



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

Appeal Numbers: IA/47666/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 15 May 2014**

**Determination  
Promulgated  
On 23 May 2014**  
.....

**Before**

**LORD BANNATYNE  
UPPER TRIBUNAL JUDGE PITT**

**between**

**CHINEDU KEVIN UDEBUALA**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Nwaekwu of Moorehouse Solicitors

For the Respondent: Mr Avery, Senior Home Officer Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a citizen of Nigeria and he was born on 9 June 1985.
2. The appeal is against the decision promulgated on 29 January 2014 of First-tier Tribunal Judge Sweet which dismissed the appeal against the respondent's decision of 29 October 2013 to refuse to issue a residence card as confirmation of a right to reside in the United Kingdom (UK) as the spouse of an EEA national exercising Treaty rights.
3. Judge Sweet found that the appellant had entered into a marriage of convenience.

4. The grounds can be summarised thus:
  - a. Procedural unfairness arose where the allegation of a marriage of convenience was made only in the submissions of the Home Office Presenting Officer (HOPO)
  - b. The First-tier Tribunal judge did not apply the correct legal tests from Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038(IAC) for assessing a marriage of convenience
5. The appellant is correct to indicate that the first formal notice that the respondent's position was that the marriage was one of convenience came in the oral submission of the HOPO; see [33] of the determination.
6. In our view that does not give rise to procedural unfairness, however. Where a new issue arises at a hearing, from the evidence given or for other reasons, it is open to both sides to seek to reformulate their case. If that occurs, the other party can object or ask for time or a longer adjournment to deal with the new point. Mr Nwaekwu conceded that here there was no application for an adjournment or any objection to the submission made by the HOPO. On the contrary, [35] of the determination shows that counsel for the appellant took the point and made submissions on it. Both parties addressed the judge on whether a marriage of convenience had taken place and it was manifestly open to him to proceed to determine the issue.
7. Mr Nwaekwu's reliance on RM (Kwok On Tong: HC395 para 320) India [2006] UKAIT 00039 to support his arguments on procedural unfairness appeared to us to be misconceived given that it confirms that an "appeal is not limited to the issues raised in the Notice of Refusal" and reflects our thinking above regarding the potential for an adjournment if a new issues arises at a hearing.
8. As regards the second ground, the appellant is also correct to point out that the First-tier Tribunal did not set out in terms that part of the ratio of Papajorgji relating to the burden of proof in cases where the question of a marriage of convenience arises. At [14] of Papajorgji the Tribunal expressed it thus:

"Not every applicant needs to prove that his marriage is not one of convenience. The need to do so only arises where there are factors which support suspicions for believing the marriage is one of convenience. Translated into the technical language of the English law of procedure and evidence, that means that there is an evidential burden on the respondent. If there is no evidence that could support a conclusion that the marriage is one of convenience, the appellant does not have to deal with the issue. But once the issue is raised, by evidence capable of pointing to a conclusion that the marriage is one of convenience, it is for the appellant to show that his marriage is not one of convenience."

9. Mr Nwaekwu was not able to take us to any part of the consideration of First-tier Tribunal Judge Sweet, however, that shows that he did not have the correct framework in mind when deciding on whether a marriage of convenience had taken place. Mr Nwaekwu conceded that the general statement of the burden and standard and proof set out at [36] was not objectionable. There was clearly evidence supporting the respondent's concern that a marriage of convenience had taken place and, indeed, paragraph 21 of the grounds goes as far as to concede that another judge could have reached the same decision on the evidence. We did not find that a material error had been identified.

### Decision

10. The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed:   
Upper Tribunal Judge Pitt

Date: 15 May 2014