**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/18530/2015

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 12th September 2017** | **On 13th September 2017** |

**Before**

**UPPER TRIBUNAL JUDGE LINDSLEY**

**Between**

**ADEJOKE DIDEOLUWA ADEDEJI**
**(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr L Ukonu, Legal Representative from Samuel Lewis Solicitors
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

**DECISION AND REASONS**

*Introduction*

1. The appellant is a citizen of Nigeria born on 19th May 1987. She arrived in the UK in September 2011 with entry clearance as a Tier 4 student migrant, which was extended until 30th September 2013. The appellant then overstayed and on 16th September 2014 applied for an EEA residence card as the wife of a Portuguese

citizen who was exercising Treaty rights in the UK. This application was refused on 22nd April 2015. Her appeal against the decision was dismissed by First-tier Tribunal Judge P Telford on all grounds in a determination promulgated on the 5th October 2016.

2. Permission to appeal was granted on the basis that it was arguable that the First-tier judge had erred in law by putting the issue of the paternity of the appellant's child in question in the decision when this was not raised by the respondent in the refusal decision and was not put to the appellant as an issue during the hearing.

3. The matter came before me on 25th April 2017 and I found that the First-tier Tribunal had erred in law and set aside the decision in its entirety. The reasons for my decision can be found at Annex A. The remaking of the appeal was adjourned with directions. Mr Nath pointed out that the notices sent out for today's hearing had indicated that this was a case management review. However, it was clear from the directions after the hearing on 25th April 2017 that the next hearing would be a remaking one, and neither party objected to my concluding the matter substantively today.

*Evidence and Submissions - Remaking*

4. The appellant provided evidence in the form of a written witness statement. She also attended before the Upper Tribunal. In her written evidence she says, in summary, as follows. She came to the UK as a student and whilst living here as a student met Mr Fernando Dos Reis in November or December 2013. They met in a local restaurant in Peckham, became friends and then started a relationship. He was living in Oxford at the time that they met. He was also exercising Treaty rights in the UK as an EEA worker. He proposed to her on her birthday in May 2014. They were married in September 2014, and she applied for a residence card as an EEA spouse in the same month. It was only at this point that they started to cohabit in London. The application for a residence card was refused and she appealed. She and Mr Fernando Dos Reis had a daughter, [F], born in October 2015. She maintains that the marriage is a genuine one, although they have now separated. She maintains Mr Dos Reis has provided her with child support for their daughter of £100 a month. She maintains that the fact that her husband does not speak fluent English, but is a Portuguese speaker which lead to problems at the Home Office interview, is not evidence that their marriage is one of convenience. She confirmed in oral evidence that she and Mr Dos Reis were not divorced, and no proceedings for a divorce had been commenced to her knowledge, although he had said on occasions he intended to divorce her.

5. Mr Ukonu presented to the Tribunal evidence that Mr Dos Reis remains in employment in the UK in the form of a letter to him from HMRC dated 6th July 2017. He also showed a copy of a letter sending this evidence to the Upper Tribunal in July 2017. He confirmed to the Tribunal orally that he had at the same time sent a copy to the Home Office Presenting Officers Unit. Whilst the evidence had neither been attached to the Upper Tribunal file as a result of being sent in

July 2017 nor arrived with the papers that Mr Nath had been given I agreed that it should be admitted, and Mr Nath did not object. Mr Nath and I both took time to examine this evidence. Mr Nath then confirmed that the Secretary of State had not put in writing any contention that [F] was not the child of the appellant and Mr Dos Reis despite his having asked for written evidence of the Secretary of State's position on this issue in accordance with the second direction I gave on 25th April 2017. In these circumstances Mr Nath accepted that the position of the respondent was that [F] was a child of the marriage of the appellant and Mr Dos Reis. He also accepted that the evidence from HMRC showed Mr Dos Reis to be in employment in the UK in 2017.

6. The respondent sets out in the reasons for refusal letter dated 22nd April 2015 her view that the marriage is one of convenience because there is no evidence of Mr Dos Reis living at the appellant's addresses in London; because all of the photographic evidence of the appellant and Mr Dos Reis was from September 2014 bar one photo from the day the questionnaire was returned in February 2015; and because the appellant and Mr Dos Reis did not request an interpreter for the interview, however it was clear that Mr Dos Reis did not understand English sufficiently to be interviewed although a lengthy interview was conducted with the appellant, and so in turn it was unclear how the appellant and Mr Dos Reis communicated.

7. At the end of the hearing I indicated that I would be allowing the appeal but that I would set out my reasons in writing.

*Conclusions – Remaking*

8. I am satisfied that Mr Ros Reis is a Portuguese citizen who is married to the appellant and that he remains in the UK exercising Treaty rights as a worker in light of the evidence from HMRC dated 6th July 2017, which in turn shows two on-going employments held on 5th April 2017 for him. I am satisfied therefore that he is a qualified person.

9. The appellant is his family member, as his legal wife, and entitled to a residence card unless her marriage is one of convenience. Whilst the lack of documentary evidence of cohabitation and the problems at interview might have raised a suspicion that the marriage might have been entered into for the predominant purpose of securing residence rights the fact, that it is not challenged by the respondent, that there is a child of the marriage I find means that the appellant has provided evidence addressing this suspicion, and satisfying me that it has not been established that the appellant's marriage is one of convenience when all the evidence is considered.

10. As such I find that the appellant is entitled to a residence card as her husband is a qualified person under Regulation 6(1) of the Immigration (EEA) Regulations 2016 and she is his family member under Regulation 7(1) of the Immigration (EEA) Regulations 2016, and thus she is entitled to a residence card under Regulation 18 of the Immigration (EEA) Regulations 2016.

