Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/42212/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 15 March 2016	**On 25 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

RODRIGUE TCHOKOGA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Nwaekwu, Moorehouse Solicitors
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Cameroon born on 29 November 1987. On 3 June 2014 he applied for a residence card as confirmation of a right to reside in the UK under the European Economic Area Regulations 2006 ("EEA Regulations") on the basis of his marriage to an EEA national Sewa Perpetue Mandeng-Houehenou. The Respondent refused that application and concluded that the marriage was one of convenience under regulation 2 of the EEA Regulations.

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2. The Appellant appealed against the decision to refuse to issue him a residence card and that appeal was heard by First-tier Tribunal Judge Lawrence who dismissed his appeal finding that the marriage was one of convenience. He dismissed his appeal under the EEA Regulations and under Article 8 of the European Convention on Human Rights.

3. The Appellant sought permission to appeal against that decision and permission was granted on 2 February 2016 by First-tier Tribunal Judge Pooler. He found that it was arguable that the judge misdirected himself as to the burden as proof. He refused permission in relation to the other grounds.

The Grounds

4. The Appellant was granted permission in respect of one ground only. That ground is that Judge misdirected himself as to the burden of proof as explained in **Papajorgji (EEA Spouse – marriage of convenience) Greece** [2012] UKUT 00038 and **Rosa v SSHD** [2016] EWCA Civ 14.

The Rule 24 Response

5. The Respondent acknowledges that the First-tier Tribunal did fail to note that there was no burden at the outset of an application on a claimant to demonstrate that a marriage to an EEA national was not one of convenience and that there was an evidential burden on the claimant to address evidence justifying reasonable suspicion that the marriage was entered into for the purpose of securing residence rights. However, the Respondent submits that any error in the determination of the First-tier Tribunal is immaterial as this was a case where there was plainly information before the First-tier Tribunal which justified a reasonable suspicion that the marriage was entered into for the predominant purpose of securing residence rights. It is argued that the determination makes it clear that the Appellant failed entirely to address the information justifying a reasonable suspicion. The Appellant's wife did not attend the hearing and there was an absence of evidence in relation to cohabitation and no adjournment was sought to secure her attendance or to demonstrate that she had been admitted to hospital as claimed. It is therefore submitted that there is not a material error of law.

The Hearing

6. Mr Nwaekwu submitted that it was critical that the burden was addressed properly and it was a clear and material error of law. A fair hearing was not conducted and that was the primary requirement in cases such as this. If the error of law was material the matter should be remitted back to the First-tier Tribunal. It was a narrow point and was critical. The Judge did not comply with the guidance in the case law.

7. Mr Melvin said that there was nothing to add to the Rule 24 response. The technical error could not be material on the findings of fact made.

Discussion and Findings

8. The First-tier Tribunal Judge directed himself at paragraph 7 of the decision that the "appellant bears the legal burden of proof from start to finish and the standard of proof is on the balance of probability". In **R and Others v SSHD (2005) EWCA Civ 982** the Court of Appeal identified the most frequently encountered points of law which includes making a material misdirection of law on any material matter.

9. In **Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC)** (Blake J) the Tribunal held that (i) 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; (ii) I**S (marriages of convenience) Serbia** [2008] UKAIT 31 establishes only that there is 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. The Tribunal clarified at [33] that they did not accept there was a burden as such on the appellant and at [39] concluded that when the issue was raised in an appeal, the question for the judge would therefore be:

> "... in the light of the totality of the information before me, including the assessment of the claimant's answers and any information provided, am I satisfied that it is more probable than not this is a marriage of convenience."

10. In **Rosa v SSHD** [2016] EWCA Civ 14 Richards LJ held at [24] that the reasoning in **Papajorgji** was compelling and that the legal burden lies on the Secretary of State to prove 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. The evidential burden can shift as explained in **Papajorgji** ([29])**.**

11. There is a clear misdirection at paragraph 7 of the First-tier Tribunal's decision as the Judge places the legal burden throughout on the Appellant. However, the error of law can only be said to be material if the Tribunal could not have reached the same conclusion had it directed itself properly.

12. In my judgment, the error was not material. The First-tier Tribunal made clear findings in relation to the question of whether the Appellant's marriage was a marriage of convenience. He found that there was only one single bed at the property, that the Appellant did not identify any items that belonged to his spouse at the property and that the utility bills relied on did not demonstrate that she lived at the address. The findings were sufficient to shift the evidential burden in this case onto the Appellant. The Appellant produced evidence in an attempt to deal with them. However, the tribunal found that the failure of the Appellant's spouse to attend the hearing, the failure to produce evidence as to why she could not attend the hearing and the incredible evidence of the

witness led to the conclusion that the marriage was one of convenience. He found at paragraph 26 that "the marriage to Ms Mandeng-Houehenou is one of convenience to secure status in the UK on a false basis". This clearly indicates that that the outcome did not turn on the tribunal's direction as to the burden of proof. There is no merit in the suggestion that the finding might have been different if the tribunal had approached the matter on the basis that the legal burden of proof lay throughout on the Secretary of State.

Conclusions:

13. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

14. I do not set aside the decision.

Anonymity

The First-tier Tribunal did not make an order for anonymity and no application has been made for such an order.

Signed Date

Deputy Upper Tribunal Judge L J Murray