



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

Appeal Number: EA/02304/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 26 February 2020**

**Decision & Reasons Promulgated
On 10 March 2020**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

**MR SAHEED OLAWUNMI OGUNREMI
(ANONYMITY ORDER NOT MADE)**

Appellant

And

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

Respondent

Representation:

For the Appellant: Mr R Obiakor, of Moorehouse Solicitors.

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of Judge of the First-tier Tribunal Cockrill (hereafter the "judge") who, in a determination promulgated 5 September 2019 following a hearing on 8 July 2019, dismissed the appeal of the appellant, a national of Nigeria born on 13 February 1972, against the decision of the respondent of 18 April 2019 for a residence card on the basis that he was the former family member of **Ms Magdalena Lakatosova**, an EEA national exercising Treaty rights in the United Kingdom. Ms Lakatosova is a Slovakian national.

2. I shall refer to Ms Lakatosova as EEA national 1.
3. The only reason given in the decision letter for refusing the appellant's application was that the respondent considered that the appellant was not validly married to EEA national 1. In reaching this decision, the respondent relied upon a previous decision letter which stated that the decision-maker had seen evidence that EEA national 1 was married to another person when she entered into the marriage with the appellant on 5 October 2009. The decision-maker concluded that this other lady and EEA national 1 were one and the same person.
4. The only evidence that the judge had before her on the question whether this other lady and EEA national 1 were one and the same person was a decision of Judge of the First-tier Tribunal R Caswell promulgated on 10 October 2016. This decision concerned an appeal by a Mr Ezeh Frank Onwuegbusi who had applied for a residence card as the family member of **Ms Magdalena Lakatsovo**.
5. As will be observed, the spelling of the person mentioned in the decision of Judge Caswell is slightly different. I shall refer to the person mentioned in Judge Caswell's decision as EEA national 2.
6. In the decision letter, the respondent accepted that the appellant satisfied all the remaining requirements for a retained right of residence.
7. At the hearing before me, Ms Everett accepted that the judge had materially erred in law.
8. I agree, for the following reasons:
 - i) There was simply no positive evidence at all before the judge that EEA national 1 and EEA national 2 were one and the same person. The judge drew this inference from Judge Caswell's decision.
 - ii) The surname of EEA national 2 in Judge Caswell's decision was spelt slightly different from the surname of EEA national 1. Judge Caswell's decision did not mention the date of birth of EEA national 2.
 - iii) There was no evidence of the prevalence of the name: "Magdalena Lakatosova" or the name "Magdalena Lakatsovo" in Slovakia or other relevant country.
9. I am therefore satisfied that there was no evidential basis for the judge's finding that EEA national 1 and EEA national 2 were one and the same person. The judge therefore erred in law for this reason.
10. In addition, the burden of proof was upon the respondent to establish, on the standard of the balance of probabilities, that the appellant's marriage was void, on the basis of the principle that he who alleges a fact must prove it. It was not for the appellant to show that his marriage was valid. The judge plainly reversed the burden of proof when he said:
 - i) at para 31, *"what the appellant has not done ... is really to clear up this very serious challenge that has been raised by the respondent about the lawfulness of his marriage"*; and

ii) at para 32, "*it has not been shown that [the appellant] was lawfully married to [EEA national 1] ...*"

11. In the absence of any positive evidence to establish that EEA national 1 and EEA national 2 were one and the same person, the only conclusion that the judge could have reached was
12. that the respondent had not discharged the burden of proof upon her to show that the appellant's marriage was void.
13. Ms Everett therefore agreed that the judge's decision must be set aside. I agree. I therefore set it aside.
14. I proceeded to re-make the decision on the appellant's appeal. There is still no positive evidence to show that EEA national 1 and EEA national 2 are one and the same person. Accordingly, the respondent has not established that the appellant's marriage was void. The respondent had accepted in the decision letter that all the remaining requirements for a retained right of residence were satisfied.
15. Accordingly, Ms Everett agreed that she could not persuade me not to allow the appeal.
16. I allow the appellant's appeal for the reasons given at para 14 above.

Decision

The decision of the First-tier Tribunal involved the making of a material error of law requiring it to be set aside. The decision was set aside in its entirety.

I re-make the decision in the appeal by allowing it.



Signed
Upper Tribunal Judge Gill

Date: 28 February 2020