



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/15779/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On 7 January 2015

Determination Promulgated
On 28 January 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

YOOFI VAN-DYCK

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Oji, instructed directly by the appellant

For the Respondent: Mr C Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a national of Ghana, appealed to the First-tier Tribunal against the decision of the Secretary of State of 26 March 2014 to remove him from the UK as a person who has ceased to have a right to reside in the UK under the Immigration (European Economic Area) Regulations 2006 (the EEA Regulations). First-tier Tribunal Judge Fox dismissed the appeal and the appellant now appeals with permission to this Tribunal.

Background

2. The background is that the appellant entered the UK on 1 December 2004 with a visit visa valid until 11 December 2004. However he failed to leave the UK and on 13 January 2012 he applied for an EEA Residence Card on the basis of his marriage to a French

national. On 22 May 2012 He was issued with a Residence Card valid until 22 May 2017. On 26 March 2014 the appellant was encountered by Immigration Officers during an enforcement visit to his home. It is alleged that he was living with a Ghanaian national with whom he has two children. It is alleged that the appellant said that his French wife had left the UK. The appellant was served with an IS151A and a decision to remove him from the UK. The IS151A sets out the reasons for the decision to remove him as being that he has ceased to have a right to reside in the UK under the EEA Regulations because his EEA family member has left the UK and is no longer a qualified person under regulation 6 (1) of the EEA Regulations.

3. The appellant requested that his appeal be determined on the papers and his appeal was so determined by the First-tier Tribunal Judge. His bundle of evidence to the First-tier Tribunal included a witness statement in which he admitted to having difficulties in his relationship with his wife who was out of the UK on a short holiday at the time of his encounter with Immigration Officers. He therefore disputed that his wife had left the UK and contended that she was still employed in the UK and therefore still a qualified person under the EEA Regulations.
4. The Judge noted that the appellant did not dispute that he is in a relationship with a Ghanaian national and found that the relationship ran in parallel to that with his French wife. The Judge considered the evidence including the witness statement of the appellant's French wife, her bank statements and payslips and found that these documents were not genuine having the 'gloss of contemporary and relevant documents' [12]. He found that the paper hearing had been requested so that the appellant's wife would not have to attend and give evidence and that the appellant's statement did not address the relationship with the Ghanaian woman. The First-tier Tribunal Judge further found that there is compelling weight to the evidence before him that the claimed marriage to the French national 'is no more than a marriage of convenience' and that the relationship has 'all the hallmarks of a marriage of convenience' [13].
5. The grounds of appeal contend that the First-tier Tribunal Judge erred in finding that the appellant had submitted forged documents without evidence and without it having been alleged by the respondent. It is further contended that the First-tier Tribunal Judge misdirected himself as to the facts as he failed to acknowledge that the appellant disputes that his wife had left the UK. It is further contended that the First-tier Tribunal Judge erred in drawing an adverse inference from the fact that the appellant requested a paper hearing. Ground 4 contends that the First-tier Tribunal Judge erred in finding that there was a marriage of convenience in circumstances where the respondent had made no such allegation. It is contended that in failing to invite submissions on this issue the First-tier Tribunal Judge committed a procedural unfairness. The final ground contends that the First-tier Tribunal Judge did not properly consider the appellant's appeal under the ground that the decision breaches Article 8 of the European Convention on Human Rights.
6. The application for permission to appeal made to the First-tier Tribunal was refused by First-tier Tribunal Judge Pirotta on 29 August 2014. A renewed application to the Upper Tribunal was considered by Upper Tribunal Judge Rintoul on 26 November 2014 who gave his preliminary view that First-tier Tribunal Judge Fox erred in finding that the

appellant was a party to a marriage of convenience when this had not formed part of the respondent's case and without putting the appellant on notice that this issue was to be raised and by directing himself that the burden of proof in relation to this issue is upon the appellant contrary to the decision in Samsam (EEA: revocation and retained rights) Syria [2011] UKUT 165 (IAC). Upper Tribunal Judge Rintoul proposed to dispose of the appeal without a further hearing and to remit it to the First-tier Tribunal unless either party objected to that course of action. The respondent submitted a Rule 24 response objecting to the case proceeding in the proposed manner.

