Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24126/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 January 2018	**On 18 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

IROEGBU KAZI OKOMBA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Jafferji, counsel.
For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal dismissing his appeal against the respondent's decision made on 17 June 2015 refusing his application for a permanent residence card as a person with a retained right of residence.

Background.

2. The appellant is a citizen of Nigeria born on 5 June 1969. On his own account, he first came to the UK in December 2000. On 1 June 2003, he claimed asylum but his application was refused. On 18 August 2008, he lodged an application for a residence card, but this was refused. He married his wife, a French citizen, on 12 March 2010 and on 5 May 2010 applied for a residence card which was issued on 3 November 2010. However, his marriage was dissolved 22 July 2014 when the decree absolute was granted. He applied for a permanent residence card under retained right of residence on 27 August 2014 but this was refused on 1 November 2014. On 19 November 2014, he made a further application for a residence card and this was again refused on 17 June 2015, the decision under appeal.

3. The respondent was not satisfied that the appellant was able to meet the requirements of reg. 10(5) of the Immigration (European Economic Area) Regulations 2006 as she found that his marriage was one of convenience. This decision was reached on the basis of discrepancies in the answers the appellant gave at interview on matters such as spelling his wife's surname incorrectly, having to check his phone when asked her mobile number, saying he last met her in November 2014, giving the wrong date of her birth (29 August 1989 instead of 11 June 1993), saying that he moved out in January 2014 when there was a joint council tax bill in March 2014 and saying that her boyfriend was French when the respondent was aware that she was now claiming to be married to another non-EEA national, not a French national as he claimed

The Hearing before the First-Tier Tribunal.

4. At the hearing before the First-tier Tribunal the judge heard oral evidence from the appellant. The appellant also relied on documentary evidence in his bundle of documents. The judge dealt with each of the discrepancies identified in the respondent's decision in [38]-[42] of his decision and summarised his findings on this aspect of the evidence at [43] where he said:

> "I have had regard to all six "discrepancies" relied on by the respondent. When considered collectively as well as individually they are not sufficient to raise a suspicion that the marriage in 2010 was one of convenience."

5. However, the judge went on to say that he had also had regard to the submissions made by the Presenting Officer, who added a further question mark over the appellant's application the fact that his former wife did not attend either the interview or the hearing and did not provide a witness statement despite the fact that the appellant was legally represented [43]. The judge said that he found this most surprising particularly as the appellant had stated in his interview he still had her telephone number, he had met her at least once to obtain supporting documentation and they had remained in contact [44]. He commented that it had not been suggested that the absence of supporting evidence from his wife was accounted for because she and the appellant had an embittered relationship and she could not reasonably be

expected to support him. On the appellant's evidence the opposite was true: he said that he still supported her, was attached to her and even now they were still in contact and talked once in a while. [45].

6. The judge was satisfied that the respondent had therefore shown that there was a reasonable basis for suspecting that this was a marriage of convenience and commented that these concerns had been exacerbated when he considered the appellant's written and oral evidence at the hearing together with the documentary evidence [46]. He then considered the relevant background. The appellant was a failed asylum seeker who at the time of his marriage had been in the UK without leave from 2000 to 2010. He said that he had married his wife, a practising Christian, because they were in love that she was not willing to live in sin. However, the appellant had had a child born on 21 November 2010 by another woman who must have been conceived early in 2010 during the 3 - 4 month period between the appellant meeting his wife and their marriage in March 2010. The judge was prepared to make allowance for human frailty and temptation but he found that this cast doubt on his evidence that he married his wife because they were so in love but, rather, it suggested the probability of an alternative explanation [48]

7. The judge also commented that the appellant's description of his wife as a Christian who was unwilling to live in sin was inconsistent with his account of having discovered her committing adultery in the matrimonial home, albeit four years later [49]. He further commented that there were surprising discrepancies in the appellant's evidence relating to the wedding [50] and the fact that in his witness statement he said that he and his wife had lived one address "for some years" but the British Gas bills related to a period of just over six months only [51].

8. Finally, the judge noted that the appellant was now in a relationship with the mother of his daughter born in November 2010, he had supported his daughter financially during this period and it was stretching credibility to suggest that this relationship with his daughter and her mother had not subsisted the intervening years [52]. For these reasons, the judge found that the respondent had proved on the balance of probabilities that the appellant had entered into this marriage as one of convenience and solely for the purpose of obtaining rights of free movement and residence [53].

The Grounds and Submissions.

9. In the grounds of appeal, it is argued that the judge erred in law as firstly there was no adequate evidence to discharge the initial burden of showing that there was a reasonable basis for suspecting that the marriage was one of convenience, secondly, the absence of evidence from the appellant's ex-wife in circumstances where the respondent did not seek to interview her or ask the appellant to call her to give evidence was "wholly unfair and perverse" and thirdly, the judge's consideration of the issue in the round was flawed, particularly in relation to his comment about his wife's adultery being inconsistent with her desire to marry and the fact that the appellant had previously fathered a child. It is argued that the absence of his wife's

parents and other relatives from the wedding and the absence of photographs were not factors of significant weight. The judge had failed to place weight on the clear documentary evidence showing that they had lived together and had also failed to consider the clear failure of the respondent to make enquiries to establish by way of evidence whether there were serious credibility concerns about the genuineness of the relationship or to produce evidence to undermine the appellant's evidence.

