



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

Appeal Number: IA042002015

THE IMMIGRATION ACTS

**Heard at Field House
On 9 May 2016**

**Decision & Reasons Promulgated
On 24 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

**ANDREEA BIANCA DUMAITRU
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Biggs of Counsel instructed by Addison & Khan, solicitors

For the Respondent: Mr T Melvin of the Specialist Appeals Team

DECISION AND REASONS

The Appellant

1. The Appellant, Andreea Bianca Dumaitru, is a citizen of Romania born on 25 January 1988. She was issued a residence card on 5 March 2009 as an EEA national exercising Treaty rights in the United Kingdom. On 8 November 2013 she married Gurdeep Singh, a citizen of India born on 11 May 1988.

2. On 30 May 2014 her husband applied for a residence card under Reg.7 of the Immigration (EEA) Regulations 2006 (the EEA Regs).
3. On 7 October 2014 the Appellant and her husband were interviewed by the Respondent who on the same day refused to issue a residence card to the husband because she was satisfied that the marriage of the Appellant and her husband was a marriage of convenience within the meaning of Reg.2 of the EEA Regs.
4. On 16 January 2015 the Respondent served on the Appellant a Decision to Remove her under Section 10 of the Immigration and Asylum Act 1999 and Regs.19(3), 21B(2) and 24 of the EEA Regs. This is the decision under appeal.
5. Although there is a letter giving reasons for refusal for the husband, there is no similar letter in relation to the decision to remove the Appellant. It is clear what are the reasons from the grounds of appeal she lodged under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended and Reg.26 of the EEA Regs. These refer to the Respondent's claim that her marriage was one of convenience and that with reference to Reg.21B of the EEA Regs she had abused her right to reside in the United Kingdom pursuant to the EEA Regs by entering into a marriage of convenience or fraudulently assisting another to attempt to obtain a right to reside.
6. On 23 January 2015 the Appellant and her husband also lodged appeals against the respective decisions to refuse him a residence card and to remove her. **CHECK**

The First-tier Tribunal Proceedings

7. The two appeals were linked and on 18 September 2015 Designated Judge of the First-tier Tribunal Manuell heard them and by a decision promulgated on 29 September 2015 found that the Appellant and her husband had entered into a marriage of convenience and dismissed both appeals. He found both the Appellant and her husband were neither reliable nor truthful witnesses.
8. It appears that the husband, who by then was apparently no longer represented, submitted an application for permission to appeal. In the absence of any documentary evidence to the contrary, it would appear this was treated by the First-tier Tribunal as an application for permission to appeal by both the Appellant and her husband. The grounds challenged Judge Manuell's finding that the marriage was a marriage of convenience. On 4 March 2016 Judge of the First-tier Tribunal A K Simpson refused permission to appeal.

Upper Tribunal Permission Application

9. The husband appears to have taken no further action, but on 22 March 2016 the Appellant through her solicitors, a different firm from the firm

instructed in the First-tier Tribunal proceedings, applied to the Upper Tribunal for permission to appeal.

10. The grounds assert the Judge erred in finding the Appellant's marriage to have been one of convenience and refer to the Appellant's child by an EEA national with whom she had established a family life and assert the Respondent's decision was a breach of the obligations owed to the Appellant and her child by reason of Article 8 of the European Convention and Section 55 of the Borders, Citizenship and Immigration Act 2009.
11. On 6 April 2016 Upper Tribunal Judge Bruce granted permission to appeal on the basis that it was arguable the First-tier Tribunal had failed to consider whether the removal of the Appellant was a proportionate response in accordance with Reg.21B(2) of the EEA Regs and had not considered the consequences of removal for her child.

The Upper Tribunal Hearing

12. The Appellant was present and I was informed that the Appellant's partner, not Gurdeep Singh, who was the father of her child was outside the hearing room with their child. I explained the purpose and procedure of an error of law hearing. The Appellant confirmed her address was as shown in the Tribunal records.

Submissions for the Appellant

13. Mr Biggs submitted the Judge had failed to make an adequate assessment whether the Appellant's marriage was a marriage of convenience. In particular, he had:-
 - (i) adopted the wrong approach to the issue of where the burden of proof lay;
 - (ii) not applied the appropriate test for a marriage of convenience, namely whether its sole purpose was for the abuse of a right to reside; and
 - (iii) failed to consider the proportionality of the Respondent's decision under Reg.21B(2) to remove the Appellant.
14. The Judge had erred with regard to his approach to the burden of proof at paragraph 14 of his decision. He had relied on the jurisprudence of *IS (marriages of convenience) Serbia [2008] UKAIT 00031*. Subsequent to the First-tier Tribunal's decision, the correct approach had been explained in *Rosa v SSHD [2015] EWCA Civ 14*. I notice that *Rosa* approved the approach described by the Upper Tribunal in *Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC)*. I note also that Judge Manuell referred expressly to *Papajorgji* at paragraph 14 of his decision.

