Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/06632/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
on 11th July 2019	**on 8th August 2019**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MRS NIJDEKA HELEN UDE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr Waithe, instructed by Mascot Solicitors

DECISION AND REASONS

1. The Secretary of State made the application for permission to appeal but for the purposes of this determination I shall refer to the parties as they were described before the First-tier Tribunal that is Ms Ude as the appellant and the Secretary of State as the respondent.

2. The respondent seeks, with permission, to challenge the determination of First Tier Tribunal Judge Plumptre ('the judge'), promulgated on 20th April 2019 allowing the appellant's

appeal against the refusal of a residence card to confirm that she was a family member of an EEA national exercising Treaty rights in the UK.

3. The one issue before me and on which permission had been granted was that the judge had arguably erred in hearing the appeal despite the respondent having certified the appeal under regulation 36 (8). It was asserted by the Secretary of State that the judge had acted ultra vires.

4. In a decision dated 20 September 2018 the respondent set out that the application dated 23 August 2018 for a residence card had been refused because the appellant had not provided adequate evidence to show that she qualified for a right to reside as the family member of her EEA sponsor.

5. The refusal letter of the Secretary of State detailed that the appellant had stated that she was the spouse of an EEA national provided a marriage certificate issued on 1 April 2015. She was a Nigerian national who had been issued with entry clearance as a visitor for the period from 7 August 2012 to 7 August 2014. The appellant entered the United Kingdom on 29 October 2012. In 2013 she applied for leave to remain on the basis she had a Portuguese partner but that application was refused on 8 October 2013. She was issued with notice of liability to removal on 10 April 2015.

6. She then claimed to have married a Bulgarian national on 1 April 2015. That marriage was not accepted as genuine but found to be one of convenience because she had previously overstayed her multiple entry visa and had no intention of returning to Nigeria. She made an application for a residence card on 17 April 2015 which was refused on 15 July 2015 after a marriage interview concluded that the relationship was a marriage of convenience. She applied for a residence card on 26 June 2017 which was rejected owing to no fee and she again reapplied for a residence card of 12 September 2017 which was refused on the 1 December 2017. Her marriage again was deemed to be a marriage convenience after a home visit marriage interview was conducted. She appealed the refusal decision and First-tier Tribunal Judge M A Khan upheld the decision finding the relationship was clearly a sham.

7. The refusal letter of the Secretary of State dated 20 September 2018 set out the findings of First-tier Tribunal Judge Khan from paragraphs 42 to 48. The judge identified the inconsistencies in their interviews and also their oral evidence finding that their marriage was one of convenience.

8. The refusal letter continued that on 17 September 2017 the appellant reapplied for a residence card as a direct family

member of an EEA national and this was despite the fact that both the Home Office and immigration judge had found that the marriage was one of convenience entered into solely to benefit from EU immigration law and the application is duly refused on 1 December 2017.

9. The decision letter which is currently being appealed dated 20th September 2018 proceeded

'*In this latest application, the documentation you have submitted amounts to being at best current evidence of cohabitation. While these documents may or may not show you are residing with your sponsor none of this evidence addresses the previous grounds for refusal stated nor do they address the concerns laid out by the Immigration Judge in the appeal determination as stated.*

As outlined in the evidence listed above, you have not provided anything materially different from your first application, or in the appeal dated 29th of November 2016 which would demonstrate your marriage is not one of convenience. You have therefore been refused a residence card with reference to regulation 2 of the regulations.

In addition, regulations 36 (7) and (8) of the regulation states following:

"(7) A person may not bring an appeal under these regulations on a ground certified under paragraph (8) or rely on such a ground in an appeal under these regulations.

(8) The Secretary of State or an immigration officer may certify a ground for the purposes of paragraph (7) if it has been considered in a previous appeal brought under these regulations and section 82 (1) of the 2002 Act"

Based on the information provided in your applications dated 17 April 2015 and 12 July 2017, in your appeal dated 29 November 2016 and in your current application dated 17 January 2017, the Secretary of State considers that your claim to be in a genuine marriage with Petar Krasimirov Petrov should be certified in accordance with regulation 36 (7). You may not therefore bring an appeal, or rely on such a ground in any appeal under these regulations.

Redress through other legal channels may be possible and it is recommended you seek legal advice should you choose to do so.

