



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/04588/2018**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 13 June 2019**

**Decision & Reasons Promulgated
On 25 June 2019**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

**MISS DRUTIBEN HIMATBHAI KAPDI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss D Qureshi, Counsel instructed by West Brook Law
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Farmer promulgated on 21 January 2019 in which her appeal against the respondent's decision dated 15 January 2018 to revoke her EEA residence card as a spouse of an EEA national exercising treaty rights in the United Kingdom. Thereafter there followed a Section 10 removal decision by the Respondent pursuant to Regulations 23 and 32 of the Immigration (European Economic Area) Regulations 2016. The respondent's decision was on the basis that the marriage was no longer subsisting, the appellant having divorced from her husband and that prior to divorce, the marriage had not subsisted for a sufficiently long period of time for her to be entitled to any retained right of residence.

2. Before the First-tier Tribunal proceedings, the appellant was represented by a firm of solicitors who contacted the Tribunal shortly before the listing to state that the client's recent instructions were that she would like to pursue this appeal only on the papers and added that a witness statement would follow in due course.
3. As at the date of the hearing on 14 January 2019, there was no representation for either party and the Judge noted that the letter of 11 January (referred to above) indicated that the appellant wished to have the matter considered on the papers. The Judge noted that by the time of leaving the Tribunal on 3pm of the day of the hearing, no witness statement had been received. The documents before the Judge were incredibly limited, detailing only the date of marriage and divorce and the Reasons for Refusal Letter. There were no further documents of any form from the appellant relied upon, nor was there any written statement.
4. In these circumstances, the Judge found that the appeal had to be dismissed, essentially as there was a lack of evidence before him to show that there was any retained right of residence under the EEA Regulations.
5. The appellant sought permission to appeal on the basis that in fact she did meet the requirements for a retained right of residence in the United Kingdom, primarily based on domestic violence from her spouse and that she had been not only inadequately but inappropriately represented by her previous solicitors. The appellant stated that she did provide documentary evidence of domestic violence to her former solicitor but these were not passed on to the Tribunal. She states that she was assured that they would prepare a witness statement for her to explain all of this and provide the evidence, but this was not done. She was aware that the solicitors had informed the Tribunal without her consent to consider the appeal on the papers as opposed to an oral hearing. The grounds of appeal state that the appellant is currently pursuing a complaint against her previous solicitors with the Legal Ombudsman for their failure and negligence and requests an opportunity for a fair hearing in this case.
6. Upper Tribunal Judge Bruce granted permission to appeal on 10 May 2019 on the basis that consideration could be given to whether this was a case which fell within **MM (unfairness E & R) Sudan [2014] UKUT 00105 (IAC)**. In that case it is noted that a successful appeal is not dependent on the demonstration of some failing on the part of the First-tier Tribunal, thus an error of law may be found to have occurred in circumstances where some material evidence, through no fault of the First-tier Tribunal, was not considered with resulting unfairness. This is of course a case in which the Judge made a proper and appropriate decision on the basis of the very limited evidence before him. No criticism can be made of the Tribunal or of the Judge in this particular case for the decision made in these circumstances.
7. Upper Tribunal Judge Bruce also noted in the grant of permission that the appellant may wish to consider whether a more straightforward solution would be to make a fresh application to the Home Office, properly

supported by all of the relevant evidence and if she is unable to evidence her ex-husband's economic activity (which she would be required to do under the Regulations for a retained right of residence) she should make a statement explaining why and what efforts she has made to secure such evidence and request that the Home Office conduct its own checks with HMRC.

