IAC-HX-MH/11-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14949/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 March 2015	**On 1 April 2015**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS NKECHI EDITH OVUIKE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Whitwell
For the Respondent: Mr Jibowu

DECISION AND REASONS

1. Although in the proceedings before me the Appellant is the Secretary of State, for convenience I keep the designations as they were before the First-tier Tribunal. Thus Mrs Ovuike is the Appellant.

2. She is a citizen of Nigeria born in 1976. She appealed against a decision of the Secretary of State made on 11 March 2014 to refuse her application for a residence card as the spouse of an EEA national exercising treaty rights in the UK.

3. The application was refused, the Secretary of State not being satisfied that the Appellant's claimed customary marriage by proxy to a citizen of the Czech Republic was a marital relationship for the purposes of the Immigration (EEA) Regulations 2006. The Secretary of State was also not satisfied that the couple were in a 'durable *relationship*' for the purposes of Regulation 8(5).

4. She appealed.

5. Following a hearing at Taylor House on 14 November 2014 Judge of the First-tier Tribunal Majid allowed the appeal.

6. In a brief determination the judge noted (at [7]) a statement by Mrs Ovuike dated 24 October 2014 lodged for the hearing. In his *'Dispositive Reasons and Deliberations'* he considered that the contents of the statement amounted to an asylum claim.

7. He stated (at [13]) *'The Asylum claim makes this Appellant fear for her life. However, looking at her EEA claim one is not sure she will win. The EEA husband is in a conflict with her and one has to think about her going back to Nigeria to those people who have already brought about the death of her sister'.*

8. He continued (at [14]) *'It is incumbent upon me to advert to the new Rules giving respect to the animus legis dictated by the Constitutional Supremacy of Parliament. The rule of law demands that this Appellant's Asylum claim should be looked at with full humanity and compassion. For anxious scrutiny of her Asylum claim, I remit this case to be looked at afresh and if necessary there should be an appeal to this Tribunal'.*

9. He ended by stating (at [15]) that he was *'persuaded that the Appellant's Asylum claim deserves a compassionate consideration by the Respondent. I am expressing my decision as "Appeal Allowed" because I do not want to see this Appellant suffer when she is waiting for the result of her case afresh'.*

10. The Respondent sought permission to appeal which was granted by a judge on 7 January 2015.

11. At the error of law hearing Mr Whitwell submitted that the determination was fatally flawed. The judge had made no findings in relation to the application for the EEA residence card which was the reason for the appeal. There had been no s.120 notice. The judge's reference to asylum was a matter which was not properly before him.

12. Mr Jibowu did not challenge that submission.

13. I agreed.

14. The judge erred in not making any findings whatsoever in relation to the application for the residence card which was the reason for the appeal.

Further, he had no legal basis for remitting the matter back to the Respondent to consider a statement made by the Appellant on 24 October 2014, which may amount to an asylum claim. It appears that a possible asylum issue was raised for the first time in that statement prepared for the hearing. There was no mention of it in the Grounds of Appeal. Nor was there a s.120 notice under the Nationality, Immigration and Asylum Act 2002.

15. *'... an Appellant on whom no Section 120 notice has been served may not raise before the Tribunal any ground of leave to remain different from that which was the subject of the decision of the Secretary of State appealed against - the Tribunal has no jurisdiction to consider or rule on "any matter ... which constitutes a Ground of Appeal listed in Section 84(1) against the decision appealed against" if there has been no Section 120 notice and therefore no statement under that Section.'* (Stanley Burnton LJ) (**Lamichhane v SSHD [2012] EWCA Civ 260** (headnote)).

16. The judge then compounded the error by allowing the appeal with no identifiable reasons. In failing to engage with the relevant legal issues before him the judge materially erred.

17. By consent I set aside the determination and proceeded to remake it.

18. Mr Jibowu said he did not seek to pursue the appeal against the EEA application and asked me to dismiss it. An asylum application would be made to the Respondent.

19. There being no evidence presented in support of the EEA appeal it is dismissed.

Decision

The decision of the First-tier Tribunal contained an error on a point of law. It is set aside and remade as follows: the appeal is dismissed under the Immigration (EEA) Regulations 2006.

No anonymity direction is made.

Signed Date **31 March 2015**

Upper Tribunal Judge Conway