



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

Appeal Number: UI-2022-000708
HU/07643/2020

THE IMMIGRATION ACTS

**Heard at Field House
On 17 October 2022**

**Decision & Reasons Promulgated
On the 09 May 2023**

Before

**MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VALENTINE EJIMNKEONYE OKOYE

Respondent

Representation:

For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer

For the Respondent: Mr C Homes, instructed by Masaud Solicitors.

DECISION AND REASONS

1. The respondent, whom we shall call “the claimant” is a national of Nigeria. On 24 February 2020 he applied for entry clearance as the spouse of Brenda Hopkins (“the sponsor”). The application was refused on 7 September 2020. The reason for the refusal was that the Entry Clearance Office did not consider that the relationship between the claimant and the sponsor was a genuine and subsisting one, or that the claimant and the sponsor intended to live together permanently in the United Kingdom. There were two strands of material leading the Entry Clearance Officer to that conclusion, as set

out in the written reasons for refusal. The Entry Clearance Officer accepted that the claimant had produced a marriage certificate, records of communication between himself and the sponsor, and the sponsor's decree of divorce, but found a number of inconsistencies in the claimant's and the sponsor's answers to questions, which he regarded as "inconsistent with a couple in a genuine and subsisting marriage". Further, although the claimant and the sponsor said that their relationship had lasted for many years, the claimant's previous immigration history appeared to suggest that he had not shown very much interest in remaining with the sponsor when he had previously been in the United Kingdom.

2. Following the refusal of his application, the claimant appealed to the First-tier Tribunal. His appeal was heard by Judge Scott Baker on 27 August 2021, all those involved appearing remotely. The Home Office was represented by a Presenting Officer. The claimant was represented by a professional representative. The sponsor gave oral evidence. It had been intended that the claimant would give oral evidence from Nigeria, but investigations at the beginning of the hearing showed that the appropriate arrangements had not been made. The Judge thereupon suggested adjourning the hearing in order for those arrangements to be made, and for the claimant to give oral evidence. Both the representatives told the Judge that they preferred to proceed immediately, even though the appellant would not be giving evidence.
3. The Judge considered all the material before her, including the claimant's written evidence, contained in his application form and elsewhere, the sponsor's oral evidence, and the considerable amount of documentary evidence. She concluded that there were entirely adequate explanations for the matters raised by the Entry Clearance Officer in the notice of refusal. In her judgment, on the evidence, the claimant had established a genuine and subsisting relationship with the sponsor as his wife. No other issue having been raised, it followed that he met the requirements of the rules and should have been granted entry clearance rather than being refused it. In those circumstances, the appeal fell to be allowed on human rights grounds, because it would be disproportionate to exclude a person who met the requirements of the Immigration Rules.
4. Judge Scott Baker's decision was sent to the parties on 3 November 2021. On 30 November 2021, just within the time allowed, the Secretary of State applied to the First-tier Tribunal for permission to appeal against Judge Scott Baker's decision. The grounds are set out as follows:
 - "1. The issue in this appeal was the genuineness of the marriage. In considering this it appears that the sponsor (and possibly, the appellant's representative) failed to disclose several pieces of evidence that were relevant to this assessment.

2. The sponsor failed to disclose that the appellant appears to be married to another woman in Nigeria and that he appears to have a family life with that woman. The sponsor also failed to disclose that she appears to be financing/subsidising this family life in Nigeria by transferring money to the appellant on a regular basis. The sponsor also failed to disclose that she has been subject to enquiries by the Cambridge Constabulary, First Direct Bank, and Triodos Bank because of suspicions about her overseas financial transactions. It is respectfully submitted that the appellant would have been aware of the first two of these points and the sponsor may have been aware of all three of them.
3. These points were not raised at the hearing by the Entry Clearance Officer's (ECO's) representative. However, since the Tribunal determination was promulgated, this information has become known. Clearly, there is an alternative course of action available to the ECO. However, it would appear that relevant information may have been withheld from the Tribunal and, possibly, the representative. While this does not impugn the character of the sponsor, it may well be of significance in assessing the genuineness of the appellant's motives.
4. While the ECO is likely to pursue alternative action, it was thought prudent to raise these allegations with the Tribunal to see if it wanted to review its determination given that it appears to have been based on incomplete evidence."
5. Despite the wording of paragraph 4, the application was not treated by the First-tier Tribunal as an application for review; indeed it is difficult to see that there would have been grounds for review. The First-tier Tribunal refused permission, giving its reasons as follows:

