



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/06021/2017

THE IMMIGRATION ACTS

Heard at HMCTS Employment Tribunals,
Liverpool
On 13th August 2018

Decision & Reasons Promulgated
On 13th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MARYLIN [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No legal representation
For the Respondent: Mr M Diwnycz (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Pickup, promulgated on 5th October 2017, following a hearing at Manchester on 20th September 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of Nigeria, and was born on 25th May 1984. She appealed against the decision of the Respondent dated 26th June 2017, refusing her application for a permanent residence card as a family member who has retained rights of residence following the termination of her marriage, pursuant to Regulation 10(5) and 10(6). The basis of the refusal is that the Appellant claims to have resided with her EEA spouse for at least one year in the UK, and that she was herself at the date of the termination of her marriage, residing in the UK in accordance with the Regulations. Her claimed EEA spouse was a Mr [NN], of [~] Townley Street, Manchester, with whom the Appellant claimed to have lived between December 2009 and December 2011. The refusal letter states that the documents in support were not regarded as reliable by the Secretary of State. Other documents purporting to show that EEA rights had been exercised were deemed to be inadequate.

The Judge's Findings

3. The judge found that the refusal letter of 26th June 2017 was wrong, insofar as it stated that the Appellant's two children were born in Nigeria, because their birth certificates showed them to have been born in the UK. The judge also observed that the Appellant's case was that she married [NN], a Czech citizen, on 5th December 2009 and that her marriage broke down such that they ceased cohabitation in 2011. The divorce was finalised by decree absolute on 5th February 2016. The judge observed that the Appellant claimed that the father of her two younger children was a man by the name of [MU] but she denied living with him, but admitted that when the Immigration Officers visited her at home he was found hiding in the loft (see paragraph 15). The judge recorded how the Appellant "confirmed that the eldest child would have lived with Mr [N] and herself, but could not produce any evidence of that" (paragraph 17).
4. In his findings, the judge held that there was "little credible or reliable evidence that the Appellant lived with Mr [N] for at least a year. It comprises a gas bill in Mr [N]'s name only, two supposed tenancy agreements, and a letter from the landlady, who was not called as a witness" (paragraph 21). The judge regarded the evidence to have been "woefully inadequate" (paragraph 21). As far as Mr [N] was concerned, "he was not called as a witness in support" and there were "no photographs of the Appellant with Mr [N]" (paragraph 21).
5. The judge dismissed the appeal.

Grounds of Application

6. The grounds of application state that the judge had erred in law in that he had failed to abide by the strictures in DIATA and in the case of PM (EEA - spouse- "residing with") Turkey [2011] UKUT 89, which decisions were to the effect that where there was a genuine marriage, the parties do not have to live together, so long as they have resided together for at least one year during the marriage's duration.
7. On 28th March 2018, permission to appeal was granted.

8. There was no Rule 24 response.

Submissions

9. At the hearing before me on 13th August 2018, the Appellant appeared in person and requested an adjournment. She said that she had been unable to find lawyers to represent her. I noted that she had been unrepresented before Judge Pickup below as well. I also noted there had been an adjournment request by Crown & Law (Solicitors) on 30th July 2018, stating that they had been instructed in two of the matters in Manchester, and therefore could not appear at this hearing in Liverpool on 13th August 2018.

10. That application was rejected by the Upper Tribunal on 1st August 2018 on the basis that,

“This is not a sufficient reason to justify a reason for an adjournment. There is adequate time for Counsel to be instructed, and for that Counsel to prepare for the hearing. No reason is offered as to why the nature of the case is such that the Appellant would be disadvantaged by alternate representation”.

The Appellant offered no evidence demonstrating that she had indeed approached other legal representatives.

11. Subject to this the hearing continued. The Appellant, who spoke English fluently, stated that if she had asked Mr [N] to appear at the hearing below, then she thought he might have appeared. However, she was in a hurry to leave the household after the marriage broke down and she was only able to take a limited number of documents with her.

12. For his part, Mr Diwnycz stated that a finding by Judge Pickup that, “there is little or no credible evidence” (at paragraph 21) that the Appellant and Mr [N] had been living together, was entirely sustainable. However, a question mark existed in relation to whether the judge had given consideration to the “best interests” of all three children of the Appellant. The existence of there being three, rather than two children, of the Appellant was a matter that was not properly flagged up in the determination but it raises the question whether Section 55 BCIA consideration was given to the “best interests” of the children.

Error of Law

13. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (paragraph 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. Although the judge cannot be remotely criticised for having found that the Appellant could not demonstrate that she had lived with Mr [N] for one year, and although it is a case that the legal authorities used with a view to getting permission in the Upper Tribunal are entirely wrongly used, because they do not apply to a situation where the marriage is not genuine, the fact remains that the position of the children, in terms of the consideration of their “best interests” appears

to have fallen by the wayside. There are three children. The eldest, “[J]” was born on 7th July 2007. He was born in the UK. He has been in this country for eleven years. He is a “qualifying child”. The result appeared to figure in any significant way in the determination below. The other two children are not qualifying children. They are “[O]” who was born on 8th April 2015, and “[P]” who was born on 14th December 2016. They are considerably younger, and any decision with respect to their having to accompany the Appellant back to her own country, would be much more easier to resolve, than the position of “[J]” who has been born in the UK and has had his childhood in this country, but whose position needs to be fully explored. Given Mr Diwnycz’s acceptance that the position of these children have not been considered in terms of the Section 55 BCIA 2009 obligation, I have no option but to make a finding of an error of law and remit this matter back to the First-tier Tribunal.

Notice of Decision

14. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. I remit this matter back to the First-tier Tribunal, to be determined by a judge other than Judge Pickup, pursuant to Practice Statement 7.2(b), because of the nature and extent of any judicial fact-finding in relation to these children.
15. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

10th September 2018