



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/05977/2020**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 6 December 2021

**Decision & Reasons
Promulgated**

On 20 December 2021

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

**OLALEKAN OLUMIDE AROYEHUN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr Aslam, Counsel instructed by M-R Solicitors

For the Respondent: Mr Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is appealing against the decision of Judge of the First-tier Tribunal Wyman (“the judge”) promulgated on 7 April 2021.

Background

2. The appellant is a citizen of Nigeria born on 6 April 1982.

3. The appellant's immigration and marriage history is as follows:
 - a. In 2009 the appellant entered the UK as a student.
 - b. In 2010 he was granted Tier 1 post study leave until 4 January 2013.
 - c. In October 2012 the appellant married an EEA national.
 - d. In December 2012 he applied for an EEA residence card as a family member of an EEA national. His application was refused but following a successful appeal the decision was reconsidered and he was issued with an EEA residence card on 24 August 2016.
 - e. On 3 December 2019 the appellant applied for indefinite leave to remain ("ILR") under paragraph 276B of the Immigration Rules.
4. The respondent refused the appellant's ILR application. It was accepted that he had valid leave until 24 August 2016 (the date he was issued with an EEA residence card) but not thereafter, and therefore he had not accrued 10 years of lawful residence as required by paragraph 276B.
5. I pause to note that it is unclear why it was accepted that the appellant has been lawfully in the UK until 24 August 2016, given that Section 3C of the Immigration Act 1971 does not extend leave where an application is made for a residence card. However, this point was not at issue before me and therefore I proceed on the basis that the appellant had lawful leave until 24 August 2016.
6. The respondent's refusal letter gives two reasons for not accepting that the appellant has had leave since 24 August 2016.
7. The first reason given by the respondent is that the appellant had not established that he had a "genuine and subsisting" relationship with his EEA national wife following his "grant of leave" on 24 August 2016.
8. I pause to note two obvious mistakes made by the respondent. Firstly, the appellant was not granted leave on 24 August 2016 - he was issued with a residence card confirming his status as a family member of an EEA national. Secondly, EU law is concerned with whether a marriage is one of convenience (see recital 28 of Directive 2004/38/EC and *Sadovska & Anor v Secretary of State for the Home Department* [2017] UKSC 54), not with whether a marriage is "genuine and subsisting", which is the entirely different test found in the Immigration Rules.

9. The second reason given by the respondent for not accepting that the appellant has been in the UK lawfully since 24 August 2016 was that the appellant did not provide any evidence showing that his wife has been exercising Treaty rights in the UK and third party checks confirmed that she had not done so.
10. I pause to note that it does not appear that the “third party checks” referred to in the refusal letter, or any details relating to them, were provided to the appellant.
11. The appellant appealed to the First-tier Tribunal. His appeal was refused in a decision promulgated on 7 April 2021. The appellant is now appealing against this decision.

Decision of the First-tier Tribunal

12. The judge noted that it was common ground that the appellant had been lawfully in the UK until 24 August 2016 and that the issue in dispute was his status from that point onwards.
13. The judge found that the appellant’s evidence about his relationship was “extremely vague” and that no evidence was submitted to corroborate his claims about the relationship. The judge stated in paragraph 50 that there was no evidence that the relationship was, or had been, genuine and subsisting; and he found in paragraph 60:

“I therefore do not accept that the appellant, who although [he] may have entered into a genuine marriage, was living in anything more than a marriage of convenience for a majority of the time that he was granted an EEA residence card”.
14. The judge also found that the appellant’s wife had not been exercising Treaty rights because (a) the appellant did not produce any evidence of her employment; and (b) the respondent confirmed with HMRC that she had not been exercising Treaty rights. The judge stated at paragraph 51:

“The respondent undertook the appropriate checks with HMRC and it was confirmed that [the appellant’s wife] had not been exercising her treaty rights in the UK for the required. This was not contested by the appellant”.
15. The judge then proceeded to consider whether the appellant would face very significant obstacles integrating into Nigeria and concluded that he would not. The judge also found that the appellant’s removal would not be disproportionate under article 8 ECHR.

