Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/11956/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7th October 2019	**On 21 October 2019**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

JEFF GODFREY ERHUNSE-ABU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Airhuoyo-Obazee, Church Street Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria born on 25 February 1959. He appeals against the decision of First-tier Tribunal Judge M A Khan dismissing his appeal against the refusal of a residence card as confirmation of a permanent right of residence under the Immigration (EEA) Regulations 2006.

2. The Appellant came to the UK in 2003. His first child was born in 2006 and his second child was born in 2007. The mother of his children is Margaret Mary Abu [MMA]. On 25 November 2009, the Appellant married an EEA national, Sarlota

Mikusova. On 7 April 2010, he was granted a residence card for one year. On 1 April 2011, he was granted a residence card for five years. On 19 December 2011 his third child was born. The mother is MMA. On 23 March 2016, the Appellant applied for a permanent residence card. This was refused on 27 September 2016.

3. In the refusal letter the Respondent stated:

> "In your application you state that your EEA national Sponsor was employed for a continuous period of five years and you have provided two payslips from 31st December 2015 and 31st January 2016 as well as an HMRC letter outlining your Sponsor's employment history from April 2011 until April 2015. On this HMRC letter it shows that in the tax year April 2013 to April 2014 there is a gap in your Sponsor's employment between June 2013 and February 2014 as the employment information shows she worked for FSH Recruitment but only earned £30 for this period, meaning she was not working full-time as £30 would reflect at most a day's income and as such not exercising treaty rights. Based off (sic) the evidence provided your Sponsor would therefore fail to meet Regulation 15(1)(b) for this period and so would not be exercising treaty rights for a full five years."
>
> …
>
> "You have provided this Department with a photocopy of your UK marriage certificate dated 25 February 2009 showing your marital status as 'single' but have also provided two photocopied birth certificates for REA and HUA listing you as their father. Additionally, on these birth certificates you have solely registered the birth which can only be done when you are married to the mother of the children (who is listed as Margaret Mary Abu [MMA]). As such you have been married prior to marrying Sarlota Mikusova and have not provided any evidence of your divorce from MMA.
>
> You have also provided photocopies of the residence permits for your children, after checking these records it shows that the children's and their mother's addresses are the same address as the company you registered in 2014. Also, when checking these records this Department were (sic) able to see that you and MMA had another child SNA born 19 December 2011 after your marriage to Sarlota Mikusova. As such this evidence provided shows that you are living in London with three children and MMA, and your spouse lives in Middlesbrough with no evidence provided to show the two of you have ever lived together. Based on the above information, this Department would refuse the application even if you were able to prove you were free to marry.
>
> From the evidence you have provided this Department does not recognise your marriage to Sarlota Mikusova as no proof of your divorce has been seen and so for this reason your application fails to meet 7(1)(a) of the Immigration (EEA) Regulations 2006 as this Department does not recognise you as the family member of an EEA national."

4. The Appellant and his EEA Sponsor did not attend the hearing before First-tier Tribunal Judge M A Khan. The judge concluded at [26] that, on the evidence before

him, the Appellant was married to MMA, the children's mother and, at [27], he was living in London with her and his children throughout his marriage to his EEA Sponsor, who lived in Middlesbrough. The judge found at [28] that it was for the Appellant to establish his case, on the balance of probabilities, that he and his EEA Sponsor were living together continuously for a period of five years in accordance with the EEA Regulations and the EEA Sponsor was exercising Treaty rights. He concluded at [29] that the Appellant could not meet the requirements of Regulation 7(1)(a) and 15(1)(b) of the Immigration (EEA) Regulations 2006.