"The grounds do not assert that the decision and reasons disclose an arguable error of law. Rather, that evidence has subsequently come to light that casts significant doubt on the credibility of the evidence that was before the judge. However, whilst I can understand the respondent's concern there is no arguable error of law in the judge's decision."
6. The application for permission was renewed to this Tribunal. The application continued to rely on the same grounds, but added the following:

“It is submitted that there was an error of law in this case as the appellant, the sponsor, and, possibly, the appellant’s representatives failed in their duty of candour to the Court. They failed to disclose that the appellant seems to be married to another woman and to be living with her as his family, rather than with the sponsor. They failed to disclose that the sponsor had been contacted by both her bank and the police over what they believed to be a fraud at her expense. If this had been disclosed it could have been considered and got to the heart of the credibility of the relationship on which this claim is based.

It is further submitted that the delay in the SSHD becoming aware of these possibilities was secondary to the requirement on all parties to disclose relevant evidence to the Court.”

7. Permission to appeal was granted. At the hearing before us Mr Lindsay elaborated on a skeleton argument produced by a colleague. He also pointed to further documentary evidence, including what were said to be a photograph of a wedding of the claimant to a woman other than the sponsor and the marriage register recording that ceremony on 6 December 2018, as well as a witness statement from a Home Office official producing them and a witness statement from the sponsor’s son, and a transcript of an interview with the sponsor in connection with the claimant’s application. Mr Homes objected that no valid application for the admission of this further evidence had been made. We reject that submission save in the case of the transcript of the interview. Rule 15(2A) does not require a notice or application in any particular form. It requires the parties seeking to adduce further evidence to give a notice indicating the nature of the evidence and explaining why it was not submitted to the First-tier Tribunal. The standard directions set a timetable and make other directions as to bundles. It has at all relevant times been clear that the first four items of further evidence listed above were the subject of the Secretary of State’s application, and that the reason was that given, that is to say that they were not available at the date of the First-tier Tribunal hearing. So far as the transcript of the interview is concerned, however, no reason has been given for not adducing it before the First-tier Tribunal, if it was relevant.
8. We are, however, content to admit all five items of further evidence in order to understand the argument being made on behalf of the Secretary of State.
9. That argument may be simply expressed as follows. The new material demonstrates (or is said by the Secretary of State to demonstrate) that the claimant underwent a ceremony of marriage to another woman (not the sponsor) some years after marrying the sponsor. It follows that his current relationship is not primarily with the sponsor; or that he does not intend

genuinely to live with her permanently; or that in any event there were matters relevant to the appeal and known to the claimant which were not put before the First-tier Tribunal Judge, and which impact upon the decision that judge had to make. The Secretary of State argues that, like the Secretary of State, the appellant in an appeal has a duty not to mislead the Tribunal. The material now available demonstrates that the claimant did mislead the Tribunal. That material could not, with reasonable diligence, have been obtained before the hearing before the First-tier Tribunal. Its existence demonstrates that the First-tier Tribunal erred by making its decision in these circumstances.

10. Mr Homes confined himself to responding on the procedural issues. As we have already indicated, he resisted the admission of the further evidence. He pointed out also that there was considerable doubt whether it was right to say that the Secretary of State could not with reasonable diligence have produced the material earlier; and the Secretary of State's failure to demonstrate that fact was fatal to the application to adduce the material now. He resisted the Secretary of State's suggestion that more time should be allowed for her to prove the facts relating to the availability of the evidence. His submission was that the appeal fell to be dismissed simply because there was no evidential basis for setting aside the First-tier Tribunal Judge's decision. Mr Lindsay pointed out that in a case where fraud is shown, there may not be any requirement to show that the material could not have been produced earlier. The Secretary of State was entitled to come to a hearing assuming that the other party would not attempt to defraud the process of justice.
11. It is our clear view that the Secretary of State's appeal falls to be dismissed. We reach that view for three reasons.
12. The first reason relates to the interests of finality in litigation. There are severe limitations on the process by which a judicial decision can be subject to appeal on the basis that newly adduced facts or evidence show an error of law by the judicial decision-maker. The vast majority of first-instance litigation is concerned with fact-finding. Evidence is heard and assessed. The trier of facts may well reach conclusions based on a decision that certain evidence is unreliable or deliberately untrue; or a decision that despite attacks on certain evidence, or the existence of contrary evidence, it is truthful or reliable. The parties have their opportunity to assemble their evidence, present it persuasively, and challenge opposing evidence. In this way, a decision is made, because it is the function of the litigation to reach a conclusion on the disputed evidence. It would be wholly contrary to those principles to admit generally a challenge to a judicial decision on the evidence, solely on the basis that the losing party still says that the evidence ought not to have been assessed in the way it was. In the same way, in general it is not open to the losing party to adduce, after the decision, further evidence either supporting that party's own case or undermining the opposing case. That is because it is not an error of law to decide a dispute on the basis of the evidence presented. The very limited circumstances in which such an

