Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/09006/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 April 2018	**On 20 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

KENNETH AKUOKU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Malik, Counsel instructed by Bwf Solicitors
For the Respondent: Miss A Holmes, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal from the decision of First-tier Tribunal Judge R G Walters which was promulgated on 9 January of 2018. The appellant is a Ghanaian national, born on 9 December 1966 who brought an appeal from the refusal by the Secretary of State to issue her with a residence card pursuant to the provisions of regulations 2 and 6 of the Immigration (EEA) Regulations 2006.

2. The First-tier Tribunal dismissed her appeal on the basis (i) that the marriage was one of convenience, and (ii) that at the material time the appellant's wife (and sponsor) was not exercising treaty rights.

3. The grounds of appeal settled by the appellant's solicitor focus on an error of law alleged to have been made by the First-tier Tribunal Judge in relation to the burden and standard of proof. Express reference is made to paragraph 6 of the decision under the sub-heading "The Applicable Law" which reads as follows:

> "In EEA appeals the burden of proof lies on the Appellant and the standard of proof is the balance of probabilities."

4. In truth, as is conceded on behalf of the Secretary of State, the evidential burden in demonstrating that there is a marriage of convenience lies on the Secretary of State.

5. Permission to appeal was granted by First-tier Tribunal Judge Pooler in the following terms:-

> "3. It is arguable that the judge misdirected himself in relation to the burden of proof where, as here, the respondent asserted that the marriage was one of convenience.
>
> 4. Although the grounds do not challenge the judge's finding that the appellant's EEA national wife was not exercising treaty rights and in those circumstances any error of law may not affect the outcome of the appeal, the appellant would arguably be prejudiced if he were to make another EEA application without being able to challenge the finding that he had entered into a marriage of convenience; and it is therefore appropriate to grant permission."

6. Mr Malik who acts for the appellant today seeks to enlarge the grounds of appeal by purporting to challenge the judge's findings in relation to whether or not the appellant's EEA national wife was exercising treaty rights. He relies on the fact that contained within the grounds of appeal there appears the following at paragraph 11:

> "The IJ's overall assessment of the marriage and the EEA national's work history, lacks clarity and does not meet the evidential burden test in the above cases."

7. Mr Malik points me to the decision in **Ferrer (limited appeal grounds; Alvi) [2012] UKUT 00304 (IAC)**. He cites the head note and in particular paragraph (2) which reads as follows:-

> "Where the First-tier Tribunal judge nevertheless intends to grant permission only in respect of certain of the applicant's grounds, the judge should make this abundantly plain, both in his or her decision under Rule 25(5) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and by ensuring that the Tribunal's administrative staff send out the proper notice, informing the applicant of the right to apply to the Upper Tribunal for permission to appeal on grounds on which the applicant has been unsuccessful in the application to the First-tier Tribunal."

8. Mr Malik says that those procedural requirements were not followed. In my judgment there was no obligation to follow any of those procedural requirements because the grounds do not, on their face, challenge the judge's finding in relation to the EEA national wife not exercising treaty rights. Paragraph 4 of the grant of permission expressly recites the absence of any challenge in that regard. I agree with Miss Holmes' submission that paragraph 11 of the grounds is insufficient to amount to a discrete and separate ground of appeal. In any event, it should have been plain on the face of the grant of permission that no permission is granted in relation to the second matter.

9. The situation is slightly complicated by a Rule 24 response sent by the Secretary of State and dated 12 March of 2018. That reads as follows:-

> "The respondent does not oppose the appellant's application for permission to appeal and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing to consider whether the appellant's marriage is one of convenience in light of the unchallenged findings with regards to the EEA sponsor having failed to exercise treaty rights."

8. Miss Holmes at one point sought to look behind that Rule 24 statement and to say that looking at the decision in the round, even though paragraph 6 amounted to a misstatement, the judge in fact applied the correct burden and standard of proof. In my opinion it is not open to Miss Holmes to look behind that Rule 24 statement and to seek to uphold the decision.

9. The proper course in the light of the concession made by the Secretary of State is to set aside the First-tier Tribunal decision (on the basis of the inaccurate statement as to the burden of proof) but then to remake the decision relying on the judge's unchallenged finding in relation to the appellant's wife not exercising treaty rights and to dismiss the substantive appeal on that basis.

10. Although Mr Malik has argued against that resolution, it seems to me that it is inevitable on the basis of the clear findings of the First-tier Tribunal.

Notice of Decision

(1) The decision of the First-tier Tribunal is set aside;
(2) The decision is remade dismissing the appellant's appeal.

Signed *Mark Hill* Date 19 April 2018

Deputy Upper Tribunal Judge Hill QC