Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33627/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23rd December 2015	**On 19 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

MS. ROSE WAMBUI KARIBA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr W M Rees, Instructed by Stanley Richards Solicitors
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision and reasons by First-tier Tribunal Judge Ghani promulgated on 15th June 2015 in which he dismissed an appeal against a decision made by the Secretary of State on 6th August

2014, to refuse to issue the appellant with a residence card as the family member of an EEA national exercising treaty rights in the UK.

BACKGROUND

2. The appellant is a Kenyan national who entered the UK in 2007 as a student nurse. On 12th July 20107, the appellant applied for a certificate of approval to marry her sponsor, Bruno Jorge Da Silva Pina ("Mr Pina"), a Portuguese national. That was approved on 24th July 2007. On 7th September 2007, the appellant married Mr Pina at Luton Registry Office and on 17th March 2008, the appellant submitted an application for a residence card. A residence card was issued to her on 16th June 2009.

3. On 26th January 2010, the respondent received an application for a residence card by Stella Okorode, a Nigerian national who submitted a marriage certificate showing she had married the same sponsor as the appellant, Bruno Jorge Da Silva Pina, at Greenwich registry office on 12th December 2009.

4. On 12th June 2014, the respondent received yet another application. This time from Judith Chinecherem Ibenne Ukandu, another Nigerian national who submitted a marriage certificate showing she had also married the same sponsor as the appellant, Bruno Jorge Da Silva Pina, this time at Luton registry office on 4th February 2013.

5. On 24th June 2014, the appellant applied for a permanent residence card as the family member of her husband Mr Pina, who claimed to have exercised Treaty rights for a continuous period of 5 years in the UK in accordance with the Immigration (European Economic Areas) Regulations 2006 ("the 2006 EEA Regulations").

6. The application was refused for the reasons set out in a 'Reasons for Refusal' letter dated 6th August 2014. The respondent was not satisfied

that the appellant and her sponsor have resided in the United Kingdom for a five-year period without any breaks in accordance with the 2006 Regulations. The respondent also concluded that there was compelling evidence undermining the appellant's credibility because of the evidence that the appellant's sponsor was involved in two other marriages, and had submitted identical evidence, and identification documents in other applications.

The decision of First-tier Tribunal Jude Ghani

7. At paragraphs [5] to [9] of his decision the First-tier Tribunal Judge refers briefly to the respondent's decision and the reasons for it. At paragraphs [10] to [14] he notes the evidence that he received from both the appellant and her husband. The Judge's findings and conclusions upon the appeal, are said to be set out at paragraphs [15] to [22] of the decision under the heading "My Findings".

8. It is uncontroversial that at paragraph 15 of his decision, the Judge correctly directed himself as to the 2006 Regulations. The Judge states:

> *"15. The Appellant's application was submitted on 24th June 2014. Under Regulation 15(1)(b), as a family member of her husband, she has to establish that she has resided in the UK with the EEA national in accordance with the 2006 Regulations for a continuous period of 5 years. In other words she has to establish that her husband has been exercising Treaty rights for a continuous period of 5 years. She has to provide evidence from June 2009 up till June 2014 of her husband's employment, self-employment, as a Job Seeker or as a student."*

9. At paragraphs [21] and [22], the Judge states:

> *"21. As far as the various applications which were submitted with the Appellant's husband's identity having been used and the application by Miss Judith Ukandu, both the Appellant and her husband confirmed that they were not aware of these. The Respondent has failed to*

confirm as to what transpired as far as these applications are concerned. Both the Appellant and her husband confirm that her husband's identity documents had been lost. It is quite possible that his identity has been used in these other applications.

22. I find with the evidence before me that there is insufficient evidence to make a finding that the Appellant and her EEA sponsor have resided in the United Kingdom for a continuous 5 year period in accordance with 2006 Regulations. Although the Appellant's husband has been in employment at various times during the 5 year period, there is insufficient evidence to make a finding that this has been continuous and I therefore find that the Appellant cannot succeed under 2006 Regulations."

The Grounds of Appeal

10. The appellant appeals on three grounds. First, the Judge erred in his finding at paragraph [22] that although the appellant's husband has been in employment at various times during the 5-year period, there is insufficient evidence to make a finding that this has been continuous. The appellant submits that the Judge erred in focusing upon whether the appellant had established that her husband had been in continuous employment because that is not what is required under the 2006 Regulations. The appellant submits that the Judge should have focused upon whether the appellant's husband was exercising treaty rights. The evidence before the Tribunal was that at different times he had been a 'worker', 'self-employed' or a 'job seeker' in accordance with the 2006 Regulations.

11. Second, the Judge failed to make any finding as to the matters set out in the statement of HMRC dated 10th June 2014 that had been relied upon by the respondent. The appellant submits that the information provided by HMRC was factually incorrect or incomplete with regard to Mr Pina's employment history in material respects.

