Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05636/2018

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision and Reasons Promulgated**
On 14th October 2019	**On 17th October 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

KAFAYAT OMUTUNDE ODEYEMI
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: no appearance
For the Respondent: Miss Isherwood Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-Tier Tribunal Judge O'Garro promulgated on 28 June 2019 following a hearing at Hatton Cross on 22 May 2019.

Background

2. The appellant is a citizen of Nigeria born on 14 February 1986 who appealed the respondent's decision refusing to issue her with a Residence Card in recognition of a right to reside in the United Kingdom pursuant to Community Law.
3. Permission to appeal was granted by another judge of the First-Tier Tribunal on 16 August 2019. On the same date notice of hearing at the Royal Courts of Justice on 14 October 2019 was sent by first class post to both the appellant and her representatives, London South Law Chambers.
4. A representative of the Home Officers attended but there was no attendance on the appellant's behalf, no explanation for the appellant's absence, or an application for an adjournment. As a result of lack of explanation enquiries were undertaken by the Clerk to the Tribunal who, at 10:31, telephoned the solicitors on record for the appellant, London South Law Chambers, on 0207 732 9973, in order to find out why there was no appearance at court by or on behalf of the appellant. The line went through to voice mail and the Clerk left a detailed message which explained the problem and requested that he be contacted on his mobile telephone as soon as possible. Having received no reply from London South Law Chambers the Clerk obtained with the help of Field House two emergency mobile telephone numbers for the firm, 07956 207 159 and 07943 350 840 which were given on their website. Unfortunately both of these mobile numbers failed to connect when rung at 11:06 and 11:07 respectively. At 11:07 the Clerk made a further telephone call to the landline number 0207 732 9973 and again left a voice mail message but there was no response.
5. In light of the situation it was concluded it was in accordance with the overriding objectives and principle of fairness to proceed with the hearing in the absence of the appellant.

Error of law

6. Having considered the evidence, both oral and written, Judge O' Garro ('the Judge') found in the appellant's favour in relation to the validity of the marriage conducted with her former husband, Mr Maduro, in Nigeria. The Judge therefore found the appellant was a family member of an EEA national. The appellant had made two previous applications when she had such status but by the time she made her third application, on 30 April 2018, she was divorced from her EEA national spouse. The date of divorce is 28 March 2017.
7. The Judge initially considered whether the appellant had established a right of permanent residence by meeting the qualifying conditions set out in regulation 15 of the EEA Regulations. The Judge's findings on this issue are set out at [34 – 36] in the following terms:

> "34. In the case before me the appellant married her EEA former spouse on 14 July 2011 and they were divorced on 28 March 2017. I have seen the HM Revenue & Customs employment history of Mr Maduro for tax years 2012/2013, 2013/2014, 2014/2015, 2015/2016, 2016/2017. I am satisfied that Mr Maduro was exercising treaty rights from April 2012 to April 2017 based on the evidence before me.
>
> 35. However to succeed under regulation 15(1) (b) the appellant must to show that Mr Maduro was exercising treaty rights for a continuous period of five years during their marriage. The appellant was married on 11 July 2011 and the marriage ended on 28 March 2017.
>
> 36. The evidence before me shows Mr Maduro's exercising treaty rights from April 2012 to April 2017. According to my calculation, April 2012 to March 2017 would not show 5 continuous years of treaty rights. Unfortunately I have no evidence before me regarding Mr Maduro's exercise of treaty rights for tax year 2011/2012. I find that if that evidence was available, relying upon the Upper Tribunal decision in **Idezuna,** the appellant would have been able to show 5 continuous years of exercise of Treaty rights by Mr Maduro throughout the marriage and would have succeeded in her appeal under Regulation 15(1) (b)."

8. Having concluded the appellant could not succeed pursuant to regulation 15 the Judge considered whether the appellant established that she had acquired a retained right of residence pursuant to Regulation 10. In doing so the Judge was required to consider whether the appellant was a self-sufficient person as it was not made out she qualified and any other basis. The Judge notes at [45] that following the breakup of her marriage the appellant claimed she had been in receipt of financial support to meet her living costs from friends and that she has been a self-sufficient person since her marriage ended in March 2017. The appellant had provided a letter from a Mr Muraino confirming that support was being provided. The Judge found it necessary to consider whether the applicant had the required comprehensive sickness insurance, a mandatory requirement of a self-sufficient person. Having considered the evidence the Judge finds at [54]:

> "54. With the limitations placed on when the appellant is able to use the insurance for medical conditions, I am not satisfied that the insurance will cover the appellant for medical treatment in the majority of circumstances. I am not satisfied that the appellant has provided satisfactory evidence to satisfy me she is a self-sufficient person as defined under the EEA regulations."

9. The appellant sought permission to appeal claiming the Judge failed to consider relevant evidence provided in the appellant's bundle and ex-spouse's witness statement in which he claimed to have been in employment since 2011. The grounds also asserted the Judge failed to consider the terms of the comprehensive health insurance the

appellant had acquired; failing to take into account the full and detailed insurance policy provided in the appellant's bundle.

10. Permission to appeal was granted by another judge the First-Tier Tribunal who concluded that the grounds are arguable.

11. As noted above there was no attendance by the appellant. The copy health insurance policy provided in the bundle refers to the exact terms of an individual's entitlement being set out in their membership statement. This was not before the Tribunal and does not appear to have been before the Judge. Accordingly no arguable legal error is made out the Judge's concerns based upon the evidence made available in relation to the health insurance.

12. In relation to the Judge's concerns relating to the period the appellant's former husband was exercising treaty rights, it is not made out the Judge failed to consider all available evidence. Some the pages in the bundle provided by the appellant to the Judge are missing. Whilst there is a letter indicating the appellant's former husband was offered employment and 2011 there is no evidence from HMRC confirming any income being received from this source at the relevant time. There was nothing before the Judge to establish lawful exercise of treaty rights by the EEA national during the missing year.

13. The appellant fails to establish that the Judge's decision is outside the range of those reasonably available to the Judge on the evidence. Accordingly it is not established the Judge has erred in law in a manner material to the decision to dismiss the appeal sufficient to warrant the Upper Tribunal interfering any further in this decision.

Decision

14. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

15. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……
Upper Tribunal Judge Hanson

Dated the 15 October 2019