



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/06148/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 17<sup>th</sup> May 2018

Decision & Reasons Promulgated  
On 21<sup>st</sup> May 2018

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANNA BASKAKOVA  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr S Walker, Home Office Presenting Officer  
For the Respondent: No attendance

**DECISION AND REASONS**

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Walters promulgated on 20 September 2017 in which Ms Baskakova's appeal against the decision to refuse her application for an EEA Residence Card dated 10 May 2016 was allowed. For ease I continue to refer to the parties as they were before the First-tier

Tribunal, with Ms Baskakova as the Appellant and the Secretary of State as the Respondent.

2. The Appellant is a national of Russia, born on 26 April 1984, who was issued with entry clearance to the United Kingdom on 10 December 2009 and subsequently granted an EEA Residence Card as the family member of an EEA national on 6 October 2010. An application for an EEA Residence Card reflecting permanent residence was refused on 24 May 2013 and a further application made on the same basis on 20 October 2015.
3. The Respondent refused the application on 10 May 2016 on the basis that the Appellant has not satisfied regulation 10(2)(c) of the Immigration (European Economic Area) Regulations 2006. Specifically, the Appellant had not established that she satisfied the condition in paragraph (6) that she is not an EEA national but would, if she were an EEA national, BA worker, a self-employed person or a self-sufficient person under regulation
4. Judge Walters allowed the appeal in a decision promulgated on 20 September 2017 on the basis that the Respondent's failure to decide whether the Appellant qualified as a family member under regulation 10(6)(b) of the Immigration (European Economic Area) Regulations 2006 renders the decision not in accordance with the law. The appeal was therefore allowed as the decision is not in accordance with the law.

### **The appeal**

5. The Respondent appeals on the basis that the First-tier Tribunal materially erred in law in allowing the appeal on the basis that the decision was not in accordance with the law, this being an avenue no longer open to a First-tier Tribunal, who is required to make findings and determine the appeal by allowing or dismissing it, or reaching a decision the effect of which is that the Respondent must or may make a fresh decision.
6. Permission to appeal was granted by Judge Doyle on 15 March 2018 on all grounds.
7. The Appellant did not attend the oral hearing, nor was she legally represented. Notice of hearing was sent to her on 30 April 2018 and no request for an adjournment has been made. In these circumstances I considered it in the interests of justice to proceed with the appeal even in the Appellant's absence.
8. At the oral hearing, no further substantive oral submissions were required from the Respondent as the grounds of challenge were perfectly clear and on a self-contained point which did not require any further elaboration.

### **Findings and reasons**

9. The right of appeal against the Respondent's decision in the present appeal arises under regulation 26 of the Immigration (European Economic Area) Regulations 2006. Regulation 21(7) together with schedule 1 of the same gives effect to sections 84 (as though the sole permitted ground of appeal were that the decision breaches the

appellant's rights under EU Treaties in respect of entry to or residence in the United Kingdom), 85, 86, 105 and 106 of the Nationality, Immigration and Asylum Act 2002 for appeals under the Immigration (European Economic Area) Regulations 2006 as if they were a decision under section 82. Appeals are therefore made to the First-tier Tribunal and thereafter the Upper Tribunal and the Tribunal Procedure Rules have effect as well.

10. Following the significant amendments made to Part V of the Nationality, Immigration and Asylum Act 2002 in force from 20 October 2014, section 86(2) of the same now provides that the Tribunal must determine (a) any matter raised as a ground of appeal, and (b) any matter which section 85 requires it to consider.
11. These changes and the consequences upon the First-tier Tribunal's powers when determining an appeal were considered in detail by the Upper Tribunal in Greenwood (No 2) (paragraph 398 considered) [2015] UKUT 00629 (IAC) with the conclusion that there was no longer a power to remit a matter to the Secretary of State. The function of every tribunal is to resolve an appeal, normally by allowing or dismissing it, unless directed otherwise by statute. There is potentially a third option still, however this does not encompass a situation where a decision could be remitted to the Respondent on an unconsidered or undetermined claim, rather the tribunal should determine such a claim as the primary decision-maker. This includes circumstances where the Respondent has not made a decision on whether an appellant has a Community law right to remain in the United Kingdom.
12. In the present appeal, although the Greenwood decision was cited, it has not been applied by the First-tier Tribunal. Judge Walters has not made any findings on the substantive matters raised by the Appellant as to whether she is entitled to an EEA Residence Card having established a permanent residence here but instead merely finds that the Respondent has not considered her claim to satisfy an alternative part of condition 6 (sub-paragraph 6), referred to in regulation 10(2)(c) of the Immigration (European Economic Area) Regulations 2006. As such the appeal was allowed on the basis that the decision is not in accordance with the law which in effect, remits the decision making on the Appellant's application back to the Respondent to consider on an alternative basis to the reasons for refusal. For the reasons already given above, this is no longer permissible, and the First-tier Tribunal has no power to deal with the appeal in this way. The First-tier Tribunal was required to make substantive findings on the matters raised before it and substantively allow or dismiss the appeal on the basis of such findings.
13. Further, the sole permitted ground of appeal in the present case is that the decision breaches the appellant's rights under EU Treaties in respect of entry to or residence in the United Kingdom and that is the only basis on which an appeal may be allowed or dismissed. It is erroneous to allow the appeal on the basis that the decision is not in accordance with the law, that is an outdated and inapplicable reference to the old grounds of appeal under section 82 of the Nationality, Immigration and Asylum Act which were repealed from 20 October 2014.

14. For these reasons, the decision of the First-tier Tribunal contains material errors of law and must therefore be set aside.
15. As no there are no findings of fact whatsoever made by the First-tier Tribunal, the appeal must be remitted to the First-tier Tribunal for a de novo hearing for the appeal to be determined afresh.

**Notice of Decision**

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and remit the appeal to the First-tier Tribunal (Taylor House centre) to be heard before any Judge except Judge Walters.

No anonymity direction is made.

Signed



Date

17<sup>th</sup> May 2018

Upper Tribunal Judge Jackson