



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/02500/2016

THE IMMIGRATION ACTS

Heard at Field House
On 30 July 2018

Decision & Reasons Promulgated
On 22 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MRS OLASIMBO ADEPERO DAIRO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Shoker, Solicitor, ABM Law Solicitors

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is a citizen of Nigeria born on 26 February 1985 who appealed to the First-tier Tribunal against the decision of the respondent, made on 18 February 2016, to refuse the appellant a permanent residence card as the former spouse of an EEA national exercising treaty rights in the United Kingdom. In a decision promulgated on 9 January 2018, Judge of the First-tier Tribunal Andrew dismissed the appellant's appeal.

2. The appellant appeals with permission on the following grounds:

Ground A

That the judge had failed to consider all the facts/exceptional circumstances in relation to whether or not the marriage was genuine;

Ground B

The judge failed to consider all the evidence in finding that it had not been demonstrated that the appellant's ex-husband had exercised treaty rights for five years and it was submitted that the judge erred in considering the small sums of money earned by the appellant's ex-husband.

Error of Law Discussion

3. Permission was granted by Designated Judge Shaerf on both grounds. Although Judge Shaerf also noted that one of the grounds of the respondent's decision was that the appellant herself had not shown that she had exercised treaty rights for a period of five years and Designated Judge Shaerf asserted that the judge's decision did not address this point, the parties agreed with my indication that this was an error. The First-tier Tribunal Judge noted (at [2(b)]) that although the issue of the appellant's exercise of treaty rights had been in issue the respondent accepted the evidence during the hearing and therefore in view of this concession, Judge Andrew indicated at [3] that the only outstanding issues were whether the appellant's ex-husband was exercising treaty rights for a period of five years or more and whether the marriage was genuine.
4. Mr Shoker relied initially on the grounds of appeal and made no submissions. Mr Bramble relied on the respondent's Rule 24 response. This was dated 18 July 2018 and noted that at [15] the First-tier Tribunal Judge found that the appellant had not been able to show that this was not a marriage of convenience and this was a finding open to the judge. In relation to the second ground the respondent relied on **Levin v Staatssecretaris van Justitie [1982] EUECJ R-53/81** where it was established that part-time work must be genuine and effective and not purely marginal and ancillary. It was the respondent's submission that at [18] and [19] the judge found that work to be purely marginal and ancillary with no economic value.
5. Mr Bramble further submitted that the judge had correctly directed herself in relation to the case of **Rosa [2016] EWCA Civ 14** in that the legal burden of proof remains with the national authorities to prove the marriage is one of convenience; if the respondent has adduced evidence capable of pointing to the conclusion that the marriage is one of convenience, the evidential burden shifts to the appellant. There was no challenge in the grounds for permission, to the judge's approach to the burden of proof. Mr Bramble submitted that as set out at [12], [13] and [14] the judge was concerned as to the lack of easily obtainable evidence in relation to the relationship.
6. Mr Bramble submitted that the judge was fully aware that the marriage had broken down. Indeed at [13] the judge notes and accepts that there are some difficulties with the appellant in obtaining evidence in relation to the marriage from her former

husband. However, the judge goes on to consider that during the course of her evidence the appellant had referred to enlisting the help of a friend to obtain documents from her ex-husband and that in addition one of the few documentary pieces of evidence that named both the appellant and her husband was an electricity bill which named another person, whom the appellant claimed was their landlord. It was open to the judge to take into consideration, as she did at [13], that there was nothing from this individual confirming the cohabitation of the appellant and her former husband. In addition the judge further noted that the appellant had stated that one of the addresses used by her former husband was that of the appellant's brother. Again there was nothing from this individual to confirm the existence of a genuine marriage. The judge also took particular note of the fact, confirmed by the appellant in evidence, that it was after the marriage that she started to work in the United Kingdom and that she would not have been able to work beforehand on a legal basis.

