



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/05242/2017

THE IMMIGRATION ACTS

Heard at Field House
On 19 July 2018

Decision & Reasons Promulgated
On 13 August 2018

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

OLUWATOSIN OLUSEYI OMOTAYO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In Person
For the Respondent: Mr T Melvin, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of Nigeria, born 02 August 1981. On 01 November 2016 she applied for a permanent resident card as the spouse of an EEA national, Mr Bryan (a Dutch national). This application was refused in a decision of 10 May 2017.
2. The reasons given by the Secretary of State for such refusal were as follows:

“Reasons why your application has been refused

Home Office records evidence that on the 14th of December 2006 you were issued with a Category D Multi Student Visa, which was valid until the 31st of October 2008. It is

therefore noted that you have possessed no valid leave to remain in the United Kingdom since the 31st of October 2008.

On the 3rd of May 2012 you applied for a residence card as the spouse of Shanyrro Anton Rhagmire Bryan, however on 11th of September 2012 your application was subsequently refused under Regulations 6, 7 and 8(5) of the Immigration (European Economic Area) Regulations 2006.

On the 4th June 2013 you again applied for a residence card as the spouse of Shanyrro Anton Rhagmire Bryan, however on the 13th of September 2013 your application was refused under Regulations 7 and 8(5) of the Immigration (European Economic Area) Regulations 2006.

On 28th of January 2014 you placed a further application for a residence card as the spouse of Shanyrro Anton Rhagmire Bryan, however on the 24th March 2014 this application was refused under Regulations 7 and 8(5) of the Immigration (European Economic Area) Regulations 2006.

On 29th of October 2014 you placed another application for a residence card as the spouse of Shanyrro Anton Rhagmire Bryan, however on 10th of February 2015 this application was refused under Regulation 8(5) of the Immigration (European Economic Area) Regulations 2006.

On 28th of February 2015 you placed a further application for a residence card as the spouse of Shanyrro Anton Rhagmire Bryan. To aid the process of deciding this application, the Home Office asked to you both to attend a marriage interview on the 17th of August 2015 however you did not attend said interview. You were then asked to attend an interview which was scheduled for the 2nd of September 2015, however you stated that you were both unable to attend this interview.

On the 1st of September 2015 your application was subsequently refused under Regulations 8(5) and 20B of the Immigration (European Economic Area) Regulations 2006.

It should be noted that you have been given the right to appeal each of the above-mentioned decisions to refuse to issue you with residence documentation. However, you have never sought to appeal the Home Office's decisions.

You have applied for permanent residence on the basis that you are the direct family member (spouse) of Shanyrro Anton Rhagmire Bryan, a Dutch national whom you claim has exercised his treaty rights, in the United Kingdom, for a continuous 5 year period.

Having assessed your application it is evident that you have not provided adequate evidence to show that you are the direct family member of a person whom has exercised treaty rights in the United Kingdom, for a continuous 5 year period, as claimed.

As previously stated, your application has been assessed under the Immigration (European Economic Area) Regulations 2016.

With regards to permanent residence, the Regulations stipulate that permanent residence can be issued to a family member of an EEA national, whom is not an EEA

national, who has evidenced that they have resided in the United Kingdom alongside their EEA national family member – in accordance with the Regulations, for a continuous period of five years.

As detailed above, the Home Office has *never* recognised that you are the family member of EEA national Shanyrro Anton Rhagmire Bryan, as claimed.

Your previous applications assessed you on the basis of you being the direct family member (spouse) and/or the extended family member (unmarried partner) of Shanyrro Anton Rhagmire Bryan. However, each of these applications were refused under Regulations 7 or 8(5) of the Immigration (European Economic Area) Regulations 2006 (now known as the Immigration (European Economic Area) Regulations 2016), and as such it is apparent that you have therefore failed to establish that you are the family member of an EEA national – as required under the aforementioned Regulations.

You have not provided this Office with any substantial evidence to demonstrate that you have been the family member, of an EEA national, for a 5 year period and as such you do not meet the requirements of permanent residence – as stipulated in the Immigration (European Economic Area) Regulations 2016.

Additionally, you have also failed to evidence that your claimed EEA national family member has exercised his treaty rights, in the United Kingdom, for a continuous 5 year period.

