



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

Appeal Number: IA/05043/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 12 December 2013**

**Determination
Promulgated
On 20 December 2013**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

**MR NICHOLAS IKPONMWOSA ONAIWU
(No Anonymity Direction Made)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Uzochina a legal representative from Obaseki Solicitors

For the Respondent: Mr G Saunders a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria who has been given permission to appeal the determination of First-Tier Tribunal Judge Kaler ("the FTTJ") who dismissed his appeal against the respondent's decision of 30 January 2013 to revoke his EEA residence card.

2. On 5 April 2011 the appellant made an application for a residence card as the spouse of Anna Sajdak ("Ms Sajdak"), a Polish citizen and EEA national. The application was granted on 15 July 2011 and the appellant was issued with a residence card. Subsequently the respondent discovered that on 26 January 2012 Ms Sajdak had been named as the spouse of an Algerian national on an application for another residence card made on 26 January 2012. The marriage certificate which had been submitted stated that she was a single woman. The respondent wrote to the appellant's representatives on 31 December 2012 to enable him to explain the position and show that he had retained the right of residence as the divorced husband of an EEA national. The respondent did not receive any response and made the decision to revoke the appellant's residence card.
3. The appellant appealed and the judge heard the appeal on 5 August 2013. Both parties were represented, the appellant by Mr Uzoechina, who appears before me.
4. The appellant's case was that he had married Ms Sajdak by proxy customary marriage in Nigeria on 12 May 2011 and that such marriage was valid under Nigerian law. They had separated but, until February 2012, he had been trying to effect reconciliation. He had no idea that she had entered into a marriage with anyone else. He was still married to her and still entitled to a residence card as her husband. In the alternative his Article 8 human rights were engaged. He was the victim of abuse because she had had an affair with and married another man.
5. The FTTJ accepted almost all of the appellant's evidence and the basis of his claim. She found that the appellant and Ms Sajdak had entered into a valid marriage. They had not divorced so that the appellant and Ms Sajdak were still spouses. She was not his former spouse. The appellant's marriage to Ms Sajdak was not a marriage of convenience. However, having married on 17 May 2011, they had not been married for three years. The appellant had to show that Ms Sajdak was still exercising treaty rights at the time of the decision to revoke his residence permit on 30 January 2013. The FTTJ accepted that Ms Sajdak was still present in the UK in January 2012 when she married somebody else. Whilst the documents indicated that the appellant was still living with Ms Sajdak in October 2012 the appellant's evidence was that they had separated by then. The FTTJ found that there was no evidence before her to indicate that Ms Sajdak was present in the UK, that she was a worker as defined in the European Economic Area) Regulations 2006 ("the 2006 Regulations") or that she was exercising treaty rights in some other way on 30 January 2013. As the appellant status in the UK depended on the status of Ms Sajdak he had not established that he was still entitled to a residence card at the date of the respondent's decision. The FTTJ dismissed the appeal under the 2006 Regulations.

6. The judge went on to consider the Article 8 human rights grounds. She found that the appellant had not shown that he had a family life in this country. On his own evidence he was estranged and separated from Ms Sajdak. Whilst he had been in the UK since 2003 he had spent most of his adult life in Nigeria where he had family. There was little evidence about his private life in the UK. His removal would not be disproportionate. The FTTJ dismissed the appeal on Article 8 human rights grounds.
7. The appellant applied for and was granted permission to appeal. The judge who granted permission considered that there was little merit in the grounds except possibly those relating to Articles 2 and 8. However permission was granted in relation to all grounds.
8. Paragraph 1 of the grounds of appeal largely consists of statements agreeing with the conclusions reached by the FTTJ. In part they are misconceived. They state that the appellant's residence card was revoked in January 2012. That is not correct. It was revoked on 30 January 2013. The difference is crucial. The FTTJ accepted that Ms Sajdak was present in this country and exercising treaty rights possibly up to January 2012 but not after that.
9. Understandably on the material before her the respondent decided the application on the basis that if Ms Sajdak had married another man she was likely to have done so after a divorce from the appellant. That was a reasonable conclusion particularly in the light of the lack of response to the letter of 31 December 2012 sent to the appellant's then representatives. I can find no merit in the argument that the FTTJ should only have determine the appeal on the basis of the facts as the respondent thought them to be and the regulations which would have applied had this been the case. The appellant is complaining that the FTTJ reached a conclusion by accepting the evidence which he put forward. It was the duty of the FTTJ to reach a conclusion on the basis of the facts she found and the appellant, who was competently legally represented, cannot be heard to complain by alleging that he or they failed to consider the obvious legal consequences of the case they were putting forward.
10. I am not persuaded that the appellant and his representatives were taken by surprise but even if they were there has been no unfairness because further time for consideration and legal argument could not lead to any different conclusion. The FTTJ correctly applied the law.
11. I find that the FTTJ's consideration of the Article 8 grounds in paragraphs 22 and 23 was not superficial. It is properly structured, addresses the appropriate tests in the correct order and reaches a conclusion open to the FTTJ on the evidence. The main cause of the brevity is not any omission on the part of the FTTJ but the dearth of relevant evidence submitted by the appellant.

12. In his grounds of appeal to the Upper Tribunal the appellant alleges that the FTTJ failed to consider his claim that removal to Nigeria would breach his right to life under Article 2. I cannot find and Mr Uzoechina could not point me to anything raised in connection with Article 2 in the application to the respondent or the appeal to the First-Tier Tribunal. With his application to the First-Tier Tribunal the appellant submitted grounds of appeal and further grounds of appeal. I can find no reference to Article 2 in either of them. There is no reference to Article 2 in the skeleton argument submitted by Mr Uzoechina to the FTTJ. All I can find is the following at the end of the FTTJ's record of proceedings; "appellant was a witness to a very serious crime. Sentenced to 8 1/2 years for drug trafficking. He received a threat from criminals' friends and relations. That is why he has the alarm at his house. P60A newspaper report. Police warned him not to travel to Nigeria and oral evidence life in danger. Art 2." I find that the FTTJ did not err in law by failing to address matters not put to the respondent, not in the grounds of appeal and not in the skeleton argument. Even if the FTTJ had erred in law by failing to address this no judge properly directing himself or herself could have reached a conclusion that to the appropriate low standard the appellant had established that he faced a real risk of a breach of his human rights including Articles 2 and 3.
13. The appellant and the respondent have now produced two letters which were not before the FTTJ. The first is a heavily redacted letter dated 31 December 2012. The redactions are such that it is not clear to whom it was sent although there are some indications that it may have been to those representing the Algerian man who, it is claimed, married Ms Sajdak. The second letter, dated 30 January 2013, is also redacted but there are clearer indications that it was sent to the Algerian man. Mr Saunders conceded that these may indicate that the respondent has accepted that the Algerian man was the family member of an EEA citizen exercising treaty rights in the UK. I find that these letters may mean that the respondent has accepted matters which impinge on the appellant's application. However, it is by no means certain that they do so or that they reveal the whole story. There is still a great deal which is unclear. What is clear is that these letters were not before the FTTJ. I find that she cannot be said to have erred in law in relation to material which was not before her and which she had no reason to believe existed. It may be that the respondent will reconsider the appellant's application. It may be that he will make a fresh application. These are not matters which I can decide on the material before me.
14. I have not been asked to make an anonymity direction and I can see no good reason to do so.
15. I find that the FTTJ did not err in law and I uphold her decision.

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Signed
Upper Tribunal Judge Moulden

Date 18 December 2013