



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

Appeal Number: IA/32645/2015

THE IMMIGRATION ACTS

Heard at Field House

On 22nd May 2017

**Decision & Reasons
Promulgated
On 14th June 2017**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

**JOSEPH DWAMENAH ANTWI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Balroop, Counsel, instructed by Starck Uberoi LLP
For the Respondent: Ms Z Ahmad, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Ghana born on 10th April 1970. His appeal against the refusal of a permanent residence card, as confirmation of a retained right of residence as the former spouse of an EEA national, was dismissed by First-tier Tribunal Judge D A Pears of 10th October 2016 under the Immigration (EEA) Regulations 2006 [the Regulations].

2. The Appellant had been granted a residence card on 16th October 2009 valid until October 2014 on the basis of his marriage to Grace Baffour [GB]. He applied for a permanent residence card on 15th September 2014. It was not in issue that the Appellant had married somebody bearing the name Grace Baffour in Accra in July 2005 and the Decree Absolute dissolving the marriage was made in the Principal Registry at the High Court in London on 15th June 2011. The Respondent refused the application on the grounds that the identity of GB was used by at least two other individuals and the Appellant did not meet the requirements of Regulation 10(5) or 10(6).
3. It was not accepted that the Appellant's marriage to GB was genuine and subsisting because on 21st December 2008 a person using an identity card in the name of GB also had in her baggage a Ghanaian passport in the name of Georgina Frimpong Amponsah-Antwi (Y1). Further, on 20th December 2008, there was reason to believe that the Appellant was using the alias of Kewsi Achempong [KA], although the Appellant claimed that KA was his brother.
4. A woman arrested on 2 July 2010 (Felicia Blay [FB]) claimed she was GB of Flat 1, [-], London, N1 and was working for Mite [sic] Cleaning Company. She then accepted that GB was not her real name. The Respondent considered that FB had been working illegally in the identity of GB.
5. The Respondent was not satisfied that the Appellant's EEA Sponsor was genuinely working in the UK because a non-EEA national was found to be working using the identity of GB. The Respondent was not satisfied that the actual GB was exercising Treaty rights up until the point of divorce. Further, the marriage to GB was one of convenience.
6. The Respondent doubted the Appellant's identity because he had not provided the passport on which he originally entered the UK, but only one issued in London in March 2008, and the photograph in that passport bore a significant resemblance to the photograph in the German passport of KA. That was evidence that the Appellant and KA are one and the same person.
7. For these reasons the Respondent refused to issue a residence card and the Appellant appealed. The appeal came before First-tier Tribunal Judge D A Pears and he heard evidence from the Appellant. He did not find the Appellant to be a credible witness and dismissed the appeal under the Regulations.
8. The Appellant appealed on three grounds. Firstly, the judge's consideration of the Appellant's oral evidence combined with a failure to give reasons for discounting that evidence was perverse. There were no discrepancies in the Appellant's evidence and the judge wrongly focussed on the Appellant's demeanour in concluding that he was not a credible witness. The judge's findings were contrary to the findings of the County

Court Judge who found that the Appellant had been a victim of fraud. The judge had erred in law in assessing the Appellant's credibility and had failed to give adequate reasons to support his adverse credibility finding.

9. Secondly the judge's criticism of the Appellant's failure to seek and secure his brother's evidence in support of his appeal was also perverse. The failure to call a witness should not be commented upon adversely and there was no obligation to call a witness even if they are assumed to know something relevant to appeal. The criticism by the judge of the lack of evidence from the Appellant's brother had been wrongly taken into account in assessing credibility.
10. Thirdly, the judge had failed to give the Appellant an opportunity to reply to the allegations made against him, infringing Article 6. The Appellant submitted that the following issues were not put to him and he had not had a fair opportunity to respond to: the evidence of his relationship with his ex-wife; how he could have been divorced without his knowledge; and how he was able to produce recent e-mails from his brother and the police.
11. Permission to appeal was initially refused by the First-tier Tribunal but was granted by Upper Tribunal Judge Lindsley on 11th April 2017. She states: "The Appellant knew the issue of whether he was in a genuine relationship with his wife was one which the First-tier Tribunal would have to determine. There was no need for this to be put specifically to him, and it was up to him to produce evidence it was genuine. However, I find it arguable that the First-tier Tribunal erred in law in relation to the findings of the County Court Judge regarding the Appellant and the existence of his brother Kewsi Achempong and that he was a 'credible witness'. It is arguable that there is insufficient reasoning at paragraphs 42 to 48 to reach a different conclusion, and alternatively that the justification for the disbelief of the Appellant is irrational, for instance that his evidence is unconvincing because it was 'slick'. The Appellant will have to show however that this error was material given the apparent lack of evidence of his having a genuine relationship with Ms Baffour."

