



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/01735/2016

THE IMMIGRATION ACTS

Heard at Field House

**Determination
Promulgated**

&

Reasons

On Monday 29 January 2018

On Wednesday 31 January 2018

Before

UPPER TRIBUNAL JUDGE SMITH

Between

CHARLES OGHENEVWOGAGA OROGUNCHA

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Not in attendance nor represented

For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity direction was not made by the First-tier Tribunal. There is no reason in this case to make such a direction.

DECISION AND REASONS

Background

1. The Appellant appeals against a decision of First-Tier Tribunal Judge A A Wilson promulgated on 10 May 2017 (“the Decision”) dismissing the Appellant’s appeal against the Secretary of State’s decision dated 29 January 2016 refusing to issue the Appellant a residence card as confirmation of a right of residence under EU law as the former spouse of an EEA national exercising Treaty rights in the UK.
2. The Appellant is a national of Nigeria. He came to the UK as a student in 2007. He successfully applied for a residence card as the spouse of an EEA national exercising Treaty rights on 12 January 2010. The Appellant was divorced from his EEA spouse, the decree absolute being dated 27 March 2015. He made an application on 21 July 2015 for a residence card on the basis of a retained right of residence. That application led to the decision under appeal.
3. The Respondent refused the application on the basis that the relationship was a marriage of convenience. The Judge agreed with that assessment and dismissed the appeal for that reason.
4. The Appellant raised six grounds of challenge to the Decision. I do not need to deal with them all in light of what was said by First-tier Tribunal Judge Brunnen when granting permission in his decision dated 24 November 2017 as follows:-
 - [3] The grounds on which permission to appeal is sought make general submissions in paragraphs 1 and 2 which do not identify any arguable error of law.
 - [4] Paragraph 3 is concerned with the Respondent’s contention that the Appellant had failed to respond to two invitations to be interviewed. It is arguably not clear from paragraph 7 of the Decision what finding the Judge made on this issue or where he considered the burden of proving this contention to lie.
 - [5] Paragraphs 4,5 and 6 appear to have no arguable merit. The reference in paragraph 4 to paragraph 2 of the Decision fails to understand that paragraph 2 is merely a recitation of the Respondent’s case.
 - [6] Although the grounds do not raise it, there is an obvious arguable error of law in paragraph 9 of the Decision, in which the Judge stated that the burden of proving whether the marriage was a marriage of convenience lay on the Appellant. This is contrary to *Rosa*, which the Judge had cited at paragraph 6.
 - [7] The interests of justice require that time for applying be extended.”
5. I pause to note, in relation to [7] of Judge Brunnen’s decision that the application for permission to appeal was made by the Appellant’s solicitors with a covering letter dated 26 May 2017 but date-stamped

as filed on 30 May 2017. The deadline was 24 May 2017. It does appear from the papers though that the application was sent by fax on 27 May 2017. The reason for the extension was that the Decision was not received until 15 May 2017 but no explanation was given why the application could not have been made thereafter in time. Nothing turns on that though since Judge Brunnen expressly extended time.

6. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.
7. Before turning to my decision, there is one further factual matter which I need to deal with. The Respondent has informed the Tribunal in her Rule 24 response that the Appellant has voluntarily departed the UK. Mr Duffy informed me that this was on 14 September 2017 and he handed me an electronic record confirming this. There has been nothing received from the Appellant's solicitors to this effect so far as I can see.
8. Although the Rule 24 response indicates that the appeal should therefore be deemed to be abandoned, Mr Duffy accepted that, as this is an appeal governed by the Immigration (European Economic Area) Regulations 2006, section 92(8) Nationality, Immigration and Asylum Act 2002 does not apply. Accordingly, there is no abandonment by operation of statute.
9. The Appellant has, therefore perhaps unsurprisingly, not attended the hearing. However, he had instructed solicitors in this matter (Moorehouse solicitors). His solicitors lodged the application for permission to appeal which led to the hearing before me. They have not informed the Tribunal (so far as I can see) that they are no longer acting or are without instructions. However, they did not attend the hearing and there has been no application for an adjournment or explanation for non-attendance.
10. In any event, the Appellant has not supplied the Tribunal with any updated address following his departure from the UK. It is therefore likely that he no longer intends to pursue this appeal. However, since there is no deemed abandonment by operation of statute, I determined that the appropriate course was to continue with the hearing in the Appellant's absence and to determine the two grounds which have been found to have arguable merit.
11. Mr Duffy suggested that, if I find a material error of law, the appropriate course would be to issue a notice requiring the Appellant or Moorehouse solicitors to provide a current address for the Appellant within a fixed period in default of which the appeal would be struck out. I bear in mind that this course is open to me if I do find a material error of law.

