Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/06757/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 March 2018	**On 17 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MS EVELYN BAIDU
(NO ANONYMITY ORDER MADE)

Appellant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A. Adewole, Ansong Associates
For the Respondent: Mr. Nath, Senior Presenting Officer

DECISION & REASONS

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1. The Appellant is a national of Ghana, born on 14.11.73. On 22 November 2010 she was issued with a residence card valid until 22 November 2015. On 1 December 2015, she applied for permanent residence on the basis of a retained right of residence. This application was refused on 19 May 2016, on the basis that the Appellant had failed to provide a divorce certificate (albeit she had

submitted a divorce petition issued on 13 October 2015). The respondent accepted that there were P60's and payslips covering the period 2009 through to 2015 in respect of the Appellant's former spouse and thus there was evidence that the EEA spouse national had been exercising treaty rights.

2. The Appellant appealed against this decision stating that her decree absolute was due to be issued the following week. Her appeal came before Judge of the First tier Tribunal Broe for hearing on 20 July 2017 for consideration on the papers. The Appellant had submitted a bundle of documents, including her decree absolute issued on 6 June 2016 and evidence of her and her former's husband's employment.

3. In a decision and reasons promulgated on 2 August 2017, the Judge dismissed the appeal, on the basis that at the time of the application and decision the Appellant was still married and thus "*her divorce is a matter arising after the date of the decision*" and was thus not relevant because "*at the time it was a fact that she was married and not therefore entitled to a retained right of residence.*" [12]. The Judge directed himself at [10] in respect of section 85(4) of the NIAA 2002, as amended, that 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 although not a new matter for the purposes of subsection (6) without permission from the Secretary of State.

4. An application for permission to appeal was made on the basis that the Judge failed to consider the evidence that was placed before him, most importantly the Appellant's divorce certificate; at the time of the application the Appellant and her ex husband had been living separate and independent lives and were not married and the Appellant is entitled to retain her right of residence.

5. In a decision dated 18 January 2018, permission to appeal was granted by Designated Judge McClure on the basis that in light of the case of Mahmud (s.85 NIAA 2002 – new matters) Iran [2017] UKUT 488 (IAC) specifically at [31] it was arguable that the judge's approach to section 85 is not correct.

Findings

6. I set out the headnote in Mahmud (op cit) which provides as follows:

> *"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."*

The Upper Tribunal further held as follows at [46]:

> *"46. The issue of whether a 'matter' is a 'new matter' is inevitably a fact sensitive one to be assessed in each appeal, but should be identifiable by something being raised that is distinguishable from and outside of the context of the original claim and decision in response to it, as well as something which constitutes a ground of appeal in section 84 of the 2002 Act."*

On the facts in that case, the Upper Tribunal found that the fact that the Appellant had a new partner, who was not mentioned until the notice of appeal, did constitute a new matter.

7. In this case, however, the Secretary of State was clearly put on notice in the application for permanent residence that it was predicated upon retention of residence rights in light of the Appellant's impending divorce, the divorce petition having been submitted along with the application. In these circumstances, I find that the fact that the divorce had subsequently taken place and was evidenced by a copy of the decree absolute served on the First tier Tribunal, which was before the Judge at the date of his consideration of the appeal, did not constitute a new matter. The fact of the divorce was not factually distinct but rather "*further or better evidence of an existing matter.*" It follows that the Judge erred materially in law in treating the fact of the Appellant's divorce, as evidenced by the decree absolute, as a new matter.

8. I informed the parties at the outset of the hearing of my preliminary view, based on the decision in Mahmud and invited them to make submissions if they so wished, however, they were content for the appeal to be determined on the basis I indicated to them.

Decision

9. I find a material error of law in the decision of First tier Tribunal Judge Broe. I substitute a decision allowing the appeal on the basis that the Appellant meets the requirements of regulation 10(5) of the Immigration EEA Regulations 2006 and thus satisfies the requirements of regulation 15(1)(f) of the Immigration EEA Regulations 2006.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman 15 April 2018