



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

Appeal Number: EA/04960/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 28 June 2019**

**Decision & Reasons Promulgated
On 03 July 2019**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

LIA SURJANA

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr. A. Malik, Direct Access counsel

For the Respondent: Mr. S. Kotas, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent is a national of Indonesia. She married her husband, JPG, on 25 September 2016 in Indonesia. He is an Irish national. On 10 May 2017 she was granted entry clearance

as the family member of an EEA National and she entered the United Kingdom in this capacity on 7 June 2017.

2. On 16 October 2017 the Appellant applied for a residence card as the partner of an EEA national. Her application was refused. She made a further application on the same basis on 24 March 2018, which was rejected. She then made another application on 13 April 2018, which was refused on 2 July 2018, on the basis that her husband was also a British citizen by reason of his birth in the United Kingdom. This was the first time that the Respondent had raised this reason for refusing her a residence card.
3. The Appellant appealed but her appeal was dismissed by First-tier Tribunal Judge Stephen Smith in a decision promulgated on 21 February 2019. The Appellant appealed against this decision and on 30 May 2019, Designated Judge Shaerf, a deputy Upper Tribunal Judge, granted her permission to appeal.

ERROR OF LAW HEARING

4. The Home Office Presenting Officer relied on a Rule 24 Reply, dated 27 June 2019, and counsel for the Appellant relied on a skeleton argument of the same date. They also both made additional oral submissions and I have taken these into account when reaching my decision below.

ERROR OF LAW DECISION

5. In paragraph 13 of the skeleton argument relied upon by counsel for the Appellant at the hearing before First-tier Tribunal Judge Smith, it had been submitted that “the Appellant had a legitimate expectation of being granted [a] residence card on the basis that she was granted [a] family permit and her previous three refusal [s] failed to take any issue with the Sponsor’s nationality”.
6. Permission to appeal to the Upper Tribunal had been granted on the basis that First-tier Tribunal Judge Smith had failed to engage with this issue.

7. I have reminded myself that in paragraph 90 of *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982, Lord Justice Brooke held:

“3) A decision should not be set aside for inadequacy of reasons unless the adjudicator failed to identify and record the matters that were critical to his decision on material issues, in such a way that the IAT was unable to understand why he reached that decision”.
8. It is clear that First-tier Tribunal Judge Smith had failed to engage with the submission that by granting the Appellant a family permit to enter the United Kingdom, as a family member of an EEA national, the Respondent had given her a legitimate expectation that she would be able to reside here in that capacity. Therefore, a potential error of law had occurred in the First-tier Tribunal Judge’s decision.
9. However, I had also to consider whether the error was material and note that, in paragraph 90 of *R (Iran)* Lord Justice Brook also found:

“1) Before the IAT could set aside a decision of an adjudicator on the grounds of error of law, it had to be satisfied that the correction of the error would have made a material difference to the outcome of, or to the fairness of the proceedings...”.
10. The Home Office Presenting Officer relied on the decision in *Mehmood (legitimate expectation)* [2014] UKUT 00469 (IAC) where the Upper Tribunal found:

“The first question in every case concerning an alleged legitimate expectation is whether the public authority concerned made an unambiguous representation, promise or assurance devoid of any relevant qualification”.
11. It is the case that she was granted a family permit by an authorized officer in the form of an Entry Clearance Officer. However, the Entry Clearance Officer did not have the power to grant her a residence card once she was here. Neither did he explicitly state that she would be granted such a card. As a consequence, the nature of the representation made by the Entry Clearance Officer was limited to the grant of a family permit.
12. It is also the case that a legitimate expectation does not arise when it is made in breach of the decision-maker's statutory powers, that is, when he or she lacked legal power to make the

representation, as “expectations” cannot be said to be “legitimate” when they would require a public body to act in breach of its statutory duties and its own.

13. The Appellant’s husband does not fall within the definition of an “EEA national” as he is also a British citizen by reason of his birth in the United Kingdom in 1968 and the exceptions contained in Regulation 2 of the Immigration (European Economic Area) Regulations (“the 2016 Regulations”) do not apply to him.

14. As a consequence, the Appellant is not a family member of an EEA national and cannot benefit from Regulation 14 of the 2016 Regulations which states:

“(1) A qualified person is entitled to reside in the United Kingdom for as long as that person remains a qualified person.

(2) A person (“P”) who is a family member of a qualified person residing in the United Kingdom under paragraph (1) or of an EEA national with a right of permanent residence under regulation 15 is entitled to remain in the United Kingdom for so long as P remains the family member of that person or EEA national”.

15. In addition, even if the Appellant’s husband was an EEA national for the purposes of the 2016 Regulations, he would still have to show that he was a “qualified person” and, as First-tier Tribunal Judge Smith found, the fact that he was a full-time carer for his mother did not bring him within the definition of a “qualified person”. This had been confirmed in the decision of *JR v SSWP (IS) (European Union law; free movement) [2014] UKUT 154 (AAC)*, in which Upper Tribunal Judge Gray found:

“19. As my view therefore, looking at the factual position and the nature of what is being done, is that the person providing care does not perform services in return for which he receives remuneration, that is sufficient to defeat the claimant’s claim, whether it is put on the basis of having been a worker or having been self-employed”.

16. The Appellant also had to show that she had relied on a representation made by the Respondent and that by doing so she had acted to her own detriment. The Appellant’s witness statement noted that she had moved to the United Kingdom and obtained employment here and formed a family life here. But she did not refer to any detriment that this had caused her

in relation to her life here or in Indonesia. Therefore, she was also not able to show that this requirement of legitimate expectation was met.

17. For all of these reasons, I find that, although First-tier Tribunal Judge Smith had omitted to consider the issue of whether the Appellant had acquired a legitimate expectation, this did not amount to a material error of law as no legitimate expectation had arisen.

Decision

- (1) The Appellant's appeal is dismissed.
- (2) The decision of First-tier Tribunal Judge Smith is maintained.

Nadine Finch

Signed
Upper Tribunal Judge Finch

Date 28 June 2019