10. Permission to appeal was granted by the First-tier Tribunal for the following reasons:

> "It is not an arguable error of law for the Tribunal to find that the respondent had discharged the legal burden of proving that the appellant's marriage was one of convenience, based as it was upon an overall assessment of the evidence. [Paragraphs 47 to 53]. It was however arguably unfair for the Tribunal to draw adverse inferences from the absence of evidence from the appellant's former wife given the lack of any pre-hearing notice that this might be an issue in the proceedings [paragraphs 43 to 46]. Permission to appeal is accordingly granted on this basis".

11. Mr Jafferji relied on the grounds. He submitted that the judge erred in law by finding that the evidential burden had been discharged even though he had accepted that the six reasons given by the respondent in her decision letter had been inadequate to do so. He argued that the absence of evidence from the appellant's wife could not discharge the evidential burden and, alternatively, that the appellant had no opportunity to deal with this issue as it was raised in submissions for the first time. It had been unfair for the appellant to be criticised, so he argued, for not calling his former wife. In any event, he submitted that the judge's analysis of the further evidence was flawed and there was no proper basis on which he could find that the burden of proof had been discharged.

12. Ms Fijiwala submitted that the judge had properly directed himself on the burden and standard of proof in accordance with the guidance of the Supreme Court in Sadovska v Secretary of State for the Home Department [2017] UKSC 54. The judge had been entitled to consider all the evidence. The appeal was a full rehearing and it was a matter for the appellant and his advisers to decide what evidence to adduce at the hearing.

Assessment of the Issues.

13. The issue on which permission to appeal was granted was whether it was unfair of the tribunal to draw an adverse inference from the absence of evidence from the appellant's former wife given the lack of any prehearing notice that this might be an issue in the proceedings. In R (Anjum)v ECO Islamabad (entrepreneur – business expansion – fairness generally) [2017] UKUT 406, the Upper Tribunal (McCloskey J and UTJ Allen) said at [20]:

> At this juncture, we turn to examine the governing legal principles. This Tribunal had occasion recently to review the doctrine of procedural fairness in R (AM) v Secretary of State for the Home Department [2017] UKUT 262 (IAC), at [76] particularly:

> "While the decision of the House of Lords in R v SSHD, ex parte Doody and Others [1994] 1 AC 531 involved a very different context, namely the release of prisoners sentenced to life imprisonment, I consider that the terms in which Lord Mustill devised his celebrated code of procedural fairness makes clear that it is of general application. Furthermore, its association with the EU and ECHR legal rules and principles outlined above is unmistakable. The passage in question (at page 560D) is not susceptible to cherry picking and demands reproduction in full:
>
> 'My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer.'"

14. Taking account of this guidance, in this appeal the issue of procedural fairness depends on whether the appellant had a proper opportunity to put his case at the hearing before the First-tier Tribunal or whether he was disadvantaged by the failure of the respondent to indicate that the appellant should produce evidence from his former wife. I am not satisfied that there has been any procedural irregularity causing unfairness. The appellant's application was refused because respondent found that his marriage had been one of convenience. In the grounds of appeal to the First-tier Tribunal the respondent's decision is vigorously challenged and it is asserted in ground 15 that there is compelling evidence that the appellant and his former spouse were in a genuine, durable and subsisting relationship lasting from March 2010 until their divorce in July 2014.

15. In addition to evidence from the appellant, it is obvious that the most compelling and cogent evidence as to whether the marriage was one of convenience would be from the other party to the marriage. There was no obligation on the respondent to indicate to the appellant or his advisers what evidence should be called in support of the appeal whether in the decision, a prehearing notice or otherwise, particularly when it relates to evidence which an appellant can reasonably be expected to call. The judge considered the issue of whether there was any good reason why the appellant might not be in a position to call his former wife dealing with that issue in [45]. Further, no application was made at the hearing for an adjournment so that the

appellant's wife could be called to give evidence in circumstances where it had become clear in submissions, if it was not clear already, that the absence of evidence from her was regarded as a matter of significance [43]. There was an opportunity not only to address the issue in submissions but also to apply for an adjournment so that further evidence could be called.

16. I am therefore satisfied that this is a case where the judge was entitled to draw an adverse influence on the failure to produce evidence from the appellant's former wife. This was evidence which could reasonably be expected and its absence called for an explanation. The judge was entitled to find that there was no such adequate explanation and to draw an adverse inference accordingly. The grounds argue that the respondent should have made further inquiries about the marriage. It is not arguable that there was any such duty in the circumstances of the present appeal. It was open to the appellant to produce at the hearing all the evidence he regarded as relevant and probative.

17. Permission to appeal was not granted on the grounds that the judge erred in law in his assessment of the evidence and in finding that the legal burden had been discharged. Mr Jafferji sought to pursue these arguments in his submissions but he did not satisfy me that there was any basis for permitting them to be argued or that they had any prospect of success. The fact that the judge was not satisfied that the discrepancies relied on by the respondent were sufficient to discharge the evidential burden did not preclude him from finding that other evidence did discharge that burden. He was not judicially reviewing the respondent's decision but hearing a full appeal on the merits. He was obliged to consider the evidence produced before him as a whole and was fully entitled to take into account the relevant background, the absence of evidence from the appellant's wife, the discrepancies in the evidence he highlighted at [50], the circumstances of the appellant's relationship with his daughter and her mother and those in which his marriage came to an end.

18. In summary, I am satisfied that the judge properly directed himself on the law and, having considered the evidence as a whole, reached findings and conclusions properly open to him for the reasons he gave.

Decision

19. The First-tier Tribunal did not err in law and the decision dismissing the appeal stands.

Signed: H J E Latter Dated: 17 January 2018

Deputy Upper Tribunal Judge Latter