Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/12033/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25 November 2014	**On 8 December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE Ms G A BLACK

Between

MS CHRISTIANA MARY ABIMBOLA
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Hulse, Counsel, instructed by A&A Solicitors
For the Respondent: Miss A Holmes, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision by the First-tier Tribunal (Judge Molloy) promulgated on 4 September 2014 in which the Tribunal dismissed the appeal on immigration and human rights grounds having determined the

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appeal without a hearing under Rule 15(2)(ba-c) of the Asylum & Immigration Tribunal (Procedure) Rules 2005 ("the procedure rules").

Background

2. The Appellant whose date of birth is 23 March 1973 and is a citizen of Nigeria.

3. The Respondent refused her application with reference to Regulations 2 and 17(1A) of the Immigration (European Economic Area) Regulations 2006 on the grounds that her marriage was one of convenience.

4. At the First-tier Tribunal hearing the appellant was not legally represented. The Tribunal determined the appeal on the papers having invoked Rule 15 of the procedure rules primarily because it found that the parties failed to produce an earlier potentially relevant determination.

5. On the day of the hearing the Tribunal became alert to the possibility of there being a relevant earlier determination to which the principles deriving from **Devaseelan [2003] ImmAR 1** may have applied. The Tribunal raised this with the parties and enquiries were pursued. In the Statement of Reasons [14] the Tribunal states :

   > "The writer then specifically informed the parties that he would welcome a full copy of the decision in the visit visa case being produced by 2 pm that afternoon, failing which and in default hearing would have recourse to Rule 15 of the Asylum and Immigration Tribunal (Procedure) Rules 2005."

6. When reconvening the Home Office Presenting Officer informed the Tribunal that it had not been possible to locate the earlier decision and there was no record of this appeal. Enquiries with her former solicitors in Nigeria were pursued by the appellant but proved fruitless. The Tribunal gave the parties further time until 3.15 pm and indicated that the case would proceed whatever the outcome of enquiries in Nigeria.

7. The Tribunal refused an application for adjournment made by the Respondent. The Tribunal summarised the matters that it considered relevant to the application of Rule 15 and invited comment from both parties. The respondent's representative submitted that the Tribunal could hear oral evidence. The Tribunal relied on Rule 15(2) of the procedure rules and determined the appeal without an oral hearing having decided that the parties failed to comply with a direction of the Tribunal and the Tribunal was satisfied, bearing in mind the extent of the failure and reasons for it, that it is appropriate to determine appeal without a hearing. Its reasons were set out at [48-85] that the earlier determination had not been produced which prevented the Tribunal's further consideration in respect of the EEA issues.

Grounds of Application

8. Ground 1 - the Tribunal made a material misdirection of law and arrived at a perverse or irrational conclusion. The Tribunal relied on Rule 15(2) of the 2005 Procedure Rules to dismiss the appeal.

9. Ground 2 - the Tribunal materially erred in its application of the applicability of **Devaseelan** guidance in the proceedings. Both parties confirmed that no reliance was to be placed on the previous determination and there was no evidence before the Tribunal to indicate that the decision made eight years ago had any relevance to the present appeal. It was therefore unreasonable on the part of the Tribunal to consider that it had any relevance.

10. Ground 3 - the Tribunal erred by dismissing the appeal without a hearing as to the merits, on the basis of the failure to produce the previous determination. The proper course open to the Tribunal was to have adjourned the hearing for the decision to be produced. It was not reasonable to expect the appellant to get a copy of the decision from her solicitors in Nigeria on the day of the appeal. Failure to adjourn was wholly unreasonable and unfair as to be perverse.

11. Ground 4 - in making use of Rule 15(2) the Tribunal failed to have regard to Rule 4 of the Immigration and Asylum Procedure Rules 2005, namely the overriding objective. Fairness dictated that the Tribunal should have taken oral evidence as suggested by the respondent.

