Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/38252/2014**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 2 February 2016 **On 16 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR ABOLORE OLUDARE BAKARE
(ANONYMITY DIRECTION NOT MADE)
Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Praisoody, Counsel instructed by Supreme Solicitors
For the Respondent: Ms Alice Holmes, Specialist Appeals Team

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge M P W Harris sitting at Hatton Cross on 29 June 2015) dismissing on the papers his appeal against the decision of the Secretary of State to refuse to issue him with a residence card on the ground that his marriage to his EEA sponsor was a marriage of convenience. The First-tier Tribunal did not make an anonymity direction, and I do not consider that

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the appellant requires to be accorded anonymity for these proceedings in the Upper Tribunal.

The Reasons for Granting Permission to Appeal to the Upper Tribunal

2. On 4 November 2015 Upper Tribunal Judge Lindsley gave her reasons for granting permission on a renewed application for permission to appeal. It was arguable, as contended in the grounds of appeal, that the First-tier Tribunal erred by not following **Papajorgji (EEA Spouse – Marriage of Convenience) Greece [2012] UKUT 38** in effectively placing the burden of proof on the appellant; secondly because the decision failed to give sufficient reasons for its conclusions; thirdly the First-tier Tribunal wrongly gave little weight to the evidence of the appellant as it was not oral but did not apply the same standard to the evidence of the absent Immigration Officer; fourthly, the First-tier Tribunal did not have regard to the documentary evidence showing cohabitation of the couple; fifthly, the First-tier Tribunal did not consider the appellant's skeleton argument.

The Decision of the First-tier Tribunal

3. The appellant originally elected for an oral hearing of his appeal against the refusal decision. His legal representatives then wrote to the First-tier Tribunal at Hatton Cross to say that their client had elected for a paper appeal, due to limited financial resources.

4. As summarised by Judge Harris in his subsequent decision at paragraph [3], the respondent's case was based on the outcome of an enforcement visit to the claimed marital home. In an IS126 report, Pat Dale, Immigration Officer, said that he and another officer had conducted a pastoral visit to the appellant's home address on 13 August 2014 at 2.45pm. The door was opened by a young boy, who woke up his father to speak to them. The man stated that his name was M S, a British national (date of birth [ ]), who had lived at the property with his children for the last ten years. He had five children. The report continues:

> There was no trace of Mr Abolore Oldura Bakare or his EEA partner staying at this place.

5. The judge's findings on the marriage of convenience issue were set out in paragraphs [6] to [18], which I reproduce below:

> 6. In assessing documentary evidence put before me I have followed the guidance given in Tanveer Ahmed* [2002] UKIAT 439.
>
> 7. It is not disputed that the appellant and Ms Maria were married on 10 January 2013. It is the claim of the appellant that they have been living as a married couple.
>
> 8. The respondent has produced a witness statement from Immigration Officer Dale one of the officials who visited the claimed marital address on 13 August 2014. IO Dale states that having gained access to the premise they spoke to a gentleman present and that there were no traces of the appellant or Ms Maria staying at the address.

9. The appellant in his grounds of appeal and witness statement claims, in effect, that the statement is not accurate. It is said that the gentleman who was spoken to is the appellant's uncle and that he did explain to the officers that his nephew and wife used a converted lounge as a bedroom. The officers failed to identify through questioning that the nephew is the appellant. The appellant and Ms Maria in their statement assert that their marriage is not one of convenience.

10. Even on the appellant's account, neither he nor his wife, were present at the time of the visit by officials.

11. It is not claimed by either appellant or his wife that there were clothing or other goods belonging to them present at the address that would have been obvious to the officers and would have shown their residence there.

12. In the circumstances, I am satisfied that the respondent has shown that the burden arises for the appellant to address evidence justifying reasonable suspicion that the marriage was entered into for the predominant purpose of securing residence rights: Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC).

13. The appellant's uncle in his witness statement says that both the appellant and his wife were out at work at the time of the visit. However, Ms Maria gives no explanation in her witness statement for why she was absent to match this. Nor does the appellant give any explanation about his absence to match the account of his uncle. I find this very surprising. I would have expected reliable witnesses to provide such detail in their statements. I find this discrepancy raises significant doubt in my mind about the reliability of what is said not just by the appellant and Ms Maria but also the appellant's uncle.

14. Neither the appellant nor Ms Maria mention in their statements about journeying to Liverpool for a spouse interview as claimed in the grounds of appeal. I attach little weight to this claim.

15. None have presented themselves for an oral hearing to have their evidence tested in cross-examination, which might have clarified matters.

16. I prefer to believe the account of IO Dale.

17. In the circumstances, although there are photographs of a marriage ceremony and some evidence of the appellant and Ms Maria using the same address for correspondence, considering matters in the round, given the doubts already raised, I do not place great weight on this evidence as demonstrating that the marriage is anything other than a marriage of convenience.

18. On the evidence before me, I am not satisfied that the appellant has demonstrated on the balance of probabilities that he is a spouse within the meaning of the 2006 Regulations and entitled to a residence card.

