Upper Tribunal
(Immigration Asylum Chamber) **Appeal**
Number: IA/38295/2014

THE IMMIGRATION ACTS

Heard at Field House, London **Decision &**
Reasons Promulgated
On the 9th September 2015 **On the 6th**
October 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

MRS CHRISTINE MUKASA

(Anonymity Direction not made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs Christine Macassar in person
For the Respondent: Ms Brocklesby-Weller (Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-Tier Tribunal Judge Agnew promulgated on the 14th January 2015.

Background

2. The Appellant is a citizen of Zimbabwe who was born on the 19th January 1959.

She is the mother of Mrs Charmaine Gail Mukasa, a lady who is married to a Polish national, Mr Marcin Slaworim Kresnicki.

3. The Appellant had applied for a Residence Card as confirmation of a Right to reside in the United Kingdom under European Community Law as the family member of an EEA national exercising Treaty Rights in the United Kingdom. Her application was dated the 9th June 2014. That application was refused by means of a decision dated the 11th September 2014. The Appellant appealed that decision to the First-Tier Tribunal, which was heard by First-Tier Tribunal Judge Agnew and decided on the papers at Glasgow on the 12th January 2015, with her decision being promulgated on the 14th January 2015. Within that decision she found that the Sponsor had been working with a company known as Contract Security Services and exercising Treaty Rights since March 2010. However, she did not find that it had been established on the evidence before her that the Appellant lived with her daughter and son-in-law as claimed, nor was she satisfied on the evidence presented that the Appellant was financially dependent on her son-in-law, whom it was accepted was a qualified person for the purposes of Regulation 6 of the Immigration (EEA) Regulations 2006 as claimed.

4. The Appellant sought to appeal that decision to the Upper Tribunal, and permission to appeal was granted by First-Tier Tribunal Judge Osborne on the 21st May 2015. Within the reasons for that decision, a decision was made to admit the application out of time, as the Appellant had posted the original application for permission to appeal to an old address and it was not until she telephoned the Tribunal on the 26th March 2015 that this became apparent. She then promptly resubmitted her Grounds of Appeal.

5. First-Tier Tribunal Judge Osborne noted how in the Grounds of Appeal it was argued that the First-Tier Tribunal Judge had erred in law at [10] in stating that the Appellant had appealed in 2007, but that she was not in the country at the time and that she had further erred in law at [11] in stating that the Appellant had claimed in the application form to have lived in the United Kingdom for 8 years and 11 months, but that such information related to the Appellant's daughter rather than the Appellant herself and that further the Judge had erred

at [16] in finding the Appellant was unable to work because she was medically incapable of work and that it was being argued that the Appellant was prohibited from being in a position to work as a result of her application for asylum on the 16th February 2009. First-Tier Tribunal Judge Osborne found that even though the Judge may have erred at [11] in finding the Appellant arrived in the UK before the Appellant herself claims that error was not material to the substantive decision made by the Judge.

6. However, First-tier Tribunal Judge Osborne in granting permission to appeal went on at [4] to state that:

"However the Judge at [13] finds that the Council tax bill for [ ]does not state that another individual is living with the couple. It is clear that the Council tax bill dated the 22nd January 2015 is in the name of 3 people, Mr Marcin Kresnicki, Mrs Charmaine Kresnicki and Mrs Christine Mukasa (the Appellant). That document tends to support the Appellant's case that she lives with and is dependent upon her daughter and son-in-law. To that extent it is arguable that the Judge erred in law.

This arguable error of law having been identified, all of the issues raised in the grounds are arguable."

Submissions

7. The Appellant herself attended the appeal hearing. She was not legally represented. In making her submissions, she adopted and repeated the submissions that she had made within her application for permission to appeal to the Upper Tribunal and read out again the reasons stated therein for appealing, which she relied upon as her submissions. These are a matter of record and are therefore not repeated in full here, but I have fully taken account of the same in reaching my decision.

