Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00497/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons promulgated**
On 24 July 2017	**On 31 August 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

GABRIEL KOWADJO BONI DADIE
(AKA JUSTIN OKIERE N'GATA)
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K Joshi of A. Bajwa & Co Solicitors
For the Respondent: Mr C Avery Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Plumptre ('the Judge') promulgated on 22 February 2017 in which the Judge dismissed the

appellant's appeal, finding it be proportionate to deport the appellant from the United Kingdom.

Background

2. The Judge records that the appellant is a citizen of the Ivory Coast born on 25 May 1997, but also provides evidence of criminal convictions all in the name of Justin Okiere N'Gata a Belgium national born on 25 December 1976 together with a Change of Name Deed referred to at [2] of the decision under challenge.
3. The Judge noted the appellant may have entered the United Kingdom in either May 2000 or possibly February 1998. The Judge noted the appellant in his witness statement claimed he entered the United Kingdom at the later date aged 21 although the Home Office records also show he first claimed to have arrived on the earlier date.
4. The Judge notes the appellant's immigration history from [3] noting that on 26 March 2017 in the identity of N'Gata the appellant was convicted in his absence of conspiracy to obtain property by deception and sentenced to 5 years' imprisonment. On 29 September 2011, the appellant was issued with an Ivory Coast passport in the name appearing at the head to this decision and on 19 June 2012 married a Belgium national. On 10 July 2012, the appellant was granted a Residence Card in recognition of the right to reside in the United Kingdom as the spouse of an EEA national exercising treaty rights in the UK.
5. The appellant had written from HMP Canterbury to the respondent to support his claim to have been in the UK since February 1998 enclosing a copy of a Belgian passport. A series of letters were written in 2010. On 31 January 2013, the Belgian passport was sent to the Belgian Embassy by the Home Office to seek clarification as to whether or not it was genuine. The appellant claimed he is a Belgium national who would therefore be deported to Belgium. In February 2013, the Belgian Embassy confirmed the passport is a forgery.
6. On 25 March 2013, a notice of liability to automatic deportation as a non-EEA national was issued to the appellant although in his response to the Home Office the appellant maintained he is a Belgium national.
7. On 11 April 2013, the appellant was issued with a notice of restriction requiring him to report although he failed to report and all letters sent to his address were returned to the Home Officers undelivered. On 15 April 2016, the appellant was convicted at Woolwich Crown Court for possessing a controlled article for use in fraud and was sentenced to 16 weeks' imprisonment. The forfeiture and destruction of the false French driving licence he possessed was ordered and deportation recommended.
8. The appellant continued to maintain in 2013, through his then representatives, that he is a Belgium national whose identity was that set out above as the AKA name and that section 32 of the UK Borders Act 2007 did not apply to him.
9. The respondent made a deportation order in the name of Gabriel Kowadjo Boni Dadie dated 12 May 2015 in relation to which the appellant's current representatives, A. Bajwa & Co, made submissions to revoke the deportation order. On 23 September 2016, the respondent wrote to the appellant giving

reasons for the making of the deportation order and serving the signed deportation order on the same date. The previous deportation order signed and served on 18 May 2016 had been revoked. That was a deportation order made pursuant to the EEA Regulations 2006. The current deportation order is made pursuant to the UK Borders Act 2007.