You have only provided this department with documentary evidence, of your sponsor's treaty rights, that covers the following time-frames:

- April 2012 – April 2013
- April 2013 – June 2013 / December 2013 – January 2014
- April 2014 – April 2015
- March 2015 – April 2015 & November 2015
- May 2016 – October 2016

As there are a number of gaps between your claimed family member's employment dates, you have therefore failed to evidence that he has exercised his treaty rights for a *continuous* 5 year period, as stipulated in the Immigration (European Economic Area) Regulations 2016.

It can therefore be ascertained that both you and your sponsor have failed to demonstrate that you have resided in the United Kingdom in accordance with the Immigration (European Economic Area) Regulations 2016, for a continuous 5 year period.

This has been determined as you have failed to demonstrate that you have been the family member of an EEA national for 5 years, as this Office has never established that you are related to your EEA national sponsor, on either a direct or extended basis. As your sponsor has failed to submit evidence of 5 years of continuous employment, without any significant gaps, he too has failed to meet the requirements of the aforementioned Regulations, and he has therefore failed to evidence that he has resided in the United Kingdom in line with the Immigration (European Economic Area) Regulations 2016.

As you have not provided the Home Office with adequate evidence that demonstrates that you are the family member of an EEA national, whom has exercised treaty rights in the United Kingdom for 5 continuous years, your application has subsequently been refused.”

Appeal before the First-tier Tribunal

3. The appellant appealed this decision to the First-tier Tribunal. In doing so she ticked the relevant box on page three of the appeal form (IAFT-5), indicating that she wanted her appeal to be decided on the papers without a hearing. This is an election the appellant was perfectly entitled to make but it had the consequence of denying the First-tier Tribunal the opportunity of hearing orally from both the appellant and Mr Bryan.
4. The First-tier Tribunal dismissed the appeal in a decision promulgated on 25 September 2017. In its decision the Tribunal summarised the reasons given by the Secretary of State for refusing the appellant’s application [2], referred to the 21 pages of submissions and attached documentation that had been prepared by the appellant in support of the appeal (at [3] and [5]), and directed itself to the burden and standard of proof (at [4]). The First-tier Tribunal thereafter concluded as follows:
 - “6. To obtain a permanent right of residence under regulation 15 of the EEA regulations the appellant must first show that she is a family member of the sponsor. Family member is defined in regulation 7. It includes a spouse. It is for the appellant to show that there is a marriage.
 7. There is no marriage certificate with the appellant’s bundle of documents. The respondent has never accepted that the appellant and sponsor are legally married. The appellant says that she and the sponsor were married in a customary marriage in Nigeria. It may be that this is a valid marriage. The burden of proof is on the appellant to show that there was a marriage and that its validity is recognized in Nigeria. She has not provided any evidence that this is the case. I do not find on the evidence before me that the appellant has shown that she is married to the sponsor.
 8. Even if the appellant is not able to demonstrate that she is the wife of the sponsor she may be an extended family member of the sponsor under regulation 8(5) if she is a partner in a durable relationship. The appellant has produced evidence of various common addresses with the sponsor. She has produced a birth certificate of a child which she says is the child of her and the sponsor. I note however that the sponsor was not originally named on the birth certificate. His name was added subsequently. The appellant has produced evidence of tax credits paid in various years to her and the sponsor up to 2017. These documents may indicate that she is in a relationship with the sponsor.
 9. However even if she were it does not avail her. She can only succeed on the basis that she is an extended family member of the sponsor if the respondent has issued a residence card or permit to her. The respondent has never issued a residence card or permit to the sponsor. Her five applications for such a document were refused by the respondent. The appellant therefore cannot meet the requirements of regulation 7(3).

