Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17989/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 November 2013	**On 28 November 2013**

Before

UPPER TRIBUNAL JUDGE ESHUN
UPPER TRIBUNAL JUDGE CRAIG

Between

KENNY OLAKUNLE YAHYAH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Stone, Counsel
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who is a national of Nigeria, applied for a residence card as the spouse of an EEA national exercising treaty rights in this country, but this application was refused by the respondent on 12 April 2013. The

appellant's appeal against this decision was dismissed on the papers (the appellant not having asked for an oral hearing) by First-tier Tribunal Judge M Davies, in a determination promulgated on 2 September 2013.

2. The appellant now appeals against this decision, permission having been granted by First-tier Tribunal Judge Gibb on 27 September 2013.

3. In the refusal letter sent to the appellant, the respondent had set out her reasons for considering that the appellant had not established that his wife had been exercising treaty rights. It had not been suggested in the refusal letter that the marriage was not a genuine subsisting marriage. However, in his determination, Judge Davies had found, at paragraph 11, that the appellant had "produced no credible evidence to show that he is a partner or spouse of an EEA national exercising treaty rights in the United Kingdom" because, "firstly I do not accept that there is any evidence to satisfy me on the balance of probability that the appellant is genuinely in a relationship with his claimed partner".

4. Judge Davies had then gone on to find, at paragraph 12, that in any event he was not satisfied that the appellant had established that his partner was exercising treaty rights in the UK. In the course of so finding, Judge Davies stated that "the evidence submitted from the HM Revenue and Customs does not take the appellant's claim any further".

5. When granting permission to appeal, Judge Gibb stated that the respondent had not suggested in the refusal letter either that the appellant and his wife were not in a genuine relationship, or that the business documents were not genuine. In those circumstances it was arguable that the appellant had had no notice of these points and should have been given an opportunity of dealing with them. Judge Gibb also considered that it was arguable that the reasoning for rejecting all of the documentary evidence was inadequate.

6. Having heard the arguments advanced by Mr Stone on the appellant's behalf before us, we were satisfied that the determination did contain material errors of law, such that the decision must be re-made. Given that the respondent had not contested in the refusal letter that the marriage was genuine, although this was a matter which the judge was entitled to raise, he should not have reached a finding that the appellant had not satisfied him that the marriage was genuine, in circumstances where the appellant was not aware that he was required to do so. Certainly, until this point was taken by the respondent, the appellant had no obligation to do so.

7. Also, although there were inconsistencies within the evidence provided on behalf of the appellant as to what his wife's earnings were, we considered that the total rejection of the evidence submitted from HM Revenue and Customs was not adequately reasoned. It followed that we must re-make the decision.

8. The appellant's wife was not present at the hearing, and furthermore, the respondent applied to adduce evidence of a previous determination, made by First-tier Tribunal Judge Tipping in respect of an earlier application by this appellant, which determination was promulgated on 22 September 2011, following a hearing at Taylor House on 15 September 2011. The appellant had chosen not to attend that hearing, although, as found by Judge Tipping, he had been served with notice of the time and place of the hearing. In that determination, Judge Tipping had found as a fact that the appellant had failed to establish that the marriage was not one of convenience, having had "clear notice that this was a concern of the respondent in both refusals" (there having been an earlier refusal as well). Judge Tipping gave reasons for his finding, including that there had been "no communications of any kind between the appellant and sponsor … nor were there any wedding or subsequent photographs". At paragraph 9, Judge Tipping had found as follows:

> "I conclude to the relevant standard of proof that the marriage on which this appeal is based was one of convenience, that the appellant is therefore not within the definition of 'spouse' set out in the 2006 Regulations, and that he is therefore not a family member of the sponsor entitled under Regulation 12 to the issue of a residence permit."

9. Although Mr Stone originally objected to the production of this evidence, he eventually accepted that he could not argue that it was not relevant to these proceedings. This evidence was certainly sent to the appellant, although Mr Stone told us on instructions that the appellant had not actually read the decision. It is not contested, however, that the appellant did not appeal against this decision.