Error of law

7. The grounds of appeal to the Upper Tribunal contend that the First-tier Tribunal Judge erred in finding that the documents submitted by the appellant were not genuine or forged without any proof. It is contended that it is for the party alleging forgery to prove it as decided in RP (Proof of Forgery) Nigeria [2006] UKAIT 00086. The decision in that case is summarised in the head note as follows;

“An allegation of forgery needs to be proved by evidence and by the person making it. The procedure under s108 of the 2002 Act remains available to respondents. A bare allegation of forgery, or an assertion by an Entry Clearance Officer that he believed the document to be forged can in these circumstances carry no weight. The Tribunal treats a document as forged only on the basis of clear evidence before it. KS (Allegations by respondent: proof required?) Pakistan [2005] UKAIT 00171 should not be read as implying the contrary.”

8. In this case the documents in relation to the appellant's wife's earnings were submitted in connection with the paper appeal. The respondent made no submissions in relation to the documents and made no allegation of forgery. The Judge's finding that the documents were 'not genuine' must have amounted to a finding that they were forged. The Judge did not give adequate reasons for his finding and there was no evidence before the Judge to support such a finding. The Judge therefore erred in finding that the appellant's wife's documents were forged.

9. The second ground of appeal contends that the Judge misdirected himself as to the facts as he failed to acknowledge that the appellant disputes that his wife had left the UK. The third ground contends that the Judge was wrong to draw adverse inferences from the fact that the appellant requested a paper hearing. I do not see the merit in these grounds of appeal on their own.

10. Ground 4 contends that the First-tier Tribunal Judge erred in finding that there was a marriage of convenience in circumstances where the respondent had made no allegation that there was a marriage of convenience. It is contended that in failing to invite submissions on this issue before making his findings the First-tier Tribunal Judge committed a procedural unfairness.

11. The Upper Tribunal considered the issue in Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC) and concluded that there is an evidential burden on an appellant to address evidence justifying reasonable suspicion that the marriage is entered into for the predominant purpose of securing residence rights. However this can only arise where there is an allegation that there is a marriage of

convenience. Mr Avery submitted that the evidence before the Judge was suggestive of a marriage of convenience and he was entitled to take it into account. However the evidence referred to by Mr Avery included the birth certificates of the children the appellant is said to have had with the Ghanaian woman. Those birth certificates were not in the bundles before the First-tier Tribunal Judge, nor indeed were they before me. Mr Avery also submitted that the circumstances in which the appellant was encountered were relevant to the Judge's findings. In this case the respondent alleged that the EEA family member had left the UK and that she was no longer a 'qualified person'. There was no allegation of a marriage of convenience and the Judge erred in considering this without giving the parties an opportunity to make submissions.

12. The final ground contends that the First-tier Tribunal Judge did not properly consider the appellant's appeal on the ground that the decision breaches Article 8 of the European Convention on Human Rights. However the First-tier Tribunal Judge had little evidence as to the appellant's true circumstances at the date of the decision. There was nothing about the appellant's relationship with the Ghanaian national or their children. In these circumstances I do not see how he could have reached any meaningful conclusions as to the appellant's private and family life in the UK and I find that he did not err in his findings in relation to Article 8.

13. Upper Tribunal Judge Rintoul raised a further potential error in the First-tier Tribunal Judge's decision. He suggested that Judge Fox may have erred in directing himself that the burden of proof is on the appellant which is contrary to the guidance in Samsam where the Tribunal said;

"27. ... As a matter of general principle, we would agree with the appellant's submission and the respondent's concession that where the sole issue in an appeal is whether the Secretary of State has lawfully revoked residence documentation on the ground of lack of qualification, the onus to justify the cancellation is on the revoking authority. It would be sufficient to justify such revocation if there has been a change of circumstances since issue that removes the right of residence."

14. This is an appeal against a decision to remove the appellant on the basis of the respondent's decision to revoke the appellant's residence card. The First-tier Tribunal Judge therefore erred in stating at paragraph 7 that the burden of proof is upon the appellant in this case.

15. I accept Mr Oji's submission that the issue to be decided by the Judge in this case was whether the respondent had lawfully revoked the appellant's residence permit. The Judge failed to make a finding as to whether the appellant's wife was still in the UK and failed to make a properly reasoned finding as to whether she was a 'qualified person'. In making the errors set out above the Judge failed to engage with the central issue in the case. Given that the errors go to the heart of the appeal I must set aside the decision of the First-tier Tribunal Judge in relation to the EEA Regulations and I go on to remake the decision.

Remaking the decision

16. The appellant submitted a bundle of evidence in advance of the hearing before me. I also had the bundle submitted to the First-tier Tribunal.

