



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

Appeal Numbers: EA/04870/2016
EA/04873/2016
EA/04874/2016

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated
On 09 July 2019**

**Decision given orally immediately after
hearing
On 24 June 2019**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

**E1, E2 AND E3
(ANONYMITY DIRECTION MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr J Walsh, Counsel instructed by Universe Solicitors
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal has been before this Tribunal on two previous occasions. Following the first hearing on 21 February 2019 I found that there had been a procedural irregularity in the hearing before the First-tier Tribunal such that the decision had to be remade. It is not necessary for the purposes of this decision to set out the basis of that decision save to

repeat that it arose out of a misunderstanding between the judge and Counsel then appearing on behalf of the appellants and that no criticism was made by this Tribunal of the conduct of the judge.

2. Subsequently the appeal was again listed for hearing on 10 April 2019 but because an interpreter had not been booked it had to be adjourned until today.
3. The appellants are all nationals of Nigeria who had applied for permanent residence cards as the wife and stepchildren of an EEA national exercising treaty rights in this country. That national is a Portuguese citizen (hereinafter "the husband") who was deported from this country in April 2016 following his conviction for various offences. The appellants had been granted residence cards in 2011, the first appellant having been married certainly in name to the husband and the second and third appellants (the first appellant's daughters) having come to join her in this country. The husband was not deported from this country until the parties had been married for a period of five years and so if this had been a genuine marriage at its inception, and if the husband had been in employment and therefore exercising treaty rights in this country during this period, all the appellants would be entitled to permanent residence cards.
4. After his arrest on criminal offences the husband was interviewed while in custody and had given answers suggesting that he was single and had no children and that he had not been involved in any application for an EEA residence permit. As a matter of fact this was not truthful, because even if the marriage was not a genuine marriage but was a marriage made for the purpose of facilitating the grant to the first appellant of a residence card nonetheless in name at any rate the sponsor was married. However, in light of this statement by the husband the respondent took the view that the marriage was not a genuine marriage.
5. The respondent also questioned whether as a matter of fact the husband had been exercising treaty rights in the UK for the requisite period.
6. On appeal to the First-tier Tribunal, the First-tier Tribunal had ordered the notes of interview of the husband to be produced which they were not and for this reason the judge had stated that she would not take account of any of the answers said to have been given by the husband in the interview concerning which no record had been produced. Unfortunately the appellants' then representative understood this (in the event incorrectly) as indicating that the judge was satisfied that the marriage was a genuine one. Because of this in argument he did not address this issue.
7. In the event the judge went on to find for other reasons that she was not satisfied that the marriage was a genuine one and at the error of law hearing I found that this was a procedural irregularity because looking at this dispassionately it seemed there had been a misunderstanding and

that as a result of this misunderstanding the appellants' case had not been properly put. I accordingly directed that there should be a rehearing before this Tribunal and that rehearing took place today.

8. Prior to this hearing on behalf of the respondent Mr Kotas set in motion very full enquiries which regrettably had not been made before. As was absolutely appropriate he put the results of these enquiries before the Tribunal, to which such reference as is necessary will be made below. I also heard oral evidence from the first and third appellants who were both asked questions, both by the Tribunal and also on behalf of the respondent. The purposes of the questioning was to elicit from these witnesses what actually occurred and to clarify what was contained within the material which had so recently been put before the Tribunal by Mr Kotas.
9. I do not intend to set out in any great detail the evidence which was given or the new material that was produced save to the extent that is necessary. However, I have before making this decision had regard to everything which was said to me during the course of the hearing and also to all the documents contained within the file, whether or not the same is referred to specifically below.
10. The evidence established first that the first appellant had married the husband and that following this marriage the second and third appellants, her daughters from a previous relationship, had joined her from Nigeria. Having considered the evidence carefully, I am entirely satisfied to the requisite standard of proof which is the balance of probabilities that the evidence of the third appellant and the first appellant was truthful evidence, and I make my decision on this basis.
11. The evidence which I have accepted establishes that at its inception the marriage was a genuine one, but that it had broken down largely as a result of inappropriate sexual conduct by the husband towards the third appellant which was distressing for her to relate and distressing for this Tribunal to hear. This evidence is supported by other papers within the file, including the evidence recently obtained by Mr Kotas and put before the Tribunal from which it appears that amongst the charges of which the husband was convicted were sexual assaults which in the papers are said to relate to his stepdaughter. Although there is some confusion as to whether and if so what charges were specifically brought in respect of his conduct towards the third appellant I am satisfied to the requisite standard of proof as I have said that the evidence of the third appellant was truthful.
12. It was also clear from the evidence which I have accepted that the husband had been working certainly up until he went into custody in late 2015 or early 2016 and it is not now submitted on behalf of the respondent that he had not been exercising treaty rights for the requisite period of time.

13. The evidence having concluded, Mr Kotas very fairly accepted on behalf of the respondent that he could not seriously argue that the witnesses were not credible witnesses and that on that basis the respondent could not properly argue that this appeal should be dismissed.
14. I entirely agree. The burden of proof to establish that a marriage was not a genuine marriage at its inception remains on the respondent and it is clear having regard to the evidence that is now before the Tribunal that the respondent has not discharged that burden. Even were the burden on the appellant to establish that the marriage had been genuine at its inception I would be satisfied on the balance of probabilities that it was. I am also satisfied that the husband was exercising treaty rights for the requisite period.
15. It follows that this appeal must now be allowed and I will so order.

Notice of Decision

I set aside the decision of the First-tier Tribunal and substitute the following decision:

The appellants' appeal is allowed, under the 2016 EEA Regulations.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:

A handwritten signature in black ink that reads "Ken Craig". The signature is written in a cursive style and is positioned above a light blue rectangular stamp.

Upper Tribunal Judge Craig

Date: 4 July 2019