argument may run are those set out by Carnwarth LJ (as he then was) in E and R v SSHD [2004] EWCA Civ 49 where, giving the judgment of the Court, at [66], having reviewed the authorities, he said this:

“In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in cooperating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements of unfairness are apparent from the above analysis.... First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been “established”, in the sense that it was uncontested and objectively verifiable. Thirdly, the appellant (or his advisors) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal’s reasoning.”

13. Mr Lindsay referred us also to the dictum of Carnwarth LJ in Khan v SSHD [2003] EWCA Civ 530, decided nearly a year before E and R, in which he had said this at [30]:

“Whatever the precise limits of this Court’s power to admit new evidence in such cases as this, I have no doubt that we should do so where there is material which appears to show that the factual basis on which the Tribunal proceeded was through no fault of its own simply wrong.”

14. It is apparent, however, from paragraph [88] of E and R, that Carnwarth LJ regarded those remarks as applying to the facts of Khan itself, rather than a principled statement different from that set out in E and R.
15. We should make two further points in this context. The first is that the requirements set out in Ladd v Marshall [1954] 1WLR 1489 are not in this jurisdiction to be seen as an alternative to the principles set out in E and R. Ladd v Marshall provides the principles according to which in general the Court of Appeal will consider whether to admit additional or new evidence. E and R deals with the special case where the appellate jurisdiction is exercisable only if the Court below is shown to have erred in law. The formulation in E and R is therefore the appropriate one in relation to appeals from the First-tier Tribunal, not the rather wider principles to be found in Ladd v Marshall.

16. We must also refer to Mr Lindsay’s allusion to the duty of the Secretary of State not to mislead the Tribunal in an immigration appeal. That duty is set out most recently in Nimo v SSHD [2020] UKUT 88 (IAC) at [21], by reference in particular to R v SSHD ex p Kerrouche (No.1) [1997] Imm AR 610. This duty is, as the Tribunal in Nimo pointed out at [20], quite different from the duty of candour which lies on all parties in judicial review. Mr Lindsay appeared to be inviting us to derive from the duty imposed on the Secretary of State not to mislead a Tribunal a parallel duty to be imposed on other parties. In our judgment that would not be right. The duty on the Secretary of State not to mislead a Court or Tribunal in an appeal on the facts is part of the general duties of a public authority in litigation, seen most obviously in the duties of the prosecution in criminal proceedings. We would of course not suggest that individual parties are at liberty to mislead a Court or Tribunal, but the point is that the restraints on their doing so are those to be found in the possibility of proceedings for perjury, contempt, or other interference with the course of justice. There is no separate procedural duty to conduct a litigation in a particular way.
17. So far as this aspect of our decision is concerned, therefore, our conclusion is that in this appeal the Secretary of State has to show, without relying on any particular duty on the claimant, that the evidence now adduced shows an error of law in the E and R sense.
18. We pass then to the second reason for our substantive decision. The asserted fact is that the claimant has been party to another marriage. The evidence of that marriage consists of a photocopy of a register of marriages showing the marriage of a person with (in part) the same name as the claimant, and a wedding photograph. The whole of the evidence relating to the photograph is in part of the sponsor’s son’s witness statement as follows:
- “My brother... obtained the photograph of the wedding group that is in the bundle of evidence. I believe that this photograph was from the appellant’s Facebook page.”
19. The implication is clear, but the truth of the matter is that there is no evidence firmly linking the claimant with the wedding photograph or identifying him in it, and no evidence demonstrating that the claimant is the person referred to in the marriage register. We doubt whether the evidence even passes the Ladd v Marshall test of being apparently credible although not necessarily uncontravertable, because of the lack of any clear statement capable of being assessed as credible. Certainly, the evidence of the alleged marriage is not evidence of an indisputably true fact. Further, even if the evidence were taken in the way suggested on behalf of the Secretary of State, it would not show that the whole factual basis of the First-tier Tribunal’s appeal decision is wrong, because the claimant certainly is married to the sponsor, and it was on the basis of that relationship that the appeal was decided. No doubt if a second

