



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/20532/2014

THE IMMIGRATION ACTS

Heard at Field House
On 27 November 2014

Determination Promulgated
On 2 December 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

OKORO AKABA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person

For the Respondent: Mr S Kandola of the Specialist Appeals Team

DETERMINATION AND REASONS

The Appellant

1. The Appellant is a citizen of Nigeria born on 23 February 1970. By a determination promulgated on 14 September 2011 Immigration Judge Afako allowed the appeal of

the Appellant's wife, a Portuguese national, against the refusal of the Respondent to issue her with a residence card to evidence that she was exercising Treaty rights as a self-employed person. The marriage of the Appellant who was named as his wife's dependant was not in issue and in consequence of Judge Afako's determination the Appellant was issued with a residence card as under Regulation 7 of the Immigration (EEA) Regulations 2006 as amended (the 2006 Regulations).

2. The Appellant and his wife had married on 17 April 2010 at All Saints' Parish Church in Forest Gate of which the priest-in-charge was Reverend Shipsides. On 3 April 2012 the Reverend Shipsides was convicted on his own admission of conspiring to breach the United Kingdom's immigration laws by arranging sham marriages. He was sentenced to a term of four and a half years' imprisonment.
3. Following his conviction the Respondent investigated a number of marriages involving foreign nationals which had been celebrated at All Saints' Parish Church. This included the marriage of the Appellant and on 26 February 2014 the Respondent revoked the Appellant's residence card under the 2006 Regulations and in a letter of the same date (the reasons letter) gave reasons for the decision and required the Appellant to leave the United Kingdom unless he made a further application or lodged notice of appeal.

The First-tier Tribunal's Determination

4. On 6 May 2014 the Appellant lodged notice of appeal under Reg.26 of the 2006 Regulations and Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended. The grounds asserted the Appellant had married at All Saints' Parish Church on 17 April 2010 and the marriage had been conducted by a person other than the Reverend Shipsides and that the Respondent had failed to take into account the various documents which had been completed in order to obtain a marriage licence. The Appellant's wife was now in employment.
5. By a determination promulgated on 9 September 2014 Judge of the First-tier Tribunal Bird dismissed the appeal under the 2006 Regulations. She found there was no evidence of cohabitation apart from utility bills. She noted there were no photographs of the Appellant and his wife although by then they had been married for almost four years; that the Appellant had provided a false address within the parish of All Saints' and had made a sworn statement which referred to or contained details of a Nigerian passport with an indefinite leave to remain stamp in it which the Respondent considered to be a fraudulent document.
6. On 22 October 2014 Judge of the First-tier Tribunal P J G White granted the Appellant permission to appeal because it was arguably an error of law for Judge Bird to have found at paragraph 21 that the burden was on the Appellant to show the marriage was not one of convenience once the Respondent had made an allegation that it was one of convenience. She had made reference to the determination in *Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038*.

7. Additionally it was an arguable error that Judge Bird had not taken into account the application of the jurisprudence in *Devaseelan (Second Appeals, ECHR, Extra-Territorial Effect)*[2002] UKIAT 702* in relation to the determination of Judge Afako promulgated on 14 September 2011 in consequence of which the Appellant was issued with a residence card. Further it was arguable that proper weight had not been given to the evidence produced by the Appellant to evidence his assertion that he and his wife were cohabiting and the marriage was not one of convenience.

The Upper Tribunal Hearing

8. On 26 November 2014 the Appellant who had been represented at the hearing before Judge Bird but who was now unrepresented filed written representations with the Upper Tribunal and a copy of the index and chronology to the Appellant's bundle which had been before Judge Bird.
9. The representations refer to whether Judge Bird had erred in deciding where the burden of proof lay and referred to Judge Afako's determination and *Devaseelan*. They assert that the Appellant's wife's payslips and bank statements addressed to the same address showed cohabitation; that his wife's employers had supplied the Home Office with a new address because the Appellant and his wife had moved. Further, the Respondent had failed to produce the Nigerian passport which it was alleged was a fraudulent document. The Appellant had not produced any Nigerian passport and such a passport had not been before Judge Bird.
10. The Appellant appeared in person with a woman who was described as "a friend of a friend". She subsequently identified herself as Dorothy Marshall. The only means of identification were her assertion and the production of a Visa debit card bearing her name. There was no photographic identity evidence.
11. I explained to the Appellant the purpose of the hearing and the procedure to be adopted. I told him that the fact of his marriage was not challenged but the issue was whether it was a marriage of convenience which, if it was, did not qualify him under the 2006 Regulations for a residence card. I referred him to paragraph 3 of the 2011 determination that the issue of his marriage was not in fact before Judge Afako. His wife had shown that she was exercising treaty rights and so entitled to a residence card. He, the Appellant, had received his residence card in his capacity as her husband without further questioning.
12. I reminded him that the appeal in the First-tier Tribunal had been against the Respondent's decision to revoke his residence card and that the Respondent had supplied ample evidence to raise serious doubts about marriages conducted between foreign citizens at All Saints' Parish Church and he had already admitted he had falsely claimed to have resided within the parish.
13. The Appellant then volunteered that in February 2014 he and his wife had had an argument and she had moved out. He had tried to trace her without success and there were letters at pages 72 and 73 of the bundle before Judge Bird and indeed I noted that she had referred to it at paragraph 14 of her determination.

