The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: IA/18166/2014**

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On March 11, 2015	**On March 13, 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR HABIB ALADE
(NO ANONYMITY DIRECTION MADE**)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant Mr Afzal (Legal Representative)
For the Respondent Mr McVeety (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria who claimed to have entered the United Kingdom in 1991 as a visitor. On November 30, 2006 he applied for indefinite leave to remain but this was refused. On September 28, 2010 he applied for a family membership card as the spouse of an EEA national, which was refused. However, he was granted a residence card until June 2, 2016. On January 17, 2013 he applied for permanent residence on the basis of a retained right of residence because

he was divorced from his EEA national wife, Renata Varayova in accordance with Regulations 10 and 15 of the Immigration (EEA) Regulations 2006. On April 7, 2014 his residence card was revoked on the grounds that his marriage was a marriage of convenience (sham) in the first place. Relevant to this current appeal the respondent stated:

a. The marriage was one of convenience.
b. The appellant had failed to prove his former wife was exercising treaty rights as at the date of the divorce.

2. The appellant appealed on April 16, 2014, under section 82(1) of the Nationality, Immigration and Asylum Act 2002 and Regulation 26 of the 2006 Regulations.

3. The matter came before Judge of the First-tier Tribunal Thorne (hereinafter referred to as the "FtTJ") on August 15, 2014 and in a decision promulgated on August 19, 2014 he refused the appellant's appeal under the 2006 Regulations.

4. The appellant lodged grounds of appeal on August 26, 2014 submitting the FtTJ had erred. On September 29, 2014 Judge of the First-tier Tribunal French refused permission to appeal on all grounds. The appellant renewed his appeal to the Upper Tribunal and on October 22, 2015 Upper Tribunal Allen gave permission to appeal finding it was arguable the FtTJ had not addressed the documentary evidence that appeared to place the appellant and his ex wife at the same address over a period of several years.

5. The matter came before me on the above date and the parties were represented as set out above. The appellant was in attendance.

ERROR OF LAW SUBMISSIONS

6. Mr Afzal submitted:

a. The respondent had not raised sufficient issues to question the veracity of the marriage. The Tribunal made clear in Papajorgi (EEA spouse marriage of convenience) Greece [2012] UKUT 38 that there was no burden on the appellant to demonstrate a marriage was not a marriage of convenience unless the respondent provided evidence justifying suspicion.

b. The appellant and his ex wife had provided evidence that demonstrated they lived at the same property and the fact the appellant was able to produce evidence of his ex-wife's payslips and bills in joint names meant there should have been no issue over the marriage.

c. The fact the appellant had fathered two children with the same woman during their marriage was not a reason to question the marriage. One child had been born when the parties were together but the other had been conceived after they had split.

d. The parties married on September 26, 2008 and their marriage had ended on June 7, 2012. The parties had therefore been together for more than three years and there was ample evidence they had been living together for at least twelve months as required by Regulation 7 of the 2006 Regulations.

e. The mother of the appellant's children did not actually live at his house during the marriage but visited and used the address for postal purposes. He had not authorised her to allow her mother to say she was coming to stay at the house and the FtTJ was wrong to place any weight on this.

f. There was evidence the ex wife was working and exercising treaty rights albeit there was no documentary evidence that she was doing this at the date of the divorce but that was not necessary because the appellant had demonstrated they had been married for three years and lived together for at least 12 months. Even if she had been on job seekers allowance she would have satisfied the 2006 Regulations.

7. Mr McVeety adopted the Rule 24 response dated January 28, 2015 and submitted the FtTJ had not erred. The respondent had revoked the residence card because information came to her attention that suggested this marriage was one of convenience. The appellant's claim that the marriage was not a sham marriage had to be considered in the light of the fact the appellant had fathered three children with the same woman between 2007 and 2012. Additionally, the woman's mother had applied for a visit visa on two occasions in April 2009 and August 2011 to come and stay with her daughter at his house. The respondent had satisfied the standard of proof placed on her and the burden of proving the marriage was no a sham lay on the appellant. The FtTJ heard the evidence and found it was a sham marriage and consequently the appellant could not benefit from any of the 2006 Regulations. It was irrelevant whether they were married for more than three years or lived together for at least one of those years. Even if the FtTJ had been wrong to find the marriage was one of convenience the appellant had failed to produce evidence that his ex-wife had been exercising treaty rights as at the date of the divorce. The findings made were open to the FtTJ and the appeal should be dismissed.

8. Mr Afzal emphasised that there was evidence of the parties living at the same address between 2008 and 2011 and he fact

the name on the bills was not altered was due to failure to notify the utility company.