10. The appellant appealed the decision on the basis that he fell within the exception to automatic deportation as a person whose removal from the United Kingdom would breach a Convention right – Article 8 ECHR, as deportation will be a disproportionate interference with his right to family life with his wife, a Belgium national, and his two sons born in 2005 and 2013.
11. Having set out procedural details and relevant legal provisions, the Judge noted at [38] that the appellant appeared in person at the hearing accompanied by his wife. Although A. Bajwa & Co were on file there was no appearance and no explanation for their non-attendance at that time. The appellant requested an adjournment to enable him to have more time to raise funds to pay for legal representation as he could not raise all the money the solicitors had asked him to pay for their attendance at the hearing.
12. The Judge noted in the same paragraph that in response to a question put to the appellant the appellant admitted he was a national of the Ivory Coast and that his true name and identity is Gabriel Kowadjo Boni Dadie, clearly indicating that assertions made to the contrary set out by the Judge were lies, including the letter from previous representatives Duncan Lewis dated 27 October 2008 challenging deportation on the basis of the appellants claimed Belgium nationality.
13. The Judge refused the adjournment request for the reasons set out at [42 – 45] and no arguable legal error is made out in the decision to proceed.
14. The Judge sets out findings of fact from [7] in relation to both the order for the appellant's deportation and the question of whether the appellant has entered into a marriage of convenience with the EEA national.
15. In relation to the order for the appellant's deportation the Judge's findings can be summarised as follows:

    a. The Judge initially approached the appeal on the basis the appellant is the family member as a spouse of a Belgium national. Whilst accepting the appellant was issued a Residence Card this was in the name of N'Gata when the respondent did not know the appellant's true identity which begs the question as to whether or not the appellant had entered into a marriage of convenience which is the respondent's case [67].
    b. The Judge found the appellant to be "a skilful liar, familiar with the use of forged documents, and well used to using and maintaining different identities - even as recently as his conviction in Woolwich Crown Court in April 2016 in the name of Justin N'Gata whilst he was simultaneously contesting deportation proceedings in his now claimed identity of Gabriel Kowadjo Boni Dadie, a national of Ivory Coast. I find as submitted by the Presenting Officer (to whom I am indebted for

very skilful cross examination in a factually complicated appeal), that the appellant has persistently and consistently deceived both the Home Office and the UK criminal courts about his true identity" [72].

c. The Judge gave weight to a questionnaire in which no reference was made to the appellant having any children in the UK. The questionnaire was submitted in April 2013 whereas at the hearing, by contrast, the appellant maintained he is the father of two children born and living in the UK [73].
d. The Judge finds the appellant has lived unlawfully in the UK throughout his stay from either 1998 or 2000. The appellant's stay prior to his marriage to Ms Kouassi on 19 June 2012 was at all times unlawful [74].
e. The appellant has not established any lawful residence and hence has no permanent right of residence since if his marriage did establish any right to reside he has only lived for some 3½ years only since his marriage. The respondent rightly considered whether deportation was justified on grounds of public policy [75].
f. The Judge considered the sentencing remarks [76–78] and the presentence report [79] before finding the appellant was involved in a conspiracy to steal a cheque book for the purpose of organised crime and gave weight to the sentencing remarks that this "was a very significant financial crime" [80].
g. The Judge did not accept the appellant lacked knowledge about the false French driving licence [81].
h. Whilst accepting the appellant pleaded guilty to possession of articles for use in fraud, the Judge gave weight to the fact those criminal proceedings were conducted in what the appellant now states is the false identity of Justin N'Gata and that the appellant never revealed his true identity to either the Woolwich Crown Court nor to his Probation Officer and continued to maintain the false identity with the probation services until at least November 2016 [82].
i. The Judge did not accept what Ms Kouassi said in her letter that the appellant had learned from his mistakes. The truth is that the appellant continued to maintain a false identity virtually up until the hearing before the Judge [83].
j. The appellant's offences of fraud are all dishonest and "show him to be well-versed in the use of and maintaining false identities, all of which go to the heart of immigration control and undermine the system of immigration control". The Judge gave weight to the fact the Bromley Magistrates Court considered the offence to be so serious that they directed the appellant be sentenced at the Woolwich Crown Court [84].
k. The Judge gave weight to the fact the presentence report states that the appellant had been granted a residence card as he had not disclosed his previous convictions and UKBA were not aware of his true identity, and that in May 2015 the Home Office made a decision to pursue a deportation order based on the appellant's previous

conviction and length of sentence and that since he had absconded and been wanted ever since [85].

