



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/01902/2016**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
Oral determination given following
hearing
On 10 October 2019**

**Decision & Reasons
Promulgated
On 26 November 2019**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR MUHAMMAD AWAIS
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr N Bramble, Home Office Presenting Officer

For the Respondent: Mr Arif Rehman, Counsel, instructed by Mayfair Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against a decision of First-tier Tribunal Judge O'Callaghan (as he then was) in which on the record he "allowed" an appeal by Mr Awais against the decision made some three years earlier to revoke the residence card which he had been issued and to remove him pursuant to Regulations 19(3)(a) and (b) of the 2006 Regulations, with reference to Regulation 21(5)(b) of the same Regulations. For ease of convenience I shall throughout this decision refer to the Secretary of State, who was the original respondent as "the

Secretary of State” and to Mr Awais, who was the original appellant, as “the Claimant”.

2. The underlying decision, as already indicated above was a decision of the Secretary of State to revoke a residence card which the Claimant had previously been granted as the spouse of a person then exercising EU treaty rights, a Ms Kutnik and to remove him. The basis of this decision was the Secretary of State’s belief that the marriage was a marriage of convenience and entered into simply in order for the Claimant to become entitled to residence rights to which otherwise he would not have been entitled.
3. By the time the appeal came to be heard (on 26 March and 14 May 2019) matters had moved on within the three years which had since passed because by that stage the Claimant had been divorced and had embarked on a new relationship with a Ms Brod. It seems that at the hearing (albeit not originally in the grounds) the appeal proceeded on the basis (which seems to have been incorrect) that the appeal was against a refusal to grant a permanent residence card to the Claimant. In order to succeed in an application for a permanent residence card, on the basis of his previous marriage to Ms Kutnik, the Claimant would have had to establish first that the marriage was not a marriage of convenience (or at any rate the Secretary of State must have been found unable to establish that it was not) and secondly, that at the date of the termination of the marriage Ms Kutnik had been exercising treaty rights. This latter requirement was not however necessary in order to challenge the revocation decision which had been made and which technically was the subject of this appeal.
4. In his decision, Judge O’Callaghan found first that the marriage was not a marriage of convenience, but secondly that the Claimant had not established to the requisite standard that the requirements of Regulation 10(5) of the 2006 Regulations were satisfied, finding at paragraph 104, as follows:

“As the [Claimant’s] divorce petition subsequent Decree Absolute were issued in 2016, there is no evidence before the Tribunal sufficient to enable the appellant to satisfy the requirement under Regulation 10 that Ms Kutnik [had] exercised EU treaty rights throughout the relevant time up to the divorce.”
5. As at paragraph 102 the judge had stated in terms that the Claimant “is also required that to establish that Ms Kutnik was exercising EU treaty rights during such period” it follows that logically, if the judge was right about this, and on the basis that the appeal had been against a refusal to grant a permanent residence card (which technically it was not), he must have intended to go on to dismiss the appeal. However, although it is not explained as to why the judge reached this decision, in fact he went on to state under “notice of decision” that “the appeal is allowed”.
6. The basis of the Secretary of State’s appeal as set out in the grounds is that this must have been effectively a slip of the pen and that was the

reason why permission was granted to the Secretary of State to bring this appeal by First-tier Tribunal Judge Saffer, on 12 August 2019, who, when setting out his reasons for granting permission to appeal stated that “it is arguable that the judge intended to dismiss the appeal, by a slip of the pen allowed it, as he found that neither wife [this is a reference to a subsequent relationship with a Ms Brod] had established that she was exercising EEA treaty rights during the relationship”.

7. On the face of this decision, it certainly does appear as if the judge had intended to dismiss the appeal but on behalf of the Secretary of State before this Tribunal Mr Bramble very fairly stated that it would not be right in all the circumstances for the Secretary of State to maintain this appeal. His reasons were given succinctly and as I have said extremely fairly and are as follows. Whatever the judge may have believed the issue to have been, in fact the challenge was not to any refusal to grant a permanent right of residence (in respect of which the Claimant would have needed to establish that Ms Kutnik or his future partner had indeed been exercising treaty rights) but was simply a challenge to the revocation of the residence card which the Claimant had previously had but which had in any event now lapsed. That revocation decision had been made on the sole basis that the marriage was a sham marriage and on that issue the judge had found in favour of the Claimant. As there was no requirement for the Claimant to establish the dates on which treaty rights had been exercised by his former wife (because this was not in issue with regard to the revocation decision) any finding that the judge had made with regard to whether or not either Ms Kutnik or Ms Brod had been exercising treaty rights was otiose to the decision which was actually under challenge. It followed that if and to the extent that the judge had intended to dismiss the appeal, he would not have been justified on his findings in so doing, because the only live issue before him with regard to the decision that was under challenge was whether or not the marriage between the Claimant and Ms Kutnik had been a sham one from its inception, and the judge had found that it was not.
8. Accordingly, Mr Bramble accepted that insofar as the decision made by the judge does not appear to follow the logic of the findings he made and what he had considered to be the issues before him, any such inconsistency, if an error, was not material because on the basis of the judge’s finding that this was not a sham marriage, he should have allowed this appeal in any event.
9. I am very grateful to Mr Bramble for the exceptionally fair manner in which he has conducted this appeal and having given anxious scrutiny to the issues in this case I accept that his submissions are entirely correct. It follows that the Secretary of State’s appeal must be dismissed, the effect being that the original decision, allowing the Claimant’s appeal **against the revocation and removal decision** must be sustained and I shall so find.
10. I should however note that the maintenance of this decision does not give this Claimant any retained rights of residence; it is merely confirmation

that the revocation decision was not justified because of the judge's finding that the marriage was not a marriage of convenience. If and to the extent that this residence card having now lapsed, and unless and until the Claimant can establish that he is entitled to further rights of residence, he has no right to remain in this country.

Decision

There being no material error of law in Judge O'Callaghan's decision, for the reasons set out above, the Secretary of State's appeal against Judge O'Callaghan's decision allowing the Claimant's appeal is dismissed, and that decision, allowing the Claimant's appeal against the Secretary of State's decision to revoke his residence card is sustained.

No anonymity direction is made.

Signed:

A handwritten signature in black ink that reads "Ken Craig". The signature is written in a cursive style with a large, prominent 'K' and 'C'.

Upper Tribunal Judge Craig
November 2019

Date: 20