5. Permission to appeal was granted by Upper Tribunal Judge Gill on 29 August 2019 for the following reasons:-

> "It is arguable that Judge of the First-tier Tribunal M A Khan may have erred in law as follows:
>
> 1. Paragraph 1 of the grounds contends that there was no evidence before the judge that the married couple's option was chosen as opposed to the unmarried partner's option.
>
>   At paragraph 26 of his decision the judge referred to the registration of the birth of the appellant's third child (SNA, date of birth 19 December 2011) and that the birth was registered using the married couple's option and not the unmarried partner's option. The decision letter refers to this issue but in connection with the birth certificates of REA and HUA (at E1 and E2 of the respondent's bundle). The issue taken in the decision letter in connection with SNA is that the appellant had this child by another woman after he was married to his EEA-sponsor who was living elsewhere. Accordingly, on the limited material before me it appears that the judge may have mixed up the issues taken in the decision letter. It is difficult to see what the judge meant when he referred to the married couple's option and the unmarried partner's option as the birth certificates do not appear to have clear couple's option or unmarried partner's option to select. There is a four page document produced from https://www.gov.uk/register-birth/who-can-register-a-birth which did not help me to assess whether there was evidence before the judge to support his finding at paragraph 26.
>
>   In these circumstances I was unable to see what evidence was before the judge to support his assessment at paragraph 26. Paragraph 1 of the grounds is therefore at least arguable.
>
> 2. If the judge did err as described above then it is arguable that this was material for the following reasons:
>
>   i) the judge's reasoning and findings at paragraphs 27 and 28 of his decision arguably show that he erred in thinking that it was necessary for the appellant to show that he had been living with his EEA-sponsor continuously for a period of five years in order to succeed in this appeal. The judge appears to have required cohabitation between the Appellant and his EEA Sponsor, contrary to PM (EEA – spouse – "residing with") Turkey [2011] UKUT 89 (IAC); and

ii) it appears that the judge had evidence of the Sponsor exercising Treaty rights for the tax years from April 2011 to April 2015 (F1-F4 of the respondent's bundle)."

Submissions

6. Mr Airhuoyo-Obazee relied on his skeleton argument and submitted that there was no evidence before the First-tier Tribunal that the Appellant was married to his ex-partner, MMA, with whom he had three children. The judge erred in fact in concluding that the Appellant had been married previously. Further, the case law did not require the Appellant to live with his EEA Sponsor. Mr Airhuoyo-Obazee accepted that there was no evidence before the First-tier Tribunal that the Appellant had lived with his EEA Sponsor in London before she moved to Middlesbrough. However, at the time of this application the Appellant was living at Webb House. MMA and his children were living at a different address, although it was accepted that the Appellant had registered his business at that address and not the address where he was living. The Appellant was not living with MMA.

7. In relation to the gap in employment the EEA Sponsor had received jobseeker's allowance from November 2012 to June 2013. It was clear that her earnings during 2013 to 2014 were meaningful and that she had been actively seeking employment. The five month gap relied on by the Respondent was not sufficient to show that the EEA Sponsor was not exercising Treaty rights for the full five years. The financial information and the documents from HMRC were sufficient to show that she was economically active during the five year period and therefore exercising Treaty rights.

8. Mr Bramble submitted that the refusal letter referred to the Appellant's first two children and that there was an error by the judge in dealing with the third child. However, that was not material because the document which was before the judge from the government website relating to the registration of births showed that, in relation to married parents, either parent can register the birth on their own. They can include both parents' details if they were married when the baby was born or conceived. In relation to unmarried parents the details of both parents can be included on the birth certificate if one of the following happens: they sign the birth register together; one parent completes a statutory declaration of parentage form and the other takes the signed form to register the birth; or one parent goes to register the birth with a document from the court giving the father parental responsibility. Mr Bramble submitted that since the Appellant himself had signed the register this was sufficient for the judge to conclude that the Appellant was married to MMA. There was no evidence of a divorce and therefore the Appellant was not able to show that he was lawfully married to his EEA Sponsor.

9. Mr Bramble accepted that the judge erred in finding that the Appellant had to show he had lived with his EEA Sponsor continuously for five years, but again this was not

material because there was no evidence of a divorce and therefore the marriage could not be said to be valid.

10. Mr Bramble submitted that the Appellant had not shown that the EEA Sponsor was exercising Treaty rights for five years. Her jobseeker's allowance ended in June 2013 and there was no other evidence to show that she was a jobseeker thereafter. There was insufficient evidence that the EEA Sponsor was exercising Treaty rights between June 2013 and February 2014. During those five months she was only paid £30 and this could not be considered to be genuine and effective employment. The judge failed to make a finding on this issue, but it was not material because there was insufficient evidence to show that the EEA Sponsor was exercising Treaty rights for the relevant period.

11. In response, Mr Airhuoyo-Obazee submitted that the EEA Sponsor's earnings were sufficient to show that she was in genuine and effective employment throughout the five year period. Further, the Appellant was granted a residence card in 2011 and at that time the Home Office had full knowledge of the Appellant's two children. It was unfair to say that the marriage was invalid five years later. The EEA Sponsor had been employed throughout the five year period whilst the Appellant had a residence card and the marriage had lasted seven years.

