Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04475/2018

THE IMMIGRATION ACTS

At: Field House
On: 14th May 2019

Decision & Reasons Promulgated
On: 21st May 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

PO
(anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

For the Appellant: **Ms Reville, Counsel instructed by Peer and Co**
For the Respondent: **Mr Melvin, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Nigeria born in 1970. He appeals with permission the decision of the First-tier Tribunal (Judge MA Khan) to dismiss his appeal under the Immigration (European Economic Area) Regulations 2016 ('the Regulations').

2. The Appellant has lived in the United Kingdom since he entered as a visitor in 2000 and remained unlawfully. In 2004, 2007 and 2008 he tried unsuccessfully to establish a right of residence under the Regulations, on the basis that he was the husband of a French national, Ms N. In 2010 a fourth application, made on the same grounds, was successful. The Secretary of State issued him with a residence card valid for five

years. On the 5th August 2015 the Appellant made an application for recognition of his 'retained' right of residence, on the grounds that although his marriage to Ms N had now ended he had already lived in the United Kingdom for the requisite period of time; this was initially refused but succeeded on appeal and a residence card was subsequently granted.

3. On the 26th March 2018 the Appellant applied for permanent residence under the Regulations.

4. The refusal letter is dated the 11th June 2018. The Respondent notes that Home Office records show that the Appellant is living with his Nigerian partner Ms V, and that they have three children together, born in 2010, 2011 and 2014. Given that these children were all born during the claimed currency of the Appellant's marriage to Ms N, the Respondent was not prepared to confirm that he had accrued a permanent right of residence. The Respondent determined that in fact the Appellant had never been entitled to any right of residence as either a family member or a former family member, since his marriage to French national Ms N had been a marriage of convenience.

5. The Appellant appealed and on the 7th January 2019 the matter came before the First-tier Tribunal. The case was adjourned due to lack of court time. On the 24th January 2019 it was re-listed at Harmondsworth, coming before Judge Khan. The Home Office Presenting Officer (HOPO) then handed in a bundle of documents including a determination by First-tier Tribunal Judge Lewis dating back to 2006, and copies of some of the earlier refusals. Although Counsel for the Appellant objected to the late service of these documents, the Tribunal decided to admit them on the grounds that they were relevant to the proceedings.

6. The Tribunal heard oral evidence from the Appellant. He said that he had met Ms N in 2003 and that they had lived together from then until 2015. He said that he had only embarked on a relationship with V after his marriage had broken down. Although he is the father of the children he and V had not been in a relationship when these children were conceived; they had just been 'good friends' at the time. The determination notes that V did not attend the hearing. Documentary evidence in the bundles indicated that the Appellant and V are married (there being numerous references to Mr and Mrs 'O'), a matter denied by the Appellant.

7. The First-tier Tribunal further had regard to the determination of First-tier Tribunal Judge Lewis from 2006, in which Judge Lewis had rejected the Appellant's claim to be in a genuine and subsisting relationship with Ms N. Judge Lewis had so found *inter alia* because of numerous discrepancies in the evidence given at interview by the alleged couple. Judge Khan then heard evidence from Ms N herself. She explained that when she had been interviewed by an immigration officer back in 2006 he had not understood much of what she had said because her English is heavily accented. She confirmed that she had been aware that the Appellant had fathered three children with another woman, and indeed that she had allowed the children to visit the matrimonial home.

8. The Tribunal dismissed the appeal having found that the Respondent had discharged the burden of proof and shown the marriage to be one of convenience. The findings of Judge Lewis had not been successfully challenged, and they must remain the starting point. She had scrutinised the marriage interview in detail and had come to his conclusion on "sound grounds". The Tribunal further found that:

   i) The Appellant had failed to provide evidence of cohabitation with Ms N despite terms of Secretary of State's refusal letter;

   ii) It was not credible that he would have three children with a 'good friend' during the currency of his marriage;

   iii) Ms N was given five days post-hearing to produce photographic evidence referred to in her testimony (of the children visiting the matrimonial home) yet none was produced;

   iv) The Appellant failed to produce any corroborative witnesses to claimed relationship.

