



Upper Tribunal

(Immigration and Asylum Chamber)

IA/07266/2015

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House, London

Decision & Reasons

Promulgated

On the 1st April 2016

On 20th April 2016

Before:

DEPUTY JUDGE OF THE UPPER TRIBUNAL MCGINTY

Between:

MS JOAN AMERIA KASEMERA
(Anonymity Direction not made)

Claimant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant in the Upper Tribunal

Representation:

For the Claimant: Miss Shaw (Counsel)

For the Secretary of State: Ms Everett (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Davey promulgated on the 30th September 2015, in which he allowed the Claimant's appeal under the Immigration (EEA) Regulations 2006.

2. Within the Grounds of Appeal it was argued that the First-tier Tribunal Judge had failed to resolve a conflict of evidence and failed to give adequate reasons and it was argued that the Judge failed to address the concerns of the Secretary of State regarding whether or not the EEA sponsor had been exercising Treaty Rights within the United Kingdom for a continuous period of five years whilst employed or self-employed, and failed to give adequate reasons in respect thereof. A list of the concerns which was said to have been set out within the refusal letter were contained within the Grounds of Appeal in respect of the sponsor's employment and self-employment in the UK.
3. Permission to appeal was granted by First-tier Tribunal Judge Andrew on the 11th February 2016, who found that it was arguable that the reason of the First-tier Tribunal Judge regarding whether or not the sponsor has been exercising Treaty Rights for a continuous period of five years was insufficient.
4. At the oral appeal hearing before the Upper Tribunal, it was initially agreed by both parties that there was no reason for the Judge to have made an anonymity order in this case and that anonymity should be discharged. I therefore discharged the anonymity order previously made by First-tier Tribunal Judge Davey.
5. I pointed out to both parties at the appeal hearing that there appeared to have been two separate and different reasons for refusal letters in this case, both said to be in respect of the Claimant Joan Ameria Kasemera whose date of birth was the 10th March 1983, with both reasons for refusal letter being written by M Burgess and dated the 4th February 2015. However the reasons set out in the two reasons for refusal letters, although reaching the same conclusion, was very different, and whereas one fully set out the concerns of the Secretary of State regarding the sponsor's employment and self-employment, the other did not set those concerns out in full.
6. Miss Shaw conceded that even though she had been Counsel at the First-tier Tribunal hearing, she had not spotted, nor seemingly had the First-tier

Tribunal Judge that there were in fact two different refusal notices in respect of the same Claimant, and that the one contained within the Claimant's bundle was different from that contained within the Secretary of State's bundle. Both legal representatives agreed that it was entirely unclear having read the decision of First-tier Tribunal Judge Davey, which of the two refusal notices he had based his decision upon. It was agreed by both legal representatives that the existence of two separate, but different refusal notices containing a different reason, albeit with the same conclusion, did mean that the decision by First-tier Tribunal Judge Davey which did not specify which refusal notice he was actually referring to or indeed even to clarify which refusal notice the Secretary of State was seeking to rely upon, was based upon a procedural irregularity, meaning that the decision of First-tier Tribunal Judge Davey was unsafe. Both legal representatives agreed that the decision thereby did contain a material error of law and should be set aside.

7. On that basis, I did find that the decision of First-tier Tribunal Judge Davey was unsafe, as a result of procedural irregularity, on the basis that there were in fact two separate refusal notices both in respect of the same Claimant, both of the same date and signed by the same person Mr M Burgess, and dated the 4th February 2015, but which had substantially different reasoning, and that the Judge had not seemingly noted within his decision that there were two separate refusal notices, or clarified which refusal notice he had based his decision upon, and that I therefore find that the decision of First-tier Tribunal Judge Davey is unsafe on that basis as a result of this procedural irregularity, and should be set aside in its entirety.
8. Having set aside the decision of First-tier Tribunal Judge Davey, Ms Everett withdrew both decisions made by Mr Burgess on the 4th February 2015. In light of her having withdrawn both decisions, there is currently no valid decision to remit back to the First-tier Tribunal, such that it remains for the Secretary of State to make a fresh decision in the case. Both legal representatives were happy with this course of action and for Ms Everett to withdraw the decisions, in order that a proper single decision could be

made, in order that the same error is not simply repeated if the matter were remitted back to the First-tier Tribunal.

Notice of Decision

The decision of First-tier Tribunal Judge Davey did contain a material error of law and is set aside.

The Secretary of State having withdrawn both decisions dated the 4th February 2015, after I indicated that the decision of Judge Davey was set aside, there is no valid decision to be appealed to the First-tier Tribunal, such that the case does not need to be remitted back to the First-tier Tribunal, but it remains for the Secretary of State to make a valid decision in respect of the Claimant's application.

Signed

Rob McGinty

Deputy Judge of the Upper Tribunal McGinty
2016

Dated 3rd April