Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23936/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 24th June 2014	**On 4th July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

MR GEOFREY CHUKWUNAGUDO NKEMJIKA
(ANONYMITY NOT DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Nnamani, Counsel instructed by Samuel Louis Solicitors
For the Respondent: Mr Gregor Jack, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria who was born on the 9th January 1973. He appeals, with permission, against the decision of the First-tier Tribunal (Judge Malins) to dismiss his appeal against refusal of his application for an EEA Residence Card as confirmation of his right to reside in the United Kingdom as the spouse of an EEA national exercising her European Community Treaty rights in the United Kingdom.

2. The issue in the appeal was whether the appellant's marriage to his EEA sponsor was one of convenience. The First-tier Tribunal found that it was. It is therefore somewhat strange that permission to appeal should have been granted on the ground that "the judge took no note of Article 8". Having found that the marriage was a sham, it would seem to follow that there would not have been any family life that was capable of engaging the potential operation of Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. However, the grounds of appeal also argue that the reasons given for the Tribunal's finding were unsustainable on the evidence. Permission was also granted to argue "all other points raised by the Appellant". I therefore begin by considering these "other points".

3. The appellant's case was that he met his now wife, a Greek national by the name of 'Monique Papenhagen', at Stratford Shopping Centre, London, in April 2012. Their relationship thereafter blossomed and they married, at Newham Registry Office, on the 5th January 2013. Ms Papenhagen is currently employed by 'Tedmoses Consult Limited' for which she is paid around £910 a month, net of statutory deductions.

4. The respondent's reason for refusing the application was that the appellant's unexplained failure to attend with his wife for an interview with the Secretary of State's official was one that gave rise to a reasonable suspicion of the marriage being a sham. The appellant's explanation at the hearing for his non-attendance was that his representative had failed to inform him of the interview, and that the representative had excused his failure on the ground that he had lost the appellant's telephone number.

5. Under the heading, "Credibility", the judge found that Ms Papenhagen's evidence was "inconsistent with the usual concept of marriage". Her brief written statement was "curt and cold", and she had not taken the opportunity to expand upon it during her evidence-in-chief [paragraph 8(a)]. The evidence that only one friend had attended the wedding, that the reception had taken place in a public house, that the appellant had not bought Ms Papenhagen an engagement ring, that the proposal of marriage had taken place in a branch of McDonald's restaurant, that they had first met in a shopping centre, and that the appellant had not got to know his wife's flatmates during the period of their courtship, were all factors which the judge regarded as being either "implausible" or "inconsistent with the usual concept of a wedding" [paragraph 8(b)-(e)]. The judge also noted an inconsistency between the evidence of appellant and his wife as to who first made the proposal of marriage [paragraph 8(c)] and found that the appellant's explanation for his non-attendance at the Home Office interview was implausible [paragraph 8(f)].

6. Under the heading, "My Findings of Fact", the judge noted that the application had been made very shortly after the marriage had taken place and very shortly before the appellant's leave to remain was due to expire, that the appellant's work as a security guard was far removed from that for which he had been granted leave to remain in the

United Kingdom, that the appellant had previously made two unsuccessful applications for leave to remain (something which the judge suggested was a sign of his desperation to remain in the United Kingdom), that there was no evidence of the appellant's academic achievements (from which the judge concluded that he was not a "genuine student"), that there were anomalies in the evidence concerning the sponsor's occupation, that the only documentary evidence of cohabitation was a bank statement and a television licence addressed to the sponsor (the judge noting, in particular, that there was no evidence of a joint tenancy agreement), and that the appellant was still giving his "bachelor address" when he made his application [paragraph 9(a)-(j)].

7. Some of Ms Nnamani's complaints concerning the judge's reasoning are clearly well founded. Thus, in the course of noting the anomalies in the documentary evidence concerning the sponsor's occupation, the judge wrongly observed that her post-decision payslips constituted "inadmissible" evidence. That statement was legally incorrect because this was an in-country appeal. However, this was immaterial to the outcome of the appeal because the claim that the sponsor was exercising her Community Treaty rights in the United Kingdom had not been placed in issue by the respondent, and neither was it ultimately the basis upon which the Tribunal dismissed the appeal.

8. Ms Nnamani also argued that the lack of evidence concerning the appellant's academic achievements could not provide a basis for a finding that the appellant had not been a "genuine student". I agree. The absence of proof of academic achievement did not constitute proof of its absence, especially in circumstances where this was not the core issue in the appeal.

9. I also agree that many of the judge's findings of implausibility are problematic. For example, her finding that the appellant's account was inconsistent with "the usual concept" of courtship and marriage was one that was based entirely upon her own subjective view of the matters in question. Judges are generally well-advised to avoid making findings that are based upon their own necessarily limited experience of the lifestyle and culture of others.

10. I do not however agree with the submission that the findings in paragraph 9 of the determination were entirely irrelevant to the issue of whether the appellant had entered into a sham marriage. The distribution of the judge's findings between paragraphs 8 and 9 of her determination is undoubtedly curious, but may have been intended to reflect a distinction between those that directly impinged upon the issue of whether the marriage was one of convenience and those that related to the general credibility of the witnesses who had given evidence in support of the appellant's case that it was not. Moreover, whilst the reference in paragraph 8(a) to "evidence which is inconsistent with the usual concept of marriage" is unfortunate, the substance of that paragraph can be read as saying no more than that the sponsor's apparent lack of love

and devotion was a factor that did not assist the appellant in proving that he had entered into a genuine marriage.

11. The question that I have to decide, therefore, is whether the undoubted flaws in some aspects of the judge's reasoning are sufficient to undermine the safety of the decision as a whole. I have concluded that they are not. Upon reading the determination as a whole, I am satisfied that sufficient and sustainable reasons were given for the judge's overall conclusion that the appellant had failed to discharge the burden of proving that he had entered into a marriage which was not a sham.

12. For the reasons that I have already given, I am also satisfied that consideration of Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms could have led to a different outcome in the determination of the appeal. Further, and in the alternative, a decision to refuse to issue a Residence Card as confirmation of a right of residence under European Community Treaties could not of itself have led to the appellant's removal from the United Kingdom, and thus to the potential engagement of the operation of Article 8. This was specifically drawn to the appellant's attention by the terms of the Notice of Decision.

Decision

13. The appeal is dismissed.

Anonymity is not directed.

Signed Date

David Kelly

Deputy Judge of the Upper Tribunal