



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/10257/2016

**THE IMMIGRATION ACTS**

Heard at Liverpool  
On 30<sup>th</sup> April 2018

Decision & Reasons Promulgated  
On 15<sup>th</sup> May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

DESRENE ANDREA EDWARDS  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr A Osadebe of Zuriel Solicitors  
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction and Background**

1. The Appellant appeals against a decision of Judge Tobin (the judge) of the First-tier Tribunal (the FTT) promulgated on 20<sup>th</sup> June 2017.

2. The Appellant is a female Jamaican citizen born 8<sup>th</sup> January 1968 who on 8<sup>th</sup> February 2016 applied for a permanent residence card. The application was refused on 9<sup>th</sup> August 2016. The appeal was heard by the FTT on 23<sup>rd</sup> May 2017.
3. The judge found that the only issue that needed to be decided in the appeal was whether the Appellant's former husband was exercising EEA treaty rights at the date of divorce which was 5<sup>th</sup> July 2016. The judge found it had not been proved that the former husband was exercising treaty rights on 5<sup>th</sup> July 2016 and therefore the appeal was dismissed.
4. The Appellant applied for permission to appeal to the Upper Tribunal. She relied upon three grounds. Permission to appeal was refused by Judge Grant-Hutchison of the FTT, who found the grounds disclosed no arguable error of law.
5. The Appellant renewed her application to the Upper Tribunal, again relying upon three grounds. Permission to appeal was not granted in relation to the first two grounds, and I therefore make no further reference to them. The third ground is set out below;

“The conclusion by the Immigration Judge that there is no requirement for the Respondent to assist the Appellant to establish her case is not sustainable in line with the case of Amos and OA [2010] UKAIT 00003.

The Appellant submits that in circumstances where the Respondent has access to information that the Appellant is not privileged to have the burden of proof shifts on to the Respondent who has to discharge that burden.

The conclusion by the Immigration Judge that to require the Respondent to go beyond presenting her own case is irrational and is against the ratio of the court in the aforementioned cases.”

6. Deputy Upper Tribunal Judge Saini found that the first two grounds relied upon by the Appellant were not arguable. I set out below the grant of appeal in relation to Ground 3;

“Ground 3 however is arguable as it is plain from the FTT's decision that it was unaware that it had the power to direct the Respondent to obtain evidence of the former EEA spouses' records with HMRC pursuant to her powers under section 40 of the UK Borders Act 2007 concerning the 'supply of Revenue and Customs information'. I note that the Grounds of Appeal argued the Social Security case of Kerr which whilst not on point shows the Appellant's representatives formed the view that assistance should be forthcoming from the Respondent and the fact that the FTT was referred to Amos v Secretary of State for the Home Department [2011] EWCA Civ 552 which mentions the ability to seek or give a direction at [45] satisfies me that the error is arguable. I do of course note that the Appellant's representative did not seemingly seek an 'Amos direction', but given that the Grounds of Appeal were framed as they were, it is obvious that had the representative been aware of such a direction, one might have been requested. In any event, given that the judge did not consider making a direction of her own volition, nor indicate that she was aware that one could be made (but refused to do so) and given that there was only one issue in the appeal which the direction

would resolve one way or another, I am satisfied that permission should be granted on Ground 3 alone.”

7. Following the grant of permission directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the FTT had erred in law such that that the decision should be set aside.

### **Submissions**

8. Mr Osadebe relied upon written submissions dated 26<sup>th</sup> April 2018. He contended that he had sought an “Amos direction” from the judge to request the Respondent to investigate whether the Appellant’s husband was still exercising treaty rights in the UK. It was submitted that it was arguable that the judge had erred in law for failing to issue that direction. It was submitted that there was only one issue before the Tribunal, and the failure by the judge to make a direction to the Respondent of his own volition, or when prompted by the Appellant’s representative, amounted to an error of law.
9. In oral submissions Mr Osadebe conceded that he had not made reference to the decision in Amos, he had referred to the decision in Kerr, and it was the Presenting Officer before the FTT who had referred to the decision in Amos.
10. Mr Bates observed that the judge granting permission had erred in making reference to paragraph 45 of Amos, submitting that the appropriate paragraph was 40. Mr Bates submitted that the judge had not been requested to make a direction. Mr Bates had before him the notes of the Presenting Officer before the FTT, which did not indicate that there was any request for a direction to be made for the Respondent to seek information from HMRC, and therefore it was not the case that the judge had declined to make such a direction. Mr Bates submitted that as no direction had been requested, it was not an error of law for the judge not to make such a direction.
11. In response Mr Osadebe submitted that the judge could have made a direction of his own volition, and contended that there had been a request made for a direction.
12. At the conclusion of oral submissions I reserved my decision.

