IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37954/2014

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice, Belfast
On 30 November 2015

Decision & Reasons Promulgated
On 5 January 2016

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALINA IAROSHYNSKA

Respondent

Representation:
For the Appellant: Mr M Diwnyez, Home Office Presenting Officer
For the Respondent: Ms M Gavin, Solicitor

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Secretary of State. However, for convenience I refer to the parties as they were before the First-tier Tribunal. Thus, the appellant is a citizen of Ukraine born on 2 February 1969.

2. On 15 July 2014 she applied for a residence card as the spouse of an EEA national. The respondent refused the application on the basis that it had not been established that the appellant's husband, a Polish national, is exercising Treaty rights. In essence, the appellant's husband ceased work

in 2009 having been made redundant. The respondent was not satisfied that he could show that he was actively seeking work and has a genuine chance of being engaged in employment.

3. The appellant's appeal against that decision came before Designated Judge of the First-tier Tribunal Murray on 26 May 2015. In the light of the matters described below, I announced to the parties at the conclusion of the hearing that I had decided to set aside the decision of the First-tier Tribunal and remit the matter to the First-tier Tribunal for further hearing.

4. All that is clear is that the First-tier Judge allowed the appeal. However, it appears that three determinations relating to the hearing before Judge Murray were promulgated. The first clue to an anomaly in the promulgation of her decision is apparent from the respondent's grounds of appeal before me which at [1] describe the determination as an "amended" determination. There is however, nothing on the face of the determination to indicate that it is an amended decision.

5. At the hearing Ms Gavin explained that when the judge's determination was received it was noted that there was an error as to the recording of who the legal representatives before her were. The judge had recorded the representatives as the Law Centre of Northern Ireland, whereas in fact the representative was Francis Hanna & Co, Solicitors.

6. A further determination was sent to the solicitors correcting the representation but in fact altering the substance of the determination. In the first determination that was sent out the judge's conclusions were stated as being, in summary, that the sponsor, the appellant's husband and the EEA national, does not have a genuine chance of being engaged in employment in the UK. Accordingly, she concluded that he was not exercising Treaty rights and could not meet regulation 6(7) of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") (despite stating in an earlier paragraph that he was in fact a jobseeker).

7. In that determination she did however find that the appellant is entitled to a derivative right of residence under reg. 15A(4), being the primary carer of the children of an EEA national.

8. However, a second determination was received by the appellant's representatives. Whereas the first determination consisted of 42 paragraphs, the second consisted of only 40 paragraphs. In the second determination the judge made no mention of the appellant being entitled to a derivative right of residence but concluded that the appellant is a jobseeker and "has retained a right to reside within the meaning of Article 14(4)(b) of the Citizens Directive". She then concluded that the appellant "has a right of residence in the United Kingdom under Regulation 14(2)". On the face of it, the two determinations are inconsistent.

9. I was informed that yet another determination was sent which was the same in content as the first determination. However, all three determinations bear the same date of promulgation, being 2 July 2015. Notices were sent by the First-tier Tribunal in respect of the second and third determinations with a stamp stating "Amended Notice disregard all previous notices".

10. To add to the confusion, it appears that there are two sets of grounds advanced by the respondent. The grounds before me are dated 11 August 2015, whereas the grant of permission relates to grounds described as being dated 7 July 2014. That is clearly a mistake as to the year since the judge heard the appeal on 26 May 2015. The grounds which are referred to by the judge who granted permission were not before me. It is clear however, that Mr Diwnyez was working from a different set of grounds of appeal from those that are on the Tribunal file.

11. It is not apparent, at least on the face of any of the determinations, that the judge purported to exercise the power under rule 31 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 to correct a mistake or accidental slip or omission. It is similarly not apparent that the judge purported to exercise any power under rule 32, setting aside her original decision, even if she had the power to do so under rule 32.

12. Were I asked to express a concluded view as to the merits of the respondent's grounds, I would have to say that it is not immediately apparent which grounds relate to which determination.

13. It is however, sufficient for me to conclude that by the promulgation of two decisions which are on the face of them inconsistent as to their conclusions in terms of the reasons for allowing the appeal, there is an error of law in the decision of the First-tier Tribunal. The two seemingly inconsistent determinations at the very least indicate that the judge had not made up her mind as to the basis on which the appeal should be allowed.

14. Both parties agreed that in the circumstances there is an error of law in the decision(s) of the First-tier Tribunal requiring it to be set aside. I too am satisfied that that is the case.

15. Accordingly, I set aside the decision of the First-tier Tribunal. The appropriate course is for the appeal to be remitted to the First-tier Tribunal to be heard *de novo* before a judge other than Designated First-tier Tribunal Judge Murray, with no findings of fact preserved.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. That decision is set aside and the appeal is remitted to the First-tier Tribunal for a hearing *de novo*.

Upper Tribunal Judge Kopieczek 23/12/15