



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/01668/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 15 February 2018**

**Decision and
Promulgated
On 02 May 2018**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE MURRAY

Between

**MOSES DAMILARE ANIFOWOSE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Nnamani, Counsel for Samuel Lewis Solicitors, London
For the Respondent: Mr Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 2 June 1992. He appealed against the decision of the respondent dated 24 January 2016 refusing to issue him a residence card as confirmation of a right to reside in the UK as the spouse of an EEA national exercising Treaty Rights in the UK. His appeal was heard by Judge of the First-Tier Tribunal Asjad and dismissed in a decision promulgated on 21 February 2017.

2. An application for permission to appeal was lodged and permission was granted by the Upper Tribunal on 7 December 2017. The permission states that the respondent's refusal letter found only that the evidence did not show that the sponsor was exercising Treaty Rights. It declined to comment on the genuine nature of the marriage. This issue was raised in the appellant's grounds of appeal and evidence. The First-Tier Judge made a finding of a marriage of convenience without the appellant having had the opportunity to address this. The permission states that it is not sufficient to say that the appellant could have attended the hearing and addressed the new evidence. He did not know that evidence about the marriage being a sham was going to be adduced so did not know that he should attend to deal with this. The documents suggesting that the sponsor has very recently assisted other non-EEA nationals to obtain residence cards on the basis of a relationship with her is on the face of it very strong, but it remains the case that procedural fairness requires that it be put to the appellant in order for him to have the opportunity to respond.
3. There is no Rule 24 response.

The Hearing

4. Counsel submitted that the appellant had no chance to address the two points referred to in the permission.
5. Counsel then went on to deal with whether the sponsor in this claim is a qualified person. She submitted that it is clear that the sponsor was working and documents have been provided. Evidence was supplied from HMRC to show that the sponsor worked for Tudor Employment Agency Limited and other companies. She submitted that as the sponsor was exercising Treaty Rights this appeal should have been allowed.
6. She submitted that on the day of the hearing the respondent brought up the point of whether the marriage is one of convenience. She submitted that although this is mentioned in the refusal letter at paragraph 4, the marriage is not challenged. She submitted that the evidence produced before the First-Tier Judge shows that the sponsor and the appellant are engaged to each other.
7. I put to Counsel that the First-Tier Judge was not satisfied with the evidence about the sponsor's employment. Counsel submitted that the HMRC letter may well not have been seen by the appellant which is another "unfair" issue, but I pointed out that the HMRC letter was actually sent to the appellant at her address so she must have seen this. I also referred her to paragraph 13 of the decision in which the Judge states that he has not seen a marriage certificate. Counsel again submitted that the issue of a sham marriage was not mentioned in the refusal letter and so the appellant had no chance to deal with it.

8. The refusal letter refers to Tudor Employment Agency Limited not being able to be contacted by telephone or located at Companies House, Yell.com or Google and that the tax codes on the wage slips are not compatible with those provided by HMRC for the period specified. It refers to discrepancies in the wage slips in regard to the appellant's total gross earned amount, deductions, net paid total and year to date totals. Counsel submitted that the HMRC letter refers to Tudor Employment Agency Limited so Tudor does exist and is a trading company. She submitted that although there is no evidence, apart from the HMRC letter, of the sponsor's employment by other companies, this may not be necessary, now that the HMRC document is on file.
9. She submitted that the additional documents provided by the respondent about the problems with the subsistence of the marriage were provided too late for the appellant to deal with.
10. The Presenting Officer submitted that there is no merit in the grounds of application. He submitted that it is not clear whether the sponsor is the wife of the appellant as there is no marriage certificate and she is referred to as his partner. He submitted that different regulations apply if the sponsor is his partner and not his wife.
11. The Presenting Officer referred to the refusal letter which states that there is insufficient evidence of the sponsor's employment. He submitted that in the refusal letter it is stated "Regulation 2 of the Immigration EEA Regulations 2006 states that a spouse does not include a party to a marriage of convenience". The refusal goes on to state that as there is insufficient evidence to show that the EEA national is exercising Treaty Rights, it was not necessary for the appellant's relationship with the sponsor to be considered and the application has been solely considered under Regulation 6 of the EEA Regulations. The refusal goes on to state that should the appellant be in a position to provide further new evidence that the EEA national is exercising Treaty Rights it is open to him to submit a new application. He submitted that this was sufficient warning to the appellant that the respondent doubted the genuineness of the relationship. He submitted that all the terms of the Regulations are to be satisfied and this part of the refusal letter put the appellant on notice that if he can provide evidence of the sponsor exercising Treaty Rights. Regulation 2 would then be an issue.
12. The Presenting Officer submitted that an oral hearing was requested by the appellant and it was expected that the appellant and the sponsor would attend. He submitted that the evidence before the Judge relating to the sponsor's employment cannot be accepted as the tax codes on the wage slips are not compatible with those published by HMRC for the period specified and there are discrepancies in the wage slips regarding the sponsor's gross earned amount, deductions, net paid total and year to date totals. He submitted that the appellant did not produce anything to satisfy these issues. I was referred to discrepancies in the application form and the HMRC letter and he submitted that if the Judge was not

satisfied that the sponsor is exercising Treaty Rights, he did not require to consider the sham marriage and it is clear from the decision that the Judge was not satisfied that the sponsor was exercising Treaty Rights and therefore the part of the decision relating to the sham marriage makes no difference to the Judge's final findings. He submitted that the error is not material.

13. Counsel submitted that the respondent has to prove that the marriage is one of convenience. She referred to the material being served late and to the appellant not being put on notice that Regulation 2 was going to be argued. She submitted that the statement in the refusal letter referred to by the Presenting Officer is not sufficient.
14. She referred to Regulation 6 and the independent evidence provided by the sponsor to show that she is working and was employed by Tudor and she submitted that what has been provided discharges the burden of proof so Regulation 6 has been satisfied.
15. With regard to whether the appellant and the sponsor are married she submitted that if the respondent was not satisfied about this then proper reference should have been made to it in the refusal letter.
16. I was asked to find that there is a material error of law in the Judge's decision and to remit the case to be reheard in the First-Tier Tribunal.

Decision and Reasons

17. The respondent's refusal letter found that the evidence provided did not show that the sponsor was exercising Treaty Rights. There is now an HMRC letter which the appellant has clearly seen as it was addressed to her at her home address. This refers to Tudor Employment Agency Limited in the years ended April 2015 and April 2016 but it is clear that the sponsor also worked for other employers and there is no evidence about any of these on file. The evidence provided does not tally with the HMRC letter for the reasons referred to by the Presenting Officer. These are also referred to in the decision. The HMRC letter was before the Judge and is referred to by him at paragraph 12 of the decision. The letter gives an employment history of the sponsor from 2012 to 2016. The application was made in 2014. The record shows that the sponsor has worked for various companies including Tudor Employment Agency Limited. The Judge has also noted that the HMRC record does not show that the sponsor is earning the amount recorded on the application form. The Judge is clearly not satisfied with the evidence produced about the sponsor's employment and refers to the discrepancies.
18. As all the terms of the Regulations have to be satisfied. The Judge's findings about the appellant's relationship with the sponsor and whether it is subsisting and genuine do not have to be taken into account as the application must fail based on the sponsor's employment and her exercise of her Treaty Rights.

19. The refusal letter suggests that a new application is made by the appellant with the required information about the sponsor's employment. That is the logical thing for this appellant to do. When he does this and all the relevant paperwork about her employment is provided, the genuineness of the relationship can be dealt with as no doubt this will be relevant when the decision letter is issued relating to the new application. The marriage certificate can also be supplied.

Notice of Decision

20. As there is no material error of law in the First-Tier Judge's decision her decision, promulgated on 21 February 2017, must stand.
21. Anonymity has not been directed.

Signed

Date 01 May 2018

Deputy Upper Tribunal Judge Murray