



**Upper Tribunal  
(Immigration and Asylum Chamber)  
IA/44889/2013**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 29 September 2014**

**Determination  
Promulgated  
On 30 September 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE PLIMMER**

**Between**

**MISS DENISE MACDONALD**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms Anifowoghe (Counsel)  
For the Respondent: Mr Kandola (Home Office Presenting Officer)

**DETERMINATION AND REASONS**

1. The appellant is a citizen of Jamaica. She has appealed against the respondent's decision dated 7 October 2013 to refuse her application for leave to remain.

## **Procedural history**

2. This is a matter that has previously been considered by First-tier Tribunal Judge Warren Grant in a determination promulgated on 8 July 2014, in which the appellant's appeal was dismissed. The grounds of appeal are difficult to follow but they seem to submit that the Judge should have found that the respondent's decision was not in accordance with the law because it failed to consider the appellant's EEA rights as a separated spouse. This is how Judge PJG White understood the grounds when he granted permission on 5 August 2014.
3. The matter now comes before me to decide whether or not the determination contains an error of law.\_

## **Hearing and findings**

4. The hearing began at 2.30pm. The appellant seemed to be unrepresented. I heard brief submissions from Mr Kandola and gave the appellant an opportunity to outline her position. She indicated that she had been in contact with her husband about two months ago but did not know if he was working. After I indicated that I would be reserving my determination, Ms Arifowoghe arrived within the building. She apologised for being late and indicated that she had to return home to change her clothes because of a medical emergency. In these circumstances I heard submissions from Ms Arifowoghe and invited Mr Kandola to re-make his submissions, to which Ms Arifowoghe responded.
5. Ms Arifowoghe accepted that in order to meet the relevant requirements the appellant had to establish that her separated spouse was exercising Treaty rights, and that she could not do so before Judge Grant. She however submitted that the SSHD should have exercised her power to make relevant enquiries about the husband.
6. Whilst I accept that the respondent should have made a decision regarding the appellant's EEA rights, I do not accept that the Judge erred in law in not remitting the outstanding decision to the respondent. I agree with Mr Kandola that this is a case in which the Judge was entitled to make a decision for himself on the basis of the evidence available to him. In any event, it would have

been illogical to remit the decision when there was simply no evidence that the appellant's husband was exercising Treaty rights as the Judge clearly explained [14-15]. The appellant's application under the EEA Immigration (EEA) Regulations 2006 was bound to fail absent such evidence. In such circumstances remittal was not an appropriate course. This is a case in which the burden lay upon the appellant - she provided no evidence before the Judge that her husband was exercising Treaty rights. She still had no evidence at the date of the hearing before me. Whilst the respondent might have the power to seek such evidence the burden remains on the appellant. It appears that she has not made reasonable efforts to obtain this evidence.

7. Even if the Judge was wrong to find that the respondent's decision was in accordance with the law, I do not regard this to be a material error of law and I would not set aside the decision. This is because the application under the EEA Regulations is bound to fail. In addition, the argument that the respondent should have exercised her power to seek such evidence was not put before the Judge and it is difficult to see how he can be said to have erred in law in these circumstances. In any event this argument is also bound to fail as it has been reasonably argued on behalf of the respondent that they will not be exercising their powers in cases such as this where the appellant has not exhausted all reasonable enquiries herself.

### **Decision**

8. I find there is no error of law in the decision of the First-tier Tribunal and I do not set it aside.

Signed:

Ms M. Plimmer  
Deputy Judge of the Upper Tribunal

Date:  
29 September 2014