



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

Appeal Number: EA/06558/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 1 July 2019**

**Decision & Reasons Promulgated
On 19 July 2019**

Before

**UPPER TRIBUNAL JUDGE PLIMMER
UPPER TRIBUNAL JUDGE OWENS**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLUWATOYIN BELLO

Respondent

Representation:

For the Appellant: Miss J Isherwood, Senior Home Office Presenting Officer

For the Respondent: Mr Singh, Counsel

DECISION AND REASONS

The appellant ('the SSHD') has appealed against a decision of the First-tier Tribunal ('FtT') sent on 9 April 2019, in which it allowed Ms Bello's appeal on EEA grounds, against a decision dated 24 September 2018, refusing to provide her with a permanent residence card.

Background

Ms Bello is a Nigerian citizen. She married Mr Semedo ('the sponsor') on 16 May 2013 and lived with him for the requisite five years, before she made her application for permanent residence on 31 July 2018.

The SSHD refused this application for one reason only. At the time of the sponsor's marriage to Ms Bello in 2013, he was married to another woman and did not obtain a divorce until 18 October 2014. It followed that Ms Bello's marriage to the sponsor was bigamous and invalid, and for that reason the SSHD rejected the claim that the parties were in a genuine and subsisting relationship.

In her grounds of appeal to the FtT, Ms Bello asserted that she was entitled to permanent residence not as the spouse of the sponsor, but because they were in a 'durable relationship' for a period of five years.

FtT decision

At the hearing before the FtT, the SSHD's representative cross-examined Ms Bello with a view to establishing that the claimed durable relationship with the sponsor was not genuine and subsisting. No other issue appears to have been taken against Ms Bello's claim for permanent residence, during the course of cross-examination.

The FtT concluded that (i) the parties' 'durable relationship' was genuine and subsisting; and (ii) Ms Bello and the sponsor had been working and therefore exercising Treaty rights in excess of the requisite five-year period.

Appeal to the Upper Tribunal ('UT')

At the hearing before us, Miss Isherwood accepted that the grounds of appeal are threefold and are properly summarised in the manner we set out below:

(1) *The perversity challenge*

The FtT's decision to accept the genuineness of the relationship is perverse because the sponsor did not give evidence, in circumstances that he was expected to do so: he had a history of criminal and dishonest behaviour; he 'married' Ms Bello without telling her that he had already been married.

(2) *The erroneous assumption*

The FtT has wrongly assumed that a bigamist marriage cannot be a marriage of convenience.

(3) *Treaty rights challenge*

The FtT's finding that the sponsor has been exercising Treaty rights for a five year period is unsupported by 'Home office records'.

Permission was granted by FtT Judge Chohan in a decision dated 17 May 2019.

Application to admit new evidence

Miss Isherwood made an application under rule 15 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the Rules') to admit new evidence. The new evidence was a previous decision to refuse to grant a residence certificate to the sponsor. She submitted that this decision was pertinent to the fact that the sponsor would have been aware of the need to demonstrate that he was a qualified national. The previous decision was not challenged by the sponsor. Miss Isherwood accepted that the SSHD had not adduced this evidence at the FtT hearing and that no notice had been served in accordance with rule 15 (2A) of the Rules indicating the nature of the evidence and explaining why it was not submitted to the FtT.

We decided not to admit the evidence. When making our decision, we took into account rule 15(2A) and rule 2 of the Rules. The SSHD had not complied with the requirements of rule 15(2A). In particular the SSHD did not serve the appropriate notice when there was ample time to do so prior to the hearing. In addition, we gave weight to the fact that this evidence was not produced at the FtT hearing. Ms Bello was not on notice that this issue was to be raised and the question of whether the sponsor was a qualified national was not referred to in the original refusal letter. We decided, taking into account all of these factors, and bearing in mind the need for procedural rigour (see the comments of Singh LJ at [68] and [69] in R (On the application of Talpada) v SSHD [2018] EWCA Civ 841), that it would not be fair to admit the new evidence. We applied the same approach to post-decision statements served by Ms Bello which were attached to the Rule 24 notice. We indicated that we would not consider this further evidence.

Macastena submission

Miss Isherwood initially drew our attention to another potential ground of appeal which had not been raised in the original grounds of appeal. She referred to Macastena v SSHD [2018] EWCA Civ 1558 to support the submission that where an applicant applies for a residence card as the extended family member of an EEA national, the SSHD has a discretion to issue the document following an extensive examination

of the applicant's circumstances and it is not for the FtT to allow an appeal outright in these circumstances. We gave Miss Isherwood time to reflect on this issue and seek instructions in light of our provisional view that this case is different because Ms Bello had applied for a permanent residence card and not a residence card.

Having taken instructions, Miss Isherwood indicated that she would not pursue this line of argument and she did not rely on any submission based upon Macastena.

