



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2021-001182
(Formerly CUC/637/2021)**

On appeal from First-tier Tribunal (Social Entitlement Chamber)

Between:

FN

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Ward

Decision date: 10 March 2022
Decided on consideration of the papers

Representation:

Appellant: Ms Maria Solomon, Engage Leeds
Respondent: Mr Michael Page, Decision Making and Appeals

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 28 August 2020 under number SC007/20/00041 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remake it as follows:

The claimant was not disqualified from universal credit on her claim made on 30 September 2019 by virtue of lacking a qualifying right to reside; she had such a right, pursuant to reg 9 of the Immigration (European Economic Area) Regulations 2016. The Secretary of State must now decide the remaining aspects of her claim. If there is any dispute about those, the claimant will have fresh rights of appeal to the First-tier Tribunal.

REASONS FOR DECISION

1. Both the claimant's representative and the representative of the Secretary of State have agreed that the decision of the tribunal involved the making of an error on

a point of law and should be remade in the claimant's favour. That makes it unnecessary to set out the history of the case or to analyse the whole of the evidence or arguments in detail.

2. The claimant is a Nigerian national and at the material time was married to, though separated from, a British citizen, who had earlier exercised his rights of free movement to Germany. Her claim for universal credit was refused by a decision dated 21 October 2019 on the basis that her only right to reside was that of a family member of a British Citizen who had exercised EU rights in Germany before returning to the UK with his family and there was no evidence that her husband had been a "qualifying person" (as defined by the Immigration (European Economic Area) Regulations 2016) at the date of her claim.

3. The First-tier Tribunal ("FtT") applied the same principle and refused the appeal. Thereby it erred in law, as it failed to follow the Upper Tribunal's decision in *HK v SSWP* [2020] UKUT 73, which was not appealed and was binding on the FtT. It was not necessary for the returning British citizen to be a "qualified person" for the claimant to have rights under reg 9 of the 2016 Regulations. In consequence, Mr Page invites me to substitute my own decision, as I am doing.

4. There are however other aspects of the case which merit a brief comment, though not part of the reasoning for my decision. On the (erroneous) basis that it was necessary to demonstrate that the husband was a "qualified person", the claimant, by her social worker, had informed the DWP that she and her daughter had fled the family home due to domestic violence and that the claimant had obtained a non-molestation order against her husband. His name, date of birth, national insurance number and details of his then current and previous employers were provided to the DWP, who were asked to contact them, as although the social worker had had some contact with the husband, he had been uncooperative in providing the information necessary.

5. On mandatory reconsideration, the DWP upheld the original decision saying that the Data Protection Act prevented them from providing the information relating to the husband that had been requested.

6. On appeal, the DWP indicated they could provide information if in response to a tribunal or court order. The claimant's representatives emailed the FtT on 6 February 2020 explaining this and asking for an order to be made. The email did not on its face identify that the claimant and her husband were estranged due to domestic violence and that may have contributed to why the District Tribunal Judge (DTJ) refused the application, saying, put shortly, that the husband should get them and send them to the DWP and that the FtT would only become involved if the parties had exhausted their own efforts. This prompted a follow-up email on 16 March 2020 explaining the background of domestic abuse and providing a copy of the non-molestation order. The DTJ remained adamant, indicating that the order did not prevent the claimant from contacting her husband through solicitors and until there was evidence that an attempt had been made to do so and had been unsuccessful the decision remained unaltered. Subsequently, on 26 May 2020 a registrar did make an order for the evidence to be supplied by DWP but it was not, despite the representative sending a follow-up email. The case was then listed as a paper hearing, without further notification to the claimant or her representative, and decided.

7. Had the FtT not been in error in any event having failed to apply *HK*, which rendered these other concerns academic, I would certainly have wished to explore in appellate proceedings the fairness or otherwise of the procedure adopted for listing the case in the FtT.

8. As to the the FtT's apparent reluctance to make the order sought, while it is not for me to second-guess their approach to matters of case management, it does seem to me that, speaking generally, in the context of domestic violence and a non-molestation injunction there may realistically be limitations on what a party can be expected to achieve on their own initiative, even with a degree of support, and that in such circumstances the FtT's power to make an order under r.16 of the FtT's Rules may be a useful tool for enabling DWP's data protection issues to be overcome and enabling justice to be done. I do understand that intervention by the FtT should not be a first resort and advisers seeking such orders may be well-advised to make clear in a stand-alone application not only what they are seeking and why, but what steps have been taken, unsuccessfully, to date.

C.G.Ward
Judge of the Upper Tribunal
Authorised for issue on 10 March 2022