15. Mr Biggs referred to paragraph 21 of the Judge's decision and submitted this contained an error of law because the Judge had found the marriage of the Appellant and Gurdeep Singh was:-

"... a hollow shell and was entered into or predominantly to enable the First Appellant (the husband) to remain in the United Kingdom, after he had become an overstayer."

Mr Biggs submitted the test for a marriage of convenience was not whether the pre-dominant purpose was an abuse of a right to reside, but whether the sole purpose was to facilitate an abuse of the right to reside. This submission did not mention but would appear to reflect the provisions of Recital 28 of the Citizen's Directive 2004/38/EC which provides:-

'To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, a Member State should have the possibility to adopt the necessary measures.'

16. Mr Biggs then referred to Reg.21B(2) of the EEA Regs. He submitted that the removal directions must be a proportionate response. The Judge had not made any assessment of the proportionality of the decision to remove the Appellant. Proportionality was a fundamental issue which needed to be addressed. At most it could be said that the Respondent had alleged the Appellant had abused the right to reside. There needed to be a careful approach to such an allegation and the consequential decision of the Respondent to remove the Appellant. These were all material errors and the decision should be set aside.

Submissions for the Respondent

17. Mr Melvin submitted the Judge had given adequate reasons to support his conclusion that the marriage of the Appellant and Gurdeep Singh was a marriage of convenience. He had not mis-directed himself as to the burden of proof. There was no evidence before the Judge to enable him to assess the proportionality of removal. The Appellant had been complicit in abusing the right to reside by entering into a marriage of convenience and consequently the decision to remove her from the United Kingdom was appropriate and proportionate. The decision contained no material error of law and should stand.

Response for the Appellant

18. Mr Biggs submitted it was far from clear the Judge had applied the appropriate burden of proof and he had referred to the pre-dominant purpose of the marriage being an abuse of the right to reside rather than the sole purpose as specified by Recital 28 of the Citizen's Directive. The Judge had never assessed the proportionality of the decision to remove to the legitimate purposes to the relevant criteria set out in the EEA Regs. The Appellant claimed to have been exercising Treaty rights since 2008.

Mr Melvin interjected that it was accepted that she had arrived in 2008 but the Respondent had not seen evidence of her exercise of Treaty rights.

19. At the end of the hearing I informed the Appellant that for the reasons to be given in this decision I found there was a material error of law in the Judge's decision.

Consideration and Conclusion

20. I do not find the Judge adopted the wrong approach to the burden of proof. He referred to the determination in *Papajorgji* which subsequent to the hearing before him the Court of Appeal has approved. He relied on evidence supplied by the Respondent, namely the record of the extensive separate interviews with each of the Appellant and Gurdeep Singh.

21. The second ground of appeal argued that the Judge had erred in the test he had applied to assess whether the Appellant's marriage to Gurdeep Singh was a marriage of convenience for purposes of the EEA Regs. In its judgment in *Rosa v SSHD [2016] EWCA Civ 14*, handed down after promulgation of the First-tier Tribunal's decision under appeal the Court of Appeal stated:-

- "9. The EEA Regulations implement Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States ('the Directive'). There is no suggestion in this case of incorrect or inadequate transposition of the Directive. It is therefore unnecessary to set out the detailed provisions of the Directive relating to the rights of residence of family members or the issue of a residence card to them. It is sufficient to note that in cases of abuse, including marriages of convenience, the Directive permits Member States to exclude the rights otherwise conferred by the Directive. Thus, Article 35 provides:

'Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.'

Recital (28) of the preamble to the Directive is in similar terms.

