



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/35738/2013

THE IMMIGRATION ACTS

Heard at Field House
On 10 October 2014

Determination Promulgated
On 13 October 2014

Before

Deputy Upper Tribunal Judge Pickup

Between

Caro Nwachukwu
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr TDH Hodson, instructed by Elder Rahimi Solicitors
For the respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Caro Nwachukwu, date of birth 23.10.68, is a citizen of Nigeria.
2. This is her appeal against the determination of First-tier Tribunal Judge Telford promulgated on 4.8.14, who dismissed her appeal against the decision of the respondent, dated 6.8.13, to refuse her application for a residence card as confirmation of a retained right of residence as the former spouse of an EEA national

exercising Treaty rights in the UK, pursuant to the Immigration (EEA) Regulations 2006, as amended. The Judge heard the appeal on 9.7.14.

3. First-tier Tribunal Judge Brunnen granted permission to appeal on 19.8.14.
4. Thus the matter came before me on 10.10.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Telford should be set aside.
6. The relevant background is that the appellant first came to the UK in 2001 as a family visitor but overstayed. On 1.11.03 in the UK the appellant married Jerome Rene Jean Drouart, a French national. It is alleged that they lived together until 2006, when Mr Drouart left the appellant. Divorce proceedings were instituted in 2008 and finalised on 25.2.10.
7. A previous application for a permanent residence card was made by the appellant in 2008, based on her being a family member, was refused on 21.3.10 and the appeal dismissed by Immigration Judge O'Connor in a determination promulgated on 10.8.2010. In that hearing the appellant stated she last knew of her former husband's whereabouts in 2006. Judge O'Connor found that she was not entitled to permanent residence status as she had only lived with Mr Drouart as her spouse for a period of 3 years, and thus short of the 5 year period required. It was also asserted on the appellant's behalf that she was entitled to a retained right of residence under regulation 10(5). However, Judge O'Connor found that the appellant had failed to demonstrate that her ex-husband was in the UK and exercising Treaty rights at the date of termination of marriage, 25.2.10.
8. In the First-tier Tribunal appeal before Judge Telford the respondent did not dispute the issue of regulation 10(6). Nevertheless, the judge concluded that the appellant had failed to demonstrate that her ex-husband was exercising Treaty rights at the date of her divorce in 2010. Reliance had been placed on a Home Office policy, dated 4.8.11, entitled 'Pragmatic Approach (revised),' dealing, inter alia, with the difficulties faced by former spouses in complying with regulation 10 of the Immigration (EEA) Regulations 2006. As I understand it, Mr Hodson's submissions to the First-tier Tribunal were to the effect that the Secretary of State failed to consider and apply the policy and thus it was argued that the refusal decision of 6.8.13 was not in accordance with the law and the matter should be returned to the Secretary of State for a decision to be made in accordance with the law. Judge Telford did not agree. He found that the application of the policy had not been triggered because of a number of features of the case. First, the policy, or its predecessor, was not raised as an issue in the 2010 appeal and the appellant had taken no steps since that date to establish the whereabouts and circumstances of Mr Drouart. No application had been made by the appellant or her representative prior to or subsequent to the 2010 hearing for any order of discovery of any document which

may have been relevant to assist her to meet the requirements of the regulations and in particular whether Mr Drouart was in the UK and exercising Treaty rights at the date of finalisation of the divorce. The judge also found that the appellant did not meet the requirements of the policy by showing that she had made every effort to provide the required documents, which is the second bullet point example under paragraph 2 of the policy. Hence the appeal was dismissed.

