



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

Appeal Number: IA/47150/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 8 December 2014**

**Decision and Reasons Promulgated  
On 15 January 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**YOUNES MIMOUN  
(Anonymity Direction NOT Made)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr P Nathan, Counsel, instructed by BMAP  
For the Respondent: Mr T Melvin, Home Office Presenting Officer

**DECISION AND REASONS**

**The Appellant**

1. The Secretary of State made an application for permission to appeal but for the purposes of this appeal I shall refer to the parties as they were at the time before the First-tier Tribunal.

2. The appellant is a citizen of Algeria born on 21 October 1977 and he appeals against the decision of the respondent dated 17 October 2013 to refuse further to the provisions of Regulation 2 of the Immigration (European Economic Area) Regulations 2006 (the EEA Regulations) his application dated 9 March 2013 for a residence card as confirmation of a right to reside in the UK. The respondent considered the appellant's marriage to Ana Marina Conceicao Lopes was a marriage of convenience and further, that the qualifying national Miss Lopes had not provided sufficient evidence that she was economically active in the UK at the time of the application and thus a qualified national further to Regulation 6 of the EEA Regulations. The appellant and sponsor were married in June 2003.
3. The immigration history was recited by First-tier Tribunal Judge Onoufrio who allowed the appeal on 12 September 2014. The appellant claimed he entered the UK on 28 July 2001 without leave and on 17 October 2003 he married an EEA national. He made subsequent applications for residence cards which were refused and on 19th December 2011 he sought a permanent residence card which was also refused.
4. The respondent's application for permission to appeal was on the following basis. The first ground was that the judge had failed to apply **Boodhoo and Another** (EEA Regulations relevant evidence) [2013] UKUT 00346 which confirmed that the Tribunal must consider the facts as at the date of the appeal hearing and that "at least for an in country appeal Section 85(4) makes clear that the Tribunal must consider all relevant evidence including matters arising after the date of the decision and must determine the facts as at the date of the hearing **LS (Post decision evidence) Gambia** UKAIT 00085.
5. Further it was submitted that the judge had failed to provide adequate reasons for accepting that the appellant was in a genuine relationship.
6. Permission to appeal was granted.
7. I find that although the issue of a marriage of convenience under Regulation 2 of the EEA Regulations was raised in the reasons for refusal letter by the respondent, the judge tackled this issue clearly at paragraph 16 and stated that
 

*"It is highly unlikely the appellant would have received so many documents from his wife spanning such a long period if they were not genuinely married together. Furthermore there was the oral evidence of his three co-tenants who all appeared to be credible witnesses. Therefore, taking into account the date and length of the marriage, the photographic and documentary evidence and the oral evidence I am satisfied that this was a genuine marriage and not one of convenience."*
8. He gave sufficient reasoning in this succinct paragraph. There was no suggestion by the respondent that the marriage certificate produced was not genuine and the judge having accepted that the marriage was genuine appeared to accept that the marriage was one which was valid and not, at the relevant time, one of convenience.
9. I note that the appellant's spouse had subsequently sponsored an application with another party but this does not indicate that *at the time the appellant married* that the

respondent was not free to do so and I am not persuaded that the respondent has discharged the burden of proof following Papajorgji (EEA spouse -marriage of convenience) Greece [2012] UKUT 00038 (IAC) that the appellant had entered a marriage of convenience at the date when the marriage was contracted. Papajorgji confirms that there is no burden at the outset of an application on a claimant to demonstrate that a marriage to an EEA national is not one of convenience. There was no evidence that the appellant and sponsor had divorced. The facts as identified by the judge did not appear to shift the evidential burden to the claimant to address evidence justifying reasonable suspicion that it was a marriage of convenience.

10. I find that the judge has adequately addressed the issue of the marriage.
11. A further question was the relevant date for considering when the appellant's wife was someone who was exercising treaty rights. The judge addressed this issue at paragraph 18 and clearly stated: "There is no evidence at the date of the hearing that the appellant's wife was either self-employed or in employment." Nevertheless the judge found that at the date of the application the sponsor was in employment.
12. Mr Nathan submitted that Section 85(4) confirmed that the relevant date for the purposes of determining the appeal was the date of the decision (17<sup>th</sup> October 2013). The reasons for refusal letter stated that the sponsor had "not provided sufficient evidence that she [the sponsor] is economically active in the UK at the time of your application" (9<sup>th</sup> March 2013).
13. The judge specifically found that
 

*"There are various receipted invoices for work she has carried out for the period 31 July 2012 to 28 February 2013 which is for the period immediately prior to and just part the date of his application. His wife's invoices in fact go back to 31 August 2010. His wife's bank statements are not particularly helpful as none of them cover the period immediately prior to the application. There is however a profit and loss account dated 20 February 2013 prepared By Zakroon Financial Services showing total income from employment and self-employment of £8,555 and after allowances showing an income tax and Class 4 NIC liability of £216. There is also a self-assessment statement dated 11 December 2012 shortly before the date of the application. Therefore whilst her income was not substantial clearly the appellant's wife was in employment and particularly self-employment at the time of the appellant's application and therefore she was an EEA national of Portugal exercising her treaty rights."*
14. The judge concluded that 'Accordingly as a family member of a qualified person i.e. her spouse entitles the appellant to an initial right of residence under Regulation 13(2) of the 2006 Regulations'.
15. As Mr Nathan submitted, the key date is the date of the decision and in fact the date of decision was 17th October 2013. I would agree. As Boodhoo establishes

(1) Neither section 85A of the Nationality, Immigration and Asylum Act 2002 nor the guidance in DR (Morocco)\* [2005] UKAIT 38 regarding a previous version of section 85(5) of that Act has 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 which concerns a matter arising after the date of the decision.*

16. I therefore find an error of law.
17. On a trawl through the documentation Mr Nathan confirmed that the references to challenging the genuine relationship was misconceived. There simply needed to be a marriage and I therefore preserve the references in the judge's determination to this fact.
18. I turn to the question of whether the sponsor was a qualified national at the relevant time. The fact is that the judge accepted that between 2012 to 2013 there was sufficient evidence to show that the appellant's ex-spouse was a qualifying national. I note that there was before the First Tier Tribunal further independent documentary evidence from HMRC for the tax years 2008/2009, 2009/2010, 2010/2011 and 2011/2012 showing that the appellant's spouse was in fact earning and from the sums recited in the HMRC documentation not just a marginal amount, and paying tax (by virtue of the documentary evidence) in each of those years. The appellant and sponsor had been married since 2003 and living in the UK. I accept that she could be classified over those five years, including the findings of the judge in relation to 2012/2013, as a worker and exercising her treaty rights. The application made by the appellant was for a residence card only and not for permanent residence although I record that it would appear that the appellant has been residing in the UK as the partner of a qualified national exercising treaty rights for the period of 5 years. I have noted Mr Melvin's written responses but as the issue is declaratory I find that the appellant can show that he has been married to an EEA national who has exercised her treaty rights as a qualified national and would be qualified for a permanent residence card under Regulation 15(1)(b) of the EEA Regulations.
19. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007), but preserve the findings made in respect of earnings and the marriage, and I remake the decision under section 12(2) (b) (ii) of the TCE 2007 and I allow Younes Mimoun's appeal for the reasons given above.

## Order

Appeal Allowed.

Signed

Date 13<sup>th</sup> January 2015

Deputy Upper Tribunal Judge Rimington