10. Lastly the appellant must demonstrate that she has lived with the sponsor in the United Kingdom for a continuous period of five years during which time he has been exercising his treaty rights. She seeks to do this by showing that the sponsor has been a worker during the period April 2012 to October 2016. This is not a five year period.
11. The respondent accepts that the sponsor has worked in the United Kingdom for parts of that period. The details are set out in the refusal letter. However there have been substantial gaps in the period relied upon between April 2012 and October 2016 where the appellant has not shown that the sponsor was a worker or that he has been otherwise exercising his treaty rights.
12. Some additional documents have been submitted with the appellant's bundle. She has produced what she says are wage slips of he sponsor from February to April 2017. The appellant still cannot demonstrate that the sponsor has been in employment or has otherwise been a qualifying person for a continuous five-year period whilst she has lived with him.
13. The burden of proof is upon the appellant to show all these things. I am not satisfied on the evidence before me that the appellant has demonstrated that she has been a family member of a qualifying person for a continuous period of five years. She does not meet the requirements for the issue of a permanent residence card under regulation 15(b). Her appeal is therefore dismissed."

Appeal to the Upper Tribunal

5. Permission to appeal was granted by the First-tier Tribunal in a decision of 22 March 2018. It is immediately apparent from reading this decision that the reasoning given therein relates to an entirely different case - a Refugee Convention case. This error subsequently came to the attention of the First-tier Tribunal Judge who 'granted' permission, which led to the judge re-issuing the decision on 21 May 2018 this time refusing permission to appeal for reasons which did relate to the instant case.
6. Nevertheless, the matter was listed for hearing before the Upper Tribunal. At the outset of the hearing Mr Melvin submitted that permission had now been refused; however, after discussion with the Tribunal it was accepted that following the decision in Katsonga v SSHD [2016] UKUT 00228, the initial grant of permission must stand.

Grounds of Challenge

7. The appellant's grounds of appeal are contained within a document running to 12 pages of close type. On close analysis the grounds can be resolved to the following:
 - (i) The First-tier Tribunal erred in stating, at paragraph 2 of its decision, that the appellant had been invited, but had failed, to attend marriage interviews with the Respondent on 17 August and 2 September 2015;
 - (ii) The First-tier Tribunal erred in stating in paragraph 3 of its decision that the appellant has a child with Mr Bryan. At that time, she in fact had two

children with Mr Bryan, born in 2013 and 2016. I observe at this juncture that the appellant has now has a third child;

- (iii) It was for the respondent to prove that the appellant had not submitted all relevant documents, and the First-tier Tribunal erred in directing itself otherwise in paragraph 4 of its decision;
- (iv) The First-tier Tribunal erred in failing to read and/or consider the 21 pages of submissions relied upon by the appellant;
- (v) The First-tier Tribunal erred in stating that the appellant had failed to submit a copy of her marriage certificate to the Tribunal ([7]);
- (vi) The First-tier Tribunal erred in failing to apply the *ratio* of the decision in Awuku v SSHD [2017] EWCA Civ 178;
- (vii) In any event, the First-tier Tribunal erred in concluding that the appellant's marriage did not satisfy the requirements of Nigerian law;
- (viii) The First-tier Tribunal erred in its consideration of the issue of durable relationship, and it consequently erred in concluding that the appellant did not meet the requirements of Regulation 8(5) of the 2016 EEA Regulations;
- (ix) The First-tier Tribunal erred in its analysis of Mr Bryan's work history.

Discussion

8. In order for the appellant to succeed in demonstrating that she is entitled to a permanent residence card, pursuant to regulation 15(1)(b) of the Immigration (EEA) Regulations 2016, she is required to demonstrate that she has resided in the UK in accordance with the EEA Regulations (including the 2006 EEA Regulations) for a continuous five year period.
9. It was the appellant's case before the First-tier Tribunal that she has been married to Mr Bryan since the 2 February 2012 and that Mr Bryan has exercised his treaty rights for a continuous five-year period – in this case as a worker – after that date. The First-tier Tribunal found against the appellant on both limbs.
10. Turning then to a consideration of the grounds of challenge. As to the first of the grounds this refers to observations made in paragraph 2 of the First-tier Tribunal's decision. However, in that paragraph the First-tier Tribunal was doing no more than summarising the terms of the Secretary of State's decision letter, as is amply demonstrated by the heading found immediately above it. The summary of the SSHD's letter is accurate. I further conclude that nowhere in its decision does the First-Tier Tribunal treat as a matter adverse to the appellant the fact that she did not attend either of the marriage interviews. In these circumstances, this ground has no merit.

