Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/00408/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 August 2014	**On 10 September 2014**

Before

Deputy Upper Tribunal Judge MANUELL

Between

MR STEPHEN SOLA OGUNSANYA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Corben, Counsel
(instructed by Martynsrose)
For the Respondent: Mr S Walker, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant appealed with permission granted on 6 June 2014 by First-tier Tribunal Judge PJG White against the dismissal of his appeal against the revocation of his and his dependant sons' EEA residence cards issued under regulation 7 of the Immigration (European Economic Area) Regulations 2006 (as amended) ("the EEA Regulations") by First-tier Tribunal Judge Obhi in a determination promulgated on 6 May 2014. The

Appellant is a national of Nigeria, born on 5 March 1961. He had denied that the marriage on which he relied was void. The appeal was determined on the papers as the Appellant had requested.

2. Judge Obhi found that the Appellant had not shown that he had satisfied the EEA Regulations. The Appellant had failed to prove either a valid marriage to or a durable relationship with a qualified EEA national. The judge went on to consider very briefly and to dismiss the Article 8 ECHR claim which the Appellant had raised in his Notice of Appeal, but there were no Removal Directions and no Section 120 Notice. Hence the First-tier Tribunal had no jurisdiction to address Article 8 ECHR: see Lamichhane [2012] EWCA Civ 260.

3. Permission to appeal was granted by First-tier Tribunal Judge PJG White because he considered it arguable that the judge had misdirected himself by stating that the burden of proof was on the Appellant. Papajorgi (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC) was applicable.

4. Mr Corben for the Appellant submitted in summary that the determination was flawed and could not stand. The judge had conflated the two stands of the Respondent's decision, i.e., that the marriage was bigamous and invalid, and was also a marriage of convenience. The judge had stated, incorrectly, that the burden of proof was on the Appellant. The judge failed to address the evidence which had been provided by the Appellant, which was more substantial than the judge had stated. There was, for example, a marriage certificate and a decree of divorce for the previous marriage. The judge had failed to give proper weight to that evidence. His findings were not open to him. He had merely echoed the assertions of the Respondent. The determination should be set aside for the failure to provide adequate and clear reasons.

5. Mr Walker for the Respondent (the Secretary of State) submitted that the determination contained no material error of law. The witness statements provided had been vague and there was little independent evidence deserving of weight as the judge had correctly said. The judge had not been required to address every single point: see VHR (unmeritorious grounds) Jamaica [2014] UKUT 00367 (IAC). The judge's findings had been open to him.

6. In reply Mr Corben reiterated his submission as to the judge's treatment of the evidence produced. The burden had been on the Secretary of State and that burden had not been discharged.

7. At the close of submissions, the tribunal indicated that it found that there was no material error of law in First-tier Tribunal Judge Obhi's determination. The tribunal reserved its decision which now follows.

8. It must be noted, in the first place, that it was the Appellant's choice to be unrepresented and to elect for a decision on the papers. It is seldom understood that this tends to make the judicial task more rather than less difficult, since there is no one to present and explain the appeal, nor to deal with possible queries, as indeed the judge rightly observed at [17] of the determination. The power to list an appeal for an oral hearing of the tribunal's own motion is one to be exercised sparingly, particularly as the tribunal cannot compel parties to appear at hearings. Part of the Appellant's complaint about the determination is the consequence of his failure to request an oral hearing and to appear. That cannot amount to an error of law on the part of the judge.

9. The grounds of onwards appeal relied on by the Appellant are relevant:

> "9 (vi) The Respondent's basic case was not so much that the Appellant had entered into a marriage of convenience but rather that the Appellant had attempted to marry whilst he was still married to another woman…"

That, in the tribunal's view, is an accurate summary of the Respondent's case against the Appellant and it identifies the basis of the revocation. The determination creates the impression that the judge had indeed conflated these two distinct stands of the reasons for refusal letter, referring interchangeably between "invalid" and "sham". That might be characterised as an error of law. But in the tribunal's view it was not a material error of law, because the determination shows that the judge examined all of the evidence placed before him, and reached a secure finding on the void marriage issue, which was the gravamen of the Respondent's decision.

10. It was asserted that the judge had given himself an incorrect self direction as to the burden of proof. At [9]

the judge states "This is an immigration decision, and therefore the burden of proof is on the Appellant and the standard of proof required is a balance of probabilities." It was submitted that the judge was mistaken to have described the decision as an immigration decision, since it was made under the Immigration (European Economic Area) Regulations 2006 (as amended), not under the Immigration Rules. There is nothing in that point, since the decision to revoke dated 18 October 2013 was communicated correctly as an immigration decision under the Immigration (Notices) Regulations 2003. The judge referred throughout his determination to the relevant EEA Regulations.

11. The self direction at [9] might possibly have been the result of the inadvertent use of an inappropriate template, but it was accurate as far as it went. The Respondent had identified evidence sufficient to challenge the validity of the marriage relied on by the Appellant, thus discharging the *prima facie* burden on her. It was then for the Appellant to produce evidence to show that he was validly married. In any event, at [6] of the determination, it is implied that the initial burden falls on the Respondent.

12. Of course, it would have been preferable for the judge to have provided a fuller and more accurate self direction, but any error of law in that respect was not material. The judge conducted a careful examination of the evidence produced by both sides. When analysed in detail by the judge as he did from [16] to [18], the Appellant's evidence fell apart. The judge identified discrepancies and a number of other unsatisfactory features of that evidence which it is unnecessary to recite here. The weight the judge gave to the evidence produced in the context of a "paper" hearing was a matter for him. The judge's findings were within the bounds of rationality and reasonableness and were open to him on the evidence which had been produced.

13. The attack on the judge's findings amounted in sum to a disagreement which failed to identify a material error of law. For all of the reasons given above, the Appellant's onwards appeal fails and the determination stands.

DECISION

There was no material error of law in the First-tier Tribunal's determination, which stands unchanged

Signed **Dated**

Deputy Upper Tribunal Judge Manuell