



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

Appeal Number: EA/02084/2018

THE IMMIGRATION ACTS

Heard at Field House

**Decision and
Promulgated**

Reasons

On 13 August 2018 and 20 November 2018

On 7 December 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

**OLUWAKEMI PEDETIN OKETUNDE
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Aborisade (for O A Solicitors)

For the Respondent: Mr S Kandola and Ms Everett (Specialist Appeals Unit)

DECISION AND REASONS

1. This is the appeal of Oluwakemi Pedetin Oketunde, a citizen of Nigeria born 26 August 1983, against the decision of the First-tier tribunal of 18 May 2018 dismissing her appeal, itself brought against the decision of the Respondent of 20 February 2018 to refuse her application for

recognition of her right to permanent residence on the basis of a retained right of residence.

2. The basis of her application of 20 November 2017 was that she had married an EEA national on 15 March 2011 from whom she had become divorced on 23 December 2016. Accordingly at the date of divorce she had resided in the UK for more than three years alongside a person to whom she had been married for more than a year, and she accordingly argued that she was owed the retained right of residence as provided by The Immigration (European Economic Area) Regulations 2016. As established by the relevant authorities, consistent cohabitation is not required so long as the marriage has not been dissolved.
3. The application was refused because no valid national identity card or passport was provided in the name of the Appellant's EEA national ex-husband. Furthermore, given she had been able to provide evidence of his working history up to December 2016, it was not accepted that she was unable to obtain confirmation of his nationality and identity as at the application date.
4. The Appellant lodged grounds of appeal against that decision, and the matter was determined without a hearing. The First-tier tribunal noted that a Portuguese Citizen Card had now been supplied in the name of Nuno Miguel Abrantes Rodirguers Costa; that name also appeared in the copy of the Decree Absolute. However, the name attributed therein to the Appellant was simply "Oluwakemi Pedetin" rather than her full name in which she brought the appeal; accordingly there was no cogent evidence connecting her with the Decree Absolute. Furthermore, the Tribunal was unable to verify Mr Costa's citizenship.
5. Grounds of appeal of 25 May 2018 argued that the validity of the Appellant's divorce had not been put in issue by the Respondent, and that witness statement evidence from Mr Costa confirming the fact of their marriage and divorce had been overlooked.
6. Permission to appeal was granted by the First-tier tribunal on 25 June 2018 on the basis that the Judge may have erred in questioning the Decree Absolute when the Respondent had not challenged that document.

Error of law hearing

7. Before me Mr Kandola accepted that the First-tier Tribunal had materially erred in law. The sole issue in dispute had been the adequacy of the evidence of the EEA national's nationality and identity. He submitted that the appropriate disposal of the appeal was for the Upper Tribunal to so rule, and consequently to retain the matter for a continuation hearing, albeit that it was possible that any such further hearing would be forestalled by the recognition in the meantime of the

Appellant's residence right if the Portuguese identity document was confirmed as genuine. Mr Aborisade replied that any ruling by the Upper Tribunal should be accompanied by firm directions to ensure that the application was reconsidered in a timely fashion.

Findings and reasons – Error of law hearing

8. I accepted that there was indeed an error of law here. The fact of the divorce had not been disputed by the Respondent. Indeed, as acknowledged by Mr Kandola, the Appellant had been married in the same name as that which appeared in the divorce certificate.
9. The First-tier Tribunal should not have raised this point of its own motion. That was unfair in the context of an appeal that was being determined without a hearing: the parties to such an appeal are entitled to presume that the issues between them have been settled by the terms of the refusal letter.
10. Furthermore, the First-tier Tribunal was required to adjudicate on the sole issue that divided the parties, ie as to whether or not there was adequate evidence of identity and nationality before it. There was witness statement evidence from the EEA national which was relevant to these consideration that was not addressed in the Tribunal's material reasoning. That represented a failure to take account of relevant considerations.
11. In any event the point raised by the First-tier Tribunal is without substance: the Appellant had in reality both married and divorced in the same name.
12. Accordingly the First-tier Tribunal decision was flawed by errors of law. As they went to the central issues in the appeal, the errors were material ones. Accordingly the appeal fell to be re-heard. As there were only limited matters remaining for adjudication, it was appropriate to retain the matter in the Upper Tribunal for a continuation hearing.
13. However, as sensibly pointed out by Mr Kandola, in the event that the Secretary of State was able to confirm the identity of the EEA national, the *only* issue that remained live for decision, as no other aspect of the Appellant's case was doubted, there would potentially be no need for the appeal to proceed further. The application could be granted without further ado.

Continuation hearing

14. At the continuation hearing, Ms Everett appeared for the Secretary of State, and confirmed that there was now no objection to the application, and that in the circumstances, it was appropriate for the appeal to be allowed. Mr Aborisade agreed.

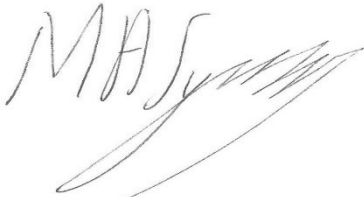
15. In the circumstances, there being no material issue that divides the parties, it is indeed appropriate for the appeal to be allowed. It is now firmly established that the Appellant remains the spouse of a qualified person.

Decision:

The decision of the First-tier Tribunal contains a material error of law.
The appeal is allowed.

Signed:

Date: 30 November 2018

A handwritten signature in black ink, appearing to read 'M.A. Symes', with a long, sweeping underline that extends to the left and then curves back under the signature.

Deputy Upper Tribunal Judge Symes