### **My Conclusions and Reasons**

13. The issue that I have to decide is whether the judge erred in law in not making a direction to the Secretary of State to request information from HMRC pursuant to section 40 of the UK Borders Act 2007. It is common ground that the judge had the power to make such a direction.
14. It is also common ground that no request for a direction was made to the Tribunal prior to the hearing. There was reference in the Grounds of Appeal lodged with the FTT to the decision in Kerr v Department for Social Development [2004] UKHL 23 but no reference to the decision in Amos.

15. It was not suggested in the grounds seeking permission to appeal to the Upper Tribunal that there had been a request for such a direction made at the FTT hearing. I find that if such a request had been made at the hearing and refused, this would have been raised in the grounds seeking permission to appeal to the Upper Tribunal.
16. I have considered the Record of Proceedings kept by the judge which is extremely brief, but does not indicate that any request for a direction was made at the hearing. I accept that the notes made by the Presenting Officer before the FTT do not indicate that any request was made by the Appellant's representative for a direction that the Respondent seek information from HMRC in relation to whether or not the Appellant's former spouse was exercising treaty rights at the date of divorce.
17. The grant of permission to appeal indicates that the Appellant's representative did not "seemingly seek an Amos direction".
18. The first time that it is contended that such a request for a direction was made is in the written submissions presented by Mr Osadebe at the Upper Tribunal hearing. Mr Osadebe however accepted that he was not in fact aware of the decision in Amos prior to the FTT hearing, or even at the hearing, and it was the Presenting Officer at the FTT hearing who referred to that decision. This accords with what is recorded by the judge at paragraph 11.
19. At paragraph 34 of Amos Lord Justice Stanley Burnton rejects the contention by the Appellant in that case that the Secretary of State was required to assist her to establish her case. The issue considered by the Court of Appeal was the same issue as was considered by the FTT, whether a former spouse was working at the date of divorce. It was held in paragraph 34 that the procedure in appeals before the FTT is essentially adversarial and there was no requirement for the Secretary of State to take steps to prove that her own decision was wrong.
20. At paragraph 41 Lord Justice Stanley Burnton observed that the Appellant submitted that the decision in Kerr was authority for the proposition that it was for the Home Secretary to produce the documentation available to Her Majesty's Revenue and Customs that would establish that her former husband had worked, and stated "I am unable to accept this submission." At paragraph 40 of Amos it was observed that the Appellant in that case had not sought a direction requiring the Secretary of State to provide any information necessary for the determination of her appeal, and had made no relevant application to the Tribunal. It was stated "As Maurice LJ pointed out in the course of argument, in these circumstances it is impossible to identify any error of law on the part of the Tribunal in this respect."
21. I conclude that if the judge was not requested to make a direction to the Respondent, to obtain information from HMRC, the judge committed no error of law in not making such a direction of his own volition. I am unable to accept that there was in fact a request made to the judge for such a direction. I make this finding on the basis that in my view the Appellant's representatives were unaware such a direction could be requested. If the Appellant's solicitors had been aware of this, then an application

could have been made for such a direction prior to the hearing. Mr Osadebe was unaware of the decision in Amos prior to the FTT hearing, and at the FTT hearing. The brief Record of Proceedings prepared by the judge, makes no reference to any direction being requested, and this accords with the notes made by the Presenting Officer before the FTT, which also records that no request for a direction was made. In addition, I note that there was no reference in the grounds seeking permission to appeal to the Upper Tribunal, to the judge being requested to make a direction but refusing to do so.

22. I therefore conclude that the judge was not asked to make a direction to the Secretary of State to seek information from HMRC, therefore, in my view, did not err in law in not making such a direction of his own volition when not asked to do so.
23. I therefore find no material error of law in the decision of the FTT, and the decision stands.

### **Notice of Decision**

The decision of the FTT does not involve a material error of law. I do not set aside the decision. The appeal is dismissed.

There has been no application for anonymity and I see no need to make an anonymity direction.

No anonymity direction is made.

Signed

Date 4<sup>th</sup> May 2018

Deputy Upper Tribunal Judge M A Hall

### **TO THE RESPONDENT FEE AWARD**

The appeal is dismissed. There is no fee award.

Signed

Date 4<sup>th</sup> May 2018

Deputy Upper Tribunal Judge M A Hall