (the Regulations).

2. The Appellant is a citizen of Ghana, born on 7 December 1962. She has at all material times been either the spouse or durable partner of a French national, Mr Daniel Lalande. The application for the permanent residence card was made on 14 February 2014. It was asserted that Mr Lalande had been exercising Treaty rights in the United Kingdom for a continuous period of five years. The Respondent rejected the application, asserting that there was insufficient proof of Mr Lalande's circumstances over the whole of the five-year period in question. The Appellant appealed, stating that she was entitled to a permanent residence card, or alternatively was entitled to a five-year residence card.
3. Judge Mayall heard the appeal on 2 December 2014. At the hearing, Mr Karim, who represented the Appellant then as now, conceded that Mr Lalande had not been a qualified person for the requisite period, and therefore the Appellant's appeal could not succeed on the basis of a permanent right of residence (paragraph 17). It was submitted, however, that Mr Lalande was exercising Treaty rights as the date of the hearing. Judge Mayall accepted this to be the case (paragraph 20).
4. On the basis that the Appellant had not acquired a permanent right of residence, Judge Mayall proceeded to dismiss the appeal because in his view it was against the Respondent's refusal to issue a permanent residence card only.
5. The Appellant appealed on the ground that Judge Mayall should have considered whether she was entitled to a five-year residence case. Permission to appeal was granted by First-tier Tribunal Judge Nicholson on 21 April 2015.

The hearing before me

6. At the outset, Mr Whitwell informed me that he would not be resisting the Appellant's assertion that Judge Mayall had materially in erred, as claimed in the grounds.

Decision on error of law

7. I find that Judge Mayall did materially err in law by refusing to consider whether the Appellant was entitled to a five-year residence card as an alternative to entitlement to a permanent residence card. Mr Whitwell's realistic position in this case was of assistance, but I would have found the error in any event.
8. The Appellant's appeal was against an EEA decision. The appeal was therefore brought under Regulation 26 of the Regulations. This had the effect of entitling the Appellant to rely on the ground of appeal under section 84(1)(d) of the Nationality, Immigration and Asylum Act 2002,

namely whether the decision breached any of the Appellant's rights under EU law in respect of her entry to or residence in the United Kingdom. Where the evidence supports the possibility of entitlement to documentation confirming a right of residence other than that which the Appellant has specifically applied to the Respondent for, the Tribunal is, I conclude, required to consider such an alternative basis. Two decisions of the Upper Tribunal support my view on this. The first, is MDB and Others (Articles 12, 1612/68) Italy [2010] UKUT 161 (IAC), at paragraph 44; the second is the recent decision in Amirteymour and others (EEA appeals: human rights) [2015] UKUT 00466 (IAC), at paragraph 61.

9. In the present case, once Judge Mayall had found as a fact that Mr Lalande was a qualified person as at the date of hearing, and there being no dispute as to the Appellant's relationship with him, it was incumbent on the judge to consider the issue of entitlement to a five-year residence card under Regulation 17 of the Regulations. His refusal to do was a material error of law.
10. In light of the above I set aside the decision of Judge Mayall.

Disposal

11. Both representatives were agreed that I should re-make the decision. All other things being equal, this would be a straightforward task, the only live issue appearing to be whether Mr Lalande was still exercising Treaty rights as of now.
12. However, the Appellant's solicitors had failed to submit any further evidence on the question of Mr Lalande's current employment in advance of the hearing before me. Mr Karim had some documentary evidence with him, but this was clearly an unsatisfactory state of affairs. I gave Mr Whitwell the opportunity to read and consider this new evidence but he was not prepared to concede the fact of Mr Lalande's on going employment. I make no criticism of that position, given the very late production of the evidence.
13. In light of the foregoing, I concluded that the appeal had to be adjourned for a continuation hearing to take place in due course.
14. Mr Whitwell raised a further matter. Until now, the Appellant's circumstances had been assessed on the basis that she was the spouse of Mr Lalande, they having contracted a proxy marriage in Ghana some years before. The apparent validity of this marriage had been accepted by the Respondent previously. However, in light of the current case-law on proxy marriages, in particular TA and Others (Kareem explained) Ghana [2014] UKUT 00316 (IAC), there was now a real question mark over this status. In response to this Mr Karim stated that he was prepared to proceed at the adjourned hearing on the basis that the Appellant was an extended family member of Mr Lalande, their relationship being a durable one within Regulation 8(5) of the Regulations.

15. Mr Whitwell acknowledged that no issue has ever been taken with the genuineness and durability of the relationship. In the absence of any previous challenge by way of submissions before the First-tier Tribunal, subsequent rule 24 notice or cross-appeal, he quite properly accepted that the only issue to be addressed at the adjourned hearing was that of Mr Lalande's Treaty rights.

Anonymity

16. I make no direction in this case.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

The appeal is adjourned.

Directions

- 1. The appeal is to be re-listed before Deputy Upper Tribunal Judge Norton-Taylor at Field House on 12 October 2015;**
- 2. The single issue to be addressed at the adjourned hearing is that of Mr Lalande's employment;**
- 3. The Appellant shall, no later than 14 days from the date this Decision is promulgated, file and serve on the Upper Tribunal and the Respondent any further evidence relied upon;**
- 4. Oral evidence from Mr Lalande may be permitted at the adjourned hearing.**

Signed

Date:

H B Norton-Taylor
Deputy Judge of the Upper Tribunal