IAC-AH-CJ-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Numbers: IA/48447/2014
IA/50547/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 4 January 2016** | **On 21 January 2016** |

**Before**

**UPPER TRIBUNAL JUDGE MCGEACHY**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**ATTIQ UR REHMAN CHATHA (FIRST APPELLANT)**
**ELINA BUKINA (SECOND APPELLANT)**

Respondents

**Representation:**
For the Appellants: Ms A Fijiwala, Senior Home Office Presenting Officer
For the Respondent: None

**DECISION AND REASONS**

1. The Secretary of State appeals, with permission, against a decision of Judge of the First-tier Tribunal Eames who in a determination promulgated on 29 June 2015 allowed the appeal of Mr Attiq UR Rehman Chatha, to whom I will refer as the appellant, against a decision made on 1 December 2014 to refuse to issue him with a residence card as confirmation of a right to reside in Britain, and the appeal of Mrs Elina Bukina, to whom I will refer as the second appellant, against the decision to remove her under Section 10 of the Immigration and Asylum Act 1999 and Regulations 19(3)

(a), 19(3)(c) and 21B(2) and 24(2) of the Immigration (EEA) Regulations 2006.

2. Neither appellant attended the hearing before me. Ms Fijiwala produced a form showing that the appellant had absconded from temporary admission which had been granted to him in that he had failed to report as required since 3 July 2015.

3. I am in some difficulty with regard to the second appellant's appeal as although the decision against her is set out in the determination of the Judge of the First-tier and indeed there were detailed grounds submitted on her behalf and the respondent, in appealing against the decision of Judge Eames heads the notice of appeal with both appellants' names the respondent has not put forward any arguments as to why the second appellant should be removed other than that there is an allegation that she had entered into a marriage of convenience.

4. The application for leave to remain was made by the appellants' solicitors on 28 August 2014. The appellants were thereafter called for interview at the UKBA offices in Liverpool. It appears that immediately after the interview they were served with notices of the decisions made: the decision in respect of the first appellant being a refusal to issue a residence card. The reason given was that his marriage was one of convenience.

5. The interview comprised 140 questions ranging over such subjects as when the appellants had met, what they had eaten the day before, what had happened on the day they married, their work and when they had last drunk alcohol. The grounds of appeal lodged on behalf of the appellant asserted that the appellants were genuinely married and that evidence submitted had been ignored and that the decision was inconsistent with the guidelines in the determination in **Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC)**. It was also asserted that no consideration had been given to the appellants' private life.

6. The grounds of appeal in respect of the second appellant stated that she and the appellant had been detained after the interview and then granted temporary admission and the decision to remove her was unfair and contrary to the terms of the Immigration (EEA) Regulations 2006.

7. Judge Eames, having noted that neither of the appellants had appeared and that there was no reason as to why they had not appeared, stated that he was taking into account all the documentary evidence before him and that he considered that there was sufficient evidence before him to decide the case in the appellants' absence. He stated that the decision in **IS (Marriages of convenience) Serbia [2008] UKAIT 00031** had held that the burden of proving that a marriage was not a "marriage of convenience" for the purposes of the EEA Regulations rested on the appellants but they were not required to discharge it in the absence of evidence of matters supporting a suspicion that the marriage was one of convenience. He stated that there was therefore an evidential burden on

the respondent. He went on to state that he was applying the standard of proof on the balance of probabilities.

8. Having set out the relevant legal framework at considerable length in paragraph 21 of the determination the judge set out a number of the matters which had led the Secretary of State to conclude that this was a marriage of convenience. These included:-

"…

- the 2nd appellant did not know in which month her husband had come to the UK;
- there was a difference in their answers as to the 2nd appellant's working hours the day before;
- there was a difference in their answers as to when they had last drunk alcohol and what they had drunk;
- there was a difference in their answers about whether the first appellant had bought the 2nd appellant a birthday present;
- they had differed as to going out on a date;
- there were discrepancies as to their plans to get married and have a family;
- the first appellant said he had asked her to marry; she had confirmed this;
- they had had a ring although give different answers about when;
- there was a difference in their answers as to whether the appellant had spoken to his wife's children;
- he said they married on 27 July whereas she said they married on 23rd of July, and they could not agree on the day of the week; he had later corrected his own answer to 23 July unprompted;
- their accounts of the length of the ceremony differed;
- on the evening of the wedding he said they had dinner at home and restaurant reception where is she said they had dinner at home;
- their answers differed by 2 as to the number of people present;
- he named one of her friends who attended but she named 2;
- there were differences in their answers as to what time everyone had gone home after the wedding day meal;
- as to what they had done later that day he said they had gone home and she said they had had sex;
- she did not know the names of her husband's brothers and sisters;

- there were differences in their answers as to where the wife's sister lived and with whom;
- he had said that her children rarely saw their father but she had said they did not see him;
- she did not know exactly what he had been studying; she had said he was not studying whereas he had said he was having a break in his studies;
- there was a difference of 2 months in the times they gave for which Ms Bukina had been working in the Chinese restaurant;
- she had said that when they met he had been working in Papa Johns but he said he was not working;
- they had given different answers as to when she had started work in the UK and for which pizza company;
- they had given different answers as to the number of hours and the number of days worked per week and the length of shifts;
- they had respectively calculated his pay on monthly and weekly rates, producing different amounts of money but roughly the same per annum figure;
- she thought he was paid weekly whereas he said he was paid fortnightly;
- they gave the names of 2 different people to whom they paid rent;
- they gave different answers as to how long the first appellant had been living in the property;
- as to his attendance at mosque, he said he did not and she gave an unclear answer;
- she had said Ramadan had been in June, whereas he had said July."