The Grounds of Appeal

9. The Appellant submits that the First-tier Tribunal decision is flawed for the following material errors of law:

   i) Legal Misdirection. The Judge asks himself whether this was a genuine and subsisting marriage, when in fact all he needed to be concerned with was whether it was, at its inception, a marriage of convenience;

   ii) Procedural Unfairness (I). The Judge gave no reasons for his decision to admit the bundle submitted by the HOPO on the day, a late disclosure of material that prejudiced the Appellant's ability to present his case;

   iii) Misapplication of *Devaseelan*. The decision of Judge Lewis could not be relied upon because it was itself legally flawed, Judge Lewis having placed the burden of proof on the Appellant;

   iv) Procedural Unfairness (II). If it could be said that the Tribunal should not have adopted Judge Lewis' findings (see above) but it was nevertheless entitled to rely on her summary of the evidence before her, a discrete error has arisen, since the marriage interview records relied upon by Judge Lewis have still to date never been supplied to the Appellant and he has therefore been denied a fair opportunity to analyse and comment upon the answers recorded.

   v) Failure to give reasons. The Judge finds the Appellant's evidence not credible but does not explain why.

   vi) Failure to take relevant information into account. The Respondent had accepted that Ms N was the Appellant's spouse within the meaning of the Regulations in 2010, 2011, 2017, and 2018.

Discussion and Findings

10. The chronology of events is as follows:

23.9.00	A's claimed date of entry to the United Kingdom
April 03	Claimed meeting of Appellant and Ms N
June 03	Claimed start date of cohabitation with Ms N
30.7.04	Marriage to Ms N
1.11.04	A sought a residence card as the family member of Ms N (application #1)
1.6.05	Marriage interviews take place
5.10.05	Application rejected on the grounds that the marriage was one of Convenience
9.3.06	First-tier Tribunal (Judge Lewis) dismisses the Appellant's appeal
3.7.07	A sought a residence card as the family member of Ms N (application #2)
12.12.07	Application rejected on the grounds that the marriage was one of Convenience
25.4.08	A sought a residence card as the family member of Ms N (application #3)
17.3.08	Application refused
23.9.10	A's first child born to V
17.12.10	A sought a residence card as the family member of Ms N (application #4)
18.4.11	Residence card issued, valid for 5 years
17.11.11	A's second child born to V
18.6.14	A's third child born
Jan 15	Appellant claims that he and Ms N separated
27.5.15	Divorce between Appellant and Ms N finalised
5.8.15	A sought a residence card as the former family member of Ms N ('retained' rights) (application #5)
18.1.16	Application refused
6.12.17	The First-tier Tribunal (Judge Ince) allows appeal by consent
25.1.18	Residence card granted for 5 years
9.3.18	A seeks permanent residence (application #6)
11.6.18	Application for permanent residence refused on grounds that marriage was a marriage of convenience

11. I deal first with ground (ii): whether the late material should have been admitted.

12. There is no arguable breach of procedural fairness, or material unfairness, in the Tribunal having admitted copies of the earlier refusal letters, and the determination of Judge Lewis, into the evidence. It is true that these should have been lodged in compliance with directions, and at the very least at the aborted hearing on the 7th January. It is most unfortunate that they were not. The Procedure Rules are however clear that in the operation of the tribunal the judge must use is or her own discretion in deciding whether or not to admit material served not in accordance with directions. In this case there were two overriding considerations. First that the material, in particular the determination, was directly relevant to the matter in hand, viz the parties' intentions at the time of the marriage in 2004. The decision of Judge Lewis, and the evidence it summarises, is the material closest situated to that point in time. It was therefore plainly important to the decision that the Tribunal here had to make. The second matter is that none of this was unknown to the Appellant. He was not ambushed by this material, since he knew full well that he had lost that appeal, why he had lost it, and that he had been successively rebuffed in his attempts to obtain a residence card. As such there was no prejudice at all.

13. I therefore turn to consider grounds (iii) & (iv), both of which are concerned with the approach taken to the decision of Judge Lewis.

14. The matter in issue before Judge Lewis in 2006 was whether the Appellant qualified for a residence card as the spouse of Ms N. The Appellant claimed to have been in that relationship since 2003, the couple having married on the 30th July 2004. They had been interviewed by an immigration officer in June 2005. It is unclear whether Judge Lewis had before her the entire transcript of those interviews, or whether she simply relied on extracts set out in the refusal letter.

15. Judge Lewis summarised a number of discrepancies in the evidence arising from the interview record. For instance, Ms N claimed that she had met the Appellant in an internet chat room and had corresponded in this way for approximately 8 months before they met in person, when she went to his house for coffee; he denied this and said that they had met in the Fridge Bar in Brixton. She said that they had been together for 2 years at the date of interview; he said it was 18 months. She said that at the time they met she was living in New Cross; he said she had lived in Peckham. She said that they had not lived together before the marriage; he said that they did. She said that the ceremony took place at 2; he said it was at 3. She said that there were 4 people at the reception; he said that there were 15 of them.

