Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/09346/2015**

THE IMMIGRATION ACT

Heard at Field House	**Decision & Reasons Promulgated**
On 12th June 2017	**On 16th June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

MR SAMUEL OLANREWAJU BELLO
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Walsh instructed by Universe Solicitors
For the Respondent: Ms Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria. Having considered all the circumstances, I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge O'Malley promulgated on 18th October 2016, whereby the judge dismissed the Appellant's appeal against the decision of the Respondent to refuse him a residence card as a spouse of an European Union citizen, who is exercising treaty rights in the UK. In essence the judge found that this was a marriage of convenience and accordingly that the appellant did not meet the requirements of the Regulations.

3. By a decision of 13th April 2017 First-tier Tribunal Judge Landes granted permission to appeal to the Upper Tribunal. In granting permission there was no restriction on the grounds that could be argued. Thus the matter appeared before me to determine in the first instance whether or not there was an error in law in the original determination.

4. The appellant is a Nigerian national, who entered the United Kingdom on 30 April 2008 under a visit visa. The visa was valid until 17 September 2008. After that date the appellant did not have leave to remain in the United Kingdom. It is suggested that the appellant sought to make attempts to regularise his status in the United Kingdom from the end of 2013. He appears to have made applications on human rights grounds but those applications appear to have been refused.

5. On 10 November 2014 the appellant married Magdalena Anna Marek, now Mrs Bello, a Polish national, who was and is exercising treaty rights in the United Kingdom. It appears that the appellant had sought to marry Ms Marek on a previous occasion in 2013 but he was prevented from doing so by Immigration Officials.

6. On 18 November 2014 the appellant applied for a residence card as the spouse of an EU citizen, who was exercising treaty rights in the United Kingdom. The appellant and Mrs Bello attended marriage interviews on 11 February 2015.

7. By decision made on 19 February 2015 the respondent refused the appellant a residence card. In refusing the application the respondent pointed out that there were significant discrepancies between the answers given in interview by the appellant and those given by Mrs Bello. Some of the discrepancies are set out within the refusal letter.

8. The appellant appealed against the decision. The appeal was heard in the First-tier Tribunal and dismissed. The appellant now seeks to appeal against that decision. The Grounds of Appeal to the Upper Tribunal assert :

   (a) There was no question as to the formal validity of the marriage. The respondent could only justify investigating whether this was a marriage of convenience where she had reasonable doubts as to the right of the appellant to a residence card and there were grounds for such reasonable doubts. In accordance with the case of Papajorgi (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 as nothing in the application raised such grounds there was no justification for the respondent investigating the marriage. At paragraph 73 the judge has suggested that the discrepancies provided about personal information and the difficulties about language spoken were sufficient to displace that burden. Given the fact that the couple were married legally and had lived together from 2013, there was nothing to justify the shifting of the burden of proof. In the circumstances the respondent was wrong to investigate this is a marriage of convenience and thereafter was wrong to put the onus on the appellant to prove that this was a genuine marriage.

   (b) The judge in paragraph 85 has placed a burden of proof on the appellant to prove that this is not a marriage of convenience on the balance of probabilities. It is submitted in accordance with the case of Papajorgi the burden on the appellant was only an evidential burden and it was then for the respondent to prove on the balance of probabilities that this was a marriage of convenience.

(c) The judge erred in paragraph 80 by failing to give any weight to the evidence of the witnesses and failing to give adequate reasons for giving no weight to such evidence.

9. Before me the appellant's representative was seeking to argue that there was no justification for the respondent investigating whether or not this was a marriage of convenience in the first place and that the respondent had no justification for investigating the marriage. Thereafter given all of the circumstances the respondent had failed to raise sufficient grounds to shift the burden of proof.

10. The case of Papajorgi (EEA spouse-marriage of convenience) Greece [2012] UKUT 00038 (IAC) has been relied upon by the appellant's representatives. At the end of the case is an Appendix, in which the Commission of the European Communities has set out guidance as to how to approach the issues relating to abuse of rights. At paragraph 15 guidance is given of which the following is relevant:-

Member States may define a set of indicative criteria suggesting the possible intention to abuse rights conferred by the Directive for the sole purpose of contravening national immigration laws. National authorities may in particular take into account the following factors:

the couple have never met before their marriage;

the couple are inconsistent about their respective personal details, about the circumstances of their first meeting, or about other important personal information concerning them;

the couple do not speak a language understood by both;

....

