



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

Appeal Number: EA/06902/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 13 August 2019**

**Decision & Reasons Promulgated  
On 20 August 2019**

**Before**

**UPPER TRIBUNAL JUDGE LANE**

**Between**

**UMESH BHARAT AHUJA  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms Harris, instructed by Thompson and Co.

For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant was born on 4 June 1989 and is a male citizen of India. On 1 March 2017, he applied for a permanent residence card as a family member of an EEA national who had been a qualified person in the United Kingdom for a continuous period of five years. Appellant claimed to have been dependent upon his father, a citizen of Spain. The appellant's application was refused by the Secretary of State in a decision dated 25 July 2017. The appellant appealed to the First-tier Tribunal which dismissed the appeal in a decision promulgated on 21 February 2019. The appellant now appeals, with permission, to the Upper Tribunal.

2. The notice of refusal records that the appellant had 'provided evidence to show that your sponsor has been exercising treaty rights as a self-employed person for five years in the form of SA302s dated 2012 to 2016 and an HMRC letter.' The decision of the judge addresses only that period 2012 - 2016. The appellant now claims that there was evidence before the judge which showed that the appellant had been the dependent of his father, who had been exercising Treaty Rights, during an additional earlier period between 2006 - 2011. The appellant submits that the judge erred in law by completely ignoring this earlier period. Irrespective of any failure on the part of the appellant to adduce evidence to show dependency in the later period, the judge should, at the least, have determined whether she had jurisdiction to consider this earlier period.
3. Mr Melvin, who appeared for the Secretary of State, had not seen the skeleton argument of the appellant before the First-tier Tribunal so I provided him with a copy. The skeleton argument at [14] refers to the earlier period and evidence in the appellant's bundle of documents which the appellant claims shows that the sponsor/father was working and exercising Treaty Rights at least from May 2006; at [16], it is asserted that 'the appellant EEA sponsor has been continuously exercising treaty rights from 30 May 2006 to date.' Mr Melvin submitted that the earlier period amounted a 'new matter' which fell to be considered under section 85(6) of the Nationality Immigration and Asylum Act 2002. By section 85(5) a new matter may only be considered by the Tribunal if the Secretary of State has given his consent to consider it. Ms Harris, who appeared for the appellant, submitted that the earlier period did not constitute a new matter; the basis of the appellant's application and appeal had always been that he resided in the United Kingdom in accordance with the regulations for a continuous period of five years; it made no difference whether this requirement was met by the earlier or later period.
4. Sections 85 and 86 of the 2002 Act provide:

**85. Matters to be considered**

- (1) An appeal under section 82(1) against the decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).
- (2) If an appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in a statement which constitutes a ground of appeal of a kind listed in section 84 the decision appealed against.
- (3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.
- (4) On an appeal under section 82(1) ... against a decision the Tribunal may consider... any matter which it thinks relevant to the substance of the decision, including... a matter arising after the date of decision.
- (5) But the Tribunal must not consider a new matter unless the Secretary of Status has given the Tribunal consent to do so.
- (6) A matter is a "new matter" if -

- (a) it constitutes a ground of appeal of a kind listed in section 84, and
- (b) the Secretary of State has not previously considered the matter in the context of -
  - (i) the decision mentioned in section 82(1), or
  - (ii) a statement made by the appellant under section 120.

### **86. Determination of appeal**

- (1) This section applies on an appeal under section 82(1).
  - (2) The Tribunal must determine -
    - (a) any matter raised as a ground of appeal..., and
    - (b) any matter which section 85 requires it to consider.
5. Schedule 2 of the Immigration (European Economic Area) Regulations 2016 provides that the sections shall also apply to appeals under those Regulations.
6. I was referred to the Upper Tribunal reported decision in *Mahmud* (S. 85 NIAA 2002 - 'new matters') [2017] UKUT 488 (IAC):
- “1. Whether something is or is not a 'new matter' goes to the jurisdiction of the First-tier Tribunal in the appeal and the First-tier Tribunal must therefore determine for itself the issue.
  - 2. A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6) (a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal.
  - 3. In practice, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive.”
7. As *Mahmud* shows, a new matter may consist of a factual matrix; it need not be wholly distinct and new legal basis or ground of appeal. In *Mahmud*, the appellant had advanced an Article 8 appeal by reference to a different relationship from that which the Secretary of State had been notified in the claim. The Tribunal concluded that this new relationship did amount to a new matter and that the First-tier Tribunal been right to dismiss the appeal on that ground because the Secretary of State had not been notified of the changed factual matrix and had, in any event, not given consent for the tribunal to consider it. In present appeal, the respondent considered the later period of 2012 - 2016, which is the only period referred to by the appellant in his application to the Secretary of State.

Before the First-tier Tribunal, the record of proceedings does not indicate that the later period of 2012 – 2016 was raised at all in examination in chief or cross-examination nor is it referred to in the judge's record of the submissions made by both parties. The later period is referred to in those parts of the skeleton argument which I have quoted above. Given that the later period was referred to in the skeleton argument, I accept the appellant's submission that the judge should have determined whether she had jurisdiction to consider the later period. Given that, other than in the skeleton argument, no reference has been made to the later period at all, this may also seem a little harsh on the First-tier Tribunal judge.

8. Having decided that the judge should have addressed the earlier period, would she have been compelled to refuse to consider the later period? Miss Harris submitted that it would have been open to the judge to decide that she should consider the later period and, as a consequence, the Upper Tribunal should remit the appeal to the First-tier Tribunal for it to make that judgement. I disagree with that submission. In my view, the later period of dependency now claimed by the appellant falls very firmly into the definition of a 'new matter' as clarified in *Mahmud*. The appellant in *Mahmud* appealed on the basis of his private/family life but was prevented from relying upon a new relationship; in the present appeal, the appellant has appealed on the basis that he has resided for 5 years in the United Kingdom as a dependant of a family member exercising Treaty Rights but he cannot succeed in that appeal by relying upon the wholly different period from that considered by the Secretary of State in the original application. It follows that, had the judge considered whether she had the jurisdiction to consider the new matter, then, in the absence of the consent of the Secretary of State, she would have been bound to decide that she did not have jurisdiction. Notwithstanding the failure, therefore, of the judge to address an issue which had been raised in the appellant's skeleton argument, I exercise my discretion and decline to set aside the First-tier Tribunal decision. If the appellant wishes to rely upon the earlier period of dependency, he will have to make a fresh application to the Secretary of State.

### **Notice of Decision**

This appeal is dismissed.

Signed

Date 13 August 2019

Upper Tribunal Judge Lane