IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/12002/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 March 2016	**On 6 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

ECHEZONA ALASORO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. M. Ume-Ezeoke, instructed by Apex Solicitors
For the Respondent: Mr. I. Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Bell, promulgated on 31 July 2015, in which she dismissed his appeal against the Respondent's decision to refuse to issue a permanent residence card as confirmation of his right to reside.

2. Permission to appeal was granted as follows:

"It is arguable as asserted the FtTJ erred in reaching conclusions on the rights of the appellant to the issue of a residence card. The FtTJ may have erred in dismissing the appeal rather than in concluding that the application awaited a lawful decision having found in the appellant's favour on the marriage of convenience allegation."

3. At the hearing Mr. Jarvis accepted that there had been a material error made in paragraph [38] onwards relating to the five year period of cohabitation. He said that he would have indicated this prior to the hearing date, but he had needed to speak to the Presenting Officer who appeared at the First-tier Tribunal hearing. The Presenting Officer had confirmed that the question of five years' residence had not been in play at the hearing. Mr. Jarvis accepted that the judge had acted in a way which was procedurally irregular, thus making the decision unfair at common law.

4. He accepted the finding at paragraphs [32] to [35] that the Appellant's marriage was not a marriage of convenience. He submitted that the application should now be remitted to the Respondent to consider the issue of five years' residence. He accepted that the reasons for refusal letter had not dealt with the issue of the five year period of residence.

5. Having heard this concession on behalf of the Respondent, and having heard brief submissions from Mr. Ume-Ezeoke, I found that the decision contained an error of law. I remade the decision, allowing the appeal it to the extent that it be remitted to the Respondent for consideration of whether or not to grant a residence card. I set out my reasons in full below.

Error of law

6. In paragraph [32] the judge states:

"Taking all this into account I am not satisfied that what emerged from the interviews was sufficient evidence to show that there were factors which support the suspicions for believing the marriage is one of convenience or that there were reasonable grounds for suspecting that this was the case."

7. In paragraph [33] she states that, as the initial burden of proof was on the Respondent, she was not satisfied that the Respondent had discharged this burden. In paragraph [34] she found that the burden therefore did not shift to the Appellant, and in paragraph [35] concluded that it had not been demonstrated that the marriage was a marriage of convenience.

8. The reasons for refusal letter considered the marriage to be a marriage of convenience, but did not go on to consider the issue of five years' residence. However, in paragraph [36] the judge went on to consider

whether or not the Appellant had demonstrated that he had resided in accordance with the Regulations for a period of five years. In paragraph [38] she found that there were some significant doubts as to whether they had been living together continuously for the last five years.

9. I find that, given that the Respondent had not considered this issue, and given that it was not raised at the hearing, the appropriate course of action was to find that the marriage was not one of convenience, and to allow the appeal to that extent, remitting it to the Respondent for consideration of the application for a residence card on the basis of five years residence. The judge should not have gone on to make the findings in paragraphs [38] and [39], given that this was not an issue which was before her.

10. Further evidence was provided to this Tribunal on 21 December 2015. As stated by Mr. Jarvis, this further evidence should be taken into account by the Respondent when considering whether or not to grant a permanent residence card on the basis of five years' residence.

Notice of Decision

11. The decision of the First-tier Tribunal involved the making of a material error of law.

12. The finding that the Appellant's marriage is not a marriage of convenience is preserved (paragraphs 1 to 35). The remainder of the decision is set aside.

13. I remake the decision allowing the Appellant's appeal to the extent that the application be remitted to the Respondent for consideration of whether or not the Appellant is entitled to a permanent residence card, given the finding that the Appellant is married to the Sponsor.

No anonymity direction is made.

Signed Date 29 March 2015

Deputy Upper Tribunal Judge Chamberlain