



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

Appeal Number: IA/03428/2015

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 24th July 2015

Promulgated

On 14th August 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**FESOJAIYE OLANIRAN ADIKA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Aghayere of Melrose Solicitors

For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against a decision of Judge of the First-tier Tribunal C Burns (the judge) promulgated on 30th March 2015.
2. The Appellant is a Nigerian national born 21st October 1976 whose application for a residence card was refused on 15th January 2015. The application was based upon the Appellant's marriage to an EEA national which ended in divorce, and a decree absolute was issued on 11th August 2014.

3. The application was refused with reference to regulation 10(5) of The Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations). The Respondent did not accept that it had been proved that the Appellant's former spouse was exercising treaty rights at the time of the divorce.
4. The Appellant appealed, and requested that his appeal be decided on the papers without an oral hearing.
5. The Tribunal acknowledged that the Appellant wished his appeal to be decided on the papers, and issued directions to both parties, to the effect that any further written evidence or submissions must be lodged with the Tribunal and the other party no later than 17th March 2015.
6. The appeal was allocated to the judge on 18th March 2015. The judge noted that no further evidence had been provided, and found that the Appellant had failed to prove that his former spouse was a qualified person. The appeal was therefore dismissed pursuant to the 2006 Regulations. The judge also considered Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) and found that the Appellant had not established that he enjoyed family or private life in the United Kingdom and therefore concluded that Article 8 was not engaged.
7. The Appellant applied for permission to the Upper Tribunal. In summary it was contended that the judge had acted unfairly in dismissing the appeal on the papers, without taking into consideration a bundle of further documents, submitted by the Appellant's solicitors on behalf of the Appellant. It was contended that the documents had been served upon the Tribunal on 18th March 2015, before the decision was prepared.
8. Permission to appeal was granted by Designated Judge of the First-tier Tribunal Zucker on 3rd June 2015.
9. The Respondent issued a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 contending in summary that the Appellant had failed to comply with directions, and had submitted the documentary evidence after the deadline had expired. Therefore the judge had not erred in law in failing to consider evidence that was not before her.
10. The Tribunal issued directions that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

The Appellant's Submissions

11. Mr Aghayere relied upon the grounds contained within the application for permission to appeal. He submitted that because the documentary evidence had been served on the Tribunal before the judge made her

decision, the documents should have been taken into account. Mr Aghayere argued that the fact that the documents were not submitted by the deadline was not the Appellant's fault as he had sent the documentary evidence to his solicitors a week before the deadline of 17th March 2015. The documents were relevant, as they proved that the EEA national was exercising treaty rights.

The Respondent's Submissions

12. Mr Wilding relied upon the rule 24 response but accepted that if documents had been submitted to the Tribunal, prior to the decision being made, then it may be the case that those documents should have been considered, but the decision of the First-tier Tribunal should only be set aside if the documents contained material evidence.

My Conclusions and Reasons

13. I indicated at the hearing that in my view the First-tier Tribunal had erred in law and therefore the decision would be set aside. I indicated that I would issue a written decision.
14. In considering this appeal I have taken into account the principles in MM Sudan [2014] UKUT 00105 (IAC), the head note of which I set out below;
 - (1) Where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of the First-tier Tribunal (the "FtT") to be set aside.
 - (2) A successful appeal is not dependent on the demonstration of some failing on the part of the FtT. Thus an error of law may be found to have occurred in circumstances where some material evidence, through no fault of the FtT, was not considered, with resulting unfairness (E & R v Secretary of State for the Home Department [2004] EWCA Civ 49).
15. I find that the Appellant's evidence was not received by the Tribunal by the deadline date of 17th March 2015, but was received by the Tribunal on 20th March 2015. The appeal had been allocated to the judge on 18th March 2015.
16. The appeal was prepared on 26th March 2015, and promulgated on 30th March 2015.
17. Therefore the evidence submitted on behalf of the Appellant should have been brought to the judge's attention, and the judge should have made a decision as to whether or not the documentary evidence was to be taken into account. This decision should have been recorded, and reasons given, whether the decision was to admit or exclude the evidence.
18. Such a decision was not taken by the judge, who proceeded to determine the appeal without reference to the Appellant's documentary evidence,

even though that evidence had been in the Tribunal's possession for six days prior to the judge's decision being made, and ten days prior to the decision being promulgated.

19. If considered, the evidence may have caused the judge to reach a different conclusion, as the evidence related to the Appellant's former EEA national spouse exercising treaty rights. That evidence needed to be considered and assessed.
20. I find that the decision made by the First-tier Tribunal was therefore unfair, because the Appellant's documentary evidence was not considered, and I am satisfied that this amounts to a material error of law.
21. It is appropriate for this appeal to be remitted to the First-tier Tribunal. I make this decision having taken into account paragraph 26 of MM in which the Tribunal indicate inter alia;

“We consider that, as a fairly strong general rule, where a first instance decision is set aside on the basis of an error of law involving the deprivation of the Appellant's right to a fair hearing, the appropriate course will be to remit to a newly constituted First-tier Tribunal for a fresh hearing”.

22. I also take into account the Senior President's Practice Statement of 25th September 2012 and in particular paragraph 7.2 which states;

7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that;

- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.

Directions

23. The appeal is remitted to the First-tier Tribunal to be decided on the papers by a First-tier Tribunal Judge, other than Judge C Burns.
24. If the Appellant wishes his appeal to be decided at an oral hearing, he must pay the appropriate fee to the Tribunal, and advise the Tribunal that he requires an oral hearing.
25. If either party seeks to rely upon documentary evidence that has not already been served, such evidence must be served upon the Tribunal and the other party within 28 days of the date when this decision is sent to the parties.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the First-tier Tribunal.

Anonymity

There has been no request for anonymity and no anonymity order is made.

Signed	Date	3 rd August 2015
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Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

No fee award is made by the Upper Tribunal. This must be considered by the First-tier Tribunal.

Signed	Date	3 rd August 2015
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Deputy Upper Tribunal Judge M A Hall