Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02223/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th April 2018	**On 14th May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

MR OMOTAYO RAPHAEL FADOJUTIMI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J L Blair, Counsel instructed by Babs and Co, Legal Practitioners
For the Respondent: Mrs H Abosie, Senior Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Abebrese to dismiss the Appellant's appeal against refusal of his application for a permanent residence card based upon what he claimed to be a retained right of residence following dissolution of his marriage to a citizen of the European Economic Area. It is right to say that the judge also dismissed a non-existent appeal against refusal of an application which had not been made (and which had not therefore been refused) for leave to remain on private and family life grounds. However, that error was not of itself

material to the outcome of the appeal and I shall not therefore make any further reference to it.

2. The Appellant is a citizen of Nigeria who was born on 8th August 1975. He had entered the United Kingdom in dubious circumstances which, by his own admission, included using false documents. The judge therefore understandably made adverse credibility findings. However, one of the questions that I shall have to address is whether his credibility was relevant to the issues that fell to be determined in the appeal.

3. I begin by summarising the reasons given by the Secretary of State for refusing the application for a Residence Card. These are contained within a letter dated 27th February 2016. The letter begins by setting out the various documents that the Appellant had submitted in support of his application. It then sets out what it was that the Appellant needed to prove to obtain the residence card for which he had applied. It is not suggested that the relevant legal requirements are other than accurately stated in the letter. Firstly, the Appellant needed evidence to show that his EEA former spouse was exercising free movement rights in the United Kingdom at the time of the divorce. Secondly, evidence was required to show that the marriage had lasted for at least three years and that both he and his former spouse had been resident in the United Kingdom together for at least one year during that period. Thirdly, evidence was required to show that the Appellant himself was currently employed, self-employed or economically self-sufficient. Additionally, given that the Appellant had applied for a permanent residence card, he needed to demonstrate that his residence in the United Kingdom had been in accordance with the Regulations for a continuous period of at least five years. This meant, amongst other things, that the Appellant would have to prove that (a) his former spouse had continuously exercised free movement rights up to the point of the dissolution of the marriage, (b) he (the Appellant) had been employed, self-employed or self-sufficient since the dissolution of the marriage, and (c) that the combination of the periods of (a) and (b) above were equal to a continuous period of at least five years.

4. It was accepted by the Secretary of State that the marriage had subsisted for at least three years. It was also accepted by the Secretary of State that at least one of those years had been spent together in the United Kingdom. What was not accepted, however, was that the Appellant's former spouse had been in employment at the date of the dissolution of their marriage. The reason for this was that although documents were submitted as evidence of that claim, the Secretary of State took the view that they were copies and thus incapable of verification. For the same reason, the Secretary of State also found that the Appellant had failed to prove that he had been working since the divorce. Had those been the only reasons for refusal of the application, then I suspect that the subsequent confusion that has arisen could have been avoided.

5. However, the Secretary of State went on to note that the Appellant's immigration history included illegal entry into the United Kingdom and use of deception in giving various false names to the Respondent, both in the past and in the present application. The appellant had also given different dates of birth. The Appellant accepts making these false statements and it is unnecessary for me to consider his explanations for doing so save to observe that they do him no credit. Those facts, which were not in dispute, led the decision-maker to *suspect* that the Appellant had solely entered into his marriage for immigration purposes, and that he accordingly "did not have a right to reside in the United Kingdom".

6. Based on the above, the decisionmaker invoked the Secretary of State's powers under Regulation 20B(1)(b) and 20(B)(2)(b) of the Immigration (European Economic Area) Regulations 2006 (as amended) to invite the Appellant to attend for an interview in order to "verify" his claimed right of residence. The Appellant thereafter failed to keep two appointments for such an interview. His explanation at the hearing in the First-tier Tribunal was that he had been too ill to attend, providing a doctor's 'sick note' as support for that claim.

7. It is necessary to set out precisely how the Secretary of State reacted to the above failures before turning to consider the judge's approach to these issues on appeal. The Secretary of State's letter reads as follows:

> "Where two invitations to interview have been made under regulation 20(2)(b) and the person invited has failed to attend on both occasions, regulation 20B(4) states:
>
> > *'(4) If, with good reason, A or B fail to provide the additional information requested or fail to attend an interview on at least two occasions if so invited, the Secretary of State may draw any factual inferences about A's entitlement to a right to reside as appear appropriate in the circumstances'*.
>
> As it is considered that you failed to attend two interviews without good reason, regulations 20B(4) and 20B(5) allows the Secretary of State to draw any factual inferences about your entitlement to a right to reside as may appear appropriate in the circumstances and to decide, following such an inference, that the person does not have, or ceased to have a right to reside in the UK.
>
> In your particular case, the reasons for inviting you and your EEA national Sponsor for interview, combined with your failure to attend two interviews to verify your right, implies that you do not, have a right to reside under regulation 14(1) of the EEA Regulations.
>
> Consequently, your application has been refused under regulations 15(1)(f), 10(3) and 2 with reference to 20B of the Immigration (European Economic Area) Regulations (as amended)."

8. Pausing there, it is necessary to clarify the reference in the reasons for refusal letter to the invitation to attend for interview being extended to the

Appellant's former wife. I am satisfied that the reason for this was that the letters sent to the Appellant were designed for those seeking to have their right of residence recognised on the basis that they are *currently* in a genuine and subsisting marital relationship. In such circumstances, it is not surprising that the Secretary of State should wish to interview both parties, albeit separately. I reach this conclusion because the letters refer only to the "spouse or partner". They do not however refer to a *former* spouse. I therefore infer from this that these letters were not intended to cover applicants, such as the Appellant, who are seeking to establish a retained right of residence following divorce. In such circumstances, it would clearly be outside the control of the applicant to secure the attendance of his or her former partner at an interview with the Respondent. It would thus be wholly inappropriate to draw any adverse inference from the failure of the Appellant's ex-wife to attend the interview, and it is clear from the letter of refusal that the decision-maker confined his adverse conclusions to the Appellant's own failure to attend.