The Judge's Findings

12. The judge made the following findings:

"41. It was perfectly clear from the refusal letter that there were a number of issues to the forefront namely that it was alleged that the Appellant was involved in a marriage of convenience and that the Appellant and Kwesi Achempong were one and the same person. The Appellant's answer that he thought the latter issue was resolved has superficial appeal but simply does not stand up to examination since the refusal letter making the point is dated September 2015 and the passport issue with the police was in 2012 and the County Court judgment was 2013. The Appellant knew and would have been advised of the importance of a

statement and or attendance from his brother (if he exists) and the absence of such evidence undermines the credibility of the Appellant's case.

42. I have borne in mind the views and findings of the County Court Judge but he was resolving a different issue with different evidence.
43. I watched the Appellant give evidence and it was a skilful display. He gave his answers with hardly a hitch save his wilful failure to understand the question about Sidney bearing part of his name rather than part of Kewsi's. His evidence was slick and unconvincing. I entirely agree that his evidence has been crafted to meet the case against him whether it is to explain why he rather than Kewsi booked the tickets, the apparent recent recollection of the disappearance of the identity papers from a safe or why he had documents relating to Grace Baffour after he separated.
44. I accept of course that the Appellant was not asked why there was no evidence of his relationship with Grace Baffour but the burden of proof is on the Appellant and the fact remains that there were no cards, e-mails, photographs, statements from friends to show it was a real marriage. Of course some documents might have been lost but there is nothing not even letters from friends or his brother in support of his case.
45. The Appellant married a person called Grace Baffour in Ghana in July 2005. There is no evidence that person was ever granted a visa to come to the UK or that she ever did.
46. The identity of Grace Baffour has been used by at least two other people as appears from the Respondent's evidence and the person called Grace Baffour seems to have been assiduous in a number of different employments.
47. There are perplexing claims which cumulatively cause me to further doubt his credibility namely the Appellant saying he was divorced without his knowledge, his ability to produce documents relating to Grace Baffour dated after their separation, his electoral registration at one address when he was living at another, his custody of his brother's passport and, despite the Appellant's claim, there is no evidence that the police accepted they were different and returned the brother's passport to him and why if the Appellant's brother is so elusive how were e-mails from him and to the police so recently produced.
48. I found the Appellant and his case wholly lacking in credibility.

49. I have considered all the evidence and I find that the Appellant has failed to show that he person that he married in Ghana every (sic) exercised treaty rights.

50. If I am wrong about that I have considered the totality of the information before me, including the assessment of the Appellant's answers and any information provided, I am satisfied that it is more probable that a person called Grace Baffour who was a Dutch national and the Appellant were in a marriage of convenience."

Documentary Evidence

13. The document at V1 [Document V1] is a refusal/cancellation of leave to enter/remain report. The name is given as Georgina Frimpoong Amponsah-Antwi [GFAA]. The reasons for the refusal are: "That you have presented a Dutch identity card in the name of GB, but I am satisfied that you are not the rightful holder of the identity card you have produced to me. Furthermore, you have subsequently produced a Ghanaian passport in the name of GFAA, but you are a visa national and under the Immigration Rules you are required to have an entry clearance to enter the UK and you have no entry clearance. I therefore refuse you leave to enter the UK under paragraph 325 of the Immigration Rules. I am further satisfied that you have used deception in this application and that you have attempted to conceal your true identity by impersonating the rightful holder of the document. Your application is therefore refused under paragraph 327A of the Immigration Rules."

14. Document V1 goes on to state:

"The pax arrived at Calais juxtapose ferry port on a Eurolines Coach from Dusseldorf accompanied by two female children. For herself she presented a Netherlands identity card in the name of GB born on 24th December 1970. For the children she presented the German Kinderweis in the name of Sidney Amponsah-Antwi no photograph, born 26th May 2003 and a German passport in the name of Miriam Amponsah-Antwi born 29th September 2006.

It was immediately apparent that the pax was not the person in the photograph of the identity card. The pax did not understand German or Dutch and only seemed to speak English. In view of the lack of photograph on the child's Kinderweis there was also doubt as to her true identity.