14. Mr Kandola for the Respondent relied on the letter of 12 November 2014, being the response to the grounds of appeal filed under Procedure Rule 24. In particular, he relied on paragraph 4 that the Judge had given sustainable reasons for her conclusions and noted the lack of evidence from third parties in support of the claimed cohabitation of the Appellant and his wife.
15. If, which was not conceded, the Judge had erred in the self-directions she had given at paragraph 25 of her determination referring to *Papajorgji*, it was not a material error. At paragraphs 27-29 she had given sustainable reasons for rejecting various explanations proffered by the Appellant and at paragraph 31 she had specifically concluded that the Respondent had supplied enough information to shift the burden of proof to the Appellant.
16. Throughout, the determination contained sustainable reasons for its conclusions. There was no evidence before the Upper Tribunal that the Appellant's wife continued to exercise Treaty rights. I noted that this was not relevant to the error of law decision that I had to make.
17. I explained to the Appellant in lay terms the substance of the submissions for the Respondent was that the Judge had given sustainable reasons for her conclusions, even if he, the Appellant, did not agree with them.
18. The Appellant explained at the hearing before Judge Bird he had never been asked to produce any photographs of his wife and himself. The Respondent had failed to produce the Nigerian passport which was stated to be a false document, referred to in paragraph 31 of Judge Bird's determination. His friends were unable to support him at the hearing before Judge Bird because they could not leave work. His wife and he were happily married and he was still trying to trace her.
19. Ms Marshall stated she had met the Appellant at church in about March 2014. He was distressed because his wife had left him and he had high blood pressure. She understood the problems he was experiencing and thought that if she intervened she might be able to help. As she encouraged him she became closer to him. She had been through a not dissimilar experience and thought she would be able to help him. It was only months later that he had told her of the hearing in the Upper Tribunal. She had offered to travel to see his wife to persuade her to return. It was only earlier on the day of the hearing that she had seen some of the relevant papers. She considered the Appellant was doubly a victim: a victim of his wife and then a victim of the immigration process. He continued to look for her and wanted her back.
20. The Appellant produced photographs which he stated were taken in 2013. They showed himself and a woman together, at home or in a café. They would appear to have been taken on the same day since the Appellant is shown wearing the same shirt although in some photographs he is wearing a suit and in others more casually dressed. The woman is wearing the same camisole and jeans. There are two photographs of her outside a church wearing a dress. Mr Kandola submitted that the photographs were not admissible because they had not been before the First-tier

Tribunal and were not relevant to the finding of an error of law. Further, Ms Marshall had not given evidence to the First-tier Tribunal. Even if any of these matters were relevant to the finding whether there was an error of law they were not relevant. If I was minded to find an error of law then the appeal should be remitted for hearing afresh.

21. The Appellant interjected that he had not been asked to produce the photographs although he was holding them throughout the First-tier Tribunal hearing.
22. The photographs show very little. The Appellant was represented by experienced Counsel before Judge Bird. Her Record of Proceedings shows that the Home Office Presenting Officer in submissions referred to photographs. I conclude that the judge had them in mind. Her failure to refer to them specifically in her determination may well be because she considered them of little importance, as indeed I have already commented that they evidence little. It was of note that at the hearing in the Upper Tribunal the Appellant stated that the photographs had all been taken in 2013, and not when he and his wife married in 2010.
23. The Appellant attached some importance to the failure of the Home Office to produce the Nigerian passport which it was alleged was a false document. His claim was that he had never used it. The relevance of the passport for this appeal is that the passport was submitted with other documents prepared in order to obtain a marriage licence. Whether or not the Appellant completed the forms, he had to sign them and he was responsible for their content. The net effect is that by signing the documents he had represented that he had indefinite leave to remain. If he did have indefinite leave to remain there would have been no need for the application leading to this appeal.
24. The fact is that false information given by or for the Appellant in the documentation for the marriage licence. He has admitted using a false address to secure the marriage licence and the use of the passport on his behalf to secure a marriage licence stating that he had indefinite leave also goes to his credibility. It is arguable the Judge might have better expressed her findings but this does not amount to an error of law.
25. The issue in the appeal before the Judge was clear cut: whether the Appellant and his wife were living in a subsisting marriage and that their marriage was not a marriage of convenience. The Appellant's claim is that the Judge applied the wrong burden of proof as described in paragraphs 20 and 21 of her determination.
26. At paragraph 15 of the determination in *Papajorgji* the Tribunal relied on Article 35 of the Citizens' Directive 2004/38/EC which provides:-

Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

The Tribunal referred to Council Resolution 12337/97 addressing the problem of marriages of convenience. Paragraphs 3 and 4 provide:-

3. Where there are factors which support suspicions for believing that the marriage is one of convenience, Member States shall issue a residence permit or an authority to reside to issue a residence permit ... on the basis of the marriage only after the authorities competent under national law have checked that the marriage is not one of convenience, and that the other conditions relating to entry and residence have been fulfilled ...
4. Should the authorities ... find the marriage to be one of convenience, the residence permit ... granted on the basis of the third-country national's marriage shall as a general rule be withdrawn, revoked or not renewed.

27. At paragraph 13 of *Papajorgji* the Tribunal found:-

It is clear that the terms of the Citizens' Directive allow national law to make Regulations to prevent abuses founded on marriage of convenience. So far as the detection of such marriages is concerned, it is clear from the Council Resolution that the relevant resident documents are not to be issued if there are 'factors which support suspicions for believing that the marriage is one of convenience', until the suspicions are resolved in the applicant's favour. That appears to us to be a clear indication that, so far as EU law is concerned, the burden of proof, as it is called in English law, rests on the Appellant, because the suspicions having arisen the matter will be resolved against him unless the suspicions are resolved in his favour.

This does not expressly refer to a case where the residence document is to be withdrawn which is mentioned in the Council Resolution but the Tribunal went on in the following paragraph 14 to say:-

... that means that there is an evidential burden on the Respondent. If there is no evidence that could support a conclusion that the marriage is one of convenience, the Appellant does not have to deal with the issue. But once the issue is raised, by evidence capable of pointing to a conclusion that the marriage is one of convenience, it is for the Appellant to show that his marriage is not one of convenience.

28. The decision in question in *Papajorgji* was to refuse to issue a residence card. In this appeal the decision is to revoke a residence card. The Respondent had ample evidence to justify her suspicions about the nature of the Appellant's marriage. In addition to all the evidence which resulted in the eventual conviction of the Reverend Shippides and the findings about marriages conducted at his church, the Respondent had the evidence that the Appellant had not lived at the address in the parish of All Saints' where he claimed to have lived. Additionally the documents leading to the marriage licence purported to claim he had indefinite leave to remain. The Judge did not make an error of law in her description and assessment of the burden of proof.

29. For the reasons given in paragraph 11 above, the jurisprudence in *Devaseelan* does not assist the Appellant. Judge Afako was not required to and did not carry out a judicial assessment of the nature and quality of the Appellant's marital relationship. Further, any previous determination is only a starting-point for the later judge. In this case there is a substantial amount of subsequent evidence to have justified the Respondent looking into the Appellant's marriage and to support the Judge's decision to consider it. She went on to give sustainable reasons for finding it to be a marriage of convenience.
30. The grounds for appeal and the written submissions bear marks of having been prepared by somebody with knowledge and experience of immigration appeals in the United Kingdom but the application was made under the Appellant's own name and he was unrepresented at the hearing. I have therefore carefully considered the entirety of the First-tier Tribunal's determination to see if it otherwise readily discloses an error of law and find that it does not. The grounds for appeal do not disclose an error of law and consequently the First-tier Tribunal's determination shall stand.

Anonymity

31. There was no request for anonymity and having considered the papers in the Tribunal file and heard the appeal find there is no need for the Appellant's identity to be protected by anonymity.

Decision

The determination of the First-tier Tribunal did not contain an error of law such that it should be set aside and shall stand.

The consequence is that the appeal of the Appellant against refusal of a residence card under the 2006 Regulations is dismissed.

Signed/Official Crest

Date 02. xii. 2014

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal