



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/00501/2015

THE IMMIGRATION ACTS

Heard at Field House
On 29 January 2016

Decision & Reasons Promulgated
On 12 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR LUIS EGUAVOEN OSAROBO
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:

For the Appellant: Mr P Nath, Specialist Appeals Team
For the Respondent/Claimant: Mr S Nwachwu, Moorehouse Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal against the decision of the First-tier Tribunal (Judge M Symes sitting at Richmond on 22 July 2015) allowing the claimant's appeal against the decision of the Secretary of State to refuse to issue him with an EEA residence card confirming his right to reside in the United Kingdom as the spouse of an EEA national exercising treaty rights here. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant requires to be accorded anonymity for these proceedings in the Upper Tribunal.

Reasons for Granting Permission to Appeal

2. On 9 December 2015 First-tier Tribunal Judge Frankish granted the Secretary of State permission to appeal for the following reasons:
 - “2. The application for permission to appeal asserts that the FTJ wrongly rested solely on **Devaseelan [2003] Imm AR** as to the sponsor not having entered a marriage of convenience. In so doing, he has omitted to address the question of whether the sponsor was a qualified person exercising treaty rights under Reg 6 per **Boodhoo [2013] UKUT 346**.
 3. Reading the determination indicates an arguable error arising from the application of **Devaseelan** without consideration of Reg 6”.

Relevant Background

3. On 30 May 2014 the claimant, a national of Austria, attended a marriage registry at Brent Civic Centre with a view to marrying Lovelyna Eromonsele, an Austrian national. They had met at the TREM Church in Nigeria, and their relationship had started in 2012. They had become engaged on 31 July 2013. He had come to the United Kingdom on 21 January 2014, and his sponsor had joined him in the UK around March 2014.
4. At the marriage registry they were met by Immigration Officers, who prevented the wedding from going ahead. The sponsor was served with removal directions for her alleged abuse of treaty rights. The claimant was granted temporary admission, and subsequently both he and the sponsor were informed that they could continue with their marriage plans. The sponsor found work with the Redeemed Evangelical Mission on 2 June 2014, and the couple married on 16 June 2014.
5. On 15 August 2014 the claimant made a second application for an EEA residence card, which was refused on 21 October 2014 on the ground that the marriage entered into on 16 June 2014 was one of convenience. Additionally, attempts to contact the sponsor’s place of work by telephone had failed.
6. While the claimant’s appeal against this decision was pending, the sponsor’s appeal against removal directions was heard by Judge Courtney in the First-tier Tribunal in January 2015. Judge Courtney allowed the sponsor’s appeal, as the Secretary of State had not satisfied her that the case involved a marriage of convenience.

The Hearing Before, and the Decision of, the First-tier Tribunal

7. Mr Nwachwu appeared on behalf of the claimant before Judge Symes. There was no appearance on behalf of the Secretary of State. In his subsequent decision, the judge noted at paragraph [4] that the second reason for rejecting the claimant’s application for a residence card was that attempts to contact his sponsor’s place of work by telephone had failed. Under the heading of “Marriage of Convenience”, the judge set out his findings on the marriage of convenience issue at paragraphs [10] to [14]. The first two of these paragraphs quoted extensively from **Papajorgji** and the

guidance from the Commission to the European Parliament and Council which is annexed to it. He continued:

- “12. The starting point for my assessment of the case is the prior determination by Immigration Judge Courtney. The approach I should take to those findings is set out in *Devaseelan (Secretary of State for the Home Department v D (Tamil))* [2002] UKIAT 00702): in short her determination is the authoritative historic resolution of the case, although I am entitled to take account subsequent facts.
13. Whilst I appreciate that the Appellant’s appeal represents a different case to that of his wife, as she is an EEA national entitled to a registration certificate whereas he is a third country national family member seeking a residence card, nevertheless the cases arise in the context of the closest of family members involving precisely the same fact pattern (ie the reality of their relationship) as was considered by Judge Courtney. It seems to me that *Devaseelan* principles do apply here, see generally *AA (Somalia)* [2007] EWCA Civ 1040. In any event my own thinking on the case fully accords with that of Judge Courtney, whose findings set out above I gratefully adopt.
14. I do not accept that the Respondent has established that the Appellant and EEA Sponsor were in a marriage of convenience”.

