



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/03031/2017**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 24 November 2017**

**Decision & Reasons
Promulgated
On 3 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

**MR CHINEDU JOACHIM MADU_
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Swain of Counsel
For the Respondent: Ms A Fijiwala, Senior Presenting Officer

DECISION AND REASONS

1. The appellant appeals against the decision of the First-tier Tribunal Judge C Ferguson promulgated on 10 May 2017 dismissing the appellant's appeal for further leave to remain in the United Kingdom as the spouse of a person present and settled in the United Kingdom.
2. Permission to appeal was at first refused by first-tier Tribunal Judge PJM Hollingworth on 21 June 2017 and subsequently granted by Upper Tribunal Judge Eshun on 15 September 2017 stating that "the grounds disclose an arguable error of law in the judge's decision that the appellant and his wife are not in a subsisting marriage".

3. The Judge of the First-tier Tribunal made the following findings in his decision which in summary are the following. The appellant is a citizen of Nigeria born on 2 August 1989 and claims to be in a subsisting relationship with Ms Page born on 16 December 1992. Paragraph 284 and Appendix FM of the immigration rules provides that it is a requirement that “each of the parties intends to live permanently with the other as his or her spouse or civil partner and the marriage or civil partner is subsisting”.
4. The Judge stated that the respondent’s reliance on the alleged inconsistencies in the marriage interview were difficult to understand. The answers were almost entirely consistent and there were no striking inconsistencies. The interviews show that the appellant and MsPage know each other well despite not having lived together and it is accepted that they have seen each other regularly since their marriage.
5. Having said that the Judge stated that he does not consider that the appellant has provided a sufficient explanation for the fact that he and Ms Page have never lived together. There is also no proper explanation for the fact that Ms Page has never been to the city where the appellant has been living and working for the past three years. Further, it was noted in the decision that even after the appellant knew that he would be working in London, he still did not intend to live with Ms Page until September of this year.
6. The Judge stated that this was not a case where there are obvious concerns about credibility. The Judge was satisfied that the appellant and Ms Page have some kind of relationship and they may intend to live together at some point in the future, but the Judge was not satisfied that they currently have a marital relationship. The Judge found that their does not appear to be any current barrier to them living together. The Judge found that Ms Page’s behaviour, is inconsistent with a marital relationship. The Judge also noted that they have no joint financial obligations of interests. The Judge found that the marriage is not subsisting, and their relationship does not engage the protection of Article 8 of the European Convention on Human Rights and dismissed the appeal.
7. The appellant submits in his grounds of appeal, the following which I summarise. The appellant’s appeal was decided on the papers because he was not represented and did not attend the hearing due to his shift requirement network and because he was in the process of moving from Derby to London. The judge has made an irrational and perverse conclusion. He has failed to take relevant evidence properly into account and his conclusion is based on irrelevant consideration and has misdirected himself in law.
8. The Judge in dismissing the appeal stated at paragraph 22 and 24 that there were no inconsistencies in the marriage interview and the interview shows that the appellant and Ms Page know each other well despite not having lived together and accepted that they have seen each other regularly since their marriage. The Judge further found that this is not a case there are obvious concerns about credibility and that he is satisfied

that the appellant and MsPage have some kind of relationship and they may intend to live together at some point in the future. Having said that, he dismissed the appeal on the basis the appellant had not provided sufficient explanation for why he and MsPage had never lived together. The Judge further concluded that the Judge failed to take into account the explanation provided for why Ms Page had never been to Derby to visit the appellant. The Judge's conclusion is therefore irrational, perverse and unsustainable given the findings of fact made by the Judge.

9. The Judge did not take into account the appellant's evidence that he and Ms Page communicate religiously via text messages and sometimes WhatsApp. The Judge did not state in his decision whether this evidence was accepted, rejected or did not support the claim that the relationship was subsisting.
10. The second ground is that the Judge failed to properly take into account relevant evidence. He did not take into account the appellant's letter of 15 February 2017 where he explained that he works at a 24-hour depot and his working patterns are based on days and night shifts. He visits Ms Page in Kent after every third week when he is given a few days off. The Judge did not take into account Ms Page's evidence that she wants to stay close to her family and Kent. Therefore, the evidence of the appellant and Ms Page adequately explains why the appellant and his wife have never lived together and why Ms Page had never travelled to Derby. Therefore, the Judge's conclusion that now proper explanation had been provided is unsustainable.
11. The judge also found at paragraph 24 that the appellant and his wife have no joint financial obligations but failed to have regard to the Nationwide evidence for account number *****referred to at, paragraph 14 which demonstrates that the appellant and his wife have a shared bank account.
12. The third ground was that the appellant's appeal cannot be lawfully undermined by the fact that Ms Page had never travelled to Derby. The relevant issue as to whether a marriage is subsisting is not where the direct contact takes place but whether direct contact takes place. The Judge accepted at paragraph 22 that the appellant and Ms Page have seen each other regularly since their marriage. Therefore, it was not lawfully open to the Judge to dismiss the appeal of the ground that the MsPage did not travel to Derby. This has been explained by Ms Page's evidence that she wanted to stay close to her family in Kent.
13. The Judge further misdirected himself in concluding at paragraph 23 and 24 of the decision that the marriage was not subsisting for reasons that the appellant and his wife would not be residing together until September 2017. This demonstrates that the appellant and his wife did intend to commence cohabitation in September 2017 so the fact that they would not do so before that date but will still be maintaining their relationship.
14. The Judge has also misdirected himself in his conclusions under Article 8 of the European Convention on Human Rights. He has found that the