**Decision:**

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal.

3. I remake the appeal allowing the appeal under the EEA Regulations.

Signed: *Fiona Lindsley* Date: 12th September 2017
Upper Tribunal Judge Lindsley

**Annex A: Error of Law Decision**

## DECISION AND REASONS

*Introduction*

1. The appellant is a citizen of Nigeria born on 19th May 1987. She arrived in the UK in September 2011 with entry clearance as a Tier 4 student migrant, which was extended until 30th September 2013. The appellant then overstayed and on 16th September 2014 applied for an EEA residence card as the wife of a Portuguese citizen who was exercising Treaty rights in the UK. This application was refused on 22nd April 2015. Her appeal against the decision was dismissed by First-tier Tribunal Judge P Telford on all grounds in a determination promulgated on the 5th October 2016.

2. Permission to appeal was granted on the basis that it was arguable that the First-tier judge had erred in law in putting the issue of the paternity of the appellant's child in question in the decision when this was not raised by the respondent in the refusal decision and was not put to the appellant as an issue during the hearing.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law

*Submissions – Error of Law*

4. In the grounds of appeal the appellant argues firstly that the First-tier Tribunal erred in law in finding that there was no evidence of the appellant's spouse's whereabouts at paragraph 7 of the decision when in fact there was evidence from the appellant (oral and written) and her spouse (written). Secondly it is argued that the finding that the appellant's child was not the child of her spouse was also irrational and unfair at paragraph 8 of the decision. This was not a point taken by the respondent, and was not put to the appellant in the hearing. If this point was to be taken the appellant would have asked for an adjournment to obtain DNA evidence.

5. Mr Nath had not been provided with the papers by the respondent, which I therefore gave him at the start of the hearing. When I explained my understanding of the case he agreed that it was appropriate to set aside the decision due to errors of law.

6. Both parties agreed that the remaking hearing needed to be adjourned as the appellant lacked evidence in supported of her case with respect to her husband exercising Treaty rights in the UK; and it was unclear what the respondent's position was with respect of the central issue of whether the appellant's marriage was one of convenience given there is a child of the marriage, evidenced by a birth

certificate and born after the date of the respondent's decision. Mr Nath had no instructions on this issue.

*Conclusions – Error of Law*

7. It was accurate, and therefore not an error of law, for the First-tier Tribunal to find that there is no evidence in the written statements as to why the appellant's spouse did not attend the hearing but was willing to write a statement saying he supported the application because of their daughter [F] born in October 2015. It was however clear from the statements of the appellant and her spouse that they are estranged, and this might provide some sort of explanation for his non-appearance.

8. The reasoning in the decision of the First-tier Tribunal at paragraphs 7 and 8 of the decision with respect to finding the marriage is one of convenience is however extremely poor, and I find there is an error of law for failure to give proper reasons for the decision. It is clear that the appellant had conceded that her marriage was not currently a subsisting relationship, but this is not a relevant consideration in EU law in any case; see Diatta v Land of Berlin. The only relevant issues are whether it is a marriage of convenience or the couple are divorced. There is no evidence or finding of a divorce, and I find that in relation to the issue of whether there is a marriage of convenience the First-tier Tribunal had to deal with the fact that on face of the papers before that Tribunal the couple had a child together in October 2015.

9. I find that the First-tier Tribunal erred in law in the consideration of this material issue by failing to consider the impact of the evidence of the birth of this child and also by making a factual mistake, which was not the fault of the appellant, when looking at the issue of the appellant's children as set out below.

10. The Judge of the First-tier Tribunal apparently became confused about the appellant's children. She has two children: the first is the one referred to in response to Question 284 of the interview at paragraph 8 of the decision. This child is a boy called David born in August 2013. His father is a Nigerian citizen to whom the appellant was not married. The appellant had a second child, a girl called [F] born in October 2015, who is the child of the marriage to her Portuguese husband according to the child's birth certificate; the evidence of the appellant; and the witness statement of her husband. There is no consideration of this child in respect of whether the marriage was one of convenience and no clear finding that she is not a child of the marriage either, although there is a finding that she has not been registered as a Portuguese citizen.

**Decision:**

11. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

12. I set aside the decision of the First-tier Tribunal.

13. I adjourn the remaking hearing in accordance with the directions set out below.

**Directions:**

1. The appellant must file with the Upper Tribunal and serve on the respondent evidence that her husband is exercising Treaty rights in the UK by the 9th May 2017.

2. The respondent must confirm in writing to the appellant and the Upper Tribunal whether she accepts the paternity of the child [F] is accurately set out on her birth certificate (and thus that she is the daughter of Fernando Dos Reis) and whether the respondent still contends that the marriage of the appellant and Mr Fernando Dos Reis is one of convenience by 23rd May 2017.

3. If the respondent does not accept the paternity of [F] is accurately set out on her birth certificate then the appellant must confirm in writing whether or not she wishes to obtain DNA evidence for submission to the Upper Tribunal and the respondent by 30th May 2017. If she wishes to obtain such evidence she must attach a copy of instructions to a company recognised as accredited for this purpose by the respondent giving the date by which the evidence will be available. At this point she should also let the Upper Tribunal know if a Portuguese interpreter is required if she anticipates her husband will attend to give evidence at the appeal.

4. The remaking hearing will be listed before me with consideration of the obtaining of any DNA evidence.

Signed: *Fiona Lindsley* Date: 25th April 2017
Upper Tribunal Judge Lindsley