



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

Appeal Number: EA/04164/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 5 April 2018**

**Decision & Reasons Promulgated
On 2 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**DANUTA KRYSZYNA MIELCARZ
(ANONYMITY ORDER NOT MADE)**

Respondent

DECISION AND REASONS

For the Appellant: Ms J Isherwood (Home Office Senior Presenting Officer)
For the Respondent: Herself

1. This is the appeal of Danuta Krystyna Mielcarz, a citizen of Poland born 3 January 1977, against the decision of the First-tier Tribunal of 20 July 2017, itself brought against the refusal of her application for permanent residence as an EEA national, dated 5 April 2017.
2. The Appellant's application of 17 February 2017 was based on her marriage to her spouse Pawel Mielcarz. As she apparently did not rely

on her own exercise of Treaty Rights, she accordingly had to establish that her spouse was working here. The application was refused because the Secretary of State considered insufficient evidence had been provided of the marriage. The Appellant appealed to the First-tier Tribunal.

3. The First-tier Tribunal found that the evidence before it made good the Appellant's case, as she had put forward her spouse's UK residence card dated 28 March 2017 showing he had permanent residence, documentation from the Bahamas recording their marriage there on 2 April 2017, and proof of the marriage having been registered under Polish law. Accordingly the Appellant was entitled to permanent residence. Thus her appeal was allowed.
4. Although not expressly referenced by the First-tier Tribunal, amongst the documents before it was a national insurance record of 18 May 2016 stating that the Appellant had accumulated "13 qualifying years up to 5 April 2016".
5. The First-tier Tribunal granted permission to appeal on the basis that there was apparently no evidence that the Appellant had lived in the UK for five years.
6. Before me Ms Isherwood briefly pressed the Secretary of State's grounds of appeal, though somewhat faintly in the light of my observation that it appeared those grounds had misled the Tribunal which granted permission to appeal, for the reasons discussed below.

Findings and reasons

7. As I indicated to Ms Isherwood at the hearing, the evidence which the Secretary of State *herself* put before the First-tier Tribunal was disconcertingly different to that which the Home Office's grounds of appeal asserted had been available to the judge. There was patently evidence which directly corroborated the Appellant's claim to have resided in the UK exercising Treaty Rights for more than five years. Indeed, the evidence from another government department recorded more than a decade of contributions to the Exchequer by way of National Insurance contributions.
8. In the circumstances, I consider that the First-tier Tribunal did err in its approach. It concentrated only on evidence of the parties being married and the grant of permanent residence of the Respondent's husband, without expressly dealing with the question of whether either the Appellant or her husband, without giving attention to whether either was working, or otherwise exercising Treaty Rights.
9. However, I do not consider, on the particular facts of this case, that that error was a material one. There was evidence before the First-tier

Tribunal which the Secretary of State had not gainsaid, from a government department, indicating that the Respondent had a significant track record of making national insurance contributions.

10. Ms Isherwood, quite rightly, did not press the Secretary of State's grounds of appeal once she appreciated that the draftsman of the grounds had made an assertion as to the available evidence that was inaccurate. It was quite wrong for the Home Office to have put evidence on the point before the First-tier Tribunal, and then denied that evidence's existence when pursuing the appeal further.
11. I accordingly find that there was no *material* error of law. The Secretary of State's appeal is dismissed. I uphold the decision of the First-tier Tribunal.

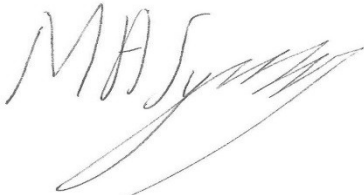
Decision:

The appeal of the Secretary of State is dismissed.

The decision of the First-tier Tribunal allowing Ms Mielcarz's appeal against the refusal of a document certifying her as entitled to permanent residence is upheld.

Signed:

Date: 5 April 2018

A handwritten signature in black ink, appearing to read 'M. A. Symes', with a long, sweeping underline that extends to the left and then curves back under the signature.

Deputy Upper Tribunal Judge Symes