A search of the pax's baggage revealed two Ghanaian passports one for the pax and one for the child Sidney but in the name of Stratford Amponsah-Antwi born 6.12.04. Neither document held a UK visa but had

valid German residency. The pax stated that the real Sidney had entered the UK yesterday.

The pax was uncooperative and started to suffer from a bad cough and it was decided not to interview or fingerprint the pax for health and safety reasons.

Previous records confirmed that a child called Sidney Amponsah-Antwi had indeed arrived the day before at Stansted where there had been a serious concern for her welfare. Although it appeared that the child had been allowed to proceed, in view of these further developments, further reference was made to Stansted. Furthermore the false identity in which the pax had presented herself, GB, was already in the system as an EEA resident.

In view of the above the pax was refused entry under the authority of CIO Mr A Wells as she was not the rightful owner of the NLD ID card and held no UK visa in her rightful document. Both children were also refused on the same grounds."

15. The document at W1 [Document W1] is an IS Minute Sheet giving the applicant's name of Felicia Blay states that the subject was arrested by police on 2nd July 2010 for theft and on suspicion of being an immigration offender under the details of GB born in Ghana on 24th December 1970. When questioned the person admitted her real name was Felicia Blay born on 4th January 1978 and that her Ghanaian passport was with the Home Office. She stated that she was divorced with two children in Ghana and her parents and siblings were in Ghana. She stated that she was working as a cleaner for Might Cleaning Company based at 25 Gresham Street, London, EC1 thus not claiming any benefits and that she lived at Flat 1, [], London, N1 [].
16. The IS minute sheet at Y1 [Document Y1] relates to Sidney Amponsah-Antwi who was brought into the UK by Jenny Dennis to visit her uncle. The Immigration Officer called the Sponsor KA a German national who was to be responsible for Sidney in the UK. He stated that Sidney was his daughter and she would be staying with him for one month and that Sidney's mother would be arriving on 24th December 2008. The mother is GFAA a Ghanaian national living in Germany holding a residence permit. KA stated that he had been in a relationship with Georgina, but he was not the biological father of Sidney. GFAA stated that KA was her brother and Sidney had arrived in the UK as a tourist for two weeks and would be staying with KA, she would be arriving with her other two children by bus. KA stated that he had booked the flight for Sidney on 9th December 2008. Sidney did not know the sponsor when she saw him. Having been told that KA made the booking an Immigration Officer sought confirmation and the name of the booking was made by Joseph Antwi of [-], EN3 [-].

17. The Appellant relied on payslips showing that GB lived at [], Enfield, Middlesex, EN3 [-] and payslips showing that she lived at [], Islington, London.

Submissions

18. Mr Balroop submitted that the judge's reasons for disbelieving the Appellant were based on his physical appearance and the way he gave evidence. These were not rational reasons for making adverse credibility findings. The judge relied on the fact that there was no evidence that GB had been granted a visa. She would not require a visa to enter the UK as an EEA national.
19. Mr Balroop relied on the paragraph in Document V1 which states: 'the false identity in which the pax has presented herself, GB, was already in the system as an EEA resident'. He submits that the person arrested was not the Appellant's wife and she had used GB's identity. Subsequent to this the Appellant was granted a residence card in October 2009 on the basis of his marriage. Therefore, it must have been accepted by the Respondent that the Appellant's wife was an EEA national exercising Treaty rights.
20. Document W1 showed that a woman named FB had been arrested for using the identity of GB. Both of these people had stolen GB's identity and this predated the Appellant's divorce. Two people have been using GB's identity in 2009 and in 2010. This could not be the person who was working in 2011 because in both cases the identity documents were seized.
21. The Respondent in concluding that the marriage was one of convenience relied on three points. The lack of evidence that GB had gained entry to the UK, that GB's identity was used on two separate occasions and that the Appellant and his brother were one and the same person. Only if the Respondent had discharged the burden was the Appellant required to respond by showing cogent evidence. However, in this case the Respondent had failed to discharge the burden.
22. It was accepted in 2009 that the Appellant was married to an EEA national who was exercising Treaty rights, therefore GB's entry into the UK was not material. The first user of GB's identity predated the issue of the residence card. The second use of GB's identity was when a completely different person was arrested for theft. The Respondent was effectively saying that a person was arrested using the name of GB and therefore they doubted whether the Appellant's ex-wife had ever worked in the UK. However, there was still a working history for GB after the arrest of FB in 2010.
23. In relation to the Appellant's brother no one was disputing that the German passport in the name of KA was genuine. It had been with the police and returned. The police had at one time held both the Appellant's

passport and the German passport of his brother. There was a picture of the Appellant's brother at AA1.