Grounds of appeal and submissions

16. Mr Aslam, who did not draft the grounds, acknowledged that the grounds were discursive, and did not seek to rely on them as drafted. Instead, he advanced two arguments, which he described as being loosely based on the grounds. These arguments were made only orally: no amended grounds of appeal or skeleton argument was filed and served prior to (or even at) the hearing.
17. Mr Aslam's first argument concerned the judge's finding that although the marriage may have been genuine at the start it had become a marriage of convenience. He argued that the judge misapplied the legal test, which is concerned with whether a marriage of convenience was "entered into".
18. Mr Aslam's second argument concerned the judge's finding that the appellant's spouse had not been exercising Treaty rights. He argued that the judge erred by accepting the respondent's bare assertion that checks from HMRC established that the appellant's wife was not exercising Treaty rights without considering whether the information from HMRC (which was not before her) in fact established this. He submitted that without reviewing the evidence herself, the judge was not in a position to know what HMRC actually said.
19. Mr Lindsay submitted that neither of the two arguments advanced by Mr Aslam can be found in the grounds of appeal. He acknowledged that the first argument (concerning whether the marriage was one of convenience) was raised (to some extent) in the grant of permission and therefore he was in a position to address it. However, he submitted that he had no forewarning of Mr Aslam's second argument (concerning information provided by HMRC) and therefore he was not in a position to properly address it. Amongst other things, he was unable to verify what evidence was before the First-tier Tribunal (or had been obtained from HMRC) concerning the employment (or otherwise) of the appellant's spouse.
20. Mr Lindsay argued that, in any event, there was no merit to Mr Aslam's arguments. With respect to the first argument (the marriage of convenience issue), Mr Lindsay argued that as this was an appeal under article 8 ECHR it was appropriate to look at the circumstances in 2016 (when the appellant began relying on his EEA status to accrue 10 years lawful leave) and as of that date the evidence before the First-tier Tribunal firmly established that the marriage was not genuine and could properly be described as a marriage of convenience.

21. With respect to Mr Aslam's second argument (concerning the HMRC evidence), Mr Lindsay argued that the burden was on the appellant, who had not adduced any evidence about his wife's employment, other than his own (which the judge found to be extremely vague), to support the contention that she had been exercising Treaty rights. In addition, he submitted that the judge cannot be faulted for accepting that the HMRC evidence established that the appellant's wife had not been exercising Treaty rights when this was not contested by the appellant (as confirmed by the judge in paragraph 51 of the decision).

Analysis

22. The two arguments advanced by Mr Aslam are not in the grounds of appeal. Mr Aslam submitted that they were loosely based on the grounds as pleaded or, in the alternative, that they could be characterised as *Robinson-obvious* (*R v Secretary of State for the Home Department, ex parte Robinson* [1997] 3 WLR 1162). I disagree with both these submissions. Firstly, there is nothing in (or implicit in) the grounds that corresponds to the two arguments advanced by Mr Aslam. Secondly, neither of Mr Aslam's two arguments raises a point so obvious that the Tribunal should be expected to appreciate it for itself. With respect to Mr Aslam's second argument, my view is reinforced by noting that the point had not occurred to either Mr Lindsay or myself until raised orally by Mr Aslam.
23. In *Latayan v The Secretary of State for the Home Department* [2020] EWCA Civ 191 at [32] it is stated:

I would however comment on the additional submissions made by Mr Ó Ceallaigh as recorded at paragraph 28. Any counsel appearing for the first time on an appeal will seek to refresh the arguments so as to present them in the most persuasive way, and I do not criticise counsel for his efforts on behalf of this Appellant. Nor should a party be penalised for drafting grounds of appeal concisely. However, these arguments were not pleaded at all on this appeal and in my view they cannot be raised now. An appeal court can entertain a new argument of law where that is in the interests of justice (though it will be slow to do so) - *Miscovic v Secretary of State for Work and Pensions* [2011] EWCA Civ 16 per Elias LJ at [69], Sedley LJ at [109-112] and Moore-Bick LJ at [134] - but these arguments relate entirely to an assessment of the facts and they cannot fairly be raised on the hoof. They are not *Robinson-obvious* points that the tribunals or court could be expected to appreciate for themselves in a case where the Appellant was represented by counsel. As my lord, Lord Justice Singh, said in *Talpada v The Secretary of State for the Home Department* [2018] EWCA Civ 841 at [69]:

"Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been

properly pleaded or where permission has not been granted to raise them. Otherwise there is a risk that there will be unfairness, not only to the other party to the case, but potentially to the wider public interest, which is an important facet of public law litigation."

