Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/51878/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21st May 2014	**On 24th June 2014**
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Before

Upper Tribunal Judge Chalkley

Between

MRS PHILOMENA OGHOGHO OGHENOVO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Nwaekwu, Solicitor with Moorehouse Solicitors
For the Respondent: Mr P Deller, a Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria who was born on 6th March 1986.

2. The appellant was married on 29th May 2013 to Ralph Mario Matos Gomes Da Silva, citizen of Portugal.

3. She made application to the respondent under Regulation 17 of the Immigration (European Economic Area) Regulations 2006 for the issue of a residence card as a family member of a qualified EEA national.

4. It was the appellant's claim that her husband Ralph Mario Matos Gomes Da Silva was exercising treaty rights in the United Kingdom. The respondent refused the application because she was not satisfied that the appellant had met the requirements of Regulation 6 in that it was not accepted that the appellant had proved that her husband was a worker or otherwise exercising treaty rights.

5. She appealed to the First-tier Tribunal and in a determination promulgated on 11th March 2014 First-tier Tribunal Judge Simon Batiste found her claim that the sponsor was working for Lexington Catering Ltd was false because a wage slip produced from that company dated 30th April 2013 was found by the respondent not to be genuine. A telephone call to the employer indicated that the sponsor no longer worked for that company and had only worked for them between 25th February 2011 and 31st March 2011. The judge reminded himself that the burden of proof shifted to the respondent and that the standard of proof was the highest civil standard. He was satisfied that the document submitted was false.

6. It was suggested before the judge that the sponsor was now employed by another company and one wage slip purporting to be from that company was submitted together with bank statements from the sponsor which it was claimed showed three payments going into his account from that company. He concluded that the evidence was not sufficient to enable him to be satisfied that the sponsor was employed by that company and therefore exercising treaty rights. The wage slip was not in an original form. False documents had previously been submitted which he felt undermined the reliability of documents and no contract of employment had been submitted or documents from Inland Revenue or a letter from the employer provided. He noted in particular that even if the sponsor had been employed at the end of January 2014 it did not follow that he remained employed. He dismissed the appeal.

7. In paragraph 10 of his determination he noted that the grounds of appeal claimed that the decision caused a breach of the appellant's Article 8 rights. He found, however, that since there were no removal directions the decision did not cause an interference with the appellant's Article 8 rights and he did not feel it either appropriate or necessary to deal with them.

8. The appellant challenged the decision on the basis firstly that there was sufficient evidence before the judge to show that the sponsor was exercising treaty rights and secondly on the basis that the judge was wrong not to have considered the Article 8 appeal notwithstanding that there were no removal directions.

9. First-tier Tribunal Judge Robertson found that the first challenge had no merit and failed to identify any properly arguable error of law on the part

of the judge. First-tier Tribunal Judge Robertson, having considered the determination, found, however, that there was an arguable error of law in relation to the second challenge. Article 8 was raised in the appellant's grounds of appeal and it fell to the judge to determine all the matters raised in the grounds of appeal under Section 86(2) of the 2002 Act. Following the decision of the Court of Appeal in *JM (Liberia)* where there had been a refusal of application for leave even where there was no removal direction an indirect consequence of the refusal of leave is that removal will follow. Consequently leave was granted.

10. Before me it was accepted by Mr Nwaekwu on behalf of the appellant that the evidence before the judge in relation to Article 8 consisted only of a copy of the appellant's marriage certificate dated May 2013, the appellant's statement and the sponsor's statement in a bundle of documents and a copy of her passport showing that she first entered the United Kingdom in January 2011 as a Tier 4 Student with leave until August 2013. Mr Nwaekwu accepted that on the basis of that evidence the judge, had he considered the appellant's Article 8 appeal, would have been bound to find that removal was not disproportionate. Mr Nwaekwu confirmed that his client could not succeed under Article 8 on the basis of the Immigration Rules.

11. I find therefore that the determination of First-tier Tribunal Judge Simon Batiste did contain an error of law but such error was not material. I therefore uphold his decision and the appellant's appeal is dismissed.

Upper Tribunal Judge Chalkley