12. Third, the Judge failed at paragraph [21] of his decision, to make any finding as to whether the appellant's husband had indeed married three times. The appellant submits that given the serious nature of the allegation, the Judge should have made a finding as to whether or not the appellant's husband played a part in the other applications made to the respondent.

13. Permission to appeal was granted on 23rd September 2015 by Upper Tribunal Judge Perkins. The matter comes before me to consider whether or not the decision of the Tribunal involved the making of a material error of law, and if the decision is set aside, to re-make the decision if appropriate.

14. At the hearing before me, Mr Rees adopted the appellant's grounds of appeal. He submits that although the Judge may have correctly directed himself as to the 2006 Regulations at paragraph [15] of his decision, the Judge failed to engage with the requirements in the following paragraphs. He submits that at paragraphs [16] to [20] the Judge simply refers to the evidence before him, and failed to make any findings as to the periods during which the appellant was employed, self-employed or in receipt of benefits. Mr Rees submits that the only finding made by the Judge is that which is set out at paragraph [22] of the decision, but in that paragraph, the Judge erroneously focuses upon whether the appellant' husband has been in employment at various times during the five-year period and erroneously concludes that there is insufficient evidence to make a finding that this employment has been continuous.

15. The respondent has filed a Rule 24 response dated 6th October 2015 that was adopted by Mr Whitwell. The respondent opposes the appeal and submits that the Judge directed himself appropriately. The respondent submits that the Judge acknowledges that there were periods where the appellant's husband was in receipt of jobseekers allowance and that having carefully considered the evidence before

him, it was open to the Judge to find that there was insufficient evidence to show that the sponsor came within Regulation 6 and had been continuously exercising treaty rights for a period of 5 years.

16. Mr Whitwell submits that the determination must be read as a whole and that it is clear that at paragraph [15] of the decision, the Judge correctly directed himself as to the requirements of the 2006 Regulations. He submits that the question is therefore whether the Judge applied that self-direction properly. He submits that at paragraphs [16] to [20] of the decision, the Judge sets out, and has regard to the evidence that was before him. He submits that the finding made at paragraph [21] is one that is made in favour of the appellant, and that the Judge appears to accept the account given by the appellant and her husband, that the appellant's husband's identity documents had been lost, and it is therefore quite possible that his identity has been used in the other applications referred to by the respondent.

Discussion

17. I have carefully read through the decision of First-tier Tribunal Judge Ghani. At paragraph [22] the Judge found that there was insufficient evidence to make a finding that the appellant and her EEA sponsor have resided in the UK for a continuous 5 year period in accordance with the 2006 Regulations. The Judge then states "Although the appellant's husband has been in employment at various times during the 5 year period, there is insufficient evidence to make a finding that this has been continuous and I therefore find that the appellant cannot succeed under the 2006 Regulations".

18. At paragraphs [16] to [20] of his decision, the Judge refers to the information that is set out in the letter from HMRC dated 10th June 2014 setting out Mr. Pina's employment history. The Judge sets out in each of those paragraphs, the evidence given by the appellant and the other

evidence before him, but fails to make any findings as to the periods during which the appellant was employed, self-employed or in receipt of benefits. The Judge might well have been satisfied that in respect of each period, there was insufficient evidence to establish that the appellant's husband has been exercising treaty rights but what is set out in those paragraphs is a rehearsal of the evidence, and one cannot discern from what is set out, any findings.

19. I accept that in those paragraphs, the Judge refers to the evidence before him relating to the earnings from employment, self-employment and the receipt of job-seekers allowance. If the Judge had made findings as to whether the appellant's husband was exercising treaty rights in the UK during those periods, I would have had little hesitation in deciding that the overall conclusion at paragraph [22] is an unfortunate oversight because it would be clear that the Judge had engaged with the correct test. However, in my judgement, the lack of findings in paragraphs [16] to [20] support the submission made by Mr Rees that the Judge has erroneously focused upon whether the appellant's husband has been continuously employed during the 5 year period, rather than whether the appellant's husband has been exercising treaty rights during that 5 year period.

20. This amounts to an error of law. The judge has not made findings or adequately explained his reasons, so that the appellant can be satisfied that the Judge had the correct requirements in mind. Paragraph [22] of the decision suggests that the Judge confused "exercising treaty rights" with "being employed". In those circumstances in my view there is a material error of law and the decision is set aside with no findings preserved.

21. The decision needs to be re-made and I have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having taken into account paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012 which states;

> ‘7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that;
>
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party’s case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.’

22. In my view the requirements of paragraph 7.2(b) apply, in that the nature and extent of any judicial fact-finding necessary, will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

23. The decision of the First-tier Tribunal involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the First-tier Tribunal.

24. No anonymity direction is made.

Signed Date 19 May 2016

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

As the appeal was dismissed by the First-tier Tribunal, there was no fee award. I have remitted the appeal back to the First-tier Tribunal. No fee award is made by the Upper Tribunal. This is to be considered by the First-tier Tribunal.

Signed

Deputy Upper Tribunal Judge Mandalia