



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/07739/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Manchester

Decision & Reasons

On 13th October 2017

Promulgated

On 19th October 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**OLUFUMILAYO OMOWUNMI AJIBOYE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss W Bremang of Counsel, instructed by Arndale Solicitors

For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge O'Brien of the First-tier Tribunal (the FTT) promulgated on 12th December 2016.
2. The Appellant is a female Nigerian citizen born 25th April 1980. She applied for confirmation that she was entitled to permanent residence in the UK pursuant to the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations).

3. The application was made on the basis that the Appellant had been married to an EEA national, the marriage having taken place on 24th February 2007 in Nigeria, and which ended in divorce on 11th November 2014. The Appellant's case was that she had retained a right of residence following divorce.
4. The application was refused on 17th March 2016 with reference to regulations 10(5) and 15(1)(f) of the 2006 Regulations.
5. The Appellant appealed and requested that her appeal be decided on the papers without an oral hearing.
6. The FTT dismissed the appeal in a decision promulgated on 12th December 2016. The FTT accepted that documentary evidence proved that the marriage had lasted for more than three years prior to divorce, and the couple had resided in the UK for at least one year during their marriage. The FTT found that the EEA national had been self-employed in the UK "since no later than 5th April 2009 until no earlier than 5th April 2015." The EEA national was exercising treaty rights at the date of divorce and the Appellant had been a worker prior to that date and thereafter until at least 28th August 2015. The appeal was dismissed for reasons given in paragraph 19 of the FTT decision which is set out below;

"19. Whilst she continued to work, therefore, the Appellant enjoyed retained rights of residence. However, there is no evidence before me that the Appellant was resident in the United Kingdom before 6th October 2010 or that she continued to work until 6th October 2015. It might be that such evidence is easily obtainable by the Appellant, upon production of which I would find that the Appellant had acquired permanent right of residence. Until such time, however, her application for a permanent residence card must fail."

7. The Appellant applied for permission to appeal to the Upper Tribunal. In summary it was contended that the FTT had erred by not considering material evidence which proved that the Appellant had been resident in the UK before 6th October 2010. The Appellant's representatives referred specifically to the Respondent's bundle of documents at N1 and N2, those documents being a GP letter dated 8th September 2015 which related to the Appellant, and an NHS medical card which also related to the Appellant.
8. The Appellant's representatives also attempted to submit new evidence to the Tribunal, which is not appropriate, as it cannot be an error of law for the FTT not to have considered evidence which was not before it.
9. Permission to appeal was initially refused by Judge Cruthers of the FTT, but a renewed application was granted by Upper Tribunal Judge Grubb in the following terms;
 - "2. It is arguable that the judge in erred in law by failing to take into account evidence within the Respondent's bundle relevant to whether the Appellant could establish her presence in the UK prior to 6th October 2010. The Respondent's bundle does not appear to be in the

file. The appeal was determined on the papers and it is unclear whether the Respondent filed a bundle with the documents referred to in the decision letter. If that was the case, and it will need to be established at the hearing, there was an arguable procedural irregularity.

3. For these reasons, permission to appeal is granted.”
10. Following the grant of permission directions were issued making provision for there to be a hearing before the Upper Tribunal to ascertain whether the FTT decision contained an error of law such that it should be set aside.

The Upper Tribunal Hearing

11. Miss Bremang relied upon the grounds contained within the application for permission to appeal, and the grant of permission by Judge Grubb.
12. Mr McVeety advised that the Respondent had prepared a bundle of documents, but there was no evidence that this had been lodged with the Tribunal. Mr McVeety advised that if the Respondent's bundle had not been before the FTT, it was accepted that this would amount to a procedural irregularity, and a material error of law.
13. Miss Bremang submitted that the decision of the FTT should be set aside. The Appellant maintained her request for the appeal to be decided on the papers, and therefore Miss Bremang submitted that the appeal should be remitted to the FTT to be decided on the papers. Mr McVeety did not oppose that application.

My Conclusions and Reasons

14. As I announced at the hearing, I am satisfied that the Respondent's bundle of documents was not before the FTT. In reaching that conclusion, I took into account that Mr McVeety could not submit any proof that the bundle had been lodged with the FTT, that there was no Respondent's bundle upon the Tribunal file, and there was no reference to the Respondent's bundle at paragraph 5 of the FTT decision which set out the documents which were before the FTT.
15. At paragraph 19 of the FTT decision it was found that evidence was missing, such that there was no documentary evidence to prove the Appellant was resident in the UK before 6th October 2010, or that she continued to work until 6th October 2015. It is clear that the Respondent's bundle had been served upon the Appellant, as her representatives made specific reference to documents contained within the Respondent's bundle at N1 and N2 in the application for permission. It is apparent that contained within the Respondent's bundle was the evidence referred to by the Appellant's representatives, and that evidence was submitted with the application for permanent residence, as the GP letter dated 8th September 2015, and the NHS medical card are contained in the list of documents, which was submitted with the application, referred to at page 3 of the Respondent's refusal letter.

16. As conceded on behalf of the Respondent, the absence of the Respondent's bundle before the FTT, means that potentially material evidence was not considered by the FTT, and this amounts to a procedural irregularity and a material error of law.
17. Therefore the decision of the FTT is unsafe and is set aside.
18. Having considered the Senior President's Practice Statements at paragraph 7, I decided that it was appropriate to accede to the request that the appeal be remitted to the FTT to be decided on the papers. This is because I accept that there was not a fair hearing before the FTT in the absence of the Respondent's bundle, and the nature of the fact-finding required, means that it is more appropriate for the appeal to be decided by the FTT rather than the Upper Tribunal, which is not primarily a fact-finding Tribunal.
19. I find that some findings made by the FTT can be preserved as they have not been the subject of any challenge. Those findings are that the couple married on 24th February 2007 and divorced on 11th November 2014. The marriage lasted more than three years prior to divorce, and the couple resided in the UK for at least one year during the marriage. The EEA citizen to whom the Appellant had been married was self-employed in the UK as found in paragraph 18 of the FTT decision "since no later than 5th April 2009 until no earlier than 5th April 2015" and was exercising treaty rights at the date of divorce.
20. Mr McVeety helpfully copied the Respondent's bundle, which has annexes A - N and this is now on the Tribunal file. There is also on the Tribunal file an updated bundle of documents from the Appellant comprising 207 pages. For the avoidance of doubt, these documents are admitted into evidence. Therefore the FTT Judge considering this appeal will have the benefit of considering bundles of documents submitted by both parties.
21. It would be of assistance to that judge if the Appellant's representatives submitted a skeleton argument setting out the issues, but that is a matter for the Appellant and her representatives and is not a direction.
22. The appeal will therefore be considered by an FTT Judge other than Judge O'Brien on the papers as requested by the Appellant.

Notice of Decision

The decision of the FTT 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 FTT.

Anonymity

There has been no request for anonymity and I see no need to make an anonymity order.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

16th October 2017

**TO THE RESPONDENT
FEE AWARD**

No fee award is made by the Upper Tribunal. The issue of any fee award will need to be considered by the FTT.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

16th October 2017