24. Accordingly, the Respondent had not discharged the evidential burden. The judge had accepted the Respondent's version and not looked at the evidence critically. He had looked at the Appellant's evidence first. The finding at paragraph 49 that the Appellant had failed to show that the person he married in Ghana ever exercised Treaty rights was perverse. All the work history of GB could not be questionable.
25. For the Respondent, Ms Ahmad submitted that the Appellant had not shown that GB, his ex-wife, had been exercising Treaty rights in the UK. The HMRC records at U1 and U2 showed that GB was not working in June 2011, the date of divorce. There was no evidence that she was a jobseeker. There was a break in her employment between March 2011 and July 2011. There was no challenge to the judge's finding at paragraph 47 in the grounds of appeal.
26. Document W1 showed that FB was arrested using the false identity of GB. The Appellant had not shown that his ex-wife was exercising Treaty rights. The address on many of the payslips was the same as that given by FB who also gave the same employer as that in the HMRC records. The Appellant was relying on the payslips of FB in his application.
27. In any event, the judge's finding that the EEA national was not exercising Treaty rights at the time of divorce was open to the judge on the evidence before him and the Appellant had not raised a challenge in the grounds of appeal or shown that there was any error of law in the judge's decision in that respect.
28. In relation to the burden of proof the judge properly directed himself at paragraph 12 relying on Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC).

“(i) There was no burden at the outset of an application on a claimant to demonstrate that a marriage to an EEA national is not one of convenience.

(ii) IS (marriage of convenience) Serbia [2008] UKAIT 31 establishes only that there is an evidential burden on the claimant to address evidence justifying reasonable suspicion that the marriage is entered into for the predominant purpose of securing resident's rights.

In summary, where the issue is raised in the appeal the question for the judge will therefore be, in light of the totality of the information before me, including the assessment of the claimant's answers and any information provided, am I satisfied that it is more probable than not that this is a marriage of convenience?”

Ms Ahmad submitted that the judge applied the correct burden of proof.

29. There was evidence in 2009 that the passport of GB had been used by GFAA and the Appellant had bought a ticket for that person to come to the UK with her children. Document Y1 showed that, on the confirmation form, the name of the booking was made by Mr Joseph Antwi 57 [], EN3 [], Enfield. There was a connection between the Appellant and GFAA who was arrested in 2009.
30. The Respondent had provided evidence to show that someone else used GB's identity in 2010. This was consistent with the HMRC records relied on by the Appellant. The Respondent had therefore raised a reasonable suspicion that the marriage was one of convenience and discharged the burden. It was then a matter of whether, on the balance of probabilities, the marriage was one of convenience. The judge's finding that it was not a genuine marriage was open to him on the evidence before him.
31. In relation to the assessment of credibility the judge is entitled to take into account the Appellant's demeanour. Ground 3 of the grounds of the appeal was not made out. Ground 2 was not made out because the Respondent had raised a concern that the Appellant and his brother were the same person. It was therefore for the Appellant to put forward evidence upon which he intended to rely.
32. Ms Ahmad relied on paragraph 17 of Greenwood No.2 (paragraph 398 considered) [2015] UKUT 00629 (IAC) which states:

"The test for irrationality has been formulated in the variety of tried and trusted ways. Was it reasonably open to the judge taking into account all material factors and disregarding everything extraneous to reach the conclusion under challenge? Another formulation is did his conclusion fall within the band, or range, of conclusions reasonably open and available to him? There is also the repeated admonition to appellate courts and tribunals that what they might have done as a first instance court or tribunal is not in point. Thus while it may be that not every first instance immigration judge would have reached the conclusion under challenge in this appeal this does not vitiate in law the decision."

She submitted that when the evidence was looked at as a whole, the findings were open to the judge and they had been reasonably made.

33. In response, Mr Balroop stated that after FB was arrested there were still employment records for GB in the UK. The Appellant was not connected to FB. On 15th June 2011, GB was still a qualifying person. She had got another job within four months, so she would have been actively seeking work.