16. The Appellant and Ms N both gave evidence before Judge Lewis. The Appellant said that he did not know why she would have mentioned the internet chat room. He suggested it was because her English was not good and she may have misunderstood the question. They were able to give consistent details about the colour of their bathroom and bedroom décor, and agreed about that they had both had for breakfast that day. There was very limited evidence of cohabitation. The Appellant had been sent a certificate for a course he undertook, and he produced five Christmas cards, three sent to his wife, and two to them both.

17. Having considered all of that evidence in the round, Judge Lewis concluded as follows:

> "Accordingly I cannot be satisfied that on balance this couple were living together either at the date of decision or currently. They may stay together from time to time but that does not establish that they are actually living together on a full time basis as a couple which I find is a basic requirement for the marriage to exist and not be a marriage of convenience which is prohibited by the Regulations. I emphasise that the burden of proof is on the Appellant and he has not discharged it"

18. Judge Khan records Ms Reville's objections to this determination at his paragraphs 49-50. First, she asked the Tribunal to note that the interview transcript, summarised and relied upon by Judge Lewis, has not been made available to the Appellant. As such he – and more importantly Judge Khan - has been unable to see whether the discrepancies identified are representative of the interview as a whole. In the absence of the entire record a skewed picture could emerge: Miah (interviewer's comments: disclosure: fairness) [2014] UKUT 00515 (IAC). Second, it is clear that Judge Lewis found the burden to lie with the Appellant: we now know that this was the incorrect approach (see for instance Rosa [2016] EWCA Civ 14). The burden lay on the Respondent to establish that this was a marriage of convenience and it cannot be gleaned from Judge Lewis' findings that this converse burden would have been discharged had she applied it. It was therefore unsafe to rely in any way on Judge Lewis' findings.

19. Having directed itself to consider those submissions, the First-tier Tribunal said this:

> "With respect to Ms Reville's submissions, Judge Lewis' findings remain unchallenged, and the findings remain a starting point for this Tribunal. Judge Lewis scrutinised the appellant and his EEA sponsor's marriage interview in detail and came to the conclusion on sound grounds. Combined with the appellant and his ex-EEA sponsor's evidence before me and their evidence before judge Lewis, I find that the respondent has established on the higher-level balance of probabilities, that the appellant entered into a marriage of convenience under regulation 2 of the EEA Regulations 2016. The appellant has failed to provide evidence or an explanation to satisfy me that his marriage to his ex-EEA sponsor was a genuine and subsisting marriage and not one of convenience under Regulation 2 of the EEA Regulations".

20. Before me Ms Reville submits that this reasoning entirely failed to engage with her submissions, duly recorded at paragraphs 49-50. I have to agree. The primary difficulty with the reasoning is that the Tribunal does not appear to have recognised that the law in respect of the burden and standard of proof has entirely changed since 2006. Whilst it was certainly correct to note that the findings of Judge Lewis were the starting point, it failed to acknowledge that they could today only attract limited weight, given the changes in approach to allegations of marriages of convenience. The determination of Judge Khan simply indicates that they were weighed against the Appellant; to what extent is not clear. Is a material error shown?

21. The first task for this First-tier Tribunal was to decide whether or not the Secretary of State had identified sufficient evidential basis for raising a doubt as to the nature of

this marriage. In her submissions before me Ms Reville relied on Miah to point out that the Respondent's case rested on notes from an interview long since forgotten and for which no transcript is ever likely to be available. There were considerable doubts as to whether those notes were even reliable, given Ms N's consistent evidence that there were interpretation difficulties at the interview itself and that she was misunderstood. I accept all of that. In light of Miah it is doubtful whether the points raised in the refusal letter in 2006 can be given any significant weight today. That is not however the only evidence that the Respondent seeks to rely on. The primary ground for suspicion is the fact that the Appellant has had three children with another woman at a time when he claims to have been happily married to Ms N. All three of those children were born prior to 2015, declared by the Appellant to be the date that he and Ms N went their separate ways. This is the matter at the centre of the refusal letter: Judge Lewis' determination had no part to play in raising the Secretary of State's suspicions.

22. The suspicion having been voiced, it was for the Appellant to provide an 'innocent explanation'. He had clearly stated in his application form that the marriage to Ms N had subsisted between 2003 and 2015, and he does not resile from that today. Whilst Ms Reville is entirely justified in emphasising, at her ground (i), that it is the date of marriage that must be the focus of enquiry, the First-tier Tribunal was plainly entitled to evaluate the Appellant's evidence about his marriage as a whole. If the evidence about the relationship was devoid of credibility, it would be logically permissibly to deduce from that that the marriage itself, from beginning to end, was a sham.

