



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: IA/27335/2014

THE IMMIGRATION ACTS

Heard at Field House, London

Decision & Reasons

Promulgated

On the 13th July 2016

On the 26th July 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MRS EVELYN IGWE

(Anonymity Direction not made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Bustani (Counsel)

For the Respondent: Mr Norton (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Liddington promulgated on the 16th September 2015, in which he dismissed the Appellant's appeal against the Respondent's refusal of her application for

a Residence Card, as the spouse of an EEA National exercising Treaty rights in the United Kingdom. Within the Grounds of Appeal it is argued by the Appellant, inter alia, that there was procedural unfairness in the case in that the Appellant had not been provided with a copy of the marriage interview record, in breach of the basic principles of fairness and the Respondent's duty of full disclosure under the First-tier Tribunal Procedure Rules. It was argued that the Respondent and the Judge was not entitled to rely upon the interview in circumstances where a copy of the same had not been provided and that the interviewing officer's comments are no more than the views of the interviewer.

2. It was further argued within the Grounds of Appeal that the decision of the First-tier Tribunal Judge is wrong in his application of the burden of proof and it is argued that following the case of Papajorgji (EEA Spouse - Marriage of Convenience) Greece [2012] UKUT 00038 (IAC), that there is 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, and that there is only an evidential burden on the Claimant to address evidence justifying reasonable suspicion that the marriage is entered into for the predominant purpose of securing residence rights. It is argued that the Respondent had to have grounds for suspecting the genuineness of the marriage before conducting an interview and thereafter in treating the comments of the interviewing officer as evidence.
3. Although within the Respondent's Rule 24 reply, it was initially conceded that the First-tier Tribunal Judge had materially erred in respect of material not having been provided, that the Judge relied upon to form the view that the marriage was one of convenience and that the Judge further misdirected herself in law in suggesting that the only matters appertaining as at the date of the decision were relevant rather than the date of the hearing, and that the case should be remitted back to the First-tier Tribunal for a hearing de novo, Mr Norton on behalf of the Respondent at the appeal hearing, initially withdrew that Rule 24 notice. However, Mr Norton did then concede on behalf of the Respondent that the Judge had materially erred in respect of her

consideration of the burden of proof in the case. Mr Norton conceded that following the Court of Appeal decision in the case of Rosa v The Secretary of State for the Home Department [2016] EWCA Civ 14, that the legal burden lies on the Secretary of State to provide that an otherwise valid marriage is a marriage of convenience, so as to justify the refusal of an application for a Residence Card under the EEA Regulations [24]. The Court of Appeal found that the legal burden of proof relied on the Secretary of State throughout, but the evidential burden can shift, as was explained in the case of Papajorgji and endorsed by the Court of Appeal in the case of Agho v The Secretary of State for the Home Department [2015] EWCA Civ 1198. In the Agho case, Underhill Lord Justice, said that:

“13...What it comes down to is that as a matter of principle a spouse establishes a prima facie case that he or she is a family member of an EEA National by providing the marriage certificate and the spouse’s passport; that the legal burden is on the Secretary of State to show that any marriage thus proved is a marriage of convenience; and the burden is not discharged merely by showing “reasonable suspicion”. Of course in the usual way the evidential burden may shift to the applicant by proof of facts which justify the inference that the marriage is not genuine, and the facts giving rise to the inference may include a failure to answer a request for documentary proof of the genuineness of the marriage where grounds of suspicion have been raised. Although, as I say the point was not argued before us, that approach seems to me to be correct...”.

4. On that basis, Mr Norton conceded that First-tier Tribunal Judge Liddington did materially err at [10] of her decision, when she stated that “in immigration appeals, the burden of proof is on the Appellant and the standard of proof required is the balance of probabilities”. He accepted that in EEA, marriage of convenience cases, the legal burden of proof remains on the Respondent at all times to establish that the marriage is one of convenience, although the evidential burden may shift. He accepted that as a result of the Judge having misapplied the burden of proof, this did amount to a material error of law, and that the decision of First-tier Tribunal Judge

Liddington should thereby be set aside and the case remitted back to the First-tier Tribunal for a hearing de novo before a different First-tier Tribunal Judge.

5. In light of that concession by Mr Norton regarding the decision of the First-tier Tribunal Judge containing a material error of law, I do not need to address the arguments raised by the Appellant in her other grounds of appeal, and I do not do so.

Notice of Decision

The decision of First-tier Tribunal Judge Liddington, containing a material error of law, the same is set aside;

The case is remitted back to the First-tier Tribunal for a hearing de novo, before any First-tier Tribunal Judge other than First-tier Tribunal Judge Liddington.

Signed

Handwritten signature in black ink, appearing to read 'RFM McGinty' with a stylized flourish at the end.

Deputy Upper Tribunal Judge McGinty

Dated 16th July 2016