9. Turning now to the decision of the judge, I begin by summarising his findings. He found that the Appellant was not a credible witness given his illegal entry into the United Kingdom and subsequent use of deception (above). He found that the Appellant had not given a credible explanation for either for his own non-attendance at the interviews *or* that of his former spouse (again, see above). He thereafter considered whether the marriage had been a sham from the outset. Then, at paragraph 32, he said as follows:

> "After careful consideration of all of the evidence I accept the case of the Respondent that with a combination of all the above mentioned factors that the sole purpose for the Appellant entering into the marriage with his former spouse was to facilitate him remaining in this country contrary to Regulation 2 which states that "spouse" does not include a party to a marriage of convenience."

10. The first problem with the above finding is that the decisionmaker had not explicitly stated that the marriage was one of convenience. Rather, in exercise of powers reserved exclusively to the Secretary of State under regulations 20B(4) and 20B(5), the decisionmaker had concluded that the combination of circumstances "*implies* that [the Appellant does] not have *a right to reside* under regulation 14(1) of the EEA Regulations" [emphasis added]. It was thus not appropriate in my view for the judge to make a finding that the Appellant had entered into a marriage of convenience in the absence of an explicit allegation made by the Respondent to that effect. However, even if I am wrong in this, the judge's finding is problematic in other ways.

11. Firstly, and fundamentally, it is far from clear that the judge appreciated that the legal burden of proving the allegation (if made) would be upon the Secretary of State and that the standard is a balance of probabilities. Mere suspicion (or 'implication') would accordingly be insufficient.

12. Secondly, there was in any event a considerable body of evidence of cohabitation between the parties to the former marriage which the judge appears to have ignored. Indeed, it was accepted by the Respondent that the parties had cohabited for at least three years as one of the elements that the Appellant had to prove in order to establish a retained right of residence. The fact of cohabitation over a relatively lengthy period should therefore have been factored into the equation when determining the supposed issue of whether the marriage had been a 'sham'.

13. The judge also took into account an immaterial matter in having regard to the fact that the Appellant's former spouse had failed to attend for interview "to support his application" [paragraph 26 of the Decision]. As I noted at paragraph 8 (above) whilst the letter inviting the Appellant to attend for interview had on the face of it been extended to his "wife", the Secretary of State had very sensibly not make an issue of it in giving reasons for refusing the application. The judge, on the other hand, wrongly took it into account in his assessment of the Appellant's overall credibility. This too was a material error of law.

14. By contrast with the power given to the Secretary of State, the Appellant's own failure to attend for interview did not of itself give rise to a discretion exercisable by the Tribunal to refuse the application. It was nevertheless a relevant factor in the Tribunal's overall assessment of the Appellant's credibility. However, the judge's rejection of the explanation given by the Appellant for this failure was erroneous in two material respects. Firstly, the judge discounted the Appellant's 'sick note' on account of the fact that it post-dated the interviews. However, he appears to have overlooked the fact the sick note was backdated to cover the date of those interviews. Secondly, the judge noted that whilst the Appellant claimed to have attempted to buy tickets online in the hope of attending those interviews, he had not produced any evidence of such attempts by way of relevant reference numbers. However, the Appellant's bundle of documents did in fact contain such evidence [see pages 141 to 147 and page 152].

15. In considering the materiality of the above errors to the decision to dismiss the appeal, I remind myself that the Appellant bore the burden of proving the matters set out in paragraphs 3 and 4 (above), and that his overall credibility was at least to that extent relevant. I have ultimately concluded, however, that the determination of the relevant issues was largely dependent upon whether the Secretary of State had been right to reject the documents that the Appellant had submitted in support of his application as mere copies that were incapable of verification. The documents in question concerned the employment history of the Appellant and his wife, and one of the central questions that fell to be determined was whether those documents were genuine and reliable. It was the Appellant's case that, contrary to the assertion of the Secretary of State, those documents were original documents that were capable of verification. That was an issue which, if resolved in the Appellant's favour, would suffice to establish a crucial element of his claim quite independently of his standing as a credible witness. At paragraph 31 of

his decision, the judge made a passing reference to the fact that the Appellant has provided payslips and employment details to support his application. There is however no finding at all as to whether he accepts those documents are genuine and original documents and thus capable of verification. Moreover, the judge failed to make any finding upon the potentially critical question of whether the Appellant's former wife had been working at the date of dissolution of the marriage. Thus, the judge not only made a significant number of immaterial findings, but also failed to make findings that were potentially critical to the determination of the appeal.

16. I am thus reluctantly forced to conclude that the decision of the First-tier Tribunal is so infected by error that it cannot stand and must accordingly be set aside with none of its findings preserved. It follows that this is one of those comparatively rare cases where it is appropriate to remit the appeal to the First-tier Tribunal for the matter to be determined afresh. I therefore remit it for complete rehearing by a judge other than Judge Abebrese at Taylor House.

Notice of Decision

1. The appeal is allowed.
2. The decision of the First-tier Tribunal is set aside and is remitted to be made afresh at Taylor House by a judge other than Judge Abebrese.

No anonymity direction is made.

Signed Date: 9th May 2018

Deputy Upper Tribunal Judge Kelly