appellant and Ms Page have regularly seen each other since their marriage. He also found that the appellant and his wife may intend to live together at some point in the future and have maintained communication. Therefore, the Judge's conclusion that the relationship was not subsisting was not an open one to him in law and on the evidence.

15. At the hearing I heard submissions from both parties as to whether there is an error of law in the decision of the First-tier Tribunal. Mr Swain relied on his grounds of appeal dated 16 August 2017. He submitted that the Judge found that this was not a case about lack of credibility. He also found that they intend to live together in the future.
16. Miss Fijiwala in her submissions stated that all the findings were open to the Judge and his conclusion that the relationship was not subsisting, is sustainable on the evidence. The fact that the Judge found that the appellant and Ms Page obviously knew each other well, can equally point to a relationship in the past. The question is whether it continues to exist. The appellant's evidence for the reason why Ms Page has never travelled to Derby for three years due to his shift work is not believable. She said that the appeal was heard on the papers and that the Judge did not have the benefit of hearing evidence from both parties. There was also a very slim bundle of documents before the court and there was no witness statement from Ms Page. She said that the appellant and Ms Page may have had a joint account but that it was operational and there was no evidence of payments to anyone from that account.
17. Mr Swain in reply said that the appellant has now moved from Derby to London. There were clear reasons given for why Ms Page did not visit the appellant in Derby which was due to his shift patterns.
18. Miss Fijiwala added that Ms Page's desire and preference to live in Kent does not mean that she could not make a simple visit the appellant in Derby which is some three hours away. She added that even though the appellant has moved to London they are still not living together.

Decision as to whether there is an error of law

19. The position of the appellant is that the Judge has made irrational and perverse findings that the appellant's marriage to Ms Page is not subsisting on the evidence before him. The difficulty with this appeal was that the appeal before the First-tier Tribunal was made on the papers and the appellant was not represented and did not attend the hearing. The Judge cannot be criticised for making a decision on the evidence before him as he did not have the benefit of oral evidence which is very important in a case where the issue is whether a particular relationship is subsisting.
20. The Judge clearly grappled with the evidence and found that it was not consistent with a subsisting marriage especially that Ms Page never visited the appellant in Derby for three years when he lived and worked there. At paragraph 14 the Judge considered the appellant's application where his answer to the question whether they had shared any financial

responsibilities, he said that they had not. He said that they share a nationwide bank account and said, “but we haven’t used it for a while because the bankcard can only be used in ATM machines”.

21. He also considered the evidence of Ms Page’s answers at the marriage interview that only two guests attended their wedding who are friends of the appellant from university. The Judge said that Ms Page did not know their names and had only seen anyone of them before. Ms Page did not know the names of any of the appellant’s friends. The appellant drives down usually when he has a meeting in London. The appellant said that it was “every three weeks give or take”. MsPage said, “not a lot” and only came down once in the last two months. Finally, the evidence that they intend to move together when the appellant gets a contract in London. The Judge considered the explanation given by Ms Page that she wants to stay close to her family and the appellant said that it would be “next year realistically”.
22. The Judge took into account the respondent’s view that it was always the appellant who travelled to see Ms Page in Kent which takes three hours every three weeks. It was stated that it would be expected that a couple in a genuine relationship and not living together and given the relatively short travel distance of three hours, it would also be expected that the appellant and Ms Page would see each other more in person.
23. The Judge did consider all the evidence because it is set out in his decision. It is not a fair criticism to say that he did not take into account all the evidence which was before him. However, the appeal was heard on the papers and no oral evidence was provided at the hearing Given that the appellant’s marital arrangements with Ms Page are unusual but that is not to say they are indicative of a non-genuine marriage because married people live in different ways.
24. Be that as it may, given that some of the findings made by the First-tier Tribunal Judge that “the appellant and Ms Page have “some kind of relationship” and that they “may intend to live together at some point in the future”, I am satisfied that this relationship requires further scrutiny. I find that this can only be done at a hearing *de novo* at the First-tier Tribunal where the appellant and Ms Page will be required to give oral evidence which can be examined, and findings of fact made.
25. I find that there is a material error of law in the decision and I set it aside and remit the appeal back to the First-tier Tribunal for a hearing by any First-tier Tribunal Judge other than Judge C Ferguson.

Notice of Decision

The appeal be remitted to the First-tier Tribunal

No anonymity direction is made.

Signed Mrs S Chana
2017
Deputy Upper Tribunal Judge Chana

Dated the 18th day of December