8. In her submissions on behalf the Respondent, Ms Brocklesby-Weller submitted that there was a typographical error in the Judge's decision in stating at [10] that

the Appellant had appealed in 2007 as well as 2009, but she argued that any such error was not material. In respect of what is said to be the error regarding the finding at paragraph [11] that the Appellant had lived in the UK for 8 years and 11 months and that that information related to the Appellant's daughter rather than the Appellant herself, the Appellant's correct entry date into the UK is a 24th January 2009, Ms Brocklesby-Weller argued that any such error stemmed from the information provided within the application form submitted by the Appellant. In answer to the question as to how long the applicant had been in the UK, it was stated 8 years and 11 months, although I do note in that regard that the asylum application form had been submitted in the name of Charmaine Gail Kresnicki, the Appellant's daughter, with the family member at part 2 being Christine Mukasa, and that therefore there was an error as to the way in which the form had been filled out by the Appellant.

9. It was further argued on behalf of the Respondent that the Judge had dealt with the question regarding documents not appearing in the bundle at paragraph [15] in terms of the Asda shopping card and the Argos gift card and although these had since been provided, the Judge had found that without more that was not enough. She further argued that following the Upper Tribunal case of Reyes (EEA Regs) [2013] UKUT 00314, the mere fact that someone is in the UK without lawful permission to work does not mean that he or she is to be considered as meeting the test of dependency under the Immigration (European Economic Area) Regulations 2006.

10. It was further argued on behalf of the Respondent that the First-Tier Tribunal Judge at [12] had dealt with the question as to whether or not the Appellant was unable to work but Ms Brocklesby-Weller argued that this did not detract from the fact that no evidence had been provided as to how the Appellant's needs were met by the EEA national. She submitted that there had been a complete lack of evidence submitted and that on the limited evidence available to the Judge there had been adequate reasoning and it was open to her to make the findings made. She argued that if the Appellant wished to submit a new application, she was perfectly entitled to do so.

11. In respect of the ground on which permission to appeal had been granted, Ms Brocklesby-Weller argued that the Council tax bill in the bundle was dated the 7th February 2014 and had only two names on it and that the further Council tax bill dated the 22nd January 2015 post-dated the decision and that therefore the Judge cannot be criticised for having failed to consider it and that the Judge can only consider the case on the evidence before her at that time.

My Findings on Error of Law and Materiality

12. Although First-Tier Tribunal Judge Agnew may have erred in stating at [10] that the Appellant had appealed against a decision in 2007, in that the Appellant, at a time before the Appellant was actually in the United Kingdom, I do not consider that any such error was material to the outcome in this case, in that the First-tier Tribunal Judge at [10] did properly set out that it was stated within the Respondent's bundle that both herself and her daughter had used deception to enter the United Kingdom and both had previous applications that had been refused. It is not disputed by the Appellant that she did proceed with an appeal in 2009 which was dismissed, and the finding that both she herself and her daughter had used deception previously, was not challenged by the Appellant, it was simply the fact that she had not actually appealed the decision in 2007. However, given that the Judge had properly set out the other issues which established her general lack of credibility regarding the use of deception and the appeal in 2009, I do not consider it to be material that she also considered an appeal had been dismissed in 2007. In any event, the Judge's reason in this regard did not affect her finding that insufficient documentary evidence had been produced regarding the Appellant living with and being financially dependent upon her Sponsor.

13. I further do find that the First-Tier Judge did err in fact at paragraph 11 at [11] in stating that the Appellant had claimed in her application form that she lived in the United Kingdom for 8 years 11 months i.e. 2006, although the computer records of the Respondent apparently showed she had arrived in February 2009. However, I find that this is as a result of the way that the application form was completed by and on behalf of the Appellant, in that the Appellant's details are

given as Charmaine Gail Kresnicki, with the family member being listed as Christine Mukasa, but that it was stated at question 10.11 in respect of the question “How long have you lived in the UK?”, “8 years and 11 months”. Although I accept that this did relate to the Appellant’s daughter rather than herself, the Judge's error in this regard did not affect her reasoning or decisions regarding the lack of sufficient documentary evidence to show cohabitation and or dependency as at the date of the appeal. Any error in this regard is therefore not material.