The Hearing in the Upper Tribunal

6. At the hearing before me to determine whether an error of law was made out, both the appellant and his EEA sponsor were in attendance. Ms Praisoody developed the arguments raised in the grounds of appeal. Ms Praisoody submitted that the couple had a right to have the appeal determined on the papers, and it was perverse of the judge to find on the papers that the Secretary of State had discharged the burden of proof, as the weight of documentary evidence was firmly in favour of the appellant. In reply, Ms Holmes submitted that it was clearly open to the judge to find on the papers that the respondent had made out a case that the marriage between the appellant and his EEA national sponsor was one of convenience. By electing for a paper hearing, they had deprived the Secretary of State of the opportunity to test their evidence, and the evidence of M S, in cross-examination. Also, by electing for a paper hearing, they could not complain that the evidence of the Immigration Officer had not been tested at an oral hearing.

Discussion

7. Ground 1 gains some traction as the judge nowhere clearly directs himself that the legal burden of proof at all time rests with the respondent to make out a case that the marriage is one of convenience. However, at paragraph [12] the judge correctly summarised the guidance given in **Papajorgji**, and went on to apply it. It was open to him to find, for the reasons which he gave in paragraphs [8] to [11], that the evidence justified reasonable suspicion that the marriage was entered into for the predominant purpose of securing residence rights, and accordingly that the evidential burden shifted to the appellant to "dispel the reasonable suspicion:" see **Papajorgji** at paragraph [33].

8. As stated at **Papajorgji** at paragraph [39], the ultimate question for the judge was whether in the light of the totality of the information before him, "including the assessment of the claimant's answers and any information provided," he was satisfied that it was more probable than not that this was a marriage of convenience.

9. At paragraph [18] the judge wrongly placed the legal burden of proof on the appellant, rather than the respondent. But I do not consider that the error is material as the judge's line of reasoning would have produced the same answer if he had correctly directed himself as to the incidence of the legal burden of proof.

10. As is encapsulated in Ms Praisoody's oral submission which I have recorded above, the crucial issue is whether the judge's conclusion is perverse or not supported by adequate reasoning.

11. I address Ms Praisoody's perversity argument in the context of ground 3. In effect, it is contended that it was not open to the judge to prefer the evidence of Immigration Officer Dale over the evidence of the appellant, his sponsor and his uncle, M S, as the Immigration Officer's evidence had not been tested at an oral hearing any more than had the evidence of the appellant and his supporting witnesses. I reject this submission. By

electing for a paper hearing, the appellant took upon himself the risk that the written evidence of the Immigration Officer would be preferred to the written evidence of himself and his supporting witnesses. Conversely, if the appellant had proceeded to an oral hearing, as originally envisaged, he would have had a reasonable expectation that the very fact that he and his supporting witnesses were willing to give oral evidence, and to have such evidence tested, would materially assist in dispelling the suspicion of a marriage of convenience which arose from the report of Immigration Officer Dale. In short, it was not perverse of the judge to prefer the evidence of Immigration Officer Dale, and to conclude that the marriage was one of convenience.

12. Ms Praisoody mentioned **Agho v SSHD [2015] EWCA Civ 1198** in passing, but did not rely on it in support of her submission of perversity. The facts of **Agho** are similar to the present case, in that the evidence relied on by the SSHD was a single enforcement visit to the claimed marital home. The Court of Appeal held at [45] that the SSHD's evidence about this visit was not capable of overcoming, "the inference to the contrary that plainly arises from the contemporary documents". The features which distinguish the present case from **Agho** include the fact that the claimant in **Agho** attended an oral hearing in the First-tier Tribunal at which he gave evidence, and that the detailed report of the enforcement visit prepared by a police officer was only produced at the hearing, so that the claimant (and his representative) were taken by surprise and there was no opportunity for the claimant to respond to the details:

> I do not believe it was right for the Judge to make a serious finding of the kind that he did, flatly contradictory to the documentary evidence, on the basis of the late-disclosed, second-hand and confused evidence relied on by UKBA (per Underhill LJ at [41]

13. Turning to ground 2 (adequacy of reasons) I consider that the judge gave adequate reasons for resolving the disputed issue in favour of the Secretary of State. He took into account the evidence which rang counter to the allegation of a marriage of convenience, which he summarises in paragraph [17]. He took into account the evidence in the witness statements of the appellant and his supporting witnesses, which he refers to at paragraph [9] and [13]. It was open to the judge to find that the evidence tendered by the appellant was not reliable, for the reasons that he gave.

14. There is no merit in ground 4, as the judge expressly addresses the probative value of the documentary evidence of co-habitation at paragraph [17] of his decision.

15. Ms Praisoody did not address me on ground 5, which in any event is too vague as to engender a sustainable ground of appeal. There has been no attempt to identify the specific point or series of points advanced in the skeleton argument which are not covered by grounds 1 to 4.

16. The attendance of the appellant and his EEA national sponsor at the hearing before me indicates that the judge may have reached a factually wrong conclusion; as does the information which is held on a Home Office database. The Home Office database entry confirms that, as alleged in the grounds of appeal, the appellant and the sponsor travelled to Liverpool for a marriage interview. Unfortunately the interview was cancelled because the appellant had not confirmed in advance that he and his sponsor would be attending the interview to which they had been invited.

17. On the evidence that was available to the First-tier Tribunal Judge, I am not persuaded that he erred in law in resolving the marriage of convenience issue in favour of the Secretary of State. Neither the appellant nor his EEA sponsor is facing removal, and it is open to the appellant to make a fresh application for a residence card, relying, among other things, on the Secretary of State's acceptance (through Ms Holmes) that the appellant and his EEA national sponsor presented themselves for a marriage interview on 29 May 2014.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision of the First-tier Tribunal stands. This appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson