Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01384/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 November 2019	**On 13 November 2019**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

VIDA ASAMOAH
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Beyebenwo, CW Law Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before me following the grant of permission to appeal by Upper Tribunal Judge Grubb on 27 September 2019 against the determination of First-tier Tribunal Judge Sweet, promulgated on 17 June 2019 following a hearing at Hatton Cross on 5 June 2019.

2. The appellant is a Ghanaian national born on 15 June 1972. She previously held a residence card as the spouse of her EEA national sponsor but on 4 February 2019 applied for a permanent residence card on the basis of retained rights of residence. As she was not divorced from her husband, the application was refused under reg. 10(5)(a)(i) of the EEA Regulations 2016. The respondent also, however, considered whether she qualified under reg. 15(1)(b) as a spouse. It was accepted that the marriage had not been terminated by a divorce, annulment or dissolution and it was accepted that the sponsor had permanent residence. However, in the absence of any evidence that he had not left the UK since he had been granted permanent residence, the Secretary of State was not satisfied that he had maintained his residence in the UK and accordingly refused the application on that basis too.

3. At the hearing before First-tier Tribunal Judge Sweet, submissions were made on the basis that the appellant was the spouse of an EEA national (at paragraph 11). The judge, however, only considered the issue of whether the appellant had retained rights of residence, found that she did not as she remained in a subsisting marriage and, accordingly, dismissed the appeal.

4. Permission to appeal was granted by Upper Tribunal Judge Grubb on the basis that the judge had only considered the issue of retained rights of residence which had not been her case before him and that he failed to make findings on the issue of whether she qualified as a spouse under the Regulations.

5. The respondent in her Rule 24 response concedes that the judge erred in failing to consider the second limb of the appellant's case but maintains that as there was no evidence that the spouse was exercising treaty rights or that he had not been away from the UK for less than two years since he was granted permanent residence, the error was not material.

The Hearing

6. Mr Beyebenwo represented the appellant at the hearing. He relied on the grounds, arguing that the judge had not considered the second limb of the appellant's case. He submitted that Counsel at the hearing before the First-tier Tribunal Judge had asked for an Amos direction. I pointed out there was nothing in the recorded submissions to confirm that and no note from Counsel had been adduced. Mr Beyebenwo accepted that but nevertheless repeated the argument. He was

able to confirm that the appellant had not approached the Secretary of State to ask for help in obtaining the sponsor's work records and also that she had not attempted to obtain any documents from her husband as there had been domestic violence in the past and he had not engaged with the divorce proceedings.

7. Mr Melvin relied on the Rule 24 response in which the respondent conceded that the judge had erred but argued that the error was not material. Mr Melvin submitted there had been no evidence before the judge that the sponsor had remained in the UK or had continued to work here and on that basis the appeal could not have succeeded. He confirmed that no request had been made to the Secretary of State for enquiries to be made of HMRC. He asked that the decision of the First-tier Tribunal Judge be upheld and the appeal dismissed.

8. I then asked Mr Beyebenwo for his submissions on why he considered the error was material. He was unable to assist and simply repeated his previous submissions.

9. That completed submissions. At the conclusion of the hearing, I indicated that I would be upholding the judge's decision to dismiss the appeal. I now give my reasons for so doing.

Discussion and Conclusions

10. I have considered all the evidence and the submissions made. Plainly the appellant made the wrong application to the respondent. She could not satisfy the requirements of reg 10(5)(a)(i) either at the date of the application, decision or the hearing as her marriage had not been terminated by divorce, annulment or dissolution. The respondent, however, quite properly proceeded to consider whether the appellant could qualify as a spouse under reg. 15. She concluded that as there was no evidence that the sponsor continued to exercise treaty rights in the UK and had remained here since the grant of his permanent residence card, that provision could not be met either.

11. It is correct to say that the appellant relied on the second limb of that decision at the hearing. Although there was no skeleton argument before the judge, that is plain from the submissions recorded as having been made by her representative. It is also correct to say that the judge made no reference at all to the case as argued and made no findings at all on whether reg. 15(1)(b) could be met. As such there is no question that he erred. Indeed, the respondent concedes that that is the case.

The issue for me is, however, whether that error is material or not.

12. The appellant does not have any information on her estranged husband since 2016 other than to have obtained his address through a private investigator. That investigator does not, however, provide any other useful information such as whether the spouse has remained in the UK without absences, and whether he has been working throughout his stay. No further evidence has been adduced and the appellant has confirmed that she has not sought to obtain any evidence and has not sought the Secretary of State's assistance in obtaining the sponsor's work records. In the absence of any evidence that the sponsor has continued to live in the UK since the grant of his permanent residence and since the appellant left the matrimonial home, I am unable to find that the consideration of the second limb of the appellant's case would have led to a different outcome. The judge's error, therefore, has no material bearing on the outcome of the appeal.

13. The appellant may wish to consider making an application to the Secretary of State for assistance in obtaining her estranged husband's work records. That would assist her whether she makes a further application as a spouse or for retained rights of residence (as it would appear she has now obtained a decree nisi).

14. In the circumstances there is no material error of law in the judge's determination.

Decision

15. The decision of the First-tier Tribunal Judge is upheld and the appeal is dismissed.

Anonymity

16. No request for an anonymity order was made.

Signed

Upper Tribunal Judge

Date: 8 November 2019