Reasons for Finding an Error of Law

8. The decision of Judge Courtney was solely directed at the question of whether the Secretary of State had made out her case that the sponsor’s removal was justified on the grounds of abuse of rights in accordance with Regulation 21B. This provides that the abuse of a right to reside includes:
- (c) entering, attempting to enter or assisting another person to enter or attempt to enter, a marriage or civil partnership of convenience.
9. Judge Courtney did not make any finding on the question of whether the sponsor was exercising treaty rights as a worker, as this was not an issue before her.
10. Mr Nwachwu sought to defend the decision of Judge Symes on the ground that his findings on the marriage of convenience issue also included in passing a finding that the sponsor was a qualified person. In order for the sponsor to be, “an EEA national entitled to a registration certificate”, the judge must have found that she was a qualified person.
11. The difficulty with this proposition is twofold. Firstly, that the judge has not engaged with the reason given in the refusal letter for disputing that the sponsor was in employment as claimed. Secondly, about a year had elapsed since the sponsor claimed to have entered employment with the Redeemed Evangelical Mission, and the judge needed to take into account “subsequent facts” pertaining to the sponsor’s claimed exercise of treaty rights. His finding that the sponsor was entitled to a

registration certificate is not supported by reference to contemporaneous evidence of the exercise of treaty rights, or by any discernible reasoning beyond reliance on the earlier decision of Judge Courtney. As previously canvassed, Judge Courtney did not make a finding that the sponsor was a qualified person.

12. As the judge failed to make a reasoned finding on the issue whether the sponsor was a qualified person at the date of the hearing before him, his decision to allow the appeal outright was erroneous in law.

The Remaking of the Decision

13. Having informed the parties of my ruling on the error of law question (with extended written reasons to follow in due course), I invited Mr Nwachwu to tender the sponsor as a witness.
14. Her evidence was that she worked as a personnel assistant. Her employer was called Terry Services. Her wages, which were paid into her bank account, came from TM Logistics, which was the same business entity. My attention was directed to the documents in the supplementary bundle which had been prepared for the hearing in the Upper Tribunal. These documents included a run of bank statements in the sponsor's name. These bank statements showed the payment of monthly wages into her account from TM Logistics. The most recent payment shown in the bank statements (which ran from July 2015 to 18 January 2016) was a payment of £1,236.66 from TM Logistics on 6 January 2016.
15. The bundle also contained pay slips issued by Terry Services to the sponsor over the same period. I noted that the net pay amounts shown in the pay slips matched the wages being paid into her bank account from TM Logistics.

Findings on Remaking

16. Regulation 16(2) provides that in the case of a worker, confirmation of the worker's engagement from his employer or a certificate of employment is sufficient proof for the purposes of paragraph (1)(b).
17. There is not a letter from the sponsor's employer, or a contract of employment. However, I consider that the evidence of the pay slips taken in conjunction with the sponsor's bank statements constitutes sufficient proof that the sponsor is exercising treaty rights as a worker, and is therefore a qualified person for the purposes of Regulation 6. Her general credibility on the topic of the exercise of treaty rights as a worker is reinforced by the other documents in the supplementary bundle, which show that she was formerly employed by the Redeemed Evangelical Mission, but that employment with them ceased at the end of September 2015, as evidenced by a P45 that the former employer issued, showing that her accrued earnings for the relevant tax year up until 30 September 2015 were just over £5,000. I am satisfied on the evidence provided that the sponsor began her employment with Terry Services at the beginning of July 2015, and that she continues to be employed by Terry Services at the date of the hearing before me.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: this appeal under the Regulations 2006 is allowed.

I make no anonymity direction.

Signed

Date

Deputy Upper Tribunal Judge Monson