10. Mr Stone applied on the appellant's behalf to adjourn the appeal in order to give the appellant an opportunity of obtaining his wife's presence at the hearing. The reason that was given for her non-attendance at this hearing was that she had just started a new job, with a three months probationary period, and therefore could not leave her job. However, directions had previously been sent to the appellant that any evidence on which he intended to rely must be served on the Tribunal prior to the hearing and that in the event that an error of law was found, the Tribunal would go on to hear the appeal, and no application had previously been made for an adjournment. In those circumstances, and also bearing in mind the history of applications by this appellant, we considered that we could deal justly with this appeal without granting any further adjournment, and that if the appellant had chosen to come to the Tribunal without any other evidence, that was a matter for him, but did not entitle him now to a further adjournment.

11. The appellant then gave evidence, in which he adopted the statement he had previously made, and he was cross-examined. Both members of the panel took notes of his evidence, which are contained within the Record of Proceedings, and so I shall not set out everything which was said to us

during the course of the hearing. We also heard submissions on behalf of both parties, which were also recorded contemporaneously and so will not be set out verbatim. However, we have had regard, when reaching our decision, to everything which was said to us during the course of the hearing, whether or not the same is specifically set out below.

12. Mr Stone, on behalf of the appellant, suggested that, in light of the Tribunal decision in *Papajorgji (EEA spouse – marriage of convenience) Greece* [2012] UKUT 00038, there was no basis upon which the genuineness of the appellant's marriage could be challenged. In our judgment, in light of Judge Tipping's previous determination, in which it was recorded that the genuineness of the marriage had previously been challenged by the respondent, we do not consider this argument to be tenable. Judge Tippings' decision was not appealed, and in those circumstances it must be the starting point of our deliberations. There is no suggestion that his determination was not sent to the appellant, and we do not accept the suggestion that the appellant was not aware of its contents. Indeed, it was the appellant's evidence to us that he was advised by his solicitors that he should just go on applying, because it was likely that an application on the grounds of his marriage to an EEA national exercising treaty rights would eventually be accepted.

13. It is also the case that even though Judge Davies should not have come to a conclusion on the evidence before him that the marriage was not genuine, without at least giving the appellant an opportunity of establishing that it was, by the time of the appeal before us, the appellant was clearly on notice that whether or not the marriage was genuine was in issue and we so find. This finding is reinforced by the fact, as we have found, that the previous determination had been communicated to him and this is now, as we were told, at least the third application this appellant has made. In those circumstances, it was a matter for him as to whether or not he chose to adduce sufficient evidence to establish that his marriage was not a marriage of convenience.

14. As has been noted above, the two issues which had to be determined in this case were first, whether or not the marriage was a marriage of convenience, because if it was, then pursuant to the Regulations the appellant is not entitled to a residence card (it is common ground between the parties, as it must be pursuant to paragraph 2 of the Regulations, that if the marriage is a marriage of convenience the appellant would not be entitled to a residence card) and secondly whether in any event the appellant's wife was exercising treaty rights in this country at the relevant time.

15. With regard to whether or not the appellant's wife (a ceremony of marriage having been entered into on 21 December 2008, to which we refer below) was exercising treaty rights, the documentary evidence was extremely confusing. The various documents do not appear to marry up; the entries in the appellant's wife's bank account do not match evidence as to payments she received. Mr Stone explained this by saying that this

was a cash business; however, in light of our findings as to whether or not the marriage was genuine, we do not need to reach any findings on this aspect of the case.

16. We turn now to consider the issue of whether or not the marriage was genuine or a marriage of convenience. Following *Papajorgji*, in light of the previous finding that the marriage was one of convenience (which must be our starting point) we consider that the burden of establishing that this was a genuine marriage was on the appellant, although for the avoidance of doubt, for the reasons which we give below, we are entirely satisfied that even if the burden had been on the respondent to establish that it was more likely than not that the marriage was not genuine, on the evidence which we have seen and heard, we would also be satisfied that the respondent had satisfied this burden. On the basis of the evidence which was put before us, we consider it much more likely that the marriage is not genuine than it is. Our reasons for so finding are as follows.

