



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/03698/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
Oral determination given following
hearing
On 9 February 2016**

**Determination Promulgated
On 22 April 2016**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RICHARD CHIDI EZEH

Respondent

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Mr Youssefian, Counsel, instructed by D J Webb & Co
Solicitors

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against a decision of First-tier Tribunal Judge Seelhoff promulgated on 26 June 2015 following a hearing at Richmond Magistrates' Court on 15 June 2015. For ease of reference throughout this determination I shall refer to Mr Ezeh who was the original appellant as "the claimant" and to the Secretary of State who was the original respondent as "the Secretary of State".

2. The background to this appeal can be summarised briefly. The claimant is a national of Nigeria who was born on 26 September 1978. He entered into a marriage with a lady, Ms Wiels, who is a national of the Netherlands born on 9 June 1986. Following this marriage the claimant applied for a residence card under the EEA Regulations but following investigation by the Secretary of State the application was refused on the ground that the marriage was a sham marriage. The Secretary of State also at that time issued removal directions in respect of Ms Wiels on the basis that by entering into a sham marriage she had abused her rights of free movement and was accordingly no longer entitled to remain in this country. One of the reasons advanced by the Secretary of State for making these decisions was that in interview Ms Wiels had confessed that the marriage was one of convenience. This version of the interview was very strongly contested by the claimant and also by Ms Wiels and Ms Wiels in particular denied very strongly having made any such "confession". As already noted they appealed against this decision and their appeal was listed for hearing before the First-tier Tribunal on 15 June 2015.
3. At that hearing the Presenting Officer who had originally been due to attend was apparently taken ill but the Secretary of State or those representing her took a decision not to apply for an adjournment and were content for the hearing to proceed in the absence of a Presenting Officer and I note from Judge Seelhoff's decision at paragraph 11 that the Presenting Officers Unit was specifically contacted by the Tribunal first to see whether or not they still wished the appeal to proceed and in Judge Seelhoff's words "they indicated they were happy for us to proceed with the case". Judge Seelhoff, having reviewed the file, was still concerned that because the Secretary of State was making such a serious allegation it was important that he had some evidence of the alleged confession which Ms Wiels was said to have made and he contacted the Presenting Officers Unit again and was sent a file note which he set out in his determination. The file note just contained a summary of what Ms Wiels was said to have confessed but did not set out a full record of the interview which apparently was conducted. Obviously no live witness was called on behalf of the Secretary of State and so neither the appellant nor Ms Wiels was in a position to cross-examine anyone or test such evidence as had been produced.
4. The appellant and Ms Wiels then gave evidence and set out their position which was that the marriage was a genuine marriage and not a sham marriage and that Ms Wiels had never made the confession she was said to have made. In light of that evidence, at paragraph 20, Judge Seelhoff found on the balance of probabilities "that the respondent has failed to produce adequate evidence to satisfy me that [Ms Wiels] confessed to being in a marriage of convenience". He noted in particular that "the interview note I was ultimately provided [with] is not a contemporaneous or verbatim record of a conversation with [Ms Wiels]" and that "it is not clear from the note in what environment the second interview took place". The judge also observed that it was not clear whether Ms Wiels had been cautioned or whether anyone else witnessed the exchange. Further, it did not appear that she was asked to sign a note of the alleged exchange or

even that she was ever provided with a copy of it. In these circumstances the judge's conclusion that the Secretary of State had not proved on a balance of probabilities that the marriage was a marriage of convenience is unsurprising.

5. The judge went on to allow the appeals both of the applicant and of Ms Wiels. In respect of Ms Wiels he allowed her appeal challenging the removal directions which had been made. In respect of the applicant the appeal was allowed; all that is said in the notice of decision is "the appeal is allowed" and the natural meaning of these words is that that the appeal against the refusal to issue a residence card was allowed outright.
6. The Secretary of State does not challenge the substantive decision that was made in respect of either the appellant or Ms Wiels so the decision in respect of Ms Wiels must stand. All that is challenged in respect of the applicant as submitted in the grounds is that in light of the reasoning contained within the decision the applicant's appeal should not have been allowed outright but should have been allowed only to the limited extent that the decision had not been in accordance with the law such that the application had to be reconsidered by the Secretary of State. The basis of this submission is that in the course of his decision at paragraph 18 the judge said as follows:

"I noted that the Secretary of State has not had an opportunity to consider whether or not [Ms Wiels] is exercising treaty rights at this time... I indicated that given that there had been a change of circumstance, that if I found that there was not a marriage of convenience I would be likely to allow the appeal subject to a proviso that [the Secretary of State] would need to reconsider the question of whether or not treaty rights were being exercised."

7. Then at paragraph 32 in the final sentence of the substantive decision the judge said as follows:

"This means that the [Secretary of State] will need to consider the issue of the exercise of treaty rights and come to a fair decision"

because (as the judge had remarked in the first sentence of this paragraph, paragraph 32):

"In terms of the exercise of treaty rights I am not satisfied from the decision letters that [the Secretary of State] examined this issue in detail as there is no reference to the exercise of treaty rights in the decision."

8. In my judgment it is clear from what the judge stated within the body of his Decision that the appropriate decision for him to make was to allow the appeal of this applicant but only to the limited extent that the Decision was not in accordance with the law so that it had to be reconsidered by the Secretary of State. Accordingly, I find that there was a material error of law and that the Decision has to be re-made.

Discussion

9. Although had I been restricted to consideration of the material which was before the First-tier Tribunal I would simply have gone on to re-make the Decision as Judge Seelhoff ought (and no doubt intended) to have made at the time. However, matters have moved on since then in that this Tribunal has now been provided with a bundle of evidence supporting the applicant's case that his wife, Ms Wiels has in fact been exercising and is continuing to exercise treaty rights in this country. On behalf of the Secretary of State Mr Melvin very fairly invited this Tribunal to consider this evidence when re-making the decision which again very fairly he conceded was very difficult to challenge. He saw no reason in these circumstances if this Tribunal was satisfied that the evidence showed that Ms Wiels was in fact exercising treaty rights in this country, why the Decision should be reconsidered by the Secretary of State. I have considered the evidence which has been adduced and I am satisfied that it is sufficient to establish on the balance of probabilities that Ms Wiels is indeed exercising treaty rights in this country.
10. Accordingly, although I have for the reasons I have given been obliged to set aside the Decision of the First-tier Tribunal Judge, in light of this evidence I am able to remake the Decision allowing the appeal outright. For the avoidance of doubt the consequence is that the applicant should now be given a residence card as he is entitled to one being the spouse of an EEA national exercising treaty rights in this country.

Decision

I set aside the decision of the First-tier Tribunal in respect of this applicant and remake the decision as follows:

The applicant's appeal is allowed under the EEA Regulations.

Signed:

A handwritten signature in black ink that reads "Ken Craig". The signature is written in a cursive style with a long, sweeping tail on the letter 'g'.

Upper Tribunal Judge Craig
2016

Date: 15 April