Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30554/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 July 2017	**On 20 July 2017**

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

AUGUSTINE UZODIMMA NGOKA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Slatter, of Counsel, instructed by Victory At Law Solicitors
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Nigeria born on 7 October 1971, appeals with permission against a decision of Judge of the First-tier Tribunal M A Khan, who in a determination promulgated on 2 November 2016 dismissed his

appeal against a decision of the Secretary of State refusing to grant him permanent residence in Britain.

2. The appellant entered Britain in 2002 and began an arranged relationship with Miss Carina Isabel Neto Do Carmo, a Portuguese national who was born in August 1984. They married in December 2003 after, the appellant asserts, they had lived together for a year. In March 2004 the appellant made an application for a residence card to confirm his right of residence in Britain. He instructed solicitors, Messrs Russell Stanley & Co, who prepared the application. On 7 September 2004 the appellant was issued with a five year residence card until 6 September 2009, his wife being issued with a residence certificate also valid for five years.

3. In 2009 the appellant made an application for permanent residence here. That application was made through Ark of Hope Consulting Solicitors of Hanover House, St Leonards-on-Sea, East Sussex. The Secretary of State did not consider that application which also included tax certificates for the appellant's wife covering the years 2004 to 2009, as well as the appellant's own P60s for those years.

4. The appellant received no response from the Home Office and called the Home Office and his solicitors whom he had instructed. New solicitors, Victory At Law Solicitors continued to contact the Home Office on his behalf. The appellant and his wife were divorced in January 2012. In September 2015 the appellant was informed that his application for permanent residence had been refused. The reasons for refusal given by the Secretary of State stated that Ark of Hope Solicitors had applied for the EEA residence card which had been granted in September 2004 and that they had also applied on his behalf for permanent residence in September 2009. It had come to light that Ark of Hope Solicitors had been involved in a scheme to facilitate a marriage of convenience, mostly between Nigerian nationals and EEA nationals, and had provided packages of documents to support applications under EEA Regulations. It was stated that the appellant's evidence fell within the parameters of such a package and that was why his application had been put on hold while further investigations were carried out. Moreover, the appellant had been divorced in January 2013. It was stated that his application had been considered under the provisions for a retained right of residence – Regulation 10(5) of the 2006 EEA Regulations as amended. It was also stated that in June 2015 the Sussex Immigration CE Team had carried out a visit to the house where the appellant was living and it was discovered that he had moved out of the address some months prior to the visit, but an occupant of that address said that he had been living with a woman who did not fit the description of the appellant's wife. It was therefore stated that he had provided insufficient evidence to show that he had lived for five years with his EEA national sponsor while they were exercising Treaty rights and that the background of where he was married and his chosen representative had serious doubts on the validity of the marriage to the EEA national, Carina Isabel Neto Do Carmo. It was stated that

therefore his application fell to be refused under Regulation 2 – that is a Regulation dealing with marriages of convenience.

5. It was also pointed out that the Home Office had been informed that he had become divorced and it was therefore considered that the appellant did not meet the requirements of the Rules. It was stated that the appellant had provided no evidence that he was divorced and therefore the Secretary of State was unable to consider his application under Regulation 10(5). It was also considered that the appellant could not succeed under the Article 8 provisions of the Rules.

6. In his determination Judge Khan considered that there were various discrepancies in the evidence of the appellant and in paragraph 8 said:

> "It is for the appellant to establish on the civil standard of proof, the balance of probabilities that he meets the requirements of Regulations 15(1)(b) 2 and 10(5) of the EEA Regulations 2006."

7. The determination is brief and the conclusions of the judge at paragraphs 23 onwards, the reasons for his decision are in three short paragraphs. The judge stated that the appellant's evidence was vague. He had not known the employer for which his wife had worked or for how long she had worked for a particular employer and this led to his conclusion therefore that the marriage was not genuine.

8. Although Mr Tarlow argued that the decision was sustainable, I consider that there are clear errors of law therein. Firstly, the judge errs when he states that the burden of proof lies on the appellant. The reality is that it is for the Secretary of State to prove that the marriage was one of convenience. That is clear from the judgment of the Court of Appeal in the case of **Collins Agho [2015] EWCA Civ 1198**. Secondly, having made that error the judge does not indicate in any way in which the Secretary of State might have discharged that burden of proof. Indeed, the reality is that the Secretary of State made factual errors in the decision. It was not Ark of Hope Solicitors who had represented the appellant when he made the marriage application. Moreover, the visit to the appellant's house in 2015 was two years after the Secretary of State had been informed that the appellant was divorced. No weight can therefore be placed on the evidence that at that stage he was not living with his wife. The Secretary of State I consider very clearly did not discharge the burden of proof upon her. Moreover, the judge when considering the evidence does not appear to have taken into account the details of the evidence that was put before the Secretary of State in 2009 of where the appellant and his wife had worked, nor does he seem to have taken into account the fact that this was a marriage which had existed for eight years between 2004 and 2013, that the application had been made in 2009 and that the appeal took place in 2016. I consider that the judge had nothing to on which to base his conclusion that the marriage was not genuine, nor that it had not

subsisted for five years. These are material errors of law and on that basis I set aside the determination of Judge Khan.

9. For the same reasons I remake the decision and allow this appeal. The Secretary of State has not discharged the burden upon her to show that this was a marriage of convenience. Moreover, the appellant had put forward evidence to show that the marriage was subsisting for many years. That evidence has not been unseated by anything put forward by the Secretary of State.

10. Having set aside the determination of the First-tier Judge I therefore remake the decision and allow this appeal.

Notice of Decision

This appeal is allowed.

No anonymity direction is made.

Signed  Date: 20 July 2017

Upper Tribunal Judge McGeachy