17. When giving evidence, the appellant gave inconsistent answers as to what his wife had been doing to earn money at different times. When first asked, he said that she had been employed until 2011, had then been engaged in hairdressing and then in cleaning. Later, he said that she had been engaged in cleaning first and had then been engaged in hairdressing. He did not know who it was she employed, and was uncertain where she had been working from.

18. When asked when he had moved to London with his wife, he first said that that was in 2010. Then, when it was pointed out to him that the Revenue had apparently been writing to his wife at an address in London in 2009, he said that his previous answer had been a mistake and that they had moved to London about a week after their wedding, which he then said had been in December 2008; so they had moved to London in January 2009.

19. The appellant confirmed that he had only been married once, yet when asked when in December 2008 he had got married, after a lot of thought, he said first that it was December 24 and then that it was December 23, but he could not really remember. Then when he was asked whether he could recollect more clearly, he said that he had got married “after Christmas”. When it was pointed out to him that the copy marriage certificate which had been exhibited showed that the date of the marriage had been on 21 December 2008, he initially said that this must have been a mistake, because he had lost his first marriage certificate when he had moved, which was why he was so uncertain of the date. He said that “they needed to follow the number of the marriage certificate” which was why a mistake had occurred as to the date. However, when it was put to the appellant that somebody had certified that the certificate which had been exhibited was a true copy and that the date of his marriage had accordingly without doubt been 21 December 2008, and he was asked whether that date rang a bell with him, even though he had earlier

appeared certain that this was a mistake, he replied that it did, and that he had got married in church.

20. When asked where he had got married, he replied that it was in Salford, but when asked what the name of the church was, he replied that it was the "Church of England". However, he could not remember the name of that church. When asked how many people were present, he said there were a lot of people, all his family and his wife's family as well. We noted that the photographs which had been exhibited only showed himself and his wife and nobody else.

21. When asked whether he had got married at the church he attended, he said that "[his] woman attended church", and that he had been a Muslim. However, he had converted and he told the Tribunal that he had been to this church every Sunday for about five months before the wedding. In other words, he must have regularly attended over twenty services at this church. It may even have been more because he claimed to have met his wife in 2007 and said that he had been obliged to go to church before he was married when he converted, which he then claimed had been in 2007.

22. Although the appellant claimed to have been a regular attender at the church in which he had got married, he still could not remember its name nor, when asked, could he even remember the name of its pastor.

23. In submissions, Mr Stone suggested that because the appellant was a Muslim who had come from Nigeria, he may not have known when Christmas was, so that he may have thought that 21 December was indeed after Christmas. This suggestion is clearly risible; it is in our judgment quite inconceivable that if somebody had been going to church regularly for twenty weeks before Christmas, he would not know when Christmas was. We also do not accept that if this was a genuine marriage, rather than a marriage of convenience, he would have been unable to remember the date of his marriage or even that it had been before rather than after Christmas. When we also take into consideration that his wife did not attend the hearing to give evidence on his behalf, even though it was clear from the determination being appealed, which had been sent to him, that he would need to establish that the marriage was genuine, the overwhelming inference from the evidence we have heard is that the marriage is not genuine. Not only has the appellant not produced evidence to persuade us that we should depart from the previous finding made by Judge Tipping that this was a marriage of convenience, but the evidence which he gave has reinforced our belief that it was indeed a marriage of convenience.

24. It follows that this appellant is not entitled to a residence card, and that his appeal must be dismissed, and we so find.

Decision

We set aside the determination of First-tier Tribunal Davies as containing a material error of law, and substitute the following decision.

The appellant's appeal is dismissed.

Signed: Dated: 6 November 2013

Upper Tribunal Judge Craig