11. Moving on, I accept that in paragraphs 3 of its decision the Tribunal erred in stating that the appellant had a child at that time, as opposed to two children. This error is reproduced later in the decision, at paragraph 8. Nevertheless, this is an error which is not capable of affecting the outcome of the appeal. There were no human rights grounds in play before the First-tier Tribunal, and insofar as the Tribunal refer to the appellant having a child it did so in the context of an analysis under regulation 8(5) of the 2006 EEA Regulations, i.e. whether the appellant and sponsor had been in a durable relationship. As it turns out, the First-tier Tribunal proceeded on the basis that the appellant had been in such a relationship with the sponsor.
12. Nevertheless, the First-tier Tribunal correctly identified in paragraph 9 its decision that such finding could be of no assistance to the appellant because time spent as an extended family member (in a durable relationship with an EEA national) does not count towards the accumulation of the five year period required by regulation 15(1)(b) absent the appellant having been provided with a residence card by the Secretary of State, which is not the position here. This is now supported by the Court of Appeal's recent decision in Macastena v SSHD [2018] EWCA Civ 1558).
13. In summary, the issue of whether the appellant is, or has been, an extended family member of Mr Bryan i.e. in this case a partner in a durable relationship, is not one which is relevant to the issue of whether the appellant is entitled to a permanent residence card pursuant to regulation 15(1)(b) of the EEA regulations. This conclusion disposes of both the second and eighth grounds.
14. As to the third of the pleaded grounds, I find that the First-tier Tribunal properly directed itself in paragraph 4 of its decision. The burden or proof is on the appellant to establish that she meets the requirements of regulation 15(1)(b) of the EEA regulations and the standard proof is the balance of probabilities. This ground must, therefore, fail.
15. By the fourth of her grounds the appellant asserts that the First-tier Tribunal failed to take account of the 21 pages of submissions that she sent to the Tribunal with the Notice of Appeal. I observe, however, that these submissions were twice referred to by the Tribunal in its decision (at paragraphs 3 and 5). The Tribunal does not have to set out each and every aspect of the submissions therein and I am satisfied having read those submissions for myself that the First-tier Tribunal took account of all matters therein which were material to its decision. The reasons given by the First-tier Tribunal for dismissing the appeal are sufficiently cogent to enable the appellant to understand why she lost the appeal despite the terms of the written submissions.
16. Moving on, a detailed analysis of the documentation contained within the Tribunal's file supports the First-tier Tribunal's statement that it did not have a copy of the appellant's marriage certificate before it. The core documentation relied upon by the appellant was sent as an attachment to the Notice of Appeal to the First-tier Tribunal. The covering submissions list the documents that were annexed thereto. The list is lengthy but does not make reference to the marriage certificate, neither is this document contained within the Secretary of State's bundle. At the hearing I invited the appellant to draw my attention to a copy of the marriage certificate in the papers

which she had previously sent to the First-tier Tribunal. She was unable to do so. Mr Melvin indicated that he had been unable to find either a copy or the original of the appellant's marriage certificate on the Home Office file

17. The appellant further stated that the Secretary of State had failed to return the marriage certificate after it had been submitted in 2012. I observe that there is a letter within the appellant's bundle of documents, dated 21 October 2015, which asserts exactly this. This letter also states that some of the documents were returned by the Secretary of State in copy, but not original, form - although does not seek to identify which documents are being referred to.
18. On the evidence before me I conclude that it has not been demonstrated that the First-tier Tribunal erred when stating in paragraph 7 of its decision that "*there is no marriage certificate with the appellant's bundle of documents*".
19. Turning to the next ground of challenge - the assertion that the First-tier Tribunal failed to apply the Court of Appeal's decision in Awuku [2017] EWCA Civ 178. I need say little more about this decision other than cite from paragraph 15 thereof in which Lloyd Jones LJ, giving the judgment of the Court, says as follows:

"In the Law of England and Wales, the general rule is that the formal validity of a marriage is governed by the law of the country where the marriage is celebrated ... In general the law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted ... a marriage by proxy will be treated as valid in England if recognised by local law, even if one of the parties is domiciled and resident in England and the power of attorney authorising the proxy to act is executed in England."

