Upper Tribunal
(Immigration and Asylum Chamber)

JO and others (foreign marriage – recognition) Nigeria [2010] UKUT 478 (IAC)

THE IMMIGRATION ACTS

Heard at Field House **Determination Promulgated**

On 11 November 2010

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Before

MR JUSTICE KENNETH PARKER

SENIOR IMMIGRATION JUDGE WAUMSLEY

Between

JO

PO

BO

BO

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellants: No Representative

For the Respondent: Mr N Bramble, Home Office Presenting Officer

"An Immigration Judge should not go behind evidence of a certificate of naturalisation as an Italian citizen on the basis of concerns about the bona fides of the marriage that resulted in the naturalisation. It would be contrary to public policy for the Immigration Judge to dispute Italian nationality or the legal validity of the marriage resulting from it."

DETERMINATION AND REASONS

1.
This is an appeal by JO (aged 20), PO (aged 6), BO (aged 11) and her twin BO (aged 11) against the dismissal dated 24 August 2010 by the First-tier Tribunal of their appeal against the decision of the Secretary of State for the Home Department refusing their application for a residence card as

confirmation of a right of residence in the United Kingdom as the daughters of an EEA national exercising Treaty rights, namely their father MO.

2.
On 6 November 2009 the Secretary of State had written to the Appellants requesting that their birth certificates be submitted as evidence of their relationship as family members. No response was received to that request and the application was therefore refused. The sponsor in this case holds both Nigerian and Italian nationality. He stated that he had married an Italian national in 1993. That marriage had enabled him, under Italian law, as he represented it to us, to acquire Italian citizenship in addition to his Nigerian citizenship. He had never lived in Italy but made one visit in 1997. He divorced his Italian wife in 2001 but it appears that he retained his Italian nationality. Before the Secretary of State and before the First-tier Tribunal he produced an original passport to substantiate his claim to Italian citizenship and at the hearing before us he produced a passport that had been recently issued in November 2010 that he said was to replace an earlier one-year passport that, in turn, had replaced an earlier ten year passport issued in 1999. We need to stress that the Secretary of State has not taken issue with the sponsor's Italian nationality either in the decision or in the appeal proceedings.

3.
On appeal to the First-tier Tribunal the judge concluded that his so-called marriage to the Italian national was, to put the matter bluntly, a sham. Accordingly, the sponsor had simply deceived the Italian authorities into believing that there was a genuine and subsisting marriage and it was on that false footing that the Italian authorities had accepted his application for Italian citizenship. The judge was, understandably, concerned that the sponsor was, in effect, seeking to rely upon fraudulent arrangements in order to obtain benefits under European Union law and that public authorities in the United Kingdom, which would include both the Secretary of State and the courts, should not allow such fraudulent arrangements to found a valid claim under European Union law.

4.
The First-tier Tribunal also found that limited weight could be given to the birth certificates which had been obtained very long after the birth of these children (see paragraph 12 of the Determination). Furthermore, insofar as the sponsor relied upon a DNA profiling report from LGC there was no satisfactory evidence as to when the samples required for DNA profiling were taken from the Appellants and nothing to show that the right samples were taken from the right people.

5.
Permission to appeal to this Tribunal was given on 3 September 2010. This appeal, therefore, raises two short points: First, was the First-tier Tribunal entitled to enquire into the genuineness of the marriage to the Italian citizen in order to conclude that the Italian nationality had been obtained by fraudulent arrangements? Second, can the conclusion of the First-tier Tribunal as to the relationship between the Appellants and their sponsor lawfully stand?

6.
On the first issue it seems, with respect to the First-tier Tribunal, that it would be inappropriate for the public authorities in the United Kingdom to seek to investigate the circumstances of a marriage that has been recognised by the authorities in another Member State of the European Union, namely Italy, and that has been recognised as a genuine marriage under Italian law. It was on that basis, as we have been led to believe, that the Italian citizenship was acquired. Again it appears to us to be inappropriate for the public authorities in the United Kingdom to question whether the grant of Italian

citizenship was valid, having regard to the alleged circumstances in which it was granted. It appears to us that as a matter of comity such issues would need to be explored in Italy and their final resolution could only properly be decided by public authorities in Italy.

7.
We, therefore, conclude that the First-tier Tribunal erred in law by embarking upon the exercise that it did. Indeed at the hearing the representative of the Secretary of State accepted that the United Kingdom was bound by the recognition by the public authorities in Italy both of the validity of the marriage and of the grant of Italian citizenship. In other words, the Secretary of State does not maintain either that the sponsor is not an Italian citizen or that he cannot rely upon such rights as European Union law accords to him as a citizen of another Member State.

8.
That leaves, therefore, only the second question. We agree entirely with the conclusion reached by the First-tier Tribunal that little weight could be attached to the birth certificates that were submitted. However, having given the matter careful consideration, we do not believe that the finding in relation to the DNA profiling report can properly stand. Although we fully recognise the concerns of the First-tier Tribunal about the robustness of that material, we have come to the conclusion that it is sufficiently reliable. We note that it is nowhere a requirement of the relevant regulations that only a birth certificate can be relied upon for the relevant purpose and the DNA report was properly admissible in relation to that question. Although it might theoretically be possible that the sponsor arranged for four other individuals to attend to be DNA profiled, those individuals in turn would have to have had a very close relationship with the sponsor, and the alternative scenario that such arrangements had been made with four people other than these Appellants in order to deceive the Secretary of State, appear so unlikely that it can be dismissed. We are prepared to accept that that evidence was, and is, sufficient to show the claimed relationship between the sponsor and the Appellants.

9.
We therefore resolve both of the relevant issues in favour of the Appellants and accordingly allow this appeal. The Appellants have, on the material before us, satisfied the criteria for the issue to them of residence cards as confirmation of their rights of residence in the United Kingdom as the daughters of an EEA national exercising Treaty rights under reg 7(1) of the Immigration (European Economic Area) Regulations 2006.

Signed Date

Mr Justice Kenneth Parker