



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

Appeal Number: EA/07044/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 14 June 2019**

**Decision & Reasons Promulgated
On 20 June 2019**

Before

**UPPER TRIBUNAL JUDGE KAMARA
UPPER TRIBUNAL JUDGE O'CALLAGHAN**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR EUGENE [N]
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr N Garrod, counsel instructed by Gordon & Thompson Solicitors

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Hembrough, promulgated on 19 March 2019. Permission to appeal was granted by First-tier Tribunal Judge Parkes on 8 May 2019.

Anonymity

2. No direction has been made previously, and there is no reason for one now

Background

3. The respondent last entered the United Kingdom on 5 May 2008 with entry clearance as a visitor. He customarily married a Slovakian national called [DB] on 30 December 2010. On 8 February 2012, the respondent was issued with an EEA residence card, valid for 5 years. The respondent separated from Ms [B] in May 2015 and he was granted a divorce on 15 August 2016.
4. On 8 February 2017, the respondent applied for permanent residence on the basis that he had resided in the United Kingdom in accordance with the Immigration (European Economic Area) Regulations 2006 for a continuous period of 5 years and had retained the right of residence as the former spouse of an EEA national. That application was refused on 26 July 2017. In the reasons for refusal letter of the same date it was explained that there was insufficient evidence relating to the sponsor's exercise of Treaty rights between April 2011 and December 2012. In addition, in relation to the salary deposited in a Lloyds bank account from September 2011 and February 2012 and from April 2012 to 2015, there was no evidence on the sponsor's HMRC employment record and nor was there any evidence of self-employment. It was therefore not accepted that Ms [B] had exercised Treaty rights for a continuous 5-year period prior to the divorce nor that adequate evidence was provided that she was a qualified person in the United Kingdom as at the "date of the termination" of the marriage. Reference was made to evidence of employment from March 2016 until June 2016, nonetheless the Secretary of State noted the lack of evidence that Ms [B] was exercising Treaty rights on the date of the divorce in August 2016. In addition, the Secretary of State had been informed that Ms [B] had married Mr Talwinder Singh in September 2014 and supported another application while residing at the same address at which the respondent claimed to be residing. Consequently, the Secretary of State had doubts as to the genuineness of the respondent's relationship and divorce certificate.

The hearing before the First-tier Tribunal

5. This matter first came before Judge Hembrough on 5 February 2019 when he adjourned the appeal in order for the Secretary of State to make available the Home Office file relating to Mr Singh in order to ensure that it was the same Ms [B] who had married Mr Singh and the respondent. That file was not available at the resumed hearing and the judge decided to proceed as the matter had already been adjourned twice. At the hearing before the First-tier Tribunal, the uncontested evidence was that the respondent's marriage to the EEA national was dissolved by a customary court in Nigeria on 15 August 2016. The respondent nonetheless produced

evidence relating to the EEA residence card application made by Mr Singh, which was supported by Ms [B] as well as the decision dated 11 December 2014 allowing Mr Singh's appeal against the refusal of that application.

6. The First-tier Tribunal judge was not satisfied that it was the same woman who married the respondent and Mr Singh, concluding that the Secretary of State had not discharged the burden of proving that the respondent's marriage to Ms [B] was not genuine. In addition, the judge found that the sponsor was continuously exercising Treaty rights from December 2010 until the point of the divorce.

The grounds of appeal

7. The single ground of challenge was that the judge made a mistake of fact and misdirected himself. Reference was made to the presenting officer's appeal hearing minute (not enclosed with the grounds) in which it was stated that the judge's attention was drawn to the same National Insurance (NI) number being used in relation to both sponsors and as such the marriage was not genuine. There was said to be a clear failure by the judge to consider all the evidence in the round. It was contended that even if the respondent was not aware or an active party to the deception, the facts "*render the application obsolete.*"
8. Permission to appeal was granted on the basis sought, with Judge Parkes commenting that "it is not clear how a non-Nigerian national could validly contract a customary marriage."
9. The respondent did not file a Rule 24 response.

The hearing

10. Mr Lindsay confirmed that he was relying on the reasons for appealing which concerned a single, narrow, issue. He did not seek to rely on the comments of the judge granting permission about the customary marriage, which was not a matter raised in the Secretary of State's grounds.
11. Mr Lindsay stated that the First-tier Tribunal judge found that the person involved in the marriage with Mr Singh was not the same person as the sponsor in the instant case because the judge considered that the photographs did not look sufficiently alike. He argued that the judge was handed the residence card application made by Mr Singh. The Secretary of State's submission was that the two people were the same and if the judge had accepted that, the outcome might have been different and impacted the credibility of the relationship.
12. The minutes of the presenting officer referred to in the grounds were submitted during the hearing. Mr Garrod having seen them shortly before the hearing commenced. Mr Lindsay submitted that the minute referred to the National Insurance numbers being the same and that the judge had failed to have regard to this matter which was capable of changing the

judge's view of credibility. Mr Lindsay was unable to identify where in the material this NI number might be because Mr Singh's application was not on the Home Office file. He was hopeful it was on the IAC file.

