



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

Appeal Number: EA/06884/2018 (V)

THE IMMIGRATION ACTS

Heard at: Field House

**Decision & Reasons
Promulgated**

On: 22 January 2021

On: 4 February 2021

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

JOSEPH KINYANJUI WAMBUI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Jafar, Counsel

For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection by the parties. The form of remote hearing was skype for business. A face to face

hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.

2. The appellant, a national of Kenya born on 3 March 1981, appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse to issue him with a residence card under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"), as the family member (spouse) of an EEA national exercising treaty rights in the UK.

3. The appellant entered the UK on 27 July 2017. He entered into a marriage on 9 May 2018 with an Italian national, Joanina Kitengele Langiu, and applied for a residence card as the family member of an EEA national on 16 August 2018. The respondent had some concerns about the genuineness of the marriage, as a result of a lack of evidence of cohabitation and noted the appellant's claim to be the father of a child born on 2 January 2018 but yet he had only entered the UK on 27 July 2017. The respondent therefore invited the appellant and his wife to an interview, which took place on 25 September 2018. The respondent considered that the interview highlighted a number of inconsistencies between the evidence of the appellant and the EEA national sponsor and accordingly suspected that the marriage was one of convenience for the sole purpose of obtaining an immigration advantage. The application was therefore refused on 4 October 2018.

4. The appellant's appeal against that decision was heard in the First-tier Tribunal on 24 May 2019. The appellant and his wife gave oral evidence at the appeal but were without legal representation. The judge concluded that the marriage was one of convenience owing to a number of discrepancies and inconsistencies in the evidence and he dismissed the appeal.

5. Permission to appeal that decision was sought on behalf of the appellant. It was explained in the grounds that the appellant and his wife had met in Kenya in 2015 and had lived together in a relationship akin to marriage from March 2016 until the appellant came to the UK on a visit visa on 27 July 2017. The sponsor joined him in the UK on 12 September 2017 and their daughter, conceived whilst they were in Kenya, was born on 2 January 2018.

6. The grounds asserted that the judge had erred by refusing an adjournment application made by the appellant at the hearing on the basis that he had only been informed on the day of the hearing that his representative was unable to attend, and further on the basis that the respondent had served the 60-page marriage interview only at the hearing. It was asserted that the judge had relied on that interview record to dismiss the appeal without having given the appellant an opportunity to address the issues raised by the respondent and that the proceedings were therefore not fair. The grounds asserted further that the judge had misapplied the test in marriage of convenience cases and had 'rubber-stamped' the respondent's documents served at the hearing without considering the appellant's position. No mention was made of the fact that the appellant's wife and daughter attended the hearing and there was a perception

of bias. The judge did not consider other evidence relied upon by the appellant and gave no consideration to the couple's child.

7. Permission was granted by the First-tier Tribunal on 9 July 2019.

8. At the hearing Ms Cunha conceded that she had difficulty defending the judge's decision, particularly given the failure to mention the appellant's and sponsor's child when there was evidence before him in that regard. She agreed that the decision ought to be set aside, but she did not want the decision to be re-made without further oral evidence.

9. There was some discussion about whether the matter should be remitted to the First-tier Tribunal or whether there could be evidence taken at the hearing before me. Mr Jafar said that he was inclined not to tender the appellant as it was his submission that the respondent had simply failed to discharge the burden of proof, given the unsatisfactory and misleading nature of the interview record. However it was agreed by both parties in the end that the appellant and his wife would give oral evidence and Ms Cunha was content that the arrangements for so doing were satisfactory, with the appellant's wife leaving the room whilst the appellant gave evidence and vice-versa.

10. Ms Cunha asked the appellant various questions about his relationship with his wife, about her pregnancy, when he found out about the pregnancy and whether it was planned, how they decided on their child's name, what made him and his wife decide to come to the UK, what family his wife had in the UK and in Kenya, what employment his wife had in Kenya and in the UK, what his own work was in the UK and what was his current employment status, as well as about the marriage ceremony. Mr Jafar re-examined the appellant on some of his evidence. The appellant's wife was then cross-examined by Ms Cunha on the same issues as the appellant.

11. Having completed the oral evidence and accepted the consistency of the evidence given by the appellant and his wife, Ms Cunha conceded that their marriage was entirely credible and genuine and asked me to allow the appeal.

12. In view of Ms Cunha's concession, there is no need for me to make any detailed findings. I would just add that, as found by Ms Cunha, I also have no hesitation in finding that the appellant's and the sponsor's marriage is entirely genuine. Their answers to personal questions were completely consistent and it was clear from observing them together that they were a genuine and loving couple. The nature of the questions was such that their answers could not have been rehearsed. It seems to me that any previous conclusions reached on the genuineness of their relationship were unfounded and that any discrepancies which had arisen in their evidence previously were no doubt as a result of misunderstanding or human error.

13. Accordingly, I find that the respondent has not discharged the burden of proving that the marriage is one of convenience. On the contrary this is a genuine marriage. As such, and given that no other reasons were given by the

respondent for refusing the appellant's application, and furthermore that it is clear that the sponsor is exercising treaty rights in the UK, I conclude that the appellant has met the requirements of the EEA Regulations to show that he is the family member of a qualified EEA national and is entitled to a residence card on that basis. The appeal is therefore allowed.

DECISION

14. 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 and is re-made by allowing the appellant's appeal under the EEA Regulations 2016.

Signed: S Kebede
Upper Tribunal Judge Kebede
2021

Dated: 22 January