Therefore, despite your relationship with Petar has been deemed a sham 4 times and recently certified, plus the immigration judge also agreed that the relationship is not

genuine, you made a further application for a residence card as the spouse of Petar on 23 August 2018.

...

Next Steps

You have a right of appeal against this decision under regulation 36 of the Immigration (European Economic Area) Regulations 2016. This appeal may be brought before the first-tier tribunal (Immigration and Asylum Chamber) (IAC)) while you are in the UK and may continue while you are outside of cake if necessary.

You have 14 calendar days of the date this decision was sent to appeal. Information on how to appeal the appeal process and the fees payable are all available online at: https: www.gov. uk/immigration-asylum-tribunal/overview'.

The application for permission to appeal.

10. The grounds of appeal by the Secretary of State set out that judge made a material error of law in the determination by acting ultra vires and the judge misdirected herself 'to her jurisdiction to so do' (sic). Any mistaken reference by the officer drafting the refusal letter/decision to an appeal right existing was just so, a mistaken reference. This was brought to the judge's attention as soon as practicable by the Home Office presenting Officer. The grounds for permission explained

"Appeal rights are not conferred by whims or slips of the pen, or omissions or errors. They stem solely from Statute. The relevant law covering this decision is as follows

Statutory Instruments 2016 No 1052 Immigration

The Immigration (European Economic Area) Regulations 2016..."

11. The application submitted that as the decision was clearly certified under regulation 36(7) and (8) of the EEA regulations the learned judge had no jurisdiction to hear the appeal as no appeal existed in law. For the judge to proceed to grant an appeal right which could not exist was materially erroneous and ultra vires whether or not an appeal right had been implied erroneously by incautious drafting. The issue under appeal had been dealt with and dismissed by an immigration judge as a previous hearing and had not been subject to any successful appeal by the appellant subsequent to that appeal hence the certification.

The First-tier Tribunal determination

12. First-tier Tribunal Judge Plumptre set out from paragraphs 10 to 14 the issues on jurisdiction raised as a preliminary issue by the presenting officer at the hearing before her in relation to the certification. The judge recorded at [10] that the Presenting Officer submitted that the appellant had no appeal right because her application made on 23 August 2018 for a residence card had been certified in the letter 20th of September 2018 as had the earlier application 17 January 2017 in a letter dated 25 April 2018.

13. The judge set out sections of the refusal letter under challenge, and which I have set out above, and at [11] the judge recorded that the presenting officer conceded that the template paragraph regarding the appeal should have been deleted but nonetheless the presenting officer relied on in the body of the letter; it was plain that the appeal had been certified because on page 5 of 8, it was stated that the appellant had not provided anything materially different from her first application or in the appeal dated 29 November 2016 and made reference to regulations 36 (7) and (8) of the EEA regulations. The identical points were made in the respondent's earlier letter of 25th April 2018 but the Next Steps paragraph was omitted. The presenting officer submitted that the issues of a marriage of convenience had been considered by the respondent and by an Immigration Judge on 11 November 2016 who had upheld the respondent's refusal and found a marriage convenience.

14. Judge Plumptre at [12] recorded that Mr Waithe submitted that it was a very late application and it was inequitable and unfair.

15. In agreement with Mr Waithe, the judge found at [13] that the form IAF T/5 had been lodged by the solicitors, the fee paid which had been accepted by the tribunal, and a notice of hearing had been sent to the appellant and solicitors as long ago as 24 October 2018 and specifically that an appeal bundle had been prepared by the Home Office and to the appellant's solicitor on 12 November 2018, without this preliminary issue being raised. The judge noted that the appellant rightly relied on the terms of the letter. The presenting officer stated that an appeal bundle was generated by a processing/bundling team and that the respondent covering letter 12 November 2018 at the start of the bundle was a generic document.