14. I do not consider that the Judge erred in her findings at [15] as the Judge was correct in stating that the Asda shopping card and Argos gift card did not appear to be in the bundle before her. Although within the Grounds of Appeal the Appellant sought to attach copies of the Asda shopping card and Argos gift card which she had retained as evidence that she did submit the cards, this does not in itself establish that this evidence had reached First-tier Tribunal Judge Agnew. In any event, the Judge properly found that this evidence in itself would not be sufficient to establish that the Appellant was maintained and her essential needs would be met by her son-in-law. This is a finding that was perfectly open to her on the evidence before her regarding the Appellant's contention that she used the Asda shopping card and Argos gift card to purchase personal goods.

15. I do not consider that the Judge made any error in terms of her finding at [16] as the Judge properly stated that "the Appellant is aged 55 and has produced no medical evidence to indicate that she is incapable of work, although she claimed she is not allowed to work. I consider it far more likely that she works and she has an independent income." The Judge here was not making any finding saying that the Appellant was incapable of work for medical reasons. She notes specifically that the Appellant was saying she was not allowed to work and had noted at [12] that in the Grounds of Appeal it was being argued that the Appellant was not allowed to work or engage in any business transactions. The Judge was simply stating that there was no medical reason for the Appellant being incapable of work and even though she was not allowed to work, she formed the view that the Appellant was working and had her own independent income. Again, this was a finding that was open to her on the evidence available.

16. In respect of the Appellant's submission that the law should be lenient and grant her a residence card or certificate as she would like to stay with her family and that her case should be considered on humanitarian grounds given that she is now widowed following the death of a husband in 2009, this does not in itself establish any error of law in the decision of First-Tier Tribunal Judge Agnew, which would be material to the likely outcome of the case. It would only be if there was a material error of law within the decision of First-Tier Tribunal Judge Agnew that I would be in a position to set aside and remake the decision. Until such error of law has been established, I am not in a position to consider remaking the decision.

17. Although within the grant of permission to appeal, it was said that the council tax bill dated the 22nd January 2015 was in the name of three people, namely Mr Marcin Kresnicki, Mrs Charmaine Kresnicki and Mrs Christine Mukasa which tends to support the applicant's case that she lives with and is dependent upon her daughter and son-in-law, given that this council tax bill dated the 22nd January 2015 post-dated the decision of First-tier Tribunal Judge Agnew which was decided on the papers at Glasgow on the 12th January 2015 and promulgated on the 14th January 2015, I can see no basis for finding that the First-Tier Tribunal Judge erred in law in failing to take account of this evidence. This evidence post-dated the decision and therefore would not have be available to her at that date. The Judge can only properly consider the case on the evidence presented and the council tax bill that had been presented and which was before First-Tier Tribunal Judge Agnew dated the 7th February 2014 only had the names on it of Mr and Mrs Kresnicki. There was no reference to the Appellant on that document. The First-Tier Tribunal Judge therefore cannot be criticised for having failed to take account of a later council tax bill that actually post-dated the decision made by her and was only submitted in support of the permission to appeal her application.

18. For the reasons set out above, although the decision of First-tier Tribunal Judge Agnew thereby did contain some factual errors, these errors were insufficient to amount to material errors of law and did not affect the First-Tier Tribunal Judge's

decision that insufficient evidence had been submitted to prove cohabitation and dependency. No material error of law having been disclosed, the decision of First-Tier Tribunal Judge Agnew is maintained. The appeal is dismissed.

Notice of Decision

1) The decision of First-Tier Tribunal Judge Agnew does not contain any material errors of law and is maintained. The Appellant's appeal is dismissed.

2) The First-tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and no application for an anonymity order was made before me. No such order is made.

Signed Dated 9th September 2015

RF McGinty

Deputy Upper Tribunal Judge McGinty