20. In my conclusion, the First-tier Tribunal did not fall into the error in failing to apply the decision in Awuku. On the contrary, in paragraph 7 of its decision the First-tier Tribunal directed itself to exactly the issue highlighted by the Court of Appeal's decision
21. In so far as the appellant asserts that the First-tier Tribunal erred in law in concluding that her marriage was not valid, I also reject this submission. The Secretary of State set out her case on this issue very early on in her interactions with the appellant. In her decision letter of 11 September 2012, the Secretary of State said as follows:

"In support of your application for a Residence card, as evidence that you are related to an EEA national you provided a marriage certificate which showed that you entered into marriage to Shanyrro who is a Netherlands national. The marriage certificate stated that your marriage to Shanyrro was conducted on 2 February 2012. You also submitted a confirmation of traditional marriage under native law and customs from Oluyole Local Government Customary Court dated 14 February 2012.

The marriage certificate pertains to a marriage under the Nigerian Marriage Act, which precludes marriage by proxy.

Paragraph 11(1)(a) of the Nigerian Marriage Act states 'before the registrar can issue the certificate he must be satisfied that one of the parties has been resident within the

district in which the marriage is intended to be celebrated at least fifteen days preceding the granting of the certificate’.

It is also noted that the parties to the marriage ceremony must sign the certificate in the presence of the officiating minister or registrar as stipulated in Paragraphs 26 and 28 of the Nigerian Marriage Act “Celebration of Marriage”.

Paragraph 24.23 of the COIS report Nigeria states ‘The United States State Department Reciprocity Schedule, in an undated section on marriage certificates in the country accessed, recorded that: “... both parties to the marriage technically must be physically present at the same location with witnesses to sign certain marriage documents, proxy marriages have ceased to be valid but still occur.

There is no credible evidence provided that you and your EEA sponsor were present at the marriage ceremony, and resident in Nigeria before the wedding.

In the absence of evidence to prove that both you and your EEA sponsor were resident in Nigeria at the time of your marriage, we cannot be satisfied that your marriage was conducted in accordance with the Nigerian Marriage Act. For this reason the UK Border Agency cannot accept the documents submitted as being lawfully issued and evidence of your relationship.”

22. As the First-tier Tribunal correctly identified in paragraph 7 of its decision, the burden was on the appellant to show that there had been a marriage and that its validity is recognised in Nigeria. The First-tier Tribunal again correctly identified that the appellant had failed to provide evidence to support her position that the marriage is valid under Nigerian law. The First-tier Tribunal’s findings and reasoning must be set in the context of the evidence and the way in which the Secretary of State put her case on this issue (see the preceding paragraph). In this context, I find that the Tribunal’s decision is not one which can be categorised as irrational, but rather it is a decision which was open to it on the limited evidence that had been made available to it. I am not required to determine whether the First-tier Tribunal’s conclusion is wrong but to decide whether on the evidence available, it reached a conclusion that was rationally open to it. I find that it did.
23. In any event, even if the First-tier Tribunal was wrong in its conclusion on the issue of the validity of appellant’s marriage it, nevertheless, concluded that the appellant had not demonstrated that Mr Bryan had been exercising treaty rights for a continuous period of five years during the currency of the marriage. Although, the appellant produced evidence in support of her case that Mr Bryan had been working, the evidence was not complete. In my conclusion, the First-tier Tribunal was rationally entitled to conclude, having considered the evidence as a whole, that the appellant had not made out her case on this issue. I also conclude that the reasons given by the Tribunal were sufficient to enable the appellant to understand why she lost on this issue.
24. For the reasons given above, I conclude that the grounds of challenge have no merit. The First-tier Tribunal’s decision is clear and cogent, demonstrates that it lawfully directed itself and that it took into account all material evidence. The conclusions reached by the First-tier Tribunal were open to it on the available evidence. In such

circumstances, the appellant's appeal is dismissed, and the decision of the First-tier Tribunal stands.

Decision

25. The decision of the First-tier Tribunal does not contain an error of law capable of affecting the outcome of the appeal. Its decision therefore stands.

Signed:

A handwritten signature in black ink, appearing to read 'H. O'Connor', written over a horizontal line.

Upper Tribunal Judge O'Connor