16. The judge proceeded

'*I refused the respondent's application to strike out this appeal finding that it was made far too late in the conduct of these*

proceedings. This issue could and should have been raised much earlier. Further, the respondent had specifically granted in writing a right of appeal in the refusal letter dated 20 September 2018 and whilst it might be inconsistent with the body of the letter and inadvertent, the appellant was entitled to rely on these words duly lodged an appeal which had not been rejected. Thereafter, the tribunal had processed the appeal in the standard manner without the issue of there being no right of appeal [n]ever being brought to the appellant's attention. I agreed with and adopted the submission of Mr Waithe that it was both unfair and far too late to raise this preliminary issue on the morning of the hearing'

17. The judge in assessing the appeal noted *Devaseelan v SSHD* [2002] UKIAT 00702, noted that the First-tier Tribunal Judge Khan had misdirected himself in relation to the burden of proof in *Sadovska v SSHD* [2017] UKSC 54. Judge Plumptre found that the appellant and her husband had lived together in the property from January 2015 and they continued to live together to the date of the hearing. The parties had married in April 2015, had been living together since January 2015 and had undergone IVF treatment which the judge found was evidence of a genuine and subsisting marriage and relationship. Further to *Sadovska,* the respondent had failed to discharge the burden to show that the marriage was not genuine and subsisting. The Secretary of State was recorded as not having challenged the oral evidence. There was a durable and subsisting relationship.

18. At the hearing before me Mr Clarke submitted that the ground of appeal in relation to the marriage had been previously certified and that only an express 'de-certification' would allow the appellant to bring an appeal on the ground certified under paragraph 36(7) or rely on such a ground. Mr Clarke referred to the body of the decision letter which he contended showed that the ground had been certified even if an appeal had been attached.

19. Mr Waithe contended an appeal right had been granted there was a duty of fairness and a duty of candour on the part of the Secretary of State.

Analysis

20. The relevant parts of the Immigration (European Economic Area) Regulations 2016 are set out above.

21. There are a number of difficulties with the position of the Secretary of State. First, it is clear that regulation 36 (7) states that the Secretary of State may certify a ground for the purposes of paragraph 36(8). Nowhere in regulation 36 does it state that certification will endure indefinitely and that only

express removal of that certification will allow an appellant to bring an appeal on such a ground.

22. Even if that were not correct, the Secretary of State clearly granted the appellant a right of appeal at the close of the letter and this right of appeal is set out in full. If there needed to be an express removal of the certification the granting of a right of appeal would act as that mechanism.

23. Secondly, the body of the letter as I have set out above does not clearly certify that the ground of marriage of convenience was to be certified. Page 5 of the refusal letter which I have set out extensively, refers to the current application as being dated 17 January 2017, which it was not, and this suggests that the Secretary of State was confused as to the material being considered. The decision which followed the *previous* application was dated 25 April 2018 and large sections of that decision were merely copied and pasted into this decision without any quotation marks or reported speech marks, and thus it was impossible for a reader to decipher what was specifically decided in relation to the certification in the current decision under challenge. I have underlined the section which was merely cut and pasted from the previous decision. This also suggests that little thought was given to any maintenance of certification independently of the consideration of the material.

24. There may have been an attempt to certify but this was not clearly set out in the decision. The paragraph on which Mr Clarke relied made no reference to current certification but to a marriage being “recently certified”. There was no confirmation that the certification was being maintained. In the light, however, of the confused format of the decision letter and the attaching of a right of appeal at the close of the letter, the refusal suggests that the ground relating to the marriage was no longer certified and that the appellant was able to appeal in country. That was compounded as Judge Plumtree laid out by the failure of the Secretary of State to take the point earlier when the tribunal forwarded a notice of hearing to the Secretary of State in November 2018 nearly 6 months beforehand, and the service of an appeal bundle.

25. The tribunal is a creature of statute and cannot create appeal rights and the grounds for permission to appeal are to that extent, correct but the refusal letter was not clearly drafted in terms of certification, lifted wholesale sections of a previous refusal without any demarcation, and attached a right of appeal. Equally rights of appeal cannot merely be stripped by merely asserting that they were given by a slip of a pen or in error. In these circumstances I am not even persuaded that the

appeal notice was inconsistent with the body of the refusal letter.

26. The only ground of appeal was that the judge acted ultra vires. For the reasons I have given above I find that that was not the case. It was not the judge who granted the appellant an appeal but the refusal letter of the Secretary of State in failing to clearly certify and by attaching a right of appeal explained over three paragraphs.

27. I find no material error of law in the First-tier Tribunal determination of First-tier Tribunal Judge Plumptre and it will stand.

Signed Helen Rimington Date 11th July 2019

Upper Tribunal Judge Rimington