



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

Appeal Number: EA/03381/2015

THE IMMIGRATION ACTS

**Heard at Liverpool
On 25 August 2017**

**Decision & Reasons
Promulgated
On 30 August 2017**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

**EFOOSE FRANCISCA OGBEWI
[NO ANONYMITY ORDER]**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr M Karnik, Counsel instructed by Charles Ete & Co, solicitors

For the respondent: Mr C Bates, a Senior Home Office Presenting Officer

DECISION AND REASONS

Decision and reasons

1. The appellant appeals with permission against the decision of the First-tier Tribunal to refuse her leave to remain as the spouse of an EEA national, pursuant to the Immigration (European Economic Area) Regulations 2006

(as amended), on the basis that her marriage is a marriage of convenience. The appellant is a citizen of Nigeria.

Background

2. The appellant first came to the United Kingdom on 14 February 2005 on a visit visa expiring 14 August 2005. When it ran out, she did not embark to Nigeria but remained in the United Kingdom without leave and made a number of applications for EEA extended family member residence cards in 2010, 2011 and 2012, all without success.
3. The applicant claims to have met her husband at Church in June 2013, when he gave her a lift home. They married on 10 October 2014 and on 20 April 2015, the applicant made an application for a residence card as the spouse of an EEA citizen. The supporting documents all dated from just before the marriage. There were, it is now accepted, no photographs from Christmas 2014, as they did not spend it together.

First-tier Tribunal decision

4. The First-tier Tribunal Judge heard oral evidence from the appellant and his wife, but was not satisfied that the marriage was not a marriage of convenience. There were some photographs of Christmas 2015 before the First-tier Tribunal Judge, which she regarded as 'staged' and to which she gave little weight. The evidence of the appellant and her husband was extremely vague.
5. The First-tier Tribunal Judge erred at [26] by saying that she was surprised that there were no photographs from Christmas 2014 and that no explanation for the absence of such photographs had been given. In fact, the parties had told the Tribunal that they did not spend that first Christmas together and so no photographs could have been expected.
6. The First-tier Tribunal Judge found the marriage to be one of convenience and dismissed the appeal. The appellant appealed to the Upper Tribunal.

Permission to appeal

7. The appellant advanced 3 grounds of appeal. Ground 1 related to [26] and has merit, but the Upper Tribunal must consider whether the error therein is material on the basis of the totality of the First-tier Tribunal's findings.
8. Ground 2 relates to the First-tier Tribunal Judge's surprise that the appellant's uncle provided neither a witness statement nor oral evidence at her hearing. The grounds of appeal, which were not settled by Counsel, assert that the appellant's husband told the Tribunal that the appellant's husband was no longer living in the United Kingdom. Counsel who appears before me is not the Counsel who appeared at the First-tier Tribunal and the appellant has neither asked for the Judge's record of proceedings nor produced the record of proceedings of Ms Appiah, Counsel before the First-

tier Tribunal. The Judge's manuscript notes record that the husband was asked where his uncle was living now, and answered, Lythenshawe.

9. Ground 3 suggests that the Judge attached too much weight to the errors made by the husband in his oral evidence, and not enough weight to his correct answers.
10. Upper Tribunal Judge Freeman granted permission on the basis of ground 1, on the basis that the error about the Christmas 2014 was capable of amounting to a mistake of fact at the level of an error of law. He directed that the Judge be asked to clarify what was meant, but that has not happened.
11. Judge freeman did not consider that grounds 2 and 3 were arguable on their own, though he did not exclude them from the grant of permission.

Rule 24 Reply

12. The respondent's Rule 24 Reply is generic in [1], [2] and [6]. The operative paragraphs of the Reply are [3]-[5]:

"... 3. The grounds of appeal amount to no more than a lengthy disagreement with findings properly open to the Judge on the evidence. It is totally unrealistic to expect every last matter to be put to the appellant in the circumstances where credibility is clearly in issue, they have been properly cross-examined, and there is an evidential burden on them. The First-tier Tribunal Judge is entitled to make adverse findings on a lack of evidence.

3. The grounds are misconceived - weight is a matter for the Judge.

4. The marriage was clearly a sham - the appellant has a history of failed attempts to regularise her stay via the EEA Regulations and this is yet another contrived application. ..."

13. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

14. I heard oral submissions from Mr Ezeoke as to whether there was a material error of law in this decision. For a finding of fact to amount to an error of law, it must meet the standard of irrationality, perversity and/or *Wednesbury* unreasonableness set out in the judgment of Lord Justice Brooke in *R (Iran) & Ors v Secretary of State for the Home Department* [2005] EWCA Civ 982. Mr Ezeoke accepted that the point at ground 1 was a narrow one but submitted that it was nevertheless sufficient to render the First-tier Tribunal decision unsound and that the decision should be set aside and remade.
15. I indicated at the hearing that it would not be necessary for me to hear from Mr Bates. I reserved my decision, which I now give.

Discussion

16. The question for the First-tier Tribunal was whether the marriage, when entered into, was a marriage of convenience. If it was, this appellant is not a spouse as defined by Regulation 2 of the EEA Regulations and cannot bring herself within Regulation 7 as a family member of her claimed spouse.
17. It is right that the weight to be given to evidence is a matter for the First-tier Tribunal Judge. The contents of [26] are plainly irrational. I therefore consider whether the remaining findings are sufficient to sustain the decision made by the Judge.
18. The Judge found at [22]-[28] that the appellant had married a Spanish national of Ghanaian origin; that his evidence was 'particularly unconvincing'. The appellant said there were 5 people at her wedding. Her husband said it was 4 people. He could not remember the name of the appellant's friend who attended as a witness for the ceremony, nor that her niece (her uncle's daughter) had been there. He could not recognise the friend who was a witness in the Christmas 2015 photographs, or identify one of the other people in the photograph. His knowledge of events in which he was supposed to have been a participant was so weak that the Judge was unarguably entitled to conclude that the alleged events were a fabrication.
19. The Judge was entitled to place weight on the absence of any evidence, written or oral, from the uncle. The Judge's manuscript notes indicate that the husband's evidence was that the uncle was still in the United Kingdom at the date of hearing. The appellant's evidence is that her sisters, who were also in the United Kingdom, did not attend the wedding because they were busy with work and again, this is not indicative of a genuine wedding.
20. The findings at [22]-[25] and [27]-[28] are more than sufficient to support a rational finding that the appellant's marriage was a marriage of convenience.
21. There is an error of law in [26] but I do not find it to be material and I uphold the First-tier Tribunal decision.

DECISION

22. For the foregoing reasons, my decision is as follows:
The making of the previous decision involved the making of an error on a point of law.
I do not set aside the decision but order that it shall stand.

Date: 25 August 2017

Gleeson
Tribunal Judge Gleeson

Signed **Judith AJC**
Upper