Decision and Reasons

12. The focus of the two grounds in relation to which permission is granted are paragraphs [7] to [9] of the Decision. Those read as follows:-

“[7] The respondent made a clear assertion in their bundle and in their decision-making process that two letters had been sent to the appellant which was denied by him. In evidence he stated that all correspondence would have gone to his solicitors and he had confidence that they had not received such letters. Totally inappropriately the solicitors dealt with the matter by way of a comment in their skeleton argument. If the solicitors firm wish to give evidence in a formal statement from the partner exhibiting the record of incoming post would have been required. However the appellant disputed the fact that posting [sic] in his grounds of appeal. No copy of the actual letter(s) was included in the respondent’s bundle.

[8] I also have the appellant’s oral evidence which I have summarised above. After concern raised by the respondent it is surprising that no further evidence of their relationship was lodged. Overall assessing all the evidence before me I am satisfied that the respondent has discharged the initial burden requiring the appellant to show that the marriage is not one of convenience. The appellant’s approach of simply denying letters were not sent whilst logically has the attraction of being impossible to prove a negative has to be coupled with an assessment of all the evidence before me including the appellant’s oral evidence. I am satisfied the appellant’s evidence lacks any coherence or gives a wider picture of a marriage stated to have lasted 6 years that gives me any confidence in the appellant’s oral evidence at all. I find that the respondent has discharged the burden set out in Rosa summarised above.

[9] In making this decision as to whether it is a marriage of convenience or not the burden of establishing that a balance of probabilities [sic] lies on the appellant. I have considered a number of matters firstly the checklist of matters referred to in *Papajorgji*. While there is no evidence as to the sponsor’s ability to speak English although I presume that there was a level of competence, it is more noteworthy that there is no evidence as to a continuing relationship and the bill and bank evidence seems to end when the initial residence card was granted. Given that it is even more strange that pay slips and P60s for a number of years was given by her brother but with no further collateral evidence as to where the brother lived or how the appellant could have maintained contact with him. I am not satisfied that the sponsor left the appellant in 2015 and all the evidence leads me to the conclusion that there was no effective in real [sic] marriage in this matter. I find that the marriage was one of convenience.”

13. I deal first with the lack of a finding by the Judge in relation to whether the Appellant was notified of the Respondent’s requirement that he attend an interview. The Appellant’s failure to attend the interview was one of the aspects relied upon by the Respondent for her contention that the marriage was one of convenience.

14. I accept that there is no express finding in this regard. However, when paragraphs [7] and [8] are read together, it is clear that the Judge considered the evidence produced on behalf of the Appellant to be unsatisfactory. Although he noted also the absence of evidence from the Respondent in the form of the letters themselves, he relied upon the clear statement in the bundle and the refusal letter that such letters were sent. The inference which I draw from what is said at [7] and [8] of the Decision is that the Judge accepted that the letters were sent and was not satisfied by the Appellant's evidence that they were not received.
15. Even if I am wrong about that, it is difficult to see how the absence of a finding could be material. Although this was one of the factors relied upon by the Respondent, there were others, such as the lack of evidence of a marital relationship continuing for six years. The Judge makes plain at [8] of the Decision that the lack of coherence in the Appellant's evidence and the lack of evidence of a marriage lasting six years led him to conclude that the Respondent had discharged the evidential burden on her. Any failure to make an express finding on the interview letters is immaterial to that conclusion.
16. The second ground has slightly more merit. Before dealing with that ground, though, I note that this was not a ground relied upon at all by the Appellant. It is one identified by Judge Brunnen. It is perhaps the case that the Appellant, as I did, read the first sentence of [9] of the Decision as being a typographical error in light of what follows. The Judge has clearly had regard to the relevant case-law. True it is that he does not cite from Rosa beyond the extract dealing with the initial burden on the Respondent. However, he also cites Papajorgji and I find it difficult to conceive that, having alluded to both authorities which deal with the relevant burdens, he has applied the wrong burden. It may be that the Judge meant to say that the burden is on the Respondent and that this is a typographical error.
17. I also considered the possibility that the Judge might have intended to consider the evidential burden which, in light of his conclusion in [8] of the Decision, had shifted to the Appellant. That is though difficult to square with the reference to the standard being one of "balance of probabilities".
18. However, even if I am wrong about this being a typographical error, I have concluded in light of the evidence, that this is not a material error. I refer in this regard to the Judge's recitation of the Appellant's evidence at [5] and [6] of the Decision:-