17. According to the witness statement dated 14 April 2014 made by the appellant's French wife she and the appellant married on 12 August 2011 under Ghanaian customary proxy marriage law. There is no marriage certificate in the papers before me. According to his witness statement in the Upper Tribunal bundle the appellant was divorced from his French wife on 6 September 2014. He said in his witness statement that he now wishes to have his appeal considered on a retained right basis. As evidence of the divorce the appellant submitted a copy of a certificate of dissolution of a customary marriage dated 27 October 2014 along with an affidavit and an order. However as Mr Avery pointed out this raises the issue as to the validity of the marriage in the first place.
18. There is no marriage certificate before me and no evidence that the customary marriage complies with the requirements of French law as set out in the guidance in Kareem (Proxy marriages – EU law) [2014] UKUT 00024 (IAC). There the Tribunal said that a marriage certificate should be issued by a competent authority in the country where it took place and that it must be decided whether the marriage was contracted between the appellant and the EEA national according to the national law of the country of nationality of the EEA national, in this case France. There is insufficient evidence before me to be satisfied that the marriage did meet these requirements.
19. I do not accept the appellant's request that the grounds of appeal should be varied to cover his changed circumstances. Should he wish he can apply to the respondent for evidence of a retained right of residence with all of the necessary evidence. Given the lack of evidence as to the Ghanaian customary marriage there is insufficient evidence before me to be satisfied that the appellant is entitled to a retained right of residence in any event.
20. The issue before me relates to the respondent's decision to revoke the residence card based on the allegation that the European Economic Area national had left the UK and was no longer a 'qualified person'. The allegation is based on the respondent's record of a visit to the appellant's home address on 26 March 2014 where he was encountered living with a Ghanaian national who he said was his partner and with whom he admitted having two children. It is recorded that he admitted that his wife was no longer living in the UK.
21. The appellant's wife submitted a witness statement to the First-tier Tribunal dated 14 April 2014. In that statement she said that she was still cohabiting with the appellant and that they intended to live together permanently notwithstanding the difficulties they had experienced. She did not deal with the allegation that she had left the UK or with the appellant's explanation at paragraph 9 of his witness statement of 14 April 2014 that she had left for a short holiday. She provided no evidence to support the explanation that she had left the UK for a short holiday, this evidence would have been easily obtained had she done so. Her failure to explain this matter damages her credibility. Further, the appellant also said in his witness statement dated 14 April 2014 that he and his wife had a subsisting and durable relationship. However he failed entirely to deal with the allegation that he was living with a Ghanaian national with whom he had two children when Immigration Officers visited his home a month previously. The failure of the appellant and his wife to contradict or explain this allegation is incomprehensible in light of its significance. The appellant requested that

his appeal be considered on the papers by the First-tier Tribunal therefore he chose not to take the opportunity to give oral evidence on this issue. The appellant's wife did not provide any further statement for the Upper Tribunal nor did she attend the hearing therefore I did not have the opportunity to hear her oral evidence on this matter. The failure of the appellant and his French wife to give any adequate explanations for these matters severely damages their credibility.

22. I also take account of the fact that the appellant and his wife underwent a customary divorce in September 2014, just 5 months after these statements. In the absence of an explanation this further undermines the credibility of their claims in April 2014 to be cohabiting in the UK.
23. In relation to the appellant's wife's employment and residence the appellant submitted copies of a letter from her claimed employer, bank statements, payslips and HMRC documentation addressed to his wife at his home address during 2013-2014. However these are all copies and not originals and this limits the weight I can attach to these documents. Further, the appellant's French wife did not attend the hearing before me to explain or evidence these documents. I consider the documents in the round in light of all of the other evidence before me.
24. The current evidence that the appellant and his wife have undertaken a customary divorce in Ghana does not provide any further evidence as to the appellant's wife's whereabouts in 2014 or currently or as to whether she was exercising treaty rights at any of the material times. Much of the evidence in the Upper Tribunal bundle was already before the First-tier Tribunal. All of the documents are copies and little relates to the period after the appellant was encountered by the immigration authorities. In any event there is no further evidence from the appellant's French wife to support these documents.
25. Considering all of the evidence before me I am not satisfied that the appellant has addressed the serious allegations made in relation to his EEA national wife and I am satisfied that the respondent has therefore shown that the decision to revoke the residence card made on 26 March 2014 was lawful.

Conclusion:

The making of the decision of the First-tier Tribunal did involve the making of a material error on point of law.

I set aside that decision in relation to the EEA Regulations.

I remake the decision in the appeal by dismissing it under the EEA Regulations.

Signed

Date: 26 January 2015

A Grimes

Deputy Judge of the Upper Tribunal