9. In essence, the rather lengthy grounds of appeal submit that the First-tier Tribunal Judge erred in law in making unsustainable findings concerning the appellant's contention that the respondent had failed to consider and apply the published policy.
10. In granting permission to appeal, Judge Brunnen stated only that he found the grounds were arguable.
11. Mr Hodson argues that the Secretary of State should have considered the policy and/or given reasons for not applying the policy. It is clear from the determination of the First-tier Tribunal that Judge Telford gave very anxious scrutiny to the policy. Mr Hodson said that was the wrong approach, and that the judge should have decided whether the Secretary of State should have applied the policy. The refusal decision is silent as to the policy.
12. The respondent's position is that the policy is not applicable and the decision was in accordance with the law, and thus that no error of law is disclosed in the decision of the First-tier Tribunal.
13. I can see from §25 that the judge was alive to the issue as to whether the Secretary of State had complied with her published policy. However, for the reasons given, Judge Telford was not satisfied that the policy was not considered, or that in any event it applied in the appellant's circumstances.
14. Before I can accept that there was an error of law in the making of the decision of the First-tier Tribunal I must be satisfied that the policy is applicable, should have been considered by the Secretary of State, and if applied would or could have resulted in a different outcome to the application and appeal.
15. The policy is expressed in paragraph 1 as applying where a family member is unable to meet the requirements of the regulations "due to the exceptional circumstances of the application."
16. Paragraph 2 indicates that applications on the basis of having a retained right of residence should be treated pragmatically where there is a breakdown in the relationship between the appellant and their EEA national sponsor. "This is because it may not be possible for the applicant to provide the required documents to support their application." Two bullet point examples are cited, the first where the applicant is the victim of domestic violence, and the second where the relationship has ended acrimoniously but they have provided evidence to show that they have made every effort to provide the required documents, for example attempts to make contact with the EEA national sponsor during divorce proceedings.

17. Paragraph states that each case must be looked at according to its individual merits, "and where they are satisfied that there is a valid reason why the applicant is unable to get the required evidence, enquiries must be made on behalf of the applicant where possible."
18. Elsewhere in the policy document it makes it clear that the applicant is expected to provide as much detail as they can about the EEA national sponsor and that enquiries with HMRC must only be done where the caseworker is sure that the applicant cannot get the required evidence.
19. Mr Hodson points to the covering letter with the application, which referenced the policy, and the appellant's divorce affidavit, dated 19.3.09. It is submitted that the ex-husband was frustrating the divorce proceedings by giving the appellant's address as his own, although he left there on 17.10.06 and never returned. He made no effort to participate in the divorce proceedings and the appellant states she has not spoken to him since 2006 and does not know his whereabouts. She provided a copy of his passport with her application. A handwritten statement of a friend states that in 2008 she assisted the appellant to look for Mr Drouart and drove her to an address given for him at that time, 9 Lansbury Way, but the local residents did not know him.
20. In assessing the facts, Judge Telford reached the conclusion that the appellant had not made 'every effort' to provide the necessary documents to establish her case. It was not clear that Mr Drouart was even in the UK at the date of termination of marriage, he having not participated in the divorce proceedings. Judge Telford found no evidence that the appellant was unable to obtain evidence of her ex-spouse. The judge also considered after the delay of some 4 years since the divorce such enquiries might be pointless when there was no evidence of any contact with the appellant or the court system since that date. The only contact since he left her in 2006 was to return the acknowledgement of service of the divorce petition in 2008. She failed to follow up with her present or previous solicitors, even after the dismissal of the previous appeal. No enquiries other than those listed herein were made to locate Mr Drouart. As Judge Telford put it at §27, "She has made simply no effort since the divorce to provide evidence of any efforts she made. She has provided no evidence that having made those enquiries she contacted the respondent to say what enquiries she had made and that they had proved fruitless ... She has made no application to the court for any direction." The judge reached the conclusion that on the circumstances of this case the policy would not have been engaged and that in any event after a delay of 4 years such enquiries would be pointless as evidence that Mr Drouart was even in the UK at the date of divorce. At §21 the judge did not accept that there were exceptional circumstances in this case, or that the appellant's circumstances were akin to those examples cited in the policy.
21. The burden remains on the appellant to demonstrate that her ex-partner was exercising Treaty rights at the date of termination of marriage. I do not accept that the burden shifts to the Secretary of State to assist the appellant where she has made little if any effort to provide the necessary evidence and simply says, 'I don't know

where he is,' and has done nothing about it since 2010. Judge Telford made a careful assessment at the appeal hearing as to what efforts had been made by the appellant.

22. In all the circumstances, I find that the appellant failed to demonstrate that either she had made sufficient effort so as to engage the policy, or that her circumstances were such that the policy was engaged at all on the facts of this case. I am not satisfied that there were or are exceptional circumstances in this case. Or that the refusal decision was not in accordance with the law by failing to consider and/or apply the policy, or that Judge Telford was in error by failing to allow the appeal to the limited extent that he should have found the decision of the Secretary of State not in accordance with the law.
23. I further note that it is open to the appellant to make a further application, demonstrating that she has made reasonable efforts to trace her ex-husband. On the present evidence she has done practically nothing since 2008.

Conclusion & Decision:

24. For the reasons set out herein, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.



Signed:

Date: 10 October 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed.



Signed:

Date: 10 October 2014

Deputy Upper Tribunal Judge Pickup