9. Having considered the submissions I reserved my decision.

ERROR OF LAW ASSESSMENT

10. There are in effect two issues that I am invited to consider and during the hearing I discussed both issues with the representatives. These issues were firstly was the FtTJ entitled to find the marriage was a marriage of convenience and secondly whether the appellant had demonstrated his ex wife had met the requirements of the 2006 Regulations.

11. Both parties referred to the decision of Papajorgi (EEA spouse marriage of convenience) Greece [2012] UKUT 38 as in fact did the FtTJ. Although the grounds of appeal suggested the FtTJ was wrong to place the burden of proof on the appellant I am satisfied, as was Judge of the First-tier Tribunal French that the FtTJ correctly stated the approach to be taken in paragraphs [26] and [27] of his determination. Mr Afzal did not pursue this issue before me but did argue that the FtTJ should not have considered the marriage at all as the respondent had failed to show any reasonable suspicion.

12. I do not agree with Mr Afzal's submission on this issue. The respondent revoked the appellant's residence card specifically because of the relationship with the other woman and the fact the other woman's mother had stated on two visit visa application forms that she would be coming to stay with her daughter at the appellant's house. The respondent was entitled to have concerns over a marriage in circumstances where the appellant appeared to be having a relationship with another Nigerian national and that relationship ended in a child shortly before he married, a child whilst they were together and a further child before they were divorced. As Mr McVeety properly submitted having affairs with three different women was not evidence of a good marriage but where the appellant had sexual relations with the same woman before he married and continued the relationship during and possibly after the marriage this suggested something else.

13. I am satisfied there was reasonable suspicion and the burden therefore switched to the appellant to prove on the balance of probabilities that his marriage was not a marriage of convenience. The FtTJ had regard to the appellant's oral evidence as well as the documents submitted. The FtTJ had regard to the documents submitted and whilst he does not set out each and every document he demonstrated in his determination an engagement with the documents. The utility bills places the appellant and his ex-wife in the property but that evidence was, in the view of the FtTJ, outweighed by the evidence relating to the other woman. The absence of a

reference to the bills does not amount to an error because I am satisfied that the FtTJ's recording of the evidence in paragraphs [18] to [21] and his subsequent findings in paragraphs [27] and [28] meant his conclusion would have been the same.

14. However, the FtTJ did not leave matters at that because he went onto consider the other requirements. As the refusal letter states the application had to be considered under Regulations 10 and 15 of the 2006 Regulations. Importantly, Regulation 10(5)(b) requires the appellant to have been residing in the United Kingdom in accordance with the Regulations and at paragraph [65] of Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs) [2013] UKUT 89 (IAC) the Tribunal confirmed this to be the case, following Amos [2011] EWCA Civ 552, when it stated:

> "… Given that we have held that to acquire a retained right of residence under both the Directive 2004/38/EC and under the 2006 Regulations it is necessary for an ex-spouse to show that her (or his) Union citizen/EEA national spouse was exercising Treaty rights in the UK at the time of the divorce (in the form of a legal termination of the marriage)…."

15. In Samsam (EEA: revocation and retained rights) Syria [2011] UKUT 00165 (IAC) the Tribunal said at paragraph [37]-

> "When considering whether a retained right of residence exists the person concerned must be the spouse of a former spouse who exercised the relevant Treaty right. The overall sense of this seems to be that in the case of a family member seeking to acquire a retained right of residence, such a person must show that the EU national remains a worker etc at the time that the right of residence is claimed to accrue (here the time of the divorce) and if so the family member (and in the case of death or divorce, former family members) has a personal right of retained residence."

16. The FtTJ found in paragraph [32] his ex-wife was not exercising treaty rights as at the date of termination. Contrary to Mr Afzal's submissions there was no evidence that she was exercising treaty rights in June 2012 because all the evidence produced ended in late 2010 and early 2011. There was no evidence for most of 2011 or any part of 2012. I referred Mr Afzal to his bundle and in particular pages [11] to [17] and he could not identify any evidence that she was seeking work. He submitted that if she was claiming job seekers allowance that would suffice but no evidence of this had been submitted.

17. Accordingly, even if the FtTJ had been wrong about the marriage being one of convenience the appellant nevertheless failed to prove he met the requirements of Regulations 10 and

15. Merely being together for three years with one year in the same house did not satisfy the Rules.

18. I therefore find there is no error in law.

DECISION

19. There was no material error. The original decision shall stand.

20. The First-tier Tribunal did not make an anonymity direction pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 and I see no reason to alter that order.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal I make no fee award.

Signed: Dated:

Deputy Upper Tribunal Judge Alis