



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

Appeal Number: IA/44629/2013

THE IMMIGRATION ACTS

**Heard at : Field House
On : 30 September 2014**

**Determination
Promulgated
On 7 October 2014**

Before

**THE RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE KEBEDE**

Between

ADAMAKA NWOLOKO

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Uzoechina of Patterson & Co

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Nigeria born on 1 February 1970, appeals with permission against the decision of First-tier Tribunal Judge Hawden-Beal dismissing her appeal against the respondent's decision of 13 August 2013 to refuse to issue her with a residence card as the spouse of an EEA national

under the Immigration (European Economic Area) Regulations 2006 (“the EEA Regulations”).

2. The history of the appeal is relevant for reasons which shall become clear. On 28 September 2010 and 29 June 2011 the appellant was refused a residence card. She applied for a third time, on 29 December 2011, for a residence card as confirmation of a right to reside in the United Kingdom as the spouse of Helio Pina Da Cruz, a Portuguese national whom she had married on 7 February 2009. The application was refused on 14 June 2012 on the grounds that the respondent considered the appellant to have entered into a marriage of convenience and was not satisfied that the sponsor was exercising Treaty rights in the United Kingdom. The basis for the conclusion that the marriage was one of convenience, aside from the appellant’s history of failed applications, was that the appellant had provided, with a passport application form which she had produced to the UKBA, the name of a next-of-kin who was not the EEA national, but yet had declared in her marriage certificate that she was single and had not been married previously.

3. The appellant’s appeal against that decision was heard by First-tier Tribunal Judge Hanes on 24 September 2012. Judge Hanes heard from the appellant and her husband. She was satisfied that there were reasonable grounds for suspecting a marriage of convenience, but on the basis that the respondent had not invited the parties for an interview and had not provided them with an opportunity to respond to the allegations made, she considered that there had been a failure by the respondent to follow the procedures set out in Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038. She concluded, in the circumstances, that the matter had to go back to the Secretary of State in order for the relevant procedures to be followed and for a lawful decision then to be made.

4. Rather than ending her determination at that point, Judge Hanes went on to make adverse credibility findings against the appellant leading to her conclusion that she could not be satisfied that the marriage was not one of convenience. On the basis that the respondent had failed to follow the procedures set out in Papajorgji, she allowed the appeal to the limited extent that the decision was not in accordance with the law.

5. Permission was sought by the appellant to appeal that decision. It was asserted that the judge, having found the decision not to be in accordance with the law, should not have gone on to make substantive findings on the merits of the appeal and that once she did so and found that the respondent had not discharged the burden of proof, she ought to have allowed the appeal outright.

6. Following a grant of permission, the matter came before Upper Tribunal Judge Craig on 15 February 2013. UTJ Craig found that the judge had not erred in law and that she had been entitled to determine the appeal as she did.

7. The case was then remitted to the Secretary of State. The appellant and her husband were interviewed and a new decision was made by the respondent on

13 August 2013 refusing the application again, on the same basis as previously, namely that the marriage was one of convenience.

8. The appellant appealed against that decision and her appeal was heard by Judge Hawden-Beal in the First-tier Tribunal on 28 May 2014. Judge Hawden-Beal had before her, and referred in her findings to the decisions of Judge Hanes and UTJ Craig. She recorded the appellant's submission that UTJ Craig had made it clear that any reference to Judge Hanes' findings would be unfair, but noted that there was no such comment in UTJ Craig's determination. She found the evidence of the appellant and sponsor to be lacking in credibility and was not satisfied that they had addressed the evidence justifying the reasonable suspicion that the marriage was one of convenience. She found the respondent's decision to be in accordance with the EEA Regulations and dismissed the appeal.

9. Permission to appeal to the Upper Tribunal was sought by the appellant on the grounds, inter alia, that Judge Hawden-Beal had erred in law by having regard to the determination and findings of Judge Hanes; by failing to take account of documentary evidence produced by the appellant; and by applying the wrong burden of proof.

10. Permission to appeal was granted on 24 June 2014.

11. Having heard detailed submissions from both parties we find that Judge Hawden-Beal's determination is materially flawed and has to be set aside in its entirety.

12. We consider Mr Uzoechina's argument, that the judge erred by having regard to Judge Hanes' findings, to be little more than an attempt to re-argue the error of law issue already determined by UTJ Craig. UTJ Craig upheld Judge Hanes' approach to the appeal before her and upheld her adverse findings. His decision was not subsequently challenged by the appellant. In the circumstances the appeal before Judge Hawden-Beal was not a remittal from the Upper Tribunal, as the grounds assert, and thus there was no requirement that there ought to be no reference to the findings of the previous judge.

13. However, we find merit in the assertion in the grounds that Judge Hawden-Beal failed to have regard to the documentary evidence before her and thus failed to make a full and proper assessment of the evidence as a whole. When hearing the appeal she had before her not only the bundle of documentary evidence that had been before Judge Hanes (referred to at paragraphs 13 and 20 of Judge Hanes' determination) but also, Mr Uzoechina told us, a further bundle of documentary evidence containing additional documents relevant to the question of cohabitation. It is not entirely clear to us precisely what documentary evidence was available to Judge Hawden-Beal, but Mr Bramble in any event did not challenge the claim that there was evidence appertaining to that issue. What is clear to us is that Judge Hawden-Beal did not make any findings on that evidence, other than by relying upon the adverse findings previously made by Judge Hanes. In the light of documentary evidence

suggesting that the appellant and sponsor had cohabited for some five years it was plainly incumbent upon Judge Hawden-Beal to address that evidence and making findings thereon. In the absence of any record in her determination to confirm that she had done so, and in the absence of any findings on that evidence, it cannot be concluded that her assessment of the relationship was a complete and thorough one.

14. In the circumstances we find that Judge Hawden-Beal's decision cannot stand and we therefore set it aside.

15. Whilst, as we have already stated, UTJ Craig's determination has not been challenged, we are mindful that this appeal arises out of a new decision taken by the respondent on the basis of further evidence adduced by the appellant and that additional documents have since been submitted to the Tribunal.

16. Accordingly it seems to us, in the interests of fairness, that the correct course would be for this appeal to be determined afresh in the First-tier Tribunal, with no regard to the adverse findings of Judge Hanes or Judge Hawden-Beal, but on the basis of a complete assessment of all the evidence that has been adduced. Such evidence will include the record of the appellant's and sponsor's interview as well as the oral and documentary evidence before Judge Hanes and Judge Hawden-Beal, although not the findings made thereon.

DECISION

17. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(a), to be dealt with afresh by a different judge.

Directions

The appellant's representatives are to produce a new appeal bundle consolidating all previous bundles and containing all the documentary evidence relied upon.

Any documentary evidence relied upon by either party is to be filed with the Tribunal and served upon the other party no later than ten days before the hearing date.

Signed
Date

Upper Tribunal Judge Kebede