(presumably bigamous) marriage were to be proved, that would have an impact on the assessment of all the other evidence, but this is not a Khan or Cabo Verde v SSHD [2004] EWCA Civ 1726 case, where the new evidence (if accepted) shows of itself that the judicial decision cannot have been right.

20. Nor is this a case where the evidence that the First-tier Tribunal did consider was itself forged or fraudulent as in SSHD v Abbasi [2020] UKUT 27 (IAC). At best, the new evidence could merely show that the evidence before the First-tier Tribunal was incomplete.
21. Thus, the new evidence does not meet the E and R test. It does not show an error of law by the First-tier Tribunal and there is therefore no lawful basis for setting its decision aside.
22. There is, as we have said, a third factor. The basis of the E and R jurisdiction is, as its formulation by Carnwarth LJ shows, the perception of unfairness if a decision is shown to have been taken contrary to uncontroversially established facts. In the present case, however, even if unfairness of that sort were to be demonstrated, it might well not be clear that the fair result would be to set aside the First-tier Tribunal's decision.
23. This was a case in which the appeal was on human rights grounds (which themselves demand a full and comprehensive consideration of the circumstances of the individuals concerned), and focused on the intentions of the claimant, as derived or to be derived from the evidence before the Tribunal. The appropriate way of indicating any challenge to the claimant's account of his life with the sponsor, both past and projected, was by cross-examination at the hearing. But, as we have noted, the Secretary of State indicated, by her Presenting Officer, that she was content for the decision to be made without the claimant being cross-examined. In these circumstances it is not easy to see how it would now be fair to allow her to raise a particular matter which would have been encompassed in the general cross-examination of the claimant on relevant matters if that had taken place.
24. Secondly, there is an important question of timing which is unresolved. The Secretary of State's position is that the evidence upon which she now seeks to rely was unavailable to her at the date of the hearing. We asked Mr Lindsay to say precisely when it became available. He declined to do so. He pointed only to the witness statement of the Home Office official who produced the copy of the registry of marriages:

"I became aware of this case on 19 November 2021 following an enquiry from the Home Office which was dealing with some ministerial correspondence. The Home Office passed me information about the alleged marriage ... in January 2018 at St Mary's Church in Enugu Nigeria. I was asked to find any information that

could corroborate this event.”

25. As we have said, the appeal was heard by the First-tier Tribunal on 27 August 2021, and its decision was sent out on 3 November 2021. We can make no finding, but it does appear to us unlikely, given the series of events already set out in the official’s witness statement, that the Home Office was not aware of the allegation about another marriage, and the one alleged in particular, in time to make representations before the First-tier Tribunal’s decision was issued, or perhaps even before the First-tier Tribunal hearing. The position is that, by not being specific about the dates, the Secretary of State is not in a position to show that she did not, as a matter of tactics, defer investigating the allegation until after she knew that she had lost the appeal in the First-tier Tribunal.
26. Those two factors would, we think, have counted heavily against finding an error of law in the E and R sense even if the E and R factors had been made out.
27. The decision of the First-tier Tribunal will therefore stand, and as a result the Secretary of State is under a duty to issue the entry clearance sought. We have found that the material now produced is not sufficient to undermine the legality of the decision properly made by the First-tier Tribunal.
28. If, however, the Secretary of State considers that there is substance in the matters she raised before us, she has a remedy under the Immigration Rules. The entry clearance might, if appropriate, be cancelled under paragraph 321A(2) of the Immigration Rules, or the claimant might be refused leave to enter despite his possession of entry clearance, under paragraph 321(i). A decision of either sort would carry a right of appeal to the First-tier Tribunal, at which the totality of the evidence could be properly assessed.
29. For the reasons we have given this appeal is dismissed.

C. M. G. OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 24 April 2023