Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/37412/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 May 2016	**On 20 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

DAVID ESSI
(NO ANONYMITY ORDER MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Adjarho, solicitor of Chancery CS Solicitors
For the Respondent: Mr T Melvin, of the Specialist Appeals Team

DECISION AND REASONS

The Appellant

1. The Appellant is a Nigerian citizen born on 7 August 1979. On 9 September 2014 the Respondent refused his application for a residence card by reason of his marriage on 29 November 2013 to Ludmila Eugenia Fermina, a Dutch national said to be exercising Treaty rights in the United Kingdom under Regulation 7 of the Immigration (EEA) Regulations 2006 as amended (the EEA Regs). No removal direction was made.

2. By a decision promulgated on 30 December 2014 Judge of the First-tier Tribunal Jerromes allowed the appeal under the EEA Regs. On 11 February 2015 Judge of

the First-tier Tribunal McDade granted the Respondent permission to appeal and on 17 April 2015 Deputy Upper Tribunal Judge Juss found that there was a material error of law in the decision of Judge Jerromes and remitted the appeal for hearing afresh in the First-tier Tribunal.

3. By a decision promulgated on 29 September 2015 Judge of the First-tier Tribunal Parkes dismissed the Appellant's appeal on the basis of unexplained inconsistencies in material matters in the evidence given by each of the Appellant and his wife.

4. The Appellant again sought permission to appeal and on 7 March 2016 Judge of the First-tier Tribunal Reid refused permission to appeal. The Appellant renewed his application to the Upper Tribunal and on 6 April 2016 Upper Tribunal Judge McGeachy granted permission on the basis that it was arguable that Judge Parkes had placed too low a standard of proof on the Respondent and that, on the evidence before the First-tier Tribunal Judge he should have found that the Respondent had not discharged the burden of proof.

Development Subsequent to the First-tier Tribunal's Second Substantive Decision

5. The Court of Appeal handed down judgments on 26 November 2015 in *Agho v SSHD [2015] EWCA Civ.1198* and on 15 January 2016 in *Rosa v SSHD [2016] EWCA Civ. 14* in which the Court affirmed the jurisprudence in *Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 38 (IAC)*.

The Upper Tribunal Hearing

6. The Appellant and his wife attended the hearing. She produced her passport to show she was born on 4 March 1968 in Curacao. I explained the purpose of the hearing and procedure to be followed. The Appellant confirmed his present address.

Submissions for the Appellant

7. Mr Adjarho handed up the Court of Appeal's judgment in *Agho* and referred to in *Rosa*. He submitted Judge Parkes had mis-directed himself at paragraph 2 of his decision as to the burden of proof. The Respondent had not made any visit to the Appellant to ascertain whether he was living with his wife. The Appellant had failed on two separate occasions to attend for interview by the Respondent. On the date of the first interview he had been ill and on the date of the second he with his wife had missed their train. Eventually, Mr Adjarho handed up a copy of internet train bookings for the date and to the city where the place appointed for their second interview is situated.

8. He submitted that notwithstanding the provisions of Regs.20B(4)-(6) of the EEA Regs which state:-

> (4) If, without good reason, A or B failed to provide the additional information requested or, on at least two occasions, failed to attend an interview if so invited, the SSHD may draw any factual inferences about A's entitlement to a right to reside as appear appropriate in the circumstances.

> (5) The SSHD may decide following an inference under paragraph (4) that A does not have a right to reside.
>
> (6) But the SSHD must not decide that A does not have or ceases to have a right to reside on the sole basis that A failed to comply with this regulation.

Regs.20(B)(4)-(6) did not provide for a burden of proof different from that described in *Papajorgji* and approved in *Agho* and *Rosa*. Further, Mr Adjarho submitted the Judge had not addressed the evidence of the Appellant's marriage certificate. I find little weight in this submission because it would not appear to take into account that for a marriage to be a marriage of convenience there needed to be a marriage; invariably evidenced by a document, generally a marriage certificate.

Submissions for the Respondent

9. Mr Melvin referred to the Judge's findings at paragraph 6ff. of his decision. The Judge had clearly placed the burden of proof on the Secretary of State and the Respondent and taken the correct approach. He had considered individual aspects of the evidence before him. Looked at in the round and as a whole the decision did not disclose any material mis-direction in law.