l. At [87 -90] the Judge finds:

> 87. I find that the respondent has established that the appellant's deportation is justified on serious grounds of public policy and that he does represent a genuine present and sufficiently serious threat to the public to justify his deportation. In reaching this decision I have considered the guidance in Regulation 21(5) and find for the reasons set out below that the decision to deport is proportionate and that his offences of dishonesty and fraud represent a genuine present and sufficiently serious threat affecting one of the fundamental interests of society when applying the reasoning in **Tsakouridis [2011] 2 CMLR 11.**
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> 88. In reaching this decision, I have considered not just the appellant's criminal convictions which I accept as he stated are several years apart being 2007/8 and 2016 and that there are only two of them. I find there is a common theme of the use of forged documents and both convictions are in what he now claims to be a false identity of Justin N'Gata but I have also taken into account his conduct was living unlawfully in the UK for many years and that he obtained his residence permit under false pretences.
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> 89. I give weight to the fact that he has received NHS treatment in 2011 for a heart condition to which he was arguably not entitled and particularly not when claiming to be a Belgium national which he now states he never has been.
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> 90. Given the fact that the appellant was convicted at Woolwich Crown Court in his alternative and, according to him, false identity of Justin N'Gata, I find that the risk of further offending is not as low as the probation officer suggested given that he has been prepared to maintain two identities up until at least November 2016.

16. In relation to the question of whether the appellant entered into a Marriage of Convenience, the Judge's findings can be summarised in the following terms:

a. The Judge was sufficiently troubled by the evidence of Miss Kouassi to invite her to write a letter to the Judge for further consideration should she wish to do so, which she did [91].

b. The Judge gave weight to the fact Miss Kouassi came to the UK aged 17 to join her father that she had been "grievously used by the men in the household of her father and is right to be ashamed of her past and what she has described as two agonising years" [92].

c. At [93] the judge finds:

> 93. I find that the marriage entered into between the appellant and Miss Kouassi on 19 June 2012 is a sham and a marriage of convenience to assist the appellant to evade deportation proceedings and remain in the UK as the spouse of an EEA national as submitted by the Presenting Officer. I find that Miss Kouassi had to endure the infidelity of the appellant who, according to him, fathered a child [PHD] DOB 21 August 2013, who must have been

> conceived in about November 2012 and hence the appellant has been unfaithful to Miss Kouassi within five months of their marriage.

d. The Judge disbelieved the appellant's evidence that Miss Kouassi had given birth to a child on 5 August 2013 by a cousin about whom there was no evidence and no birth certificate. The Judge recorded that Miss Kouassi made no reference to any such child in her oral evidence [94].
e. The Judge noted Miss Kouassi was expected to look after another child said to be the product of a liaison between the appellant and another named individual shortly after her arrival, and disbelieved the appellant's oral evidence that he is the father of that child. The Judge finds the father of that child is also the father of another named child and disbelieved the appellant's oral evidence that he has DNA evidence to establish his paternity of that child and that if he had such evidence he would have produced it to the Tribunal [95].
f. The Judge gave weight to the fact that children whom the appellant claims to be the father of both live with their natural mothers and there was no evidence from the alleged mother of the child Miss Kouassi is expected to look after. The only evidence relating to this was a letter from another named individual that the appellant himself conceded he had written, according to him dictated whilst the alleged author of the letter was speaking [96].
g. The Judge gave weight to the fact there was no evidence the appellant had ever financially supported either of the children and there was no evidence to establish he had regular access each weekend as claimed [97].
h. The Judge considered the best interests of the children and found there was no family life between the appellant and each of the two named children who will remain living and being supported by their natural mothers. It was found there is no family life deserving of protection pursuant to article 8 ECHR with the children [98].
i. The Judge found the appellant was not truthful about the application to adjourn maintaining he had already raised £800 and needed a short adjournment in order to raise £1000. The Judge refers to a letter from A. Bajwa & Co dated 19 January 2017 part of which states "*we did not appear today as we were left without any proper instructions from the above despite having prepared some of the case on the basis of the client's numerous assurances that he will pay our fee for the appeal. The client told us yesterday evening approximately 18:34 hrs that he paid into our account and we requested that he send us a screenshot of the online payment as proof of payment given. Fees, however, have not been paid towards the appeal preparation and legal representation. We apologise for any inconvenience caused, however we were very flexible with the above named due to the seriousness of the matter before the court*" [99].
j. The Judge found weight could be given to the fact the appellant although running a self-employed cleaning business obtained working families tax credits because he only works 30 hours a week and found the appellant