23. The explanation offered to the Tribunal was that prior to 2015 V was simply a 'good friend' whom he impregnated on three separate occasions whilst continuing to live with his wife. The Tribunal was told that Ms N was well aware of this arrangement and indeed that the children were brought to visit her.

24. That explanation having been offered, it was for the Tribunal to weigh the competing evidence and evaluate whether the Respondent had discharged the overall legal burden of proof.

25. Ms Reville submits that in conducting that evaluation of the current evidence (ie that distinct from the determination of Judge Lewis) the Tribunal failed to give reasons why it rejected the Appellant's 'innocent explanation' as "not credible". Reasons are necessary so that the losing party can understand why he has lost. I do not accept that the Appellant is under any illusions as to why Judge Khan found this evidence incredible. The Tribunal was perfectly entitled to reject as implausible evidence that the Appellant and Ms N would carry on living together in the matrimonial home whilst he fathered three children with a friend. It is a scenario so out of the ordinary it could be said that no elaboration was necessary, but in fact the Tribunal does give reasons.

26. Apart from the inherent implausibility of the account, Judge Khan identifies a lack of supporting evidence as material to his decision. Ms N insisted that photographic evidence of her relationship with the children would be produced; it was not. Despite the matter being at the centre of the refusal, there was no corroborative

evidence of the appellant's claim to have lived with Ms N for 12 years until 2015. No statements from friends, nor photographs of the couple together, nor evidence of cohabitation.

27. The Judge further finds that the Appellant has "done his best to conceal the existence of [V] and the three children". This was a finding that was certainly open to the Tribunal to make. At Q11.15 of the application form, completed on the 9th March 2018 and replicated in the Respondent's bundle, the Appellant is asked whether he has any children of whom the sponsor is not the parent. He ticks 'Yes'. At Q11.17 he is asked to explain why the children referred to at 11.15 are not being included in the application. In the text box the Appellant has simply written "there are no children included in this application". At Q11.22 the Appellant is asked whether he is currently in a relationship to which he replies 'no'. Curiously, the Appellant's bundle contains extracts of another application form, described in the index as the 'EEA (FM) Application'. This again shows the Appellant to have disclosed the existence of his children, but to have offered no details bar stating that they are "from a previous relationship". None of that is easy to square with the case now advanced. Whilst the Appellant might reasonably be able to point to his honest declaration that his children exist, there is no reasonable explanation offered for his denial (in the form dated 9.3.18) of a current relationship when he was plainly living with Vivian at the time. Nor is there any explanation, bar dishonesty, for his claim that the children were born "of a previous relationship". That is wholly contrary to the case he now advances.

28. I am therefore satisfied that there was before the Tribunal sufficient evidence to justify the Respondent's accusation; I am further satisfied that the Tribunal, in its final reckoning, was entitled to reject the Appellant's innocent explanation for the reasons that it gives. Ms Reville's objections to the use of Judge Lewis' determination are well made, but in the end are not material. The decision of the First-tier Tribunal would have been the same even if all of that reasoning was expunged.

29. There remains ground (vi). It is accepted that on two occasions the Respondent has granted the Appellant a resident card on the basis of his marriage to Ms N: in 2011 as a family member, and in 2018 on the basis of retained rights. On at least one other occasion a card was refused without reference to any such allegation. Ms Reville accepts that these grants did not raise any kind of estoppel. She submitted however that they were plainly relevant to the overall assessment and should have been taken into account. I find that those grants were of only marginal significance. The Secretary of State took the decisions on each applications on the evidence before him at the time. The evidence on this occasion included information from Thurrock Council that the Appellant, V and their three children were seeking emergency support. That was how it came to the Home Office's attention that the Appellant was in this relationship. Had that matter not come to light no doubt the application would have been granted. On the facts, all that does is suggest that the earlier grants should not have been made either. This is of no assistance to the Appellant.

30. In conclusion I am satisfied that the decision of Judge Lewis should only have been given limited weight. It remains the case however that the Respondent had given

clear reasons for making the accusation; the Appellant's explanation was lacking in credibility and unsupported by evidence; in those circumstances the Tribunal was entitled to find that the overall legal burden had been discharged.

Anonymity Order

31. Although there is no reason to protect the identity of the adults in this case, the Appellant is father to three children resident in the United Kingdom. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I am concerned that identification of the Appellant, his partner or ex-wife could lead to identification of the children and for that reason I consider it appropriate to make an order in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decisions

32. The decision of the First-tier Tribunal does not contain an error of law such that it should be set aside.

33. There is an order for anonymity.

Upper Tribunal Judge Bruce
19th May 2019