7. Although Judge Andrews' findings are brief, that in itself does not constitute an error of law:

'Adequacy means no more nor less than that. It is not a counsel of perfection. Still less should it provide an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, perhaps even surprising, on their merits. The purpose of the duty to give reasons, is in part, to enable the losing party to know why she has lost and it is also to enable an appellate court or tribunal to see what the reasons for the decision are so that they can be examined in case there has been an error of approach.' (MD (Turkey) v SSHD [2017] EWCA Civ 1958).

8. The respondent had raised questions in relation to the genuineness of the appellant's marriage and the findings made by Judge Andrew were available to her: although the legal burden remains with the respondent the evidential burden had shifted and the appellant had failed to discharge that evidential burden. The appellant's challenge in ground 1 to the adequacy of those findings is unsubstantiated.
9. There was discussion both before the First-tier Tribunal and the Upper Tribunal in relation to the appellant's alleged inability to obtain documents because of the acrimony of the marriage split. However it is significant that the lack of evidence identified by Judge Andrew related to sources of evidence which ought to have been easily obtainable by the appellant, including her own brother.
10. Although Mr Shoker indicated at the start of the hearing that there had been further evidence produced and that evidence as to the genuineness of the marriage had been submitted either (he first indicated) with the application or, in his alternative submission, on appeal, Mr Bramble helpfully summarised all of the documents before the respondent decision maker and the First-tier Tribunal. This accorded with the documents in the court file. There was nothing in the evidence either in Mr Bramble's file or before the Upper Tribunal which might be identified as additional evidence from other sources as to the genuineness of the marriage provided by third parties. Mr Shoker, who had also represented the appellant before the First-tier Tribunal, was unable to point to any specific evidence not considered by Judge Andrew.

Ground 2

11. It was conceded by the respondent and the appellant accepted that at the date of divorce the appellant's former husband was exercising treaty rights. Although the grounds of appeal asserted that Judge Andrew erroneously imposed a minimum income requirement in her assessment of the evidence of the appellant's ex-spouse's economic activity, I disagree.
12. Judge Andrew made findings in the alternative if she was wrong in relation to the marriage of convenience. As Judge Andrew correctly identified, it was incumbent on the appellant to show that her ex-husband was exercising treaty rights for a continuous five years prior to the divorce. The judge took into account the evidence from HMRC which showed that for the tax years 2009 to 2010, 2010 to 2011 and 2011 to 2012 the appellant's ex-husband was earning small sums of money. Although described as self-employed from 2009/10 he earned £3,000 and £5,000 the following tax year. Judge Andrew took into consideration that there was no evidence that the appellant's ex-husband was working in any other employment or that he was a jobseeker. Judge Andrew took this evidence into consideration including in light of the Upper Tribunal decision in **Begum (EEA - worker - jobseeker) Pakistan [2011] 00275 (IAC)**.
13. The First-tier Tribunal correctly directed itself that the key question was whether the appellant's ex-husband was pursuing effective and genuine economic activity or whether the activities were on such a small scale as to be purely marginal and ancillary. Although it is not the case that Judge Andrew was imposing a minimum income requirement, it was open to the First-tier Tribunal to take into consideration, in the round, the level of the appellant's 'minimal' earnings in assessing whether the economic activity was genuine and effective. In so doing Judge Andrew took into consideration that although there were some National Insurance payment receipts, these were not sequential and not for a period of five years. These were findings that were available to the judge.
14. Judge Andrew further noted that there was nothing before her in the way of accounts, receipts for work carried out or materials bought, business accounts or any accountant's letter to confirm assertions as to continuing self-employment. This was particularly the case given that the appellant had asserted that her ex-husband was going out every day to work including weekends.
15. Although the permission judge was concerned that Judge Andrew did not fully engage with the respondent's European modernised guidance and noted that the appellant was self-employed, it is evident that the judge had in mind and applied the correct test including as identified in **Levin**. As with ground 1, the findings were adequate and were conclusions available to the judge on the basis of the evidence before her.

Conclusion

16. The decision of the First-tier Tribunal does not contain an error of law and shall stand. The appellant's appeal is dismissed.

No anonymity direction was sought or is made.

Signed

Date: 10 August 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed. I therefore make no fee award.

Signed

Date: 10 August 2018

Deputy Upper Tribunal Judge Hutchinson