10. Neither the EEA Regulations nor the provisions of the Directive contain a definition of 'marriage of convenience', but in *R (Baiai) v Secretary of State for the Home Department (Nos. 1 and 2) [2008] UKHL 53, [2009] 1 AC 287* at paragraph 6 Lord Bingham said it was difficult to improve on the definition (which the Secretary of State accepted in that case as apposite) in Article 1 of EC Council Resolution 97/C 382/01 of 4 December 1997 on measures to be adopted on the combating of marriages of convenience. That article defines a marriage of convenience as -

‘a marriage concluded between a national of a Member State or a third-country national legally resident in a Member State and a third-country national, with the sole aim of circumventing the rules on entry and residence of third-country nationals and obtaining for the third-country national a residence permit or authority to reside in a Member State.’ ”

For the purpose of a fuller exposition, it is to be noted that Section 24(5) of the Immigration and Asylum Act 1999 gives a definition of a “sham marriage” (not a marriage of convenience) in the following terms:-

“ ‘Sham marriage’ means a marriage (whether or not void)—

- (a) entered into between a person (“A”) who is neither a British citizen nor a national of an EEA State other than the United Kingdom and another person (whether or not such a citizen or such a national); and
- (b) entered into by A for the purpose of avoiding the effect of one or more provisions of United Kingdom immigration law or the immigration rules.”

22. The Judge made a finding of fact at paragraph 21 of his decision that the marriage was a “hollow shell”. He went on to state it was entered into or pre-dominantly as an abuse of the right to reside. Given the overwhelmingly adverse credibility findings against each of the Appellant and her husband made by the Judge I do not consider the finding that the marriage was entered into or predominantly for the purposes of the abuse of the right to reside to amount to a material error of law such that this aspect of the decision cannot be sustained. Further, having carefully considered the decision and other documents in the Tribunal file, together with the Appellant’s grounds for permission to appeal, I am satisfied that no different Tribunal would have come to a different conclusion even if it had expressly and exclusively applied the “sole purpose” test.
23. The last ground was the challenge to the Judge’s treatment of the decision to remove the Appellant. Mr Biggs submitted Reg.21B(2) of the EEA Regs. required that an EEA decision on the grounds of abuse of rights must be proportionate. The Judge had not assessed either the proportionality of the decision to remove the Appellant in the context of the EEA Regs. or whether she had any potential claim under Article 8 of the European Convention. The Judge was not assisted by the Appellant, as he properly noted, extraordinarily little evidence about her child or her relationship with the child’s father who is now stated to be an EEA national. Indeed at paragraph 18 of his decision, the Judge noted there was no birth certificate and the Appellant’s account had emerged in the course of re-examination, indicating that it was coaxed out of her. That the lack of evidence was unsurprising led to the Judge’s comments at the start of paragraph 19 of his decision. In this regard I would add that there is no evidence in the Tribunal file of the Appellant’s previous divorce.

24. I find the omission of the Judge to assess the proportionality of the Decision to Remove the Appellant and to assess whether she had any claim under Article 8 of the European Convention to amount to material errors of law, even if the Appellant failed to provide much, if any, evidence to support an argument that her removal would be disproportionate or an unreasonable interference with the private and family life of herself and her child.
25. I therefore set aside the decision of the First-tier Tribunal. The appeal will need to be heard afresh because the basis on which the Appellant is now putting forward her case would appear to be entirely different from that on which it was put before the Judge. I have considered the possibility that I should find that having regard to the evidence before the Judge and the case as presented for the Appellant, the Judge did not make any material error of law. This would leave the Appellant to make a further application under the EEA Regs. on the basis of her present circumstances.
26. I have decided against such a robust approach because the appeal is against a Decision to Remove and involves a child. Additionally, I find it will be useful and relevant for the Judge re-hearing the appeal to have before him or her the documentation relating to the Appellant's marriage of convenience. I therefore see no reason to set aside the findings of fact, limited as they are because, as the Judge rightly noted, there was a dearth of evidence before him shall stand. I find the Judge made no findings of fact relating to the child; as he stated at paragraphs 9-11 of his decision setting out the Appellant's evidence about the child and concluding he could make no findings because of the dearth of evidence about the child.
27. A full fact-finding exercise will be required on the basis of the Appellant's now claimed circumstances and having regard to Section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2 of 10 February 2010 as amended, I direct that the appeal be remitted to the First-tier Tribunal for hearing before a Judge other than Designated Judge of the First-tier Tribunal Manuell.

Anonymity

28. No request for an anonymity order was made and having considered the appeal I find none is warranted.

SUMMARY OF DECISION

The decision of the First-tier Tribunal contained an error of law and the appeal is remitted for re-hearing in the First-tier Tribunal.

DIRECTIONS

Not less than 10 working days before the next hearing the Appellant is to file and serve copies of:-

- her certificate of divorce prior to her marriage to Gurdeep Singh

- the full birth certificate for her child
- payslips, forms P60 and if appropriate forms P45 and personal bank statements showing receipt of wages from 2008 to date.

Signed/Official Crest

Date 23.v. 2016

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal