



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/05489/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 20<sup>th</sup> July 2018

Decision & Reasons Promulgated  
On 21<sup>st</sup> August 2018

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

AMOS GERMAIN JUNIOR FONGANG  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: No attendance

For the Respondent: Ms Kiss, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Cameroon born on 12 August 1994. His appeal against the Respondent's decision to revoke an EEA residence card under Regulation 22 of the EEA Regulations 2006 was dismissed by First-tier Tribunal Judge Hembrough on 14 July 2017.
2. The reasons for revocation letter dated 30 June 2016 refers to a joint investigation between the Home Office, DWP and HMRC into an organised crime network [OCN]

involved in the facilitation of bogus, proxy and customary marriages between primarily French nationals and non-EU citizens and widescale benefit fraud: Operation Boromo. Several of those known to be involved had received prison sentences ranging from twelve months to six years. It was asserted that the Appellant's marriage to Marie-Erline Julien, the Sponsor, on 4 August 2014 was facilitated by the OCN. It was, therefore, a marriage of convenience and was not genuine and subsisting. In addition, it was asserted that the Sponsor was not a qualified person under Regulation 6.

3. Permission to appeal was initially refused by First-tier Tribunal Judge Alis on 24 December 2017 for the following reasons:
  - "2. The judge was concerned with Regulation 20(2) of the 2006 Regulations and accepted the respondent had failed to demonstrate the marriage was a marriage of convenience but as he was concerned with an in-country appeal he was concerned with whether the Appellant had ceased to have right to remain here at the date of the appeal. The judge set out in some detail why he was not satisfied the marriage was subsisting from [37] onwards. Having concluded the EEA national was no longer exercising treaty rights he dismissed the appeal.
  3. The grounds run to 28 pages and unnecessarily go into too much detail with many quotes from the decision itself and references to none reported decisions for which no permission to adduce in evidence had been sought. The grounds can be summarised as follows:
    - a. The judge applied the wrong burden of proof when in the case of revocation of a residence card.
    - b. Misapplying section 85(4) of the Immigration, Nationality and Asylum Act 2002.
    - c. Procedural unfairness.
  4. The first ground raised concerned whether the judge applied the correct burden of proof. The grounds argue that as the judge concluded the marriage was not one of convenience he should have then conclude (sic) the marriage was subsisting or alternatively misdirected himself as to which party bore the legal burden of proof. The judge concluded that the EEA national was no longer exercising treaty rights and discussed this in paragraph [38] and [39] of the decision. Having decided he was seized of all issues the judge concluded the EEA national was not exercising treaty rights and his decision to revoke the Appellant's residence card must naturally follow that decision. The lengthy grounds do not engage with this finding and concentrate on the marriage of convenience issue which the judge had already dealt with. Whilst the grounds make for an interesting read they failed to address the core finding made by the judge namely the EEA national was no longer exercising treaty rights in this country and therefore the Appellant's right to reside ceased.