Conclusions and Reasons

12. The Appellant and his EEA Sponsor did not attend the hearing before the First-tier Tribunal. The judge was required to decide the appeal on the papers with the benefit of submissions by the Appellant's representative. The submissions made were that it was not necessary for the Appellant and his EEA Sponsor to live together. The Appellant rented a room and lived in London because of his employment whilst his EEA Sponsor lived in Middlesbrough. The Appellant was never married to the mother of his three children. The Respondent had not provided any evidence about this. The Appellant and the mother of his children would not necessarily have to be married to register the birth of their third child. The Respondent's decision was not in accordance with the law.

13. Mr Airhuoyo-Obazee submitted that the judge's finding that the Appellant was married to MMA was not open to him on the evidence before him because the birth certificates and accompanying documents were insufficient to enable the judge to rationally conclude that the Appellant was married. Secondly, the documents were sufficient to show that the EEA Sponsor was exercising Treaty rights throughout the five year period. It was irrational for the judge to conclude that the gap relied on by the Respondent meant that her employment was not sufficient given her level of income during the relevant tax years.

14. The judge made the following findings of fact: The Appellant had three children with MMA and they were living at an address in London where he registered his company in 2014. MMA gave birth to his third child, SNA, on 19 December 2011,

after his marriage to his EEA Sponsor on 25 February 2009. The judge considered the information from the government website and concluded the Appellant was married to MMA because it was only possible to register the birth of his children, on his own, if he was married. I am of the view that this finding was reasonably open to the judge on the evidence before him for the following reasons.

15. The Appellant and his EEA Sponsor did not give evidence before the First-tier Tribunal. The bundle which was before the judge stated that the Appellant was in a love relationship with MMA and they had three children but had never married. The Appellant met his EEA Sponsor in 2008 while he was separated from MMA and he married his EEA Sponsor in 2009. He continued to support his children. The Appellant registered the birth of his two children born in 2006 and 2007. He lived separately from his EEA Sponsor because of his employment with Network Rail and there was no possibility of a job in Middlesbrough. There was no evidence before the judge to show that the Appellant had ever lived with his EEA Sponsor.

16. The evidence before the judge showed that the Appellant was in a relationship with MMA and he had three children with her, two born before his marriage to his EEA Sponsor and one born afterwards. There was evidence that it was only possible for one parent to sign the birth certificate if the parents were married. The birth certificates of REA and HUA showed the father as 'Godfrey ABU' and the mother as 'Margaret Mary ABU' and referred to her maiden name as 'OMORAGBON'. The birth certificates are signed by the Appellant alone.

17. The information from the government website relating to the registration of births stated as follows:

> "**Married parents**
>
> Either parent can register the birth on their own. They can include both parents' details if they were married when the baby was born or conceived.
>
> **Unmarried parents**
>
> The details of both parents can be included on the birth certificate if one of the following happens:
>
> - they sign the birth register together
> - one parent completes a statutory declaration of parentage and the other takes the signed form to register the birth
> - one parent goes to register the birth with a document from the court (e.g. a court order) giving the father parental responsibility"

18. There was no statutory declaration or court order before the judge and the birth certificate was signed by the Appellant not MMA. On the basis of the evidence before the judge his conclusion that the Appellant was married to MMA was open to him. The judge was entitled to prefer this evidence to the unsupported assertion in the Appellant's witness statement that he was only in a love relationship with MMA and they had never married. Since there was no evidence of a divorce, the Appellant's

marriage to his EEA Sponsor was not valid. Any error in finding that the Appellant had failed to show he had been living with his EEA Sponsor was not material.

19. In any event, the appeal could not succeed because the Appellant had failed to show that his EEA Sponsor had been exercising Treaty rights continuously for five years. On the evidence before the judge, there was a gap in the EEA Sponsor's employment from June 2013 to February 2014. During this time the Appellant received £30 from FSH Recruitment. There was insufficient evidence to show that she was genuinely and effectively employed during this period. There was insufficient evidence to show that she was a jobseeker because her jobseeker's allowance ended in June 2013.

20. On the evidence before the judge, the Appellant had failed to show that he was validly married to his EEA Sponsor or that his EEA Sponsor was a qualified person exercising Treaty rights for the five year period. The was no material error of law in the judge's conclusion that the Appellant could not satisfy Regulation 7 and Regulation 15 of the Immigration (EEA) Regulations 2006. I dismiss the Appellant's appeal.

Notice of Decision

Appeal dismissed

No anonymity direction is made.

J Frances

Signed Date: 18 October 2019

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed Date: 18 October 2019

Upper Tribunal Judge Frances