Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08872/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7th January 2015	**On 8th January 2015**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR NNAEMEKA PEACE ANUNA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Kandola, Senior Presenting Officer
For the Respondent: Miss A Heller, Counsel, instructed on behalf of Sunrise Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Judge Majid) who in a determination promulgated on 25th September 2014 allowed the appeal of the Respondent against the decision of the Secretary of State to

refuse to issue a residence card under the Immigration (EEA) Regulations 2006, as amended (the Regulations).

2. For sake of convenience I shall refer to the parties as they were before the First-tier Tribunal.

3. The Appellant Mr Anuna, a citizen of Nigeria, born on 2nd April 1980 was last admitted to the United Kingdom on 28th March 2013 on a visit visa valid from 19th July 2012 to 19th July 2017. On 19th July 2013 he married an EEA national and on 21st August 2013 he submitted his current application which was for the issue of a Residence card as confirmation of a right of residence under European Community law as the spouse of an EEA national exercising treaty rights in the United Kingdom.

4. On 25th January 2014 a decision was made to refuse that application. The notice of immigration decision dated 20th January 2014 gave two reasons for the refusal of the application; namely that it was stated that the marriage was one of convenience and secondly, that the EEA family member, in this case the Appellant's spouse, had failed to provide evidence that they were a qualified person as set out in Regulation 6 of the Immigration (EEA) Regulations 2006.

5. Detailed reasons for refusing the application were set out in a reasons for refusal letter dated 14th December 2013. In that letter it was further stated that to qualify for a residence card as a spouse of an EEA national, the Appellant must prove that the marriage is lawful, genuine and subsisting and was not solely for immigration purposes. The letter went on to make reference to the contents of a marriage interview that took place whereby the Appellant and his spouse were asked a number of questions. That interview took place in Liverpool on 20th January 2014. A copy of that marriage interview is set out in the Respondent's bundle. The letter set out a number of matters that the Respondent relied upon in support of the refusal of the application. The refusal letter went on to consider the material provided for the issue of a residence card under Regulation 6 and the exercise of treaty rights. The letter went on to also make reference to any application to be made under Article 8 of the ECHR.

6. The Appellant submitted Grounds of Appeal against that decision of the Secretary of State which led to the appeal coming before the First-tier Tribunal (Judge Majid) on 19th September 2014. In a determination promulgated on 25th September 2014 the judge allowed the appeal under the Regulations finding at [21] that the marriage was genuine and also allowed the appeal under the ECHR, although not specifying which Article [C25 and 26].

7. The Secretary of State sought permission to appeal that decision on two substantive grounds. The first ground asserted that the judge had failed to make a finding on a material issue, noting that the Secretary of State had provided two reasons in the refusal letter, namely that the marriage is one of convenience, and secondly that the Appellant's spouse, the EEA national had not demonstrated that she was exercising treaty rights and that the judge had failed to make any findings on that issue as to

whether or not the Appellant's spouse was exercising the treaty rights in the United Kingdom. The second ground related to a failure to provide reasons concerning the issue of the marriage. The Secretary of State had taken issue with the core of the Appellant's account and that the marriage interview set out what was described as a "plethora of discrepancies". The reasoning of the judge to simply rely on the spouse's assertion that she had reservations about the interview and that they were living together prior to the marriage, was insufficient in the light of the discrepancies that were set out. Furthermore, the grounds also make it plain that the Secretary of State sought permission on the basis of the judge's findings [26] that the appeal was allowed under an Article of the ECHR. It was submitted that no reasons had been provided as to which Article of the ECHR the Appellant met nor were there any reasons given as to why the Appellant should meet any such Article of the ECHR.

8. On 10th November 2014 the First-tier Tribunal (Judge Robertson) granted permission to the Secretary of State. Thus the hearing was listed before the Upper Tribunal. Mr Kandola appeared on behalf of the Secretary of State and Miss Heller, who appeared before the First-tier Tribunal, appeared for Mr Anuna. It was not necessary to call on Mr Kandola in respect of the grounds advanced on behalf of the Secretary of State as Miss Heller confirmed the instructions that had previously been set out in writing that it was conceded on behalf of the Appellant that the First-tier Tribunal (Judge Majid) erred in law in two important respects. First of all by failing to make any findings on whether or not the Appellant's spouse was exercising treaty rights and secondly by giving inadequate reasons for finding the marriage was "genuine and subsisting" as opposed to a marriage of convenience. The request was made for the matter to be remitted for a de novo hearing at the First-tier Tribunal.

9. In the light of the concession made on behalf of the Appellant, it is now common ground before me between the parties that the First-tier Tribunal Judge made material errors of law and that in those circumstances the decision must be set aside. In those circumstances, it is necessary only briefly to explain why the Tribunal finds that to be the case and to identify the nature of those errors.

10. I am satisfied that the concession was properly made and as the grounds plainly set out, there were two issues for the judge to resolve. The judge did not make any findings of fact as to whether or not the Appellant's spouse, the EEA national, was exercising treaty rights which had formed part of the reasons for refusing the application by the Secretary of State. That was a material error of law. As to the second error, again it is plain from the refusal letter that there was an issue as to the marriage itself. Whilst the judge purported to deal with that part of the refusal, paragraphs [21] and [22] did not adequately engage with the evidence that had been provided by both parties and in particular the discrepancies relied upon by the Secretary of State in the marriage interview that had taken place. It is wholly unclear what the judge made of those discrepancies or what weight the judge gave to them and in those circumstances, as conceded on behalf of the Appellant, the judge did not provide adequate reasoning for the decision reached. Furthermore, the judge also purported to allow the appeal under an Article of the ECHR. As the grounds submit it is unclear as to which Article the judge was referring to although it seems to me

that the judge was making reference to Article 8 of the ECHR by the reference to that at [25] however it is unclear from the determination what the judge's reasoning was to support the appeal being allowed under Article 8 and particularly against the background of the refusal letter in itself where the Respondent had made no decision on the Appellant's family life.

11. Therefore it is common ground between the parties that the determination should be set aside and that a new hearing be convened to hear the case de novo. In the light of the nature of the errors of law, and the issues identified, factual findings are required upon those issues and to that end oral evidence will be required from the relevant parties. In those circumstances I am satisfied, as Miss Heller submits, that the appropriate course is to remit the case to the First-tier Tribunal to a different judge to consider the oral evidence of the parties, and to make factual findings necessary on the relevant issues taking into account the evidence before the Tribunal, both documentary and oral. In addition Miss Heller indicated there would be some updating of the documents which would be provided in a supplementary bundle. In those circumstances this is a case that falls within the practice statement of 10th February 2010 (as amended).

12. Therefore the decision of the First-tier Tribunal is set aside, none of the findings of fact shall stand and the case is to be remitted to the First-tier Tribunal for a hearing in accordance with Section 12(2)(b) of the Tribunals, Courts and Enforcement Act at paragraph 7.2 of the practice statement of 10th February 2010 (as amended).

13. The Tribunal makes the following direction:-

    The Secretary of State shall file and serve upon the Tribunal and the other party a typed copy of the marriage interview that took place between the parties within fourteen days of the date this determination is served.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal is set aside and the appeal is remitted to the First-tier Tribunal as set out in the preceding paragraphs.

No anonymity direction is made.

Signed Date 7/1/2015

Upper Tribunal Judge Reeds