5. Dealing with grounds 3(b) I note this was an in-country appeal. In SGC and Others [2005] UKAIT 00179 the Tribunal said that in an EEA appeal under the 2002 Act the relevant date is the date of hearing. The relevant date for the judge is the date of hearing. In Boodhoo and Another (EEA Regs: relevant evidence) [2013] UKUT 00346 (IAC) the Tribunal held that neither Section 85A of the Nationality, Immigration and Asylum Act 2002 nor the guidance in DR (Morocco)\* [2005] UKAIT 38 regarding the previous version of Section 85(5) of that Act had any bearing on an appeal under the Immigration (European Economic Area) Regulations 2006. In such an appeal, a Tribunal has power to consider any evidence which it thinks relevant to the substance of the decision, including evidence concerning a matter arising after the date of the decision.
6. Finally, Ground 3(c) has no merit. The judge was entitled to clarify matters and where he felt an adjournment was appropriate the correct approach would be to offer one. This is what the judge did at the beginning of the hearing and the offer was declined by the Appellant's representative."
4. Permission was granted by Upper Tribunal Judge Allen on 8 May 2018 on the grounds that they were arguable issues in this case concerning the burden of proof.
5. The Appellant did not attend the hearing. I am satisfied that the notice of hearing was properly served at the Appellant's home address and the address that he gave on the notice of appeal. It was also served on his representative who has given a home address in London. There was no telephone number stated on the notice of appeal and therefore enquiries made on the day failed to establish why there was no attendance by the Appellant or his representative. I am satisfied that the notice of hearing was properly served and in the interests of the overriding objective I proceeded in the Appellant's absence.
6. The grounds of appeal are lengthy (77 paragraphs). In summary the relevant paragraphs, relating to the burden of proof, are 54 and 58:
  - "54. It was not open to First-tier Tribunal Judge Hembrough to require, elicit or probe any evidence on the part of the Appellant. It is submitted that the First-tier Tribunal Judge materially erred in law in requiring evidence from the Appellant, testing such evidence and drawing adverse inference as to lack of evidence."
  - "58. In summary First-tier Tribunal Judge Hembrough:
    - (a) misdirected himself as to which party bore the legal burden of proof in relation to the qualified person issue;
    - (b) wrongly considered the issue of whether the marriage was genuine and subsisting to be discreet from, and fell to be determined separately from, the marriage of convenience issue;

- (c) in the alternative misdirected himself as to which party bore the legal burden of proof in relation to the issue of whether the marriage was genuine and subsisting; and
- (d) erred in requiring and testing evidence from the Appellant in the circumstances."

7. The judge made the following findings:

- "12. I noted however that in addition to the question as to whether the marriage was one of convenience issues had also been raised in the reasons for revocation letter as to whether the marriage was subsisting and as to whether the Sponsor was a qualified person. I also noted that there was no witness statement from the Sponsor who was not in attendance at the hearing and that whilst I had been presented with copies of her P60s for the tax years ended 2015 to 2017 it might be arguable that the level of earnings shown was 'marginal or ancillary'. Her stated earnings for the year ended 2015 were £1,942.40, in 2016 they were £4,303.26 and in 2017 they were £5,980.48."
- "16. I indicated that I was prepared to adjourn the hearing in order to give the Appellant the opportunity to gather further evidence so as to address the issues in relation to the subsistence of the marriage and the continued exercise of treaty rights by the Sponsor proposing that in doing so I would reserve the matter to myself. Mr Sobowale then requested a short adjournment to take instructions. On the resumption he indicated that the Appellant did not wish for the hearing to be adjourned and wished to proceed on the basis of the available evidence."
- 17. In response to my enquiry as regards the Section 120 notice Mr Sobowale said that he was unaware as to whether the Appellant had in fact lodged any separate asylum claim and in the context of this appeal no reliance was placed upon asylum grounds or Article 3 of the ECHR."
- "29. When the Appellant was cross-examined by Mr Lumb he confirmed that the Sponsor had given up her employment when she travelled to Martinique. A P45 included in the papers submitted showed that she had left on 8 May 2017. It was put to him that the Sponsor's pay slip for the period 13 March 2017 to 26 March 2017 showed that she had worked 103 hours which was not consistent with his evidence that she worked part-time. He said that he was busy with his own work and was not always there to monitor what time she left the house and what time she returned."
- "35. I have found this to be a perplexing appeal in many respects. However as was accepted by Mr Lumb the Respondent has brought forward no documentary (sic) to substantiate the assertion that the marriage between the Appellant and the Sponsor was one of convenience. I agree with the submission made by Mr Sobowale with reference to the decision in Papajorgji and Rosa that the Respondent has not come close to discharging the burden of proof upon her in that regard. In so far as this was relied upon

as a reason for revocation of the residence card issued to the appellant on the 26 February 2015 I find the decision was not in accordance with the 2006 Regulations.