24. Having regard to what was said in *Latayan* and *Talpada*, I am not prepared to permit Mr Aslam's second argument (concerning the HMRC evidence) to be advanced. I will, however, permit the first argument (concerning the status of the marriage) to be advanced because it was raised in the grant of permission.

25. The appellant's case before the First-tier Tribunal was that he had accrued 10 years of lawful residence in the UK and therefore he was entitled to ILR under paragraph 276B of the Immigration Rules.

26. Lawful residence is defined in paragraph 276A(b) of the Immigration Rules as:

(b) "lawful residence" means residence which is continuous residence pursuant to:

(i) existing leave to enter or remain; or

(ii) temporary admission within section 11 of the 1971 Act (as previously in force), or immigration bail within section 11 of the 1971 Act, where leave to enter or remain is subsequently granted; or

(iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain.

27. Time spent in the UK as a family member of an EEA national does not count as lawful residence because a family member is not required to have leave to enter or leave to remain. The respondent's guidance on Long Residence (at p.25) confirms this. However, it also provides that time spent in the UK exercising Treaty rights will nevertheless be counted as lawful residence, so long as:

"Sufficient evidence [is] provided to demonstrate that the applicant has been exercising treaty rights throughout any period that they are seeking to rely on for the purposes of meeting the long residence rules"

28. Therefore, in order for the appellant to establish that the time he spent in the UK after 24 August 2016 counted towards the accrual of 10 years continuous lawful leave for the purposes of paragraph 276B, it was necessary for him to demonstrate that he was in the UK as a family member of an EEA national exercising Treaty rights during that time. Accordingly, time spent by the appellant in the UK after 24 August 2016 will only count towards 10 years of continuous lawful leave for the purposes of paragraph 276B if (a) he has been married to an EEA national in a marriage that is

not a marriage of convenience; and (b) his wife has been exercising Treaty Rights.

29. The judge found in paragraph 60 that although the appellant may have entered into a genuine marriage, he was subsequently (after he was granted a residence card in 2016) in a marriage of convenience. This is legally erroneous because a marriage is only a marriage of convenience if it is *entered into* for the predominant purpose of circumventing immigration rules or regulations. A marriage that was entered into for genuine reasons but subsequently ceases to subsist is not a marriage of convenience under EU law. See *Sadovska*. Accordingly, the judge fell into error by finding that the marriage became one of convenience even though it initially was genuine.
30. This legal error, however, is not material because the judge also found that the appellant's wife was not exercising Treaty rights. I have refused to permit Mr Aslam's arguments contesting this finding to be advanced because they are not in the grounds. However, I would, in any event, have rejected them. This is because the judge was entitled, based on the evidence before her, to find that the appellant's wife had not been exercising Treaty rights after 24 August 2016. Firstly, the burden of proof was on the appellant and the appellant failed to adduce any evidence indicating that his wife was exercising Treaty rights. Secondly, the judge was entitled to accept the respondent's claim that HMRC had confirmed that the appellant's wife had not been exercising Treaty rights. Although, as argued by Mr Aslam, this was a bare assertion by the respondent unsupported by evidence, it was not contested by the appellant, as made clear in paragraph 51 of the decision. As it was not contested, it was open to the judge to accept it.
31. Accordingly, although I agree with Mr Aslam that the judge fell into error by finding that the marriage became a marriage of convenience, this error is immaterial because the appellant could only succeed if he could establish that his wife was exercising Treaty rights after 24 August 2016 and there is no permitted challenge before me to the judge's finding that she was not. Moreover, even if I had permitted Mr Aslam's argument on this issue to be advanced, I would have rejected it because (i) the appellant (upon whom the burden of proof lay) failed to submit evidence to support his claim that his wife was exercising Treaty rights; and (ii) it was open to the judge to rely on the evidence the respondent claimed to have received from HMRC because this was uncontested.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of a material error of law and stands.

Signed

D. Sheridan
Upper Tribunal Judge Sheridan

Dated: 9 December 2021