"[5] The appellant was called by his representative and gave oral evidence. The appellant's bundle in fact contained very little new evidence that had not already been supplied to the respondent as part of the appellant's application. There are P60s for the sponsor from 2009 through to the tax year ending April 2015. There are also wage slips ending again in March 2015 and some bank statements.

The bank statements end in May 2011. There are BT bills for the sponsor ending in 2010.

[6] The appellant's evidence relating to his marriage and how it ended was not detailed. He seemed uncertain even when the sponsor had finally moved out saying it did however occur in 2015. A copy of the appellant's divorce petition and the sponsor's acknowledgement of service stating her address was not part of his bundle. He stated that he was not in contact with his ex-wife. As to how various tax and wage documents became available he stated that he had obtained that from her brother. However he no longer had any contact with him. The sponsor is a French citizen but he could not remember whereabouts in France she came from she regularly visited it stated her brothers her other brothers sisters and parents [sic] that he had never accompanied her for a visit nor had the family visited him. The only reason for that being "financially a bit tough", no family member had come to her wedding except her brother who lived in the United Kingdom."

19. I have reviewed the evidence which was before the Judge. The Appellant's own statement is a collection of assertions, mainly directed at the Respondent's refusal letter. The most that is said about the relationship is this:-

"[4] That I met my ex spouse in December 2008 in a friend's party and we formed relationship which developed into a more committed relationship.

[5] That we got married on 26th November 2009 and we continually lived together as a couple and our marriage subsisted until we got divorced on 27th March 2015"

The latter sentence is in itself an odd assertion given that divorce signals an irretrievable breakdown of a marriage. Further, as the Judge noted, there is no evidence of the grounds for divorce which, if not based on adultery or unreasonable behaviour, would include some period of separation prior to divorce. The Appellant was apparently unable to say when in 2015 his spouse had moved out.

20. The documentary evidence produced does not take matters further. There is one document addressed solely to the Appellant dated 2013 at the address which he says he shared with his wife. That is a notice of appointment from a hospital. I also note that the Appellant's address as given to this Tribunal was (until after the application for permission to appeal) the address at which he says he lived with his wife. The payslips in her name bear that address. There are bank statements and bills in her sole name but as the Judge observed most of those documents are dated 2010/2011.

21. There are no documents evidencing any joint financial commitments. There are no photographs of the couple, no evidence from their friends confirming the relationship, no messages or cards passing between them.

22. In short, even if the evidence is capable of showing that for at least part of the period 2010 to 2015 they lived at the same address, it is insufficient to establish that they did so as man and wife. That evidence is certainly insufficient to satisfy the evidential burden on the Appellant of showing that the marriage was not one of convenience.
23. For those reasons, even if the Judge did err in his application of the burden of proof at [9] of the Decision, I am quite unable to accept that this error is material.
24. For the above reasons, I am satisfied that the Decision does not contain a material error of law. I therefore uphold the Decision.

DECISION

I am satisfied that the Decision does not contain a material error of law. I uphold the decision of First-tier Tribunal Judge A A Wilson promulgated on 10 May 2017 with the consequence that the Appellant's appeal stands dismissed

Signed
Upper Tribunal Judge Smith



Dated: 30 January 2018