was manipulating the UK system of state benefits to his own advantage [101].

k. The Judge found the appellant was never entitled to the residence card issued in the name of Justin N'Gata, a Belgium national, since he now denies this identity [102].

l. The Judge noted a change of name deed entered into by the appellant on 5 February 2011 which it is said the appellant breached as he had not adhered to the terms of the change of name deed on many occasions, which required him to only use the name Gabriel Kowadjo Boni Dadie, including in the proceedings at the Woolwich Crown Court in April 2016 [103].

m. At [105], having considered case law referred to in the previous paragraph, the Judge writes:

> 105. For the reasons set out earlier I find it would be proportionate to deport the appellant when balanced against the threat to the appellant represents to the public and that the appellant's length unlawful residence in the UK, his modest earnings from his self-employment and reliance on public benefits such as working tax credit and his use of the NHS, and his dishonest conduct in all his dealings with the criminal courts and with the Home Office leads me to the conclusion that there is nothing in the appellant's private life, since I have dismissed any claim based on family life with Ms Kouassi, to outweigh the public interest in his deportation.

17. The appellant sought permission to appeal to the Upper Tribunal which was granted by another judge of the First-tier Tribunal on 5 June 2017. The operative part of the grant being in the following terms:

> 2. It is arguable, as stated in the grounds of application, that the Judge erred in fact in stating that the Respondent's position was that the Appellant had entered into a marriage of convenience with an EEA national (when in fact the Respondent's position as stated in the refusal letter was that the relationship between the Appellant and the EEA national was not genuine and subsisting) and that the Appellant was sentenced, in November 2016, to a term of imprisonment of was 16 weeks, not 16 months, stated by the Judge. It is unclear if these factual errors resulted in a material error of law and permission to appeal is therefore granted.

Error of law

18. On behalf of the appellant Ms Joshi confirmed the appellant was not represented before the First-tier Tribunal as he had not paid for the solicitors to attend. This fact was recorded by the Judge who also found that the solicitors had acted with great propriety in the appeal [100]. The Judge was entitled to proceed to determine the appeal in the absence of the legal representative on the facts of this case.

19. Ms Joshi had to accept that as a result she was unaware of what had happened at the hearing and what had been said but claimed that that is a situation that should not have come about and that if the solicitors had attended they could

have guided the judge and dealt with the issues that led to the findings in this case.

20. The fact the solicitors were unaware of what happened at the hearing is as a result of the appellant's own actions. A person does not have a fundamental right to be represented during proceedings and many appear before the Courts and Tribunal's as self represented litigants in light of the difficulty in obtaining public funding and costs of private representation. It has not been made out this is a case in which the appellant should be categorised as a vulnerable witness and it is clear from reading the decision that the appellant was able to give his evidence, answer questions put in cross examination, and provide a number of documents in support of his case referred to by the Judge.

21. Ground 1 of the application for permission to appeal to the Upper Tribunal asserts the Judge considered inaccurate facts and made irrelevant findings. The claim the Judge did not consider the evidence has no arguable merit as a reading of the determination clearly shows. It is accepted there is a reference in [86] that the Sentencing Judge imposed a prison sentence of 16 months upon the appellant when in fact the sentence of the Woolwich Crown Court was 16 weeks but the appellant's assertion this makes the decision unsafe has no arguable merit. At [33] the Judge sets out in tabular form four occasions on which the appellant has come to the attention of the authorities as a result of criminal activity, the final event of which on 15 April 2016 was before the Woolwich Crown Court when the appellant received a term of 16 weeks' imprisonment and the Court ordered the forfeiture and destruction of the false French driving licence.

22. It was submitted on the appellant's behalf that the error is material as a 16-week sentence is less than a 12 month sentence. Whilst that is so, the issue is whether what was submitted on the respondent's behalf is a typographical error at [89] has been shown to have materially affected the Judge's conclusions. This has not been made out on the basis of the evidence when considered as a whole.

23. It is also submitted the Judge erred at [90] in stating the appellant kept his identity hidden up until November 2016 as his most recent conviction in November 2016 was under his current and not previous name. The finding at [90] recorded that the appellant had been convicted at the Woolwich Crown Court in his false name. The fact of the conviction and reason for conviction is not disputed and nor is it challenge that the appellant did not confirm his true identity until asked by the Judge at the day of the hearing, having maintained throughout that he was exempt from deportation under the UK Borders Act 2007 on the basis of his Belgian nationality. It has not been shown any error in the finding by the Judge that the appellant has not been honest in relation to his true identity, on one occasion, is infected by arguable material legal error.

24. The appellant asserts the Judge was wrong to make a finding that the marriage was one of convenience as this was never an issue open to the Judge to adjudicate upon as it is said this is not a matter the respondent raised in the decision subject to the appeal. This is challenged by Mr Avery on behalf of the Secretary of State on the basis the question raised by the respondent was whether the marriage was subsisting. It is argued the question of the marriage

of convenience arose from the evidence received at the hearing, as found by the Judge at [93], when further evidence was received relevant to this issue. No prejudice is made out as the Judge invited the appellant's wife to make further written submissions on the point, which it is noted she did, and which have been considered within the body of the determination under challenge. A Judge is entitled to raise matters which have not been raised previously provided the parties are given the opportunity to respond before a decision is made upon such issues. The Judge clearly ensured there was no procedural unfairness by providing the opportunity to make additional written submissions. Even if the marriage of convenience issue was not raised by the Secretary of State that does not bar the Judge from making a decision on that point if required. No arguable legal error is made out.

25. The grounds assert the Judge failed to fully apply case law relating to rehabilitation/integration in light of the inaccurate assessment of relevant facts but it is not made out that detailed submissions were made to the Judge or that evidence was made available that would warrant a finding being made in the appellant's favour on this point. The Judge clearly considered evidence provided and has given adequate reasons for conclusions reached including on the question of whether the appellant could be removed from the United Kingdom.

26. The finding of the Judge that the marriage between the appellant and Ms Kouassi is a marriage of convenience means it is not a valid marriage as that term is defined under the EEA Regulations. The Judge notes the appellant now admits he is not an EEA national and finds he is not the family member of an EEA national and hence a foreign criminal. This is a finding fully open to the Judge on the evidence considered and findings made. The Judge thereafter considered the merits of the appeal by reference to established case law prior to dismissing the appeal.

27. The appellant's representative sums up the challenge to the decision in Ground 9 in the following terms:

> 9. In conclusion, it is clear from the numerous inconsistencies in fact and irrelevant findings made in law that the FTT IJ has failed to consider this matter fully and fairly. This is to suggest that the error in listing the facts accurately has led the FTT IJ not to make findings regarding the appellant's character which of the facts was stated accurately would lead to another conclusion. Thus, the FTT IJ has failed to grapple the fact rendering the decision materially in error of law. Similarly, the FTT IJ finding that the marriage is one of convenience when the issue was not before the court is indicative of the FTT IJ's approach and therefore the determination has not been fully and fairly concluded. Therefore, the FTT IJ's determination is not based on the facts of the matter as such there is an error of law, on the balance of probabilities, and permission to appeal should be granted.

