IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/15918/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 July 2015	**On 17 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

MR FRANK CHUKWUMA OPUTA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms D Revill, Counsel instructed by Peer and Co (Immigration Assist)
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal from the decision of First-tier Tribunal Judge Moore which was promulgated on 20 February 2015. Judge Moore dismissed the appellant's appeal against a decision by the respondent to revoke his EEA residence card.

2. The facts very shortly are these. The appellant is a Nigerian national born on 10 August 1978 who was granted a residence card on the basis of his marriage to Ms Valeska Lucia Martha, a Dutch citizen working in the United Kingdom. The reason the respondent revoked the residence card was that

she considered the marriage to be one of convenience. It was carried out at All Saints Church in Forest Gate where at a period not covering the particular date of this marriage proven criminality in the form of sham marriages had taken place leading to the criminal conviction and sentencing of the parish priest, the Reverend Brian Shipside and also an individual for brokering marriages of convenience.

3. Judge Moore in an otherwise meticulous, thorough and balanced determination opens with some unhelpful words regarding the burden of proof. In paragraph 7 of the determination he says this:

> "The burden of proof is on the appellant to satisfy me that as at the date of the respondent's immigration decision it was on the balance of probabilities against the weight of the evidence."

4. The primary ground pursued before me was that this self-direction on the burden of proof was against the weight of the evidence. Ms Revill, who appeared for the Appellant, made some makeweight submissions on a second ground but I do not consider those to have any mileage and I propose concentrate on this first ground.

5. Ms Revill says that statement is simply wrong and she refers me to the decision of **Hussam Samsam (EEA: revocation and retained rights) Syria [2011] UKUT 165 (IAC)**. The headnote of that decision reads as follows:

> "1. Where the Secretary of State revokes a residence card before the expiry of its validity it falls on her to justify such revocation."

6. Ms Revill took me in particular to paragraph 25 of that judgment which says:

> "25. But a residence card can clearly be revoked on broader grounds than conduct making cancellation of the card and removal from the United Kingdom appropriate. If a card is obtained by fraud or misrepresentation then it would be open to the issuing authority to cancel it but again the onus would be on the Secretary of State. But if it could be shown that a card was issued in error by administrative mistake, we see no reason why it should be revoked even if the holder has no right of residence.
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> 27. In immigration decisions made outside the context of EU law, the onus of justifying revocation or curtailment of limited leave, indefinite leave or a particular status would fall on the authority taking the action in question.

7. I was also taken by Mr Clarke for the Secretary of State to the case of **Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC)**. Here the headnote there states that:

> "i) There is no burden at the outset of an application on a claimant to demonstrate that a marriage to an EEA national is not one of convenience.

ii) **IS (marriages of convenience) Serbia [2008] UKAIT 31** establishes only that there is an evidential burden on the claimant to address evidence justifying reasonable suspicion that the marriage is entered into for the predominant purpose of securing residence rights."

8. There are various passages in this judgment which speak of there being at times an evidential burden on the Secretary of State to demonstrate suspicion whereupon a legal burden passes to the claimant.

9. The concluding paragraphs of **Papajorgji** include the following:

> "39. In summary, our understanding is that, where the issue is raised in an appeal, the question for the judge will therefore be 'in the light of the totality of the information before me, including the assessment of the claimant's answers and any information provided, am I satisfied that it is more probable than not this is a marriage of convenience?'."

10. It is beyond question that the judge in addressing this case came to the conclusion that this was a marriage of convenience and it was therefore a sham marriage. However, what seems to me to be crucial is that this was a revocation decision and if what I have read from the case of **Samsam** is correct then the onus of proof is on the Secretary of State. Even if that be an evidential burden shifting to becomes a legal burden on the claimant as might be suggested in **Papajorgji** (although that did not concern revocation) the judge undoubtedly misstated the position on that burden of proof. That is so fundamental to the administration of justice that I cannot be satisfied that the determination which followed is soundly based because there is a real doubt as to whether the burden of proof was properly applied.

10. There was clearly evidence pointing in both direction. Although there were undoubtedly sham marriages being conducted at this church, two matters are of significance. First that the minister who conducted this particular marriage was not charged with any criminal misconduct and secondly that the date of this marriage fell outside the range of dates comprised within the indictment for the criminal proceedings.

11. Clearly there is a powerful case to be made by the Secretary of State that this was indeed a marriage of convenience. It may very well be that the outcome on a rehearing will be exactly the same but when matters as fundamental as the burden of proof are misstated the only safe and proper course is to start again. I therefore allow this appeal and remit the matter to the First-tier Tribunal to be considered afresh.

Notice of Decision

The appeal is allowed.

The determination is set aside and the matter is remitted for a rehearing by the First-tier Tribunal but not by Judge Moore.

No anonymity direction is made.

Signed Mark Hill Date 16 July 2015
Deputy Upper Tribunal Judge Hill QC