Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11271/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 December 2015	**On 5 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

SAKA ENEJI MUHAMMED
(No anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr S. Nwaekwu instructed by Moorehouse Solicitors
For the Respondent: Mr S. Kola, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 3 April 1979. His appeal arises out of a decision by the respondent, dated 20 March 2015, to refuse his application for a residence card as confirmation of a right to reside in the UK as the spouse of an EEA national exercising Treaty rights in the UK under the Immigration (EEA) Regulations 2006 ("the 2006 Regulations"). His application was refused on two grounds: firstly, that his relationship with an EEA national was one of convenience; and secondly, that he had failed to demonstrate his wife was a qualified person.

2. The ensuing appeal was determined by First-tier Tribunal ("FtT") Judge Wallace on the papers. In a decision promulgated on 22 June 2015, the FtT dismissed the appellant's appeal.

3. In respect of the appellant's relationship with an EEA national, the FtT concluded, at paragraph [14], that "*the documents on file do not endorse the appellant's claim that he and his wife are in a subsisting relationship*" and, at paragraph [15], that *"what the appellant claims may be true but there is no evidence substantiating that the couple live together"*.

4. There are no findings in the decision concerning whether the appellant's sponsor is a qualified person under the 2006 Regulations.

5. The grounds of appeal submit that the FtT erred in two respects:

   a. Firstly, it applied the wrong test in respect of the relationship between the appellant and his sponsor. The FtT found that the evidence did not support there being "a subsisting relationship" whereas the relevant question, as specified in Regulation 2 of the 2006 Regulations, is whether the appellant was a party to a marriage of convenience.

   b. Secondly, in considering whether there was a subsisting relationship (which in any event was the wrong test) the FtT failed to take into account the documentary evidence before it which showed the appellant and his sponsor were living together.

6. The grounds also argue that the FtT erred in failing to consider the appellant's appeal under Article 8 ECHR.

7. Permission to appeal was granted on the basis that the FtT failed to address either of the two points made in the refusal notice: that this was a marriage of convenience and that the EEA national was not exercising Treaty Rights. Permission was not granted with respect to the Article 8 ground.

Consideration

8. The respondent refused the appellant's application on two grounds:

   a. that his relationship with an EEA national was one of convenience; and

   b. that he had failed to demonstrate his wife was a qualified person.

9. I will consider each of these in turn.

Marriage of convenience

10. The appellant will not be entitled to a residence card under Regulation 17 of the 2006 Regulations as the spouse of his EEA national sponsor if his marriage to her is one of convenience. This is because Regulation 2 of the 2006 Regulations stipulates that 'spouse' does not include "*a party to a marriage of convenience*".

11. The phrase "marriage of convenience" is not defined in the 2006 Regulations but its meaning has been commented on in case law. In *Papajorgji (EEA spouse marriage of convenience) Greece* [2012] UKUT 00038 (IAC) it was defined as a *"marriage entered into without the intention of matrimonial cohabitation and for the primary reason of securing admission to the country."*

12. Instead of considering whether the appellant was in a marriage of convenience the FtT asked itself, and reached a finding with respect to, whether the appellant and his sponsor were in a "subsisting relationship." The FtT has therefore applied the wrong legal test and as such has made a clear error of law. The error is material as "marriage of convenience" and "subsisting relationship" are not synonymous and an appellant could satisfy one but not the other.

Qualified Person

13. The appellant will only be entitled to a residence card if his spouse is a qualified person under Regulation 6 of the 2006 Regulations.

14. The FtT decision does not include any consideration or findings on whether the appellant's spouse was a qualified person even though the spouse filed a witness statement that included evidence in the form of pay slips that was undoubtedly relevant to this issue. The failure to address this matter, which was one of the two reasons the respondent rejected the appellant's application, was a further error of law.

Remaking the appeal

15. I informed the parties at the hearing that I found there to be a material error of law for the reasons described above. I advised them that I intended to remake the decision at the hearing and I proceeded to hear submissions from both parties in respect of whether the appellant and his sponsor were in a marriage of convenience and whether the sponsor was a qualified person under Regulation 6. I then reserved my decision.

16. Having considered the submissions and looked again at the evidence that was before the FtT, and having regard to *both* 7.2(a) and 7.2(b) of the President's Practice Direction, notwithstanding my initial view, as expressed at the hearing, that I was in a position to remake the appeal, I have decided that this is an appeal that should be remitted to the First-tier Tribunal.

17. At the conclusion of the hearing, after I had advised the parties that my decision was reserved, Mr Nwaekwu was handed a bundle of documents by the appellant which he in turn handed to me. No application was made and I was simply asked to take them into consideration in remaking the decision. Mr Kola objected to this evidence being admitted and I agree with his objection. Not only has the appellant disregarded section 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, he waited until

after the hearing was concluded to submit the evidence. The evidence has not been admitted and has played no part in my decision.

Decision

a) The decision of the First-tier Tribunal contains a material error of law such that it should be set aside in its entirety and the appeal heard afresh.

b) The appeal is remitted to the First-tier Tribunal for hearing afresh before a judge other than First tier Tribunal Judge Wallace.

c) No anonymity order is made.

Signed

Deputy Upper Tribunal Judge Sheridan Dated: 30 December 2015