IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/40504/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 October 2015	**On 15 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR OLUWASEUN YOMADE AWOTUNYA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondent: Mr B Oyanrinde, Babs & Co. Legal Practitioners

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State for the Home Department in respect of a determination made by First-tier Tribunal Judge O'Flynn, promulgated on 11 May 2015.

2. The background is as follows. The applicant (as I shall call him to avoid confusion with the term appellant since that properly belongs to the Secretary of State) is a citizen of Nigeria born in 2006. He entered the United Kingdom in May 2011 on a Tier 4 Student visa which expired at the

end of July 2013. Further leave was granted in that capacity but this was curtailed on 29 August 2013.

3. The applicant had applied for a residence card confirming his right to reside in the United Kingdom under the Immigration (EEA) Regulations 2006. This was refused on 27 November 2013 and there was no appeal. On 10 February 2014 the applicant made a further application for a residence card under the Regulations and this was refused on 13 October 2014. The applicant appealed that refusal to the First-tier Tribunal which allowed his appeal. It is this decision which the Secretary of State now appeals.

4. The substance of the issue before the First-tier Tribunal Judge was the extent to which the applicant was in a subsisting relationship. Regulations 20B(1)(b) and 20B(2)(b) caused the Home Office to invite the applicant and his spouse to attend interview. They failed to do so and no adequate reason was given. There was then contact with the Home Office indicating that the spouse was ill. Thereafter a further invitation was made to attend for interview on 16 September 2014. Again there was a failure to attend.

5. These successive instances on non-attendance brought into play Regulation 20B(4) which states:

> "If, without good reason, [persons] fail to provide the additional information requested or fail to attend an interview on at least two occasions if so invited, the Secretary of State may draw any factual inferences about [their] entitlement to a right to reside as appears appropriate in the circumstances."

The Secretary of State clearly did draw adverse inferences as appears in the terms of the refusal letter but those adverse inferences were not the sole reason why the Secretary of State had issued the refusal letter. On the first page of that refusal letter the following is stated:

> "After assessing the above documentation the Home Office noted that you have not held any valid leave to remain in the UK since August 2013 when your student leave was curtailed. Also <u>the documentation submitted along with your application form for a residence card does not demonstrate that of a subsisting relationship</u>."(emphasis added)

6. In reaching his conclusions the First-tier Tribunal Judge had occasion to consider the burden of proof. He made reference to the decision in **<u>IS</u> (marriages of convenience) Serbia [2008] UKAIT 00031**. He quoted from the head note which reads:

> "The burden of proving that a marriage is not a 'marriage of convenience' for the purposes of the EEA Regulations rests on the appellant: but he is not required to discharge it in the absence of evidence of matters supporting a suspicion that the marriage is one of convenience (i.e. there is an evidential burden on the respondent)."

7. The First-tier Tribunal Judge said the following at paragraph 17. It is with his choice of phraseology that this appeal has been concerned. He said:

> "What seems to be the case, then, is that the respondent may not rely solely on failure to attend an interview (Regulation 20B(6)) and the appellant is not required to prove that the marriage is not a marriage of convenience in the absence of evidence of matters supporting the respondent's submission. It certainly appears that the main reason advanced by the respondent is the appellant's and his wife's failure to attend the three interviews."(emphasis added)

This paragraph appears to give the impression that the burden of proof rested on the Home Secretary because there had been no discharge of the evidential burden which would have passed the legal burden onto the applicant. It was a misstatement on the part of the First-tier Tribunal Judge because it failed to take into account the additional material beyond non-attendance upon which the Home Secretary had based her refusal letter.

8. The judge then went on to consider the disposal of the matter but he did so in the context of an indication implying a reversal of the burden of proof. This is so fundamental to any determination that it can only be categorised as a material error of law.

9. In the circumstances, there is no alternative but to set aside the determination of the First-tier Tribunal Judge. Having done so, and with the concurrence of the representatives of the applicant and of the Home Secretary, it is for me to remake the decision.

10. As Ms Everett quite properly concedes on the Home Secretary's behalf, there was a substantial bundle of documentation before the First-tier Tribunal Judge which clearly indicated that the applicant and his spouse were living together at the same address over a substantial period spanning some two years. This evidence included individual bank statements, joint bank statements, correspondence with Her Majesty's Revenue & Customs, utility bills, credit card bills, council tax bills, insurance documents in joint names, electoral register cards, wage slips and a tenancy agreement in joint names. I take fully into account that the wife was described as being something of a "shadowy figure" by the First-tier Tribunal Judge but it is important to look at the matter in the round and the substantial body of documentary evidence which all points in one direction.

11. Properly applying the burden of proof which is that it is for the applicant to demonstrate that his is not a marriage of convenience and to do so on the civil standard, I am of the view that that burden is discharged. The documentation and the surrounding circumstances indicate that this was not a marriage of convenience but a genuine and subsisting relationship.

12. In all those circumstances, having remade the decision, I formally allow the appeal under the EEA Regulations from the refusal granted by the Secretary of State.

Notice of Decision

The Secretary of State's appeal is allowed

The decision of First-tier Tribunal Judge is set aside and remade as follows

The substantive appeal of the Oluwaseun Yomade Awotunya is allowed and the decision of First-tier Tribunal Judge affirmed

No anonymity direction is made.

Signed *Mark Hill QC* Date 12 October 2015

Deputy Upper Tribunal Judge Hill QC