13. Mr Lindsay accepted that the presenting officer did not put the issue of the NI numbers to the judge, however he maintained that the issue should have been looked at with greater care and that it rendered the decision of the judge unsafe. He went further, arguing that had that point been considered, it could have made a difference to the judge's decision not to adjourn the appeal and also to his finding that the wives were not the same person.
14. Mr Garrod started his submissions by pointing out an inaccuracy in the presenting officer's minute (regarding a gap in the receipt books) which was not the case but immaterial to the issue before us. He contended that there was not a great deal of evidence to substantiate the NI point, even if reference to it could be found. He argued that there was no material error of law in the First-tier Tribunal's decision. In response to Mr Lindsay's submission that the judge might have adjourned the appeal if he had considered the NI numbers, he reminded us that the matter had been adjourned twice already. He submitted that the Secretary of State was seeking to rely on an issue which was not brought to the judge's attention. In the alternative, even if the NI number was the same for both women, he argued that it did not prove much. He argued that the use of the name, date of birth and NI number of the respondent's former wife might have indicated identity theft, which had not been considered. He argued that the evidence did not establish that the respondent's former wife was complicit or involved in the marriage to Mr Singh. He emphasised that the addresses used regarding each relationship were different, the judge found that the photographs were of two different women and this would be far more reliable evidence. Mr Garrod argued that even if the wife in each case was the same, the Secretary of State had provided no evidence that the respondent entered into a marriage of convenience. On the contrary, the other marriage took place 5 years after that of the respondent and it was hard to see how post-marriage events could prove a marriage of convenience. He drew our attention to the enforcement visit paid to the respondent and his former wife, following which he was granted a residence card, which indicated that it was a subsisting relationship.
15. In reply, Mr Lindsay submitted that unlike a name and date of birth, a NI number was unique and that if the judge had considered that, the outcome might have been different. In response to our query as to what difference it would have made even if the two wives were one and the same, he contended that the judge's attention would have turned to whether it was a marriage of convenience, as the NI evidence was capable of raising such a suspicion.

16. At the end of the hearing, we announced that we detected no material error of law in the decision in question and upheld the findings therein. Our reasons are set out below.

Decision on error of law

17. It is useful to remind ourselves of the contention made in the grounds of appeal, the substance of which was set out in paragraph 2 as follows.

“2. Specifically as per the PO’s Appeal Hearing Minute, the Judge was specifically drawn attention to the NI number pertaining to the appellant’s former EEA spouse – which is the same as that which corresponded to a previous marriage to a Mr Singh. This shows that the sponsor had also been married to another individual at the same time of marriage to the appellant.”

18. As indicated above, the minute referred to was not enclosed with the application for permission to appeal. A cursory glance at the note of Sarah Gledhill, who was the presenting officer before the First-tier Tribunal indicates that the claim in the grounds is far from accurate.

19. In the minute, Ms Gledhill comments that she produced a copy of Mr Singh’s application and determination and that the judge *“was not convinced that this was the same woman ...as the photos did not look similar.”*

20. After noting that the judge reserved the decision, Ms Gledhill made the following note in her minute:

“NB: after hearing noticed evidence that it IS the same woman as NI numbers matched. This NI number was in the application that I handed up to the IJ though I had not drawn his attention to it specifically.”

21. According to that minute, the presenting officer did not draw the judge’s attention to the matching NI numbers despite the judge clearly indicating during the hearing that he did not accept that the photographs were of the same woman. Permission to appeal was granted on the understanding that the judge had failed to consider evidence “specifically” drawn to his attention, when this was not in fact the case. As indicated above, Mr Lindsay was unable to draw this evidence to our attention either, as it was not in his file. The NI evidence was not readily identifiable among the hundreds of documents on the respondent’s IAC case file, which included the many loose, unindexed documents relating to Mr Singh. The

inaccuracy of the claim made in the single ground of challenge is reason enough to dismiss the Secretary of State's appeal.

22. In the alternative, we have considered the position even were the NI evidence to have been drawn to the judge's attention and find that it would have in all likelihood made no difference to the outcome of the appeal for the reasons argued by Mr Garrod. Essentially, the judge's unchallenged finding that the photographs of the respondent's former wife and Mr Singh's wife were not the same is not likely to be disturbed by the revelation that the person who married Mr Singh was using the same NI number as well as the same name and date of birth as the woman who married the respondent.
23. For completeness, we have considered whether the conclusions of the judge might have been different had he accepted that the respondent's wife underwent a bigamous marriage to Mr Singh. We could find no support for the contention that the respondent's relationship with his former spouse which lasted from 2008 to 2016 was one of convenience, particularly when an unannounced enforcement visit by immigration officers in 2012, during which the respondent and Ms [B] were interviewed, revealed no cause for concern.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is upheld.

Signed

Date: 17 June 2019

Upper Tribunal Judge Kamara