28. As stated, permission was granted and the judge granting permission refers to the fact it was unclear whether any factual errors made resulted in a material error of law. It is the conclusion of this Tribunal that any errors that have been identified are not material. The appellant seeks to argue that he should have been represented at the hearing and appears to infer that as representation is now available the matter should be reheard. Disagreement with findings made

or a desire to be represented do not warrant a properly concluded decision being set aside. The appellant had the opportunity to put his case to the Judge who ensured a fair hearing for all parties, and made findings based upon the evidence presented.

29. The Judge was entitled to take the marriage of convenience point in light of the evidence received which, when considered as a whole, arguably shows that the Judge had good reason for making a finding in the manner expressed in the determination. The core question was whether the marriage was entered into for the purposes of enabling the appellant to evade deportation proceedings and remain in the UK as the spouse of an EEA national as was submitted by the Presenting Officer assisting the Judge [93]. The fact the Presenting Officer made this submission clearly shows that this was an issue that did not arise from the Judge considering the material after the hearing but at the hearing itself and which must have been raised and brought to the attention of the parties. No arguable legal error is made out.

30. In relation to the evidence, the weight to be given to that evidence was a matter for the Judge. The appellant has failed to make out that in apportioning weight the Judge has acted in an irrational or perverse manner. The appellant applied for an adjournment which was refused by the Judge who was therefore aware that the proceedings will continue with the appellant as an unrepresented litigant. The Judge also founds the appellant deceived his own solicitors and attempt to deceive the Judge which is also very relevant, in light of the history of offences of deception, to the caution with which the Judge had to approach the evidence. Mr Avery refers to the finding at [43] recorded that the appellant's witness statement and that of Ms Kouassi drafted by the appellant's solicitors, together with a number of other documents were in the appellant's possession and came to the attention of the Judge during the course of the hearing. The relevance of these documents is not only that they clearly set out the nature of the appellant's case which the Judge was then able to take into account, but because the nature of the adjournment application made by the appellant was because he claimed such documents were not available and that he needed more time to prepare the same.

31. The Judge clearly considered the public policy issue and the risk the appellant posed to the wider public together with the content of the presentencing reports and other documentation.

32. A submission made by Ms Joshi in reply was that if the Judge thought the point regarding the marriage was in issue the Judge should have asked the Secretary of State to carry out a procedure to make checks to assess if the marriage was one of convenience, as the appellant was not represented and was in person and she questioned how the appellant could deal with this issue. When asked what checks she was proposing the respondent should be expected to make, Ms Joshi stated the evidence from the appellant asserting that the marriage was genuine and that these were not matters for the hearing as the procedure was not fair.

33. Such assertion has no arguable merit. Whilst it is for the Secretary of State to discharge the burden upon her to prove a marriage is a marriage of convenience if that is asserted prior to any hearing as part of the decision-making process,

this matter arose at the hearing when it was the Judge who was concerned about the point arising from the evidence being considered, which included concerns regarding Ms Kouassi having been used as a sex slave by the various men living at the address stated at [91]. As such, the burden is not upon the Secretary of State as she does not make the allegation. Had further enquiries been necessary, such as a marriage interview, the Judge possessed the appropriate discretionary case management power to adjourn the hearing for this to occur. It was not considered such a step was necessary in light of the evidence received and in light of the fact the Judge gave the appellant the opportunity to adduce further evidence as recorded above, which could have been obtained with the assistance of legal representatives if required. These matters are appropriate to be determined at a hearing in light of the nature of litigious proceedings and it has not been shown any procedural impropriety has occurred sufficient to amount to material error of law. On balance, I make a finding of fact that the appellant has failed to make out any arguable material error of law in relation to the decision of the Judge to dismiss the appellant's appeal on the stated grounds. The Judges determination shall therefore stand.

Decision

34. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

35. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Judge of the Upper Tribunal

Dated the 30 August 2017