Discussion and conclusions

34. Ground 1: the judge's credibility findings were perverse. It was submitted that the judge's assessment of the Appellant's oral evidence was based on the Appellant's physical appearance and the way in which he gave evidence and therefore any adverse finding was irrational. I accept Ms Ahmad's submission that the judge is entitled to rely on demeanour and any defect in his assessment of the Appellant's oral evidence at paragraph 43 is certainly not material to the findings at paragraph 44 to 47.
35. It is submitted that the judge failed to give reasons for why he attached little weight to the County Court judgment. However, at paragraphs 41 and 42, the judge explained that the passport issue was with the police in 2012 and the County Court judgment was 2013. The County Court Judge was resolving a different issue with different evidence. These reasons were sufficient to explain why the judge attached little weight to the judgment. In any event, any defect in the judge's assessment of the Appellant's oral evidence or a failure to give reasons was not material given the judge's findings at paragraphs 44 to 48 which were sufficient to support the judge's adverse credibility findings.
36. Ground 2: the failure to submit evidence from the Appellant's brother. The judge was entitled to take into account a lack of evidence. The Respondent alleged that the Appellant and his brother were the same person. The Appellant failed to produce evidence that he ought to have been able to produce if his account was true. The judge took into account the Appellant's failure to submit evidence from his brother. Again this was a matter on which the judge was entitled to rely in his assessment of credibility.
37. Ground 3 has no merit. It is for the Appellant to prove his claim and he has failed to do so. There was no unfairness in failing to put matters to the Appellant. The Appellant was well aware from the refusal letter of the matters in issue and the judge dealt adequately with the evidence of the Appellant's relationship with GB at paragraph 44.
38. The grounds relied on in the application for permission to appeal did not establish a material error of law. The Appellant was divorced on 15th June 2011. The last payslip was March 2011. The HMRC records show that gap between March 2011 and July 2011. On the evidence submitted by the Appellant he has not shown that his ex-wife was exercising Treaty rights up until the time of the divorce. The Appellant has to show that he has resided in the UK for a continuous period of five years in accordance with the Regulations. He has not shown that his former spouse was continually exercising Treaty rights up to the time of the divorce.
39. The judge's finding, at paragraph 49, that the Appellant had failed to show that the person he married in Ghana ever exercised Treaty rights in the UK was one which was open to the judge on the evidence before him and this

point was not challenged in the grounds of appeal. Any defect in the judge's assessment of credibility was not material.

40. The documents V1, W1 and Y1 show that there is a connection between the Appellant and the two people who admitted to fraudulently using GB's identity in 2009 and 2010.
 - (i) The Appellant had bought the ticket for the GFAA's daughter, Sidney, who arrived in the UK in February 2009. Her booking was made in the Appellant's name giving the Appellant's address in Enfield. GFAA had tried to enter the UK the following day using GB's passport.
 - (ii) FB, who was arrested on 2nd July 2010 using GB's identity, gave her employment as 'Mighty Cleaning Company' and her address as Flat 1, [], Essex. The Appellant relies on the payslips of GB who lived at the same address and who was working for the same cleaning company (Mitie). The Appellant was seeking to rely on documents which connected him to a person who admitted to fraudulently using GB's identity.
41. Mr Balroop submitted that this was not relevant because there was a history of GB continuing to work after FB was arrested. Further, after the arrest of GFAA, the Respondent accepted that the Appellant was married to an EEA national exercising Treaty rights. Therefore, it was irrational for the judge to rely on these documents. The Respondent had failed to show that because a person was using GB's identity, the 'actual GB' was not exercising Treaty rights.
42. Mr Balroop's submissions explain another way of looking at the evidence, but disclose no error of law on the part of the judge. The judge was not satisfied that the Appellant was married to an EEA national, rather than a person fraudulently using the identity of an EEA national, or that the person to whom the Appellant was married was exercising Treaty rights in the UK. The judge's findings were reasonably open to him on the evidence before him.
43. I find that the evidence relied on by the Respondent is sufficient to satisfy the evidential burden that there was a suspicion that the marriage was one of convenience. The judge properly directed himself on the burden and standard of proof. The judge then assessed the Appellant's evidence and for the reasons he gave at paragraphs 44 to 47 he did not find it credible.
44. Accordingly, the Respondent had raised a reasonable suspicion that the marriage was one of convenience and the Appellant had failed to submit reliable evidence to show otherwise. The judge quite properly looked at the totality of the evidence, including the Appellant's oral evidence and the information upon which the Appellant relied. It was open to the judge,

on that evidence, to find that the marriage was one of convenience. I find that there was no error of law in the judge's decision dated 10th October 2016 and I dismiss the Appellant's appeal.

Notice of decision

Appeal dismissed

No anonymity direction is made.

J Frances

Signed

Date: 13th June 2017

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed **J Frances**

Date: 13th June 2017

Upper Tribunal Judge Frances