Jurisdiction - 'new matter'

We raised the question of jurisdiction, as we must, following the authority of Mahmud (s.85 NIAA 2002 - 'new matters') [2017] UKUT 488 (IAC) followed by Oksuzoglu (EEA appeal - 'new matter') [2018] UKUT 00385 because the arguments in relation to Regulation 8 of the Immigration (EEA) Regulations 2016 ('the 2016 Regulations') potentially constituted a 'new matter' to which section 85 of the Nationality, Immigration and Asylum Act 2002, as amended ('the 2002 Act') applies. We asked both parties to make submissions on whether the issue of the claimed durable relationship under Regulation 8 constituted a new matter. We stood down the hearing for 30 minutes for both parties to consider this issue.

Miss Isherwood submitted that the durable relationship argument was a 'new matter' because the SSHD had applied for a permanent residence card as a family member of an EEA national pursuant to Regulation 7. Her residence permit was issued on that basis and this is the basis on which she resided in the UK. At the FtT hearing Ms Bello advanced different arguments in respect of her right to remain in the UK as an extended family member pursuant to Regulation 8 of the 2016 Regulations. Mr Singh argued that both Regulation 7 and Regulation 8 were based on the same 'factual matrix'. The question turned on whether Ms Bello and the sponsor were in a genuine and subsisting relationship. There were no new factual issues. Regulation 8 was raised in the grounds of appeal to the FtT and the SSHD cross examined Ms Bello with a view to establishing whether the claimed durable relationship with the sponsor was genuine and subsisting.

Having considered Mahmud (supra) and Oksuzoglu (supra) we are satisfied that the issue of whether Ms Bello satisfied Regulation 8 was not a 'new matter.' This is because Regulation 8 related to the same factual matrix in respect of the relationship between Ms Bello and sponsor. We note that the original grounds of appeal to the FtT asserted that the decision was in breach of the 2016 Regulations and specifically pleaded Regulation 8. There was no objection to the appeal being argued in this manner by the SSHD. Similarly the SSHD did not raise this issue in his grounds of appeal to the UT.

In any event, at the hearing before the FtT, the SSHD's representative raised no objection to Ms Bello raising Regulation 8 and did not assert that it was a 'new matter'. The SSHD's representative cross-examined Ms Bello with a view to establishing that the claimed durable relationship with the sponsor was not genuine and subsisting and both parties made submissions on this issue. In these circumstances we find that even were the issue of Regulation 8 to constitute a 'new matter' in accordance with section 85 of the 2002 Act consent was implicitly provided and the FtT therefore had jurisdiction to deal with it.

Discussion

Ground 1 - the perversity challenge

The FtT's decision to accept the genuineness of the relationship is a generous one. There were many reasons for not accepting the genuineness of the relationship, given the absence of the sponsor from the hearing. The sponsor has a concerning history of criminal and dishonest behaviour. Miss Isherwood drew our attention to the brief witness statement of the sponsor and the lack of detail about the relationship. However, the FtT specifically took these matters into account. The FtT made it clear at [27] and [34] that it was concerned that the sponsor did not attend the hearing to give oral evidence given his previous criminal convictions and bigamist marriage. Notwithstanding these concerns, the FtT clearly regarded the extensive documentary evidence and Ms Bello's oral evidence (which withstood cross examination) to strongly support a genuine and long-established relationship. The FtT applied the correct standard of proof after taking into account all the evidence including the absence of oral evidence from the sponsor, before concluding that the claimed durable relationship is genuine and subsisting. The FtT's findings are generous but do not reach the high threshold of perversity.

Ground 2 - The erroneous assumption

The FtT observed the following at [28]: "*clearly given that her marriage was a bigamist one it could not have been one of convenience*". Read in isolation, that might appear confusing. However, the FtT was simply observing that Ms Bello could not rely on her bigamist marriage and was therefore not a spouse in accordance with Regulation 7. The marriage was invalid. As such it could not have been a marriage of convenience, because it was no marriage at all. The FtT did not lose sight of the need to assess the genuineness of the claimed durable relationship and expressly directed itself in those terms at [26] before undertaking that assessment from [30] onwards.

Ground 3 - Treaty rights challenge

Miss Isherwood realistically withdrew this challenge because she accepted that the submission that the sponsor could not have been exercising Treaty rights for a five year period because "*Home office records show that on 8 May 2015 the appellant applied for a registration certificate however this was refused on 18 November 2015 as there was evidence that he had committed bigamy and was not at that time exercising treaty rights*", was made for the first time in the SSHD's grounds of appeal to the UT and could not be relied upon in the absence of the material we declined to admit (see above).

Out of completeness, we note that the SSHD's decision letter made no reference to the sponsor not being a qualified person. It was solely based upon the marriage being a bigamist one and the relationship not being genuine. At the hearing, the SSHD's cross-examination did not include any reference to the sponsor not being a qualified person, although the submissions referred to there being "little evidence" that he was working. On the information available to it, we find that the FtT was entitled to conclude that the sponsor was working as claimed.

Conclusion

It follows that none of the grounds of appeal are made out and the SSHD's appeal is dismissed.

Decision

The FtT decision does not contain an error of law and we do not set it aside.

Signed

Date

UTJ Owens

Upper Tribunal Judge Owens

15 July 2019