The past history of one or both of the spouses contains evidence of previous marriages of convenience or other forms of abuse and fraud to acquire a right of residence;..

The above criteria should be considered possible triggers for investigation without any automatic inferences from results or subsequent investigations. Member States may not rely on one sole attribute; due attention has to be given to all the circumstances of the individual case. The investigation may involve a separate interview with each of the 2 spouses.

11. The criteria did not appear to be exhaustive. From the facts as presented it was evident that the couple did not speak a common language. Whilst it was noted that the couple had met before their marriage, and indeed on the judge's findings had been living together from 2013 onwards, the appellant had entered the United Kingdom in 2008 and have merely stayed without lawful leave or without being in any relationship that would have entitled him to remain until 2013.

12. Given the circumstances there was sufficient within the evidence to justify the respondent questioning whether this was a genuine relationship and to investigate by asking that the parties attend for marriage interviews.

13. I would note the cases of Papajorgi and the case of Collins Agho [2015] EWCA Civ 1198 both of which were relied on by the appellant representatives. The cases were decided under the regulations as they appeared prior to January 2014.

14. The Regulations have altered. Within the refusal letter reference is been made to the Immigration (EEA) Regulations 2006 as amended specifically Regulation 20B, which states: –

    20 B 1) this regulation applies when the Secretary of State—

    a) has reasonable doubt as to whether a person ("A") has a right to reside under regulation 14 (1) or (2) ; or

    b) wants to verify the eligibility of a person ("A") to apply for documentation issued under Part 3

    2) The Secretary of State may invite A to –

    a) provide evidence to support the existence of the right to reside, or to support an application for documentation under Part 3, or

    b) attend an interview with the Secretary of State

    3) If A purports to be entitled to a right to reside on the basis of the relationship with another person ("B"), the Secretary of State may invite B to

    a) provide information about their relationship with A; or

    b) attend an interview with the Secretary of State .

15. On the basis of the regulations as they now appear, the respondent is entitled where an individual is applying under part 3 for a residence document to conduct an investigation to verify whether the individual is entitled to a residence card. The regulations as they now appear seem to go further than originally appeared in the directives.

16. However as indicated above the respondent had sufficient grounds for conducting an investigation given the appellant's personal circumstances including his immigration history and given the fact that the parties did not share a common language.

17. The 2nd ground of appeal suggests that the judge was wrong to place the burden upon the appellant to prove that this was not a marriage of convenience. The judge in paragraph 46 and 47 has set out material parts of the judgment in the case of Papajorgi and has properly identified how judges should approach the burden of proof. The appellant's representative accepted that the judge has properly cited the legal principles laid down in the case law.

18. The judge makes a specific finding in paragraph 85 that this is a marriage of convenience. The judge in the paragraphs running up to paragraph 85 has given valid reasons for finding that the appellant and his spouse have acted dishonestly, given testimony which they knew to be untrue in an effort to

bolster the appellant's claim. The sponsor had even acknowledged in giving evidence that she had lied to the Home Office (see paragraph 24).

19. The judge has properly applied the guidance in the case law and has properly approached the issues as to where the burden of proof lay and in what circumstances the burden of proof shifted. It is clear that the judge has made a clear and unequivocal finding that this was a marriage of convenience. The judge has properly justified that conclusion.

20. Finally it is suggested that the judge has erred in his approach to the evidence of the appellants witnesses. The judge has in paragraph 80 of the decision indicated that the appellant's friends gave evidence in support of the appeal. It is suggested that the judge has given no valid reasons for not giving weight to the evidence.

21. First and foremost the matter of weight to be applied to evidence is entirely a matter for the judge.

22. Secondly one has to consider the nature of the evidence given by the individuals. The judge had noted that one of the witnesses had been present at the wedding but lived some distance away although allegedly they saw the appellant and his spouse at weekends. The other witness lived 15 or 16 miles away from the appellant and his spouse. The evidence of the individuals did not give any detail or substance to the claim that this was a genuine marriage merely asserted that they believed it to be a genuine marriage. In the light of that the judge was entitled to give their evidence such weight as he considered appropriate. He examined the circumstances in which they knew the appellant and gave a valid reason in respect of each case for not giving significant weight to the evidence.

23. In the circumstances the judge was entitled to deal with their evidence in the manner that he did.

24. For the reasons set out there is no error of law. I uphold the decision of first-tier Tribunal Judge.

Notice of Decision

25. I dismiss the appeal by the Appellant.

Signed Date 15.6.17

Deputy Upper Tribunal Judge McClure