Permission to appeal

12. Designated First-tier Tribunal Judge Zucker granted permission to appeal on 21 October 2014 on the following grounds:

> "Although, but only because the judge arguably 'entered the arena', there was a basis for finding dishonesty on the part of the appellant, it is also arguable that this was not fairly tested by the procedure adopted by the judge. This is arguably, all the more so because the appellant was not represented and because the respondent was content for the judge to determine the appeal in the absence of that earlier determination (see paragraph 44). It is arguable that the proceedings were tainted by unfairness; he decided to proceed without a hearing in circumstances where he was 'disappointed' by the conduct of *both* parties."

13. A Rule 24 response was submitted but was not relied on at the hearing.

The Hearing
Submissions

14. Miss Hulse submitted that the decision made by the Tribunal was not in accordance with the law, the Tribunal's Procedure Rules and not in accordance with the Human Rights Act 1998. She further submitted that even having applied Rule 15(2) the Tribunal failed to engage in any determination of the issues at all. There was no consideration of any evidence to support any finding on either side and no consideration of whether the Secretary of State had exercised discretion or not. The Tribunal failed to consider the human rights of the relevant parties. Rule 15(2) was invoked by the Tribunal where there was a previous first determination approaching eight years old, where the appellant was not legally represented and the Home Office had placed no reliance on that determination. The Tribunal failed to consider the overriding principles with regard to fairness. There had been no proper consideration of the appellant's claim whatsoever in reaching a decision.

15. Miss Holmes did not rely on the Rule 24 response submitted. She concurred with the submissions made on behalf of the appellant. There was unfairness by the Tribunal; no real findings had been made or any proper consideration given to the appellant's claim. There was no direction made in advance of the hearing to produce the determination. This was a matter raised by the Tribunal on the day of the hearing.

16. It was agreed between the parties that the Tribunal had erred in law. Having considered all of the relevant material and the submissions made, I found that there was an error of law by way of procedural irregularity by the Tribunal which resulted in unfairness to the appellant. She did not have a fair hearing.

Discussion and reasons

17. I find that the decision taken by the Tribunal to invoke Rule 15A was in the circumstances of this appeal an error. All of the grounds are made out. I find that the Tribunal further erred by refusing to grant an adjournment so that the earlier determination, which the Tribunal considered to be potentially relevant, could be obtained.

18. I am satisfied that the application of Rule 15A resulted in the appellant being treated unfairly. The Tribunal raised the issue of a possible previous decision at its own instigation where there was no indication that it had any relevance to the present proceedings or having regard to **Devaseelan** principles [7]. The first determination was not relied on nor considered to be relevant by either party. Reasonable efforts had been made by both parties on the day of the hearing to obtain a copy of the decision which itself was some eight years old and an explanation given as to why it was

not relevant to the current issues and facts. It was reasonable given that the matter was raised on the day of the hearing for the Tribunal to have granted an adjournment in such circumstances.

19. The Tribunal invited responses from the representatives having indicated its reasons for intending to rely on Rule 15A[34]. The Tribunal relied on the late response in filing documents for the hearing, the appellant's failure to produce a witness statement and the failure of both sides to supply a copy of the first determination under **Devaseelan** principles which it considered was their duty/responsibility to do [51-73]. The Tribunal emphasised that the parties failed in their duty to produce a "potentially **Devaseelan** relevant decision" [66].

20. Having decided to determine the appeal on the papers the Tribunal then failed to consider the merits of the claim at all. The Tribunal failed to give sufficient weight to the fact that the appellant was not represented and had not understood that she needed to produce a witness statement and/or that she could give oral evidence. Further, the Tribunal emphasised that its consideration was limited and restricted by the failure to produce the earlier decision.

21. I am satisfied that the proper and fair course of action was for the Tribunal to have adjourned the proceedings so that it had before it the determination that it considered to be of potential relevance to the appeal. By its actions and overall approach the Tribunal appears to have indeed "entered the arena" and has failed to reach an objective and fair decision in line with the overriding objective under Rule 4 of the Tribunal Procedure Rules 2005. The only course of action open to the Upper Tribunal is for the matter to be remitted to the First-tier Tribunal for hearing afresh.

Decision

22. **There is a material error of law in the decision which shall be set aside.**
The matter is to be remitted to the First–tier Tribunal (excluding Judge Molloy) for re hearing at Taylor House on 27th April 2015.

Signed Date 4.12.2014

G A Black
Deputy Judge of the Upper Tribunal