- “37. I found the Appellant’s evidence regarding the subsistence of the marriage to be unconvincing and whilst he produced some documentary evidence which appears to show that the Sponsor has been living and working in the UK and that they have shared the same address. There was no cogent evidence of a subsisting relationship. No personal correspondence, birthday or anniversary cards, texts or email messages or evidence of a pooling of resources. There was no joint bank account and the only documents that bear both of their names are the council tax bills (which simply show that they occupied the same address with others) and a letter from Student Finance England the content of which was not explained. Whilst he submitted evidence of his travel to Belgium in 2013 the ticket was in his sole name for “one young person” as was the associated travel insurance. There was no documentary evidence to show that he had travelled in the company of the Sponsor.
38. Of perhaps more importance is the absence of any supporting witness statement from the Sponsor who it is said departed the UK on 10 May 2017. Whilst I appreciate that the Appellant was in detention between 9 June 2017 and 4 July 2017 he and his lawyers had access to e-mail and a telephone. It is apparent from the documents before me that the Sponsor has an e-mail account with Yahoo. It would therefore have been possible to have obtained even a short statement in which she confirmed, the subsistence of the marriage, the reasons for her absence from the UK and her intention to return. There was nothing. Not even a copy of her father’s death certificate. There was no evidence from the housemates in Norwich who it is to be anticipated could have confirmed the subsistence of the relationship at least prior to May 2017. I also note that my offer of an adjournment to allow the Appellant time to obtain documentation to address the issues of subsistence and qualification was declined.
39. The Appellant’s evidence was that he did not know when the Appellant was likely to return. Her P45 shows that she gave up her job on May 2017. This I find is inconsistent with an intended temporary absence.
40. The Sponsor is not presently exercising treaty rights in the UK. There was no evidence before me that she had a permanent right of residence in the UK so as to preserve her rights whilst temporarily absent.
41. Looking at the evidence before me in the round I find that I have not been satisfied to the required standard that as at the date of the hearing the marriage between the Appellant and the Sponsor was subsisting or that she was a qualified person within the meaning of Regulation 6. It follows that I have not been satisfied that the Appellant continues to have a right to reside in the UK. I therefore dismiss the appeal under the 2006 Regulations.

42. The Appellant has been served with notice of intention to remove him from the UK. Whilst a Section 120 notice was served placing reliance upon asylum grounds Mr Sobowale placed no reliance upon the same in the context of this appeal. The Article 3 ECHR ground of appeal was not pursued either.”
8. The judge then dealt with the Article 8 claim and dismissed the appeal under the Immigration (EEA) Regulations 2006 and on Article 8 grounds. There was no challenge to the judge’s conclusions on Article 8 in the lengthy grounds of appeal.
9. Regulation 6 was specifically raised in the refusal letter. The Appellant’s right to reside was dependent on his EEA Sponsor exercising treaty rights. It is clear from the Appellant’s own evidence and the Sponsor’s P45 that at the date of hearing the Sponsor had left her employment and the UK. She was not a qualified person. The Appellant had no right of residence under the EEA Regulations 2006. Accordingly, there was no material error of law in the judge’s decision.
10. Permission was granted only in relation to ground 1: the burden of proof. Permission was properly refused on grounds 2 and 3 for the reasons given by Judge Alis in his decision of 24 December 2017 (see above). There was no error of law in the judge’s application of section 85(4) of the 2002 and no unfairness in the conduct of the appeal.
11. There was no material error of law in the judge’s application of the burden of proof. It is clear from paragraph 35 of the decision (see above) that the judge found the Respondent had failed to show that the marriage was one of convenience. He then went on to consider whether the Appellant ceased to have a right to reside in the UK for the other reasons given in the revocation letter. His findings that the Sponsor was not a qualified person and the marriage was not genuine and subsisting were open to him on the evidence before him. The judge was obliged to consider the evidence at the date of hearing and the judge gave the Appellant ample opportunity to produce any further evidence.
12. I find there was no material error of law in the decision dated 14 July 2017. Accordingly, I dismiss the Appellant’s appeal.

**Notice of decision**

**Appeal dismissed**

**No anonymity direction is made.**

*J Frances*

Signed  
Upper Tribunal Judge Frances

Date: 9 August 2018

**TO THE RESPONDENT**  
**FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

*J Frances*

Signed  
Upper Tribunal Judge Frances

Date: 9 August 2018