



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

Appeal Number: EA/03582/2018  
EA/03954/2018

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On Wednesday 19 December 2018**

**Determination  
Promulgated**

**On Wednesday 9 January  
2019**

**Before**

**UPPER TRIBUNAL JUDGE SMITH**

**Between**

**MS TSEHAINESH ZERAI  
MR DANIEL VACCARO**

Appellants

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr J Patel, Counsel instructed on a direct access basis  
For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Background**

1. The Appellants appeal against the decisions of First-tier Tribunal Judge John Hillis both promulgated on 10 August 2018 ("the Decisions"). By the

Decisions the Judge dismissed the Appellants' appeals against the Respondent's decision dated 2 May 2018 refusing them a permanent residence card as an EEA (Italian) qualified person and her family member (spouse). The appeals are linked to that of the Appellants' minor son (Mr Massimo Vacaro: appeal number EA/03955/2018) but the Judge appears to have overlooked that appeal and, on the face of it, there is as yet no decision in relation to that appeal and therefore no application for permission to appeal against any decision.

2. The Judge dismissed the appeals on the basis that the Appellants had failed to provide evidence in support of their case that the First Appellant has exercised Treaty rights in the UK from 29 August 2010 onwards, first as a self-employed person and, after 9 February 2012 on an employed basis. The appeals were determined on the papers at the Appellants' request. The Appellants indicated that they would be serving the relevant documentation following the lodging of their grounds of appeal, but the Judge found that they had not done so. The Appellants' sole ground of appeal is on the basis that this is an error of fact because they had sent the documents under cover of a letter dated 3 July 2018 and those were signed for on 5 July 2018. They say that this error of fact amounts to an error of law because the Judge failed to take into account relevant evidence.
3. Permission to appeal was granted by First-tier Tribunal Judge Mailer on 15 October 2018 in the First Appellant's appeal in the following terms so far as relevant:

"... [2] The grounds assert that all the documents were filed and served by her letter dated 3 July 2018. She complied with the FTT directions dated 7 June 2018. The documents and written submissions relating to her appeal as well as the related appeals of Mr Daniel Vaccaro and Mr Massimo Vacaro, were sent. She enclosed a copy of the relevant post office reference numbers and proof of delivery which was signed for on 5 July 2018, by Madhu and Fawad.

[4] It is arguable that in the circumstances there may have been procedural unfairness through no fault of the Judge.

[5] The grounds are arguable."

The grant in the Second Appellant's appeal is in similar terms.

4. The matters come before me to assess whether the Decisions disclose an error of law and to re-make the decisions or remit to the First-tier Tribunal for re-hearing.

### **Discussion and Conclusions**

5. I can deal with these appeals very shortly. A letter dated 3 July 2018 and headed with the details of the three appeals is on the First Appellant's file along with the evidence served thereunder. It is date-stamped as received at Arnhem Support Centre on 5 July 2018 which is consistent

with the Appellants' evidence as to delivery. There is a note asking for this to be linked with the files, but it is not clear when that was done and therefore whether it was before Judge Hillis. Whatever the position in that regard, the Decisions contain an error of fact because the evidence had been filed with the Tribunal prior to those Decisions being made. That amounts to an error of law because, as a result of the error of fact, the Judge has failed to take into account relevant evidence that was before the Tribunal (whether or not it was actually on the file before the Judge).

6. For those reasons, I am satisfied that the Decisions contain a material error of law. I therefore set aside the Decisions.
7. In relation to the question whether I should remit the appeals to the First-tier Tribunal or re-determine them myself, I have had regard to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows:

“[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

  - (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
  - (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.”
8. Although as Judge Mailer made clear, Judge Hillis may have been unaware of the evidence which had been lodged if that had not reached the file, there are no findings about what that evidence shows. I am therefore satisfied that it is appropriate to remit the appeals to the First-tier Tribunal for a fresh hearing before a Judge other than Judge John Hillis. The First-tier Tribunal should note that the linked appeals include that of the minor son of the First and Second Appellants which also needs to be determined alongside their appeals.

## **DECISION**

**I am satisfied that the Decision involves the making of a material error on a point of law. The Decisions of First-tier Tribunal Judge John Hillis promulgated on 10 August 2018 are set aside. The appeals are remitted to the First-tier Tribunal for re-hearing before a different Judge.**



Signed  
Upper Tribunal Judge Smith

Dated: 19 December 2018