



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/44629/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 20 November 2015**

**Decision and Reasons
Promulgated
On 25 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

MRS ADAMAKA NWOLOKO
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Uzoechina, solicitor, Patterson & Co
For the Respondent: Mr P Whitwell, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant appeals a decision promulgated on 27 April 2015 of First-tier Tribunal Judge M Robertson, hereinafter referred to as the FTTJ. Permission to appeal was granted by First-tier Tribunal Judge Fisher on 7 July 2015.

Background

2. The appellant applied for a residence card as confirmation of her right

to reside in the United Kingdom as the spouse of an EEA national, on 29 December 2011. Her appeal against that decision was allowed to the extent that FTTJ Hanes found that the respondent's decision was not in accordance with the law and thereby remitted the matter for the Secretary of State's reconsideration on that basis. On 15 May 2013, the appellant and her spouse were interviewed in respect of the residence card application. The decision of FTTJ Hanes was, subsequently, upheld by the Upper Tribunal.

3. The appellant's application was refused (following reconsideration by the Secretary of State) on 13 August 2013, on the basis of what were said to be inconsistencies within the appellant's evidence at her earlier appeal as well as the marriage interview. Consequently, it was not accepted that she was in a genuine relationship with her spouse.
4. The appeal was then heard by FTTJ Hawden-Beal who dismissed it under the 2006 Regulations in a determination promulgated on 4 June 2014. However, that decision was set aside, in its entirety, following a hearing at the Upper Tribunal which took place on 7 October 2014.
5. When this matter came before FTTJ M Robertson, a request was made on the appellant's behalf for the respondent to produce form ICV 4605. The FTTJ did not accept that the respondent relied on this form in reaching her decision and decided it would not be unfair to the appellant to proceed to hear her appeal without this evidence. Thereafter the FTTJ heard oral evidence from the appellant and her spouse as well as submissions from both representatives.
6. The FTTJ had regard to the findings of the previous judges; issues arising from the marriage interview as well as her impression of the evidence before her and concluded that the marriage was one of convenience.

Error of law

7. The grounds of application, submitted out of time, criticised the decision of the FTTJ in seven respects, summarised here. Firstly, it was argued that the decision to refuse disclosure of form ICV 4605 was procedurally unfair, Miah (Interviewer's comments; disclosure: fairness) [2014] UKUT 515 applied. Secondly, it was said that the FTTJ failed to take account of the 105 consistent answers given in interview or to assess earlier adverse comments of FTTJ's (some of which had been set aside) in an unbiased way. Thirdly, the FTTJ erred in her assessment of whether Community law was abused by placing undue weight on the absence of photographic evidence. Fourthly, it was argued that the FTTJ had shifted the burden of proof, in relation to the marriage of convenience issue, onto the appellant.
8. Fifthly, the FTTJ had made a number of material factual errors in relation to the evidence and submissions before her. Sixthly, it was

said that the FTTJ failed to treat the appellant's evidence with impartiality. Lastly, the grounds argued that the FTTJ failed to take into consideration the earlier witness statements of the appellant and sponsor alongside the previous determinations.

9. Time was extended *"in view of the strength of the grounds."* Permission was granted in relation to the first ground in particular, however all grounds raised were considered to be arguable.
10. The Secretary of State's Rule 24 response dated 17 July 2015, made the following statement; *"The respondent does not consider that the determination is sustainable given the failure to disclose the full interview transcript. The judge did not follow Miah..."*
11. In terms of the disposal of the appeal, the respondent considered *"that it would be appropriate that the matter be remitted to the Secretary of State to serve a full interview transcript and to provide any amended refusal letter to take account of any or all the issues arising from the interview. "*

The Hearing

12. As a preliminary issue, Mr Whitwell confirmed from the outset that the respondent accepted that the FTTJ had made a procedural error, which infected the entirety of the findings. He invited me to find a material error of law and remit the matter to the First-tier Tribunal for a further rehearing. When I drew Mr Whitwell's attention to the third paragraph of the Rule 24 response, he indicated that he was now in a position to serve the missing material. He handed form ICD 4604 to Mr Uzochina and me. I asked Mr Whitwell if he had form ICD 4605 in his file, which was the subject of the procedural issues in this case, however he did not. Consequently, Mr Whitwell stated that he would not seek to go behind his colleague's suggestion that the matter ought to be remitted to the Secretary of State.
13. For the appellant, Mr Uzochina argued that the matter has to be sent for a fresh hearing and that it was not open to me to remit the matter to the respondent. He did not develop the last point. He stressed that the key issue was that the respondent failed to disclose her evidence. He asked that the appeal be remitted to Hatton Cross rather than Birmingham IAC.
14. I accept the respondent's rightly made concession that the FTTJ fell into procedural error in refusing to grant the appellant's application for the respondent to be required to disclose form ICD 4605 and that this amounted to a material error of law rendering the decision and reasons unsafe in their entirety.
15. In Miah, headnote (iii) refers to the respondent's decision-making process including a process where the comments of an interviewing

officer are conveyed to the decision maker. Headnote 9(iv) stipulates that form ICD4605, the document, which enshrines those comments *"must be disclosed as a matter of course. An appellant's right to a fair hearing dictates this course."*

16. Form ICD 4605 was not disclosed to the appellant; she was denied a further opportunity to obtain disclosure of that document and the FTTJ proceeded to find against her without reference to this document. The lack of disclosure of the form in question, leads me to the conclusion that the appellant had been subjected to an unfair decision making process, in that she was not fully aware of the case against her. Accordingly, the respondent's decision was not in accordance with the law. The FTTJ fell into procedural error, which in this case amounts to a material error of law.
17. I took into consideration, the fact that the appellant has had three hearings in relation to her application for a residence card and even at the hearing before me there was no disclosure of form ICD 4605. I therefore proceeded to remake the decision by allowing the appellant's appeal to the limited extent that the matter remains outstanding before the Secretary of State in order for a lawful decision to be made, in which Form ICD 4605 is taken into consideration and disclosed should the decision to refuse a residence card be maintained.

Decision

- (1) I am satisfied that the FTTJ erred in law in refusing the appellant's application for disclosure of form ICD 4605.
- (2) The respondent's decision was vitiated by procedural unfairness and thus, was not in accordance with the law,
- (3) I therefore allow the appeal to the Upper Tribunal to the limited extent that;
 - (a) the decision of the judge to dismiss the appeal is set aside with no findings preserved.
 - (b) I substitute a fresh decision to allow the appellant's appeal against the refusal of his application for a residence card to the limited extent that it remains outstanding before the Secretary of State for her to consider all the information before her including that contained in ICD 4605.
- (4) In reaching that conclusion I have had regard to Mr Uzochima's submission that I should simply remit the appeal to the First-tier Tribunal, despite the fact that form ICD 4605 remains undisclosed.

No application for anonymity was made and I could see no reason to make such a direction.

Signed

Date: 22 November 2015

Deputy Upper Tribunal Judge Kamara