



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

Appeal Number: EA/07786/2016

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 17 April 2018**

**Decision &  
Promulgated  
On 4 May 2018**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE APLEYARD**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR MICHAEL JOSEPH HOLMES  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr C Avery, Home Office Presenting Officer.

For the Respondent: No appearance.

**DECISION AND REASONS**

1. The Appellant in this is Secretary of State for the Home Department. However, for the sake of clarity I shall use the titles by which the parties were known before the First-tier Tribunal with the Secretary of State referred to as “the Respondent” and Mr Holmes as “the Appellant”.
2. The Appellant is a citizen of the United States of America who made application for a Residence Card. It was refused and he appealed and following a hearing, and in a decision promulgated on 4 September 2017, Judge of the First-tier Tribunal Brewer allowed the appeal.

3. The Respondent sought permission to appeal which was granted by Judge of the First-tier Tribunal Doyle on 22 February 2018. His reasons for so granting were:-
  - “1. The Respondent seeks permission to appeal, (in time), against a Decision of the First-tier Tribunal (Judge Brewer) who, in a Decision and Reasons promulgated on 04/09/2017, allowed the appellant’s appeal under the Immigration (EEA) Regs 2006.
  2. The grounds assert that the Judge failed to take account of the sponsor’s previous involvement in applications by other men and failed to take account of Upper Tribunal Judge Lindsley’s decision promulgated on 5 December 2014 which found that the sponsor is the spouse of another man. The respondent argues that the Judge reversed the burden of proof and that [43] of the determination is nothing more than confusing.
  3. The Judge’s findings of fact are found between [20] and [27] of the decision. The Judge’s analysis of the facts runs from [28] to [44] the decision.
  4. The respondent’s decision was made in the belief that the appellant has entered into a marriage of convenience and relies on an assertion that the appellant’s relationship with the sponsor overlaps the sponsor’s relationship with somebody else. Between [35] and [37] the Judge acknowledges a decision of the Upper Tribunal (involving the sponsor) and finds there is a conflict in the evidence - but does not resolve the conflict.
  5. It is arguable that at [43] the Judge poses a rhetorical question and then does not answer it.
  6. The grounds of appeal identify arguable errors of law permission to appeal is granted”.
4. Thus, the appeal came before me today.
5. There was no appearance by either the Appellant or a representative. I though, have before me a letter from the Appellant dated 26 March 2018 wherein he confirmed that he had dismissed his previous representatives and was acting in person and that neither he nor his wife would be attending the hearing today. The letter invited me to maintain the original decision of Judge Brewer and goes on to reiterate that the Appellant and his wife are in a genuine relationship.
6. Mr Avery relied upon the grounds seeking permission to appeal. The Appellant’s purported wife, Ms Sczcygielska previously sponsored a Mr Kaliba in an application under the EEA Regulations. Upper Tribunal Judge Lindsley allowed Mr Kaliba’s appeal under Article 8 on the basis that the Appellant and Ms Sczcygielska were married. This is shown in the Judge’s determination under reference number IA/24043/2014. Upper Tribunal Judge Lindsley also found that Ms Sczcygielska was the spouse of Mr Kaliba. Mr Avery emphasised that it was unclear on what legal basis Judge Brewer had gone behind the Upper Tribunal Judge’s findings. This was particularly so as Ms Sczcygielska did not attend the hearing and provide

oral evidence. The Respondent accepted that the legal burden rested on her but in this case, given the adduced evidence, that burden had shifted to the Appellant and the Judge has materially erred in concluding that the Appellant had discharged his burden and particularly so in the absence of any oral evidence from Ms Sczcygielska.

7. I share the Respondent's analysis and find that the Judge has materially erred for all the reasons put forward in the grounds.
8. The Respondent's decision was made upon the basis that the Appellant had entered into a marriage of convenience and relies on an assertion that the Appellant's relationship with the sponsor overlaps the sponsor's relationship with another man. Whilst at paragraphs 35 and 37 the Judge acknowledges the decision of the Upper Tribunal involving the sponsor and finds that there is a conflict in the evidence the Judge does in fact not resolve that conflict. The Judge has accordingly materially erred.
9. Mr Avery invited me, were I to find a material error, to remit this appeal for a fresh hearing. That is a course that I intend to take.

### **Decision**

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh pursuant to Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Direction 7(b) before any Judge aside from Judge Brewer.

No anonymity direction is made.

Signed

Date 1 May 2018.

Deputy Upper Tribunal Judge Appleyard