Response for the Appellant

10. Mr Adjarho reminded me that he had attended the hearing before the First-tier Judge and the Appellant had stated where his wife worked. The identity of the restaurant, KFC or McDonald's, near which the Appellant had proposed to his wife was not material. The burden of proof remained on the Respondent. The Judge had not dismissed all the evidence for the Appellant. He had found in the evidence of the Appellant and his wife that although there were differences there were also consistencies. He produced photographs from the Appellant's wedding. He referred generically to paragraph 13 of the judgment in *Agho* which states:-

> Thus far, the UT was concerned with the approach to be followed by the ECO. At paras. 33-38 it goes on to discuss the burden of proof in proceedings in the Tribunals. It was concerned about a possible reading of an earlier decision – *IS (Marriages of Convenience) Serbia [2008] UKAIT 31* – to the effect that "once evidence of reasonable suspicion has been raised, there is a legal burden on the applicant to demonstrate that it is more probable than not the marriage is not one of convenience" (see para. 33). It expressed considerable reservations about such an approach, and although it said that the issue did not fall for decision it went on at paras. 34-37 to explain why it was strongly inclined to believe that it was wrong in principle. Mr Gullick took no issue with the reasoning in those paragraphs, but it is fair to say that the grounds of appeal did not turn on the issue of the burden of proof and it does not fall for decision before us any more than it did before the UT in *Papajorgji*. In those circumstances I will not attempt to summarise the passage in detail. 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 that that 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 for suspicion have been raised. Although, as I say, the point was not argued before us, that approach seems to me to be correct – as does the UT's statement that the standard of proof must be the civil standard, as explained by the House of Lords in *Re B (Children) [2008] UKHL 35, [2009] 1 AC 11.*

In the light of this, he concluded the decision should be set aside and the appeal allowed.

Findings and Consideration

11. Notwithstanding paragraph 2 of the Judge's decision, I find he properly directed himself as to the relevant law and the relevant burden of proof at paragraphs 4 and 11 of his decision. In the course of his submissions Mr Adjarho accepted the implied criticism of his firm in paragraph 6 of the Judge's decision and in the preparation of the statements filed for each of the Appellant and his wife.

12. It is clear the Judge found that some evidence supported the Appellant's claim and some evidence did not. He referred to and identified some inconsistencies in paragraph 12 of his decision but he did not similarly address any one particular consistency and in his assessment at the end of paragraph 13 of his decision he concluded that the differences identified in paragraph 12 were sufficient when set against the consistencies generically referred to in paragraph 13 to support the conclusion that the Respondent had discharged the burden of proof.

13. Having regard in particular to the judgments in *Agho* and *Rosa* which explained the extent of the burden of proof on the Respondent in cases of marriages of convenience, I have come to the conclusion that the Judge erred in law because he did not address specific parts of the evidence in sufficient detail to amount to sustainable reasons for his conclusions adverse to the Appellant who had given explanations why he and his wife did not attend on at least two occasions for interview by the Respondent. These needed to be expressly addressed. I find looking at the matter in the round that the Judge who did not have the benefit of the jurisprudence in *Agho* and *Rosa* explaining the relevant law and that the determination in *IS (marriages of convenience) Serbia [2018] UKAIT 00031* was not to be followed made a material error of law his application of the burden of proof to the assessment of the evidence before him.

14. It follows that his decision should be set aside in its entirety. Having regard to the substance of the appeal which relates to the factual matrix of the Appellant's marriage and that it was accepted for the Appellant that the evidence previously submitted for the Appellant was not all that it could or should have been, I am satisfied it is appropriate for the matter to be heard afresh in its entirety before a Judge other than Judges Jerromes or Parkes.

Anonymity

15. There was no request for an anonymity order and having considered the appeal I find none is warranted.

SUMMARY OF DECISION

The decision of the First-tier Tribunal contained a material error of law and is set aside in its entirety.

The matter is to be heard afresh.

No anonymity order is made.

Signed/Official Crest Date 19. v. 2016

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal