



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/25512/2012

THE IMMIGRATION ACTS

Decided at Field House
On 6 September 2013
No hearing

Determination Promulgated
On 9 September 2013
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Before

UPPER TRIBUNAL JUDGE LATTEER

Between

NADIA NIBIGERA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal promulgated on 28 May 2013.
2. On 6 August 2013 I granted permission to appeal and gave directions as follows:
 - “1. The appellant is a citizen of Burundi who applies for permission to appeal against the decision of the First-tier Tribunal dismissing her appeal on immigration and human rights grounds. She is a national of Burundi who

entered the UK with leave to remain as a student on 17 September 2009 and her leave was subsequently extended until 29 October 2012. She applied for leave to remain as a spouse, but she failed to attend an interview and her application was refused under the provisions of para 322(10) and para 286 with reference to 284(vi). The respondent not only refused the variation application but made a decision to remove her under s47, both decisions being made in the same document.

2. The First-tier Tribunal Judge did not believe that the appellant and her husband were credible witnesses and did not believe that their marriage was subsisting. Her reasons are set out in [34] – [55]. The judge also found that the application had properly been refused on the basis that there was a failure without providing a reasonable explanation to comply with a request made to attend for an interview: [29] – [33].
3. In the grounds it is argued that the judge erred in law by failing to find that the removal decision was unlawful and, when considering whether the marriage was subsisting, to take into account the guidance set out in Goudey (Sudan) [2012] UKUT 0041.
4. However, the position in Goudey was different and dealt with a couple who, although living apart, both wanted to be together and live together as husband and wife, whereas in the present appeal the judge was not satisfied for reasons properly open to her that the marriage was subsisting. I am satisfied that her findings and conclusions on that issue were properly open to her for the reasons she gave. In the light of her findings on the issue of the marriage, there can be no criticism of her findings under article 8.
5. However, the judge did not deal with the appeal against the removal decision and to this extent arguably erred in law. Permission to appeal is granted on this issue only.

Direction

My preliminary view is that the appeal relating to the lawfulness of the decision to make a removal direction should be dealt with on the papers and that in the light of the judgment of the Court of Appeal in Secretary of State v Ahmadi [2013] EWCA Civ 512 the appeal should be allowed to the extent that the decision to remove is set aside as not in accordance with the law. Any representations to the contrary are to be filed with the Tribunal within 14 days of receipt of this decision, a copy being served on the other party.”

3. No response has been received from the appellant but the respondent has written to say that the s.47 decision is formally withdrawn.
4. In these circumstances I am satisfied that the proper course in this appeal is for it to be determined without a hearing. Permission to appeal was only granted on the issue of the lawfulness of the removal decision. I am satisfied that the First-tier Tribunal erred in law by failing to find that that decision was not in accordance with the law, a conclusion confirmed by the Court of Appeal in the Secretary of State v

Ahmadi. I set the decision aside to the extent that it dismissed the appeal against the removal decision.

5. I would have substituted a decision allowing the appeal on the basis that the decision to remove was not in accordance with the law but the respondent has now withdrawn the s.47 decision.

Decision

6. The First-tier Tribunal erred in law. The decision dismissing the appeal is set aside in relation to the removal decision only. I record that the removal decision has been withdrawn by the respondent. Save as aforesaid the decision of the First-tier Tribunal stands.

Signed

Date: 6 September 2013

Upper Tribunal Judge Latter