



**Upper Tribunal  
(Immigration and Asylum Chamber)** Appeal Number: EA/07461/2018

**THE IMMIGRATION ACTS**

**At Field House  
On papers**

**Promulgated  
On 24 February 2020**

**Before**

Upper Tribunal Judge Canavan

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

**and**

**KAYLEE HILL  
(NOW KAYLEE HERBERT)**

**Respondent**

**DECISION AND DIRECTIONS**

1. For the sake of continuity I shall refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.
2. The appellant (Mrs Herbert) appealed the respondent's (Secretary of State) decision dated 09 October 2018 to refuse to issue a residence card recognising a right of residence as the family member of a British citizen who returned to the UK having exercised rights of free movement. The decision was made with reference to regulation 9 of The Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016").
3. First-tier Tribunal Judge Hillis allowed the appeal in a decision promulgated on 09 May 2019. He allowed the appeal with reference to regulation 9 (family member of a British citizen). He also purported

to allow the appeal with reference to regulation 15 (permanent residence). The judge made no findings to explain how or why he considered that the requirements for permanent residence were met.

4. The Secretary of State does not seek to challenge the judge's findings relating to rights of residence with reference to regulation 9 but argues that the judge erred in purporting to allow the appeal with reference to regulation 15 when Mrs Herbert did not return to the UK with her husband until early 2018 and could not meet the requirement for five years' continuous residence under the EEA Regulations 2016.
5. Correspondence from Mr and Mrs Herbert indicates that they may recognise that this was an error because Mrs Herbert only made an application for a residence card as a family member. Nothing in the application form nor the Secretary of State's decision letter indicated that this was an application for recognition of a permanent right of residence.
6. Given the delay due to the Secretary of State's out of time application for permission to appeal, the Upper Tribunal considers that it might be possible for the appeal to be dealt with without the need for the parties to attend a hearing.
7. The role of the Upper Tribunal is, initially, to consider whether the First-tier Tribunal judge made an error of law in his decision. If the Upper Tribunal concludes that the First-tier Tribunal decision involved an error of law, it can set aside the whole decision or only part of it depending on the nature and extent of the error of law. The Upper Tribunal can then substitute its own decision if necessary.
8. In this case it seems that the parties might agree that the judge made a mistake when he referred to regulation 15 of the EEA Regulations 2016 when it was not a relevant issue. Understandably, the Secretary of State does not want to be bound to issue a permanent residence card when Mrs Herbert did not apply for one, nor, on the face of it, did she meet the criteria for permanent residence. Otherwise, it seems the Secretary of State accepts the findings of the First-tier Tribunal judge in so far as they relate to rights of residence with reference to regulation 9 of the EEA Regulations 2016. The Secretary of State appears to be willing to issue a residence card on that basis.
9. For these reasons the Upper Tribunal proposes to find that the First-tier Tribunal decision involved the making of an error of law only in so far as the judge wrongly referred to regulation 15 of the EEA Regulations 2016.
10. I bear in mind that Mrs Herbert is acting in person and may not have relevant legal expertise. To be clear, the effect of the Upper Tribunal's decision to find an error of law would be that only the findings relating

to regulation 15 would be set aside. The findings made by First-tier Tribunal Judge Hillis relating to regulation 9 would stand i.e. the positive findings relating to the application for a residence card as a family member. The decision would be formally remade and Mrs Herbert's appeal would be allowed solely with reference to the findings relating to regulation 9. The only relevant ground of appeal would be that the Secretary of State's decision dated 09 October 2018 breaches the appellant's rights under the EU Treaties in respect of entry into or residence in the United Kingdom.

### DIRECTIONS

11. Since Mrs Herbert is acting in person, it may be of assistance if a representative of the Secretary of State contacts her to see if there is any agreement in relation to the above issues.

*If the parties object*

12. If either party has any objection to this course of action, they should write to the Tribunal within **14 days** of the date this decision is sent outlining their reasons for objecting to the proposed course of action. The Upper Tribunal will then consider whether it is necessary to list the case for hearing.

*If the parties do not object*

13. If neither party has lodged an objection to the proposed course of action within **14 days** of the date this decision is sent, the error of law decision outlined above will become final and shall have effect.
14. If neither party has any objection, the Upper Tribunal finds that the First-tier Tribunal involved the making of an error of law and sets aside the decision in so far as it refers to regulation 15. The decision is remade and Mrs Herbert's appeal is allowed based on the First-tier Tribunal's findings relating to regulation 9. The decision breaches the appellant's rights under the EU Treaties in respect of entry into or residence in the United Kingdom. This decision of the Upper Tribunal shall take effect and there will be no need for an oral hearing.

Signed:   
Upper Tribunal Judge Canavan

Date: 10 February 2020