8. Prior to the grant of permission, it transpires that the appellant did make a further application for an EEA residence card on the basis of a retained right of residence on 25 March 2019 and which was refused by the respondent on 1 May 2019. The application was refused on the basis that there was a lack of adequate evidence to show that the marriage had lasted for at least three years, that there were difficulties within the marriage and that their residence was in accordance with the Regulation for a continuous period. The refusal was largely on the basis that an application was not accompanied by the evidence referred to and was therefore refused. There are other fuller reasons for the refusal which were not relevant to the current appeal.
9. The appellant has proceeded with this appeal to the hearing today, submitting a bundle of documents shortly before. The bundle includes a witness statement dated 7 June 2019 which sets out her immigration history, details in relation to her marriage and attaches documents in relation to domestic violence in particular. The last few paragraphs of that written statement deal with the situation surrounding the First-tier Tribunal hearing, although I am told by Counsel that the written statement is wrong and no formal correction has been made to it. I did not invite Counsel to make formal corrections on the basis of other matters in this case which made that unnecessary.
10. The further documents submitted within that bundle include those referenced in the witness statement in relation to domestic violence, but do not address the other EEA matters required to satisfy the requirements in Regulation 10 of the EEA Regulations for a retained right of residence. In particular, there remains a lack of evidence in relation to the duration of the marriage and the exercise of treaty rights by the EEA national and then by the appellant. That is despite the clear indication from Judge Bruce that these are relevant matters for the appellant to establish.
11. Counsel submitted that it was hoped that an error of law would be found by the Upper Tribunal, following which the matter would be remitted to the First-tier Tribunal and therefore there would be an opportunity to provide those further documents which are in fact available to the appellant. That is contrary to the directions which were given in this case which clearly indicate that if an error of law is found the Upper Tribunal would proceed, if at all possible, to re-determine the appeal afresh and parties should proceed on that basis.
12. There is also one further significant absence from the bundle to the appeal hearing which is any evidence of an actual complaint against the previous solicitors or in fact any detail as to what happened, as to instructions and preparation and so on. I am told that the appellant was aware of the

hearing date but later advised not to attend as it was not necessary for her to give oral evidence and that she was essentially poorly advised and wrongly advised. Although it was said in her grounds of appeal that a complaint to the Legal Ombudsman was in process no complaint has in fact yet been made about the previous representatives. It is not clear if any complaint has even been made directly to them and there is certainly no evidence of correspondence or a response from them. It is said that there has been miscommunication between the appellant and her current solicitors as to who was going to make the complaint. That does not assist anyone in this case. The impression given by the grounds of appeal was that a complaint had been made and was in progress.

13. In these circumstances, I do not find an error of law in the decision of the First-tier Tribunal. To find an extraneous reason why the First-tier Tribunal proceedings were not conducted fairly, there is real need for evidence about what instructions were given to the former solicitors and complaints made against them. That is clear from the case of **BT (Nepal) (former solicitors' alleged misconduct) [2004] UKIAT 00311**. If an appeal is based in whole or in part on allegations about the conduct of former representatives there must be evidence that those allegations have been put to the former representative and the Tribunal must be shown either the response or correspondence indicating that there has been no response. In the present appeal, there is no such evidence and it is not even clear that any complaint has been made.
14. Despite what is said in the appellant's written statement and in her grounds of appeal, this is not a case which falls within the ambit of **MM** or establishes that there can be an error of law in the proceedings to the First-tier Tribunal by not considering material which was not before it. The Judge properly considered the very limited evidence before him and there was no error of law in doing so in these circumstances.
15. This conclusion is also reinforced on the basis that any error could not possibly be material where there remains a lack of evidence about the marriage subsisting for the required period of time and a lack of any evidence at all about the EEA national's economic activity or exercise of treaty rights in the United Kingdom.
16. This is clearly a case where the appellant is not prejudiced because it is entirely open to her to make an application to the Home Office accompanied by the required evidence to establish her claim to retained right of residence. It is the most appropriate course for her to do that rather than take up the Upper Tribunal's time with an inadequately prepared appeal.
17. For all of these reasons there is no error of law in the decision of the First-tier Tribunal and I dismiss the appeal.

Notice of Decision

The appeal is dismissed on human rights grounds.

No anonymity direction is made.



Signed
2019

Date

21st June

Upper Tribunal Judge Jackson