



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

Appeal
IA/13333/2014

THE IMMIGRATION ACTS

Heard at: Manchester
On: 2nd October 2014

**Determination
Promulgated
On: 1st December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUDASSIR ALI

Respondent

**For the Appellant: Ms Johnstone, Senior Home Office
Presenting Officer**
**For the Respondent: Mr Brown, Counsel instructed by Arshed and Co
Solicitors**

DETERMINATION AND REASONS

1. The Respondent is a national of Pakistan date of birth 2nd December 1985. On the 9th June 2014 the First-tier Tribunal allowed his appeal against a refusal to issue him with a residence card confirming his right of residence as the spouse of an EEA national exercising treaty rights. The Secretary of State now has permission to appeal against that decision.
2. The Secretary of State had refused the application on the grounds that the Respondent's marriage to Polish national Urszula Olga Kubicz

was a marriage of convenience entered into for the purpose of circumventing immigration control.

3. The Respondent had appealed the decision on the papers. The First-tier Tribunal began its deliberations by directing itself that the burden of proof is on the Secretary of State (paragraph 6). The determination then sets out each of the reasons advanced by the Secretary of State as to why she considered this marriage a sham. These all arose from simultaneous interviews conducted with the Respondent and Ms Kubicz by immigration officers who had attended at a registry office where they were attempting to get married. In respect of each of the points made, the Tribunal resolves the dispute in favour of the Respondent. The discrepancies are found to have arisen from the respective accents of the parties to the marriage, and the responses characterised as “vague” by the decision-maker found to be so because of the vague nature of the questions put. The Tribunal was unimpressed by the Secretary of State’s decision to only reproduce selected parts of those interviews: “this is most unfortunate because selected extracts can lead to a false impression of the overall interview. It may very well be that the Appellant and the Sponsor were asked a very large number of questions which would show the whole interview in a different light”.
4. The Secretary of State now has permission to appeal on the grounds that the First-tier Tribunal failed to apply the guidance in Papajorgi (EEA Spouse - marriage of convenience) Greece [2012] UKUT 00038(IAC). It is submitted that the First-tier Tribunal has erred in respect of the burden of proof, and that this has led the Tribunal to err in respect of its analysis of the evidence.

My Findings

5. There is no burden on the Secretary of State to show that this is a marriage of convenience. There is an evidential burden only: it is for the Secretary of State to produce evidence justifying reasonable suspicion that the marriage is a sham. After this, it is for the Appellant to show that his marriage is in fact genuine. I am satisfied that the determination of the First-tier Tribunal contains an error in this regard.
6. I have given careful consideration to Mr Brown’s submission that this error is not such that the determination should be set aside. I have some sympathy with this suggestion. I agree with the First-tier Tribunal that many of the reasons for refusal in this case are not well made - some, such as the difference in accents between the pronunciation of “tigger” and “thaiga”, are frankly ridiculous. It may be that the Tribunal, having properly directed itself, would have concluded that the Secretary of State had failed to discharge the evidential burden, or that the Appellant had done enough in reply to show his marriage to be genuine. I cannot however be satisfied as to

either. There is repeated reference in the determination to the burden of proof lying on the Secretary of State and it is clear from the decision overall that the Tribunal believed that to be the case. Had the Tribunal properly directed itself there is a real chance that the outcome would have been different.

7. Both parties invited me to remit this matter to the First-tier Tribunal, should an error be found. Neither the Respondent nor Ms Kubicz were present at the hearing before me, and Mr Brown indicated that should the matter be remade, both would wish to give evidence. I therefore agree that this matter should be remitted to the First-tier Tribunal.

Decisions

8. The determination of the First-tier Tribunal contains an error of law and it is set aside.
9. The matter is to be re-made in the First-tier Tribunal.

Deputy Upper Tribunal Judge Bruce
12th November 2014