9. The judge then went on to note the assertions made that the appellants were in a genuine marriage and that the respondent had ignored evidence submitted with the application.

10. In paragraph 25 the judge set out the documentary evidence before him which included the appellants' passports, their marriage certificate, wage slips, bank statements in relation to a joint account held by both the appellants showing that they both lived at the same address, letters from the GP practice to testify that they were registered at the same surgery, broadband, home phone and mobile bills in relation to the appellants from "EE and 3", a tenancy agreement showing they lived at the same address and contracts of employment for each of them (these show the appellants living at the same address) and the interview record.

11. In paragraphs 29 onwards he set out his findings of fact stating that the respondent had accepted that the second appellant was a worker exercising EU Treaty rights. He went on to say that he found that the appellants had married on 23 July 2014 for genuine reasons. And then, having referred to the determination in **Papajorgji (EEA spouse – marriage of convenience) Greece** which referred to a marriage of convenience as being one contracted for the sole or decisive purpose of gaining admission to the host state, stated that "in the EEA context" there was no additional requirement that the marriage be "genuine and subsisting".

12. He then referred to the guidance given in the determination in **Goudey (Subsisting marriage – evidence) Sudan [2012] UKUT 00041 (IAC)** and in the guidance of the EU Commission. He noted that that guidance included the observation which stated:-

> "Artificial conduct
>
> Firstly, the conduct through which EU law is abused, must be artificial in the sense that it is a feigned imitation, lacking in naturalness, sincerity or spontaneity.
>
> When it comes to marriages of convenience the abusive conduct is linked to the absence of intention of the married couple to create a family as a married couple and to lead a genuine marital life.
>
> The abusive character of marriages of convenience is represented by mala fide of the spouses prior to and at the moment they enter into the marriage.
>
> The abusive conduct must be made with the purpose of obtaining the right of free movement and residence under EU law."

13. Having then referred to the notion of sole purpose he stated that it was clear that the objective to obtain the right of entry and residence must be the predominant purpose of the abusive conduct.

14. Finally he referred to case law from the European Court of Justice before stating in paragraph 38 that he was applying those principles. He stated that he had to address whether the sole predominant purpose for which the parties had got married was to obtain a right to remain for the first appellant.

15. In paragraphs 39 onwards he referred to the "alleged discrepancies or inconsistencies" the respondent had pointed to in the marriage interview. He stated that these were largely inconsequential and that the respondent alleged that 57 questions disclosed a difference in the way the appellants answered points put to them about their marriage and therefore the respondent had left unchallenged the degree of agreement between the appellants' answers in the other 83 questions. He stated that many of the alleged discrepancies were either debatable or varied to such a small margin that it was not clear to him that there were any significant difference in the appellants' understanding of each other's lives – he referred to the topics such as the last time they had drunk alcohol and

how much they had drunk, where they had been out together, the exact number of hours they had worked, the numbers of people at the wedding and the way in which they got paid by their employers and the practice of Islam. He pointed out that both the answers given for when Ramadan was were correct as the first appellant stated in July and the second appellant had stated in June and that Ramadan began on 29 June 2014. He stated that to many of the questions one appellant had given an answer and the other had not given an answer and that was not in his view a discrepancy. He referred to the issue of when the ring was purchased and stated that although the answers were different they were both correct. He referred further to the key question of the date of the wedding and stated that although the first appellant had got this initially wrong he corrected himself, unprompted, a few questions later. He took into account the documentary evidence including the tenancy agreement and the phone bills which he stated he found reliable and persuasive.

16. He then reached the conclusion that in his view the marriage between the appellants was not one that was entered into in order to secure immigration status and was not a marriage of convenience and therefore their residence card should not have been refused. Moreover the respondent had erred by making a removal decision in relation to the second appellant when there was no fraud or abuse. He therefore stated that he allowed the appeals both under Directive 2004/38 and the EEA Regulations.

17. The grounds of appeal allege that the letter of refusal had set out a compelling case for a marriage of convenience supported by a list of significant discrepancies with regard to the relationship and that the judge had taken into account that the appellants had failed to attend the appeal hearing to explain the discrepancies. The grounds went on to state the judge had failed adequately to reason his conclusions which were perverse and irrational. The grounds stated:-

> "4. The Judge finds in paragraph 39 that the respondent has alleged that 57 questions at interview disclose differences in the appellants' answers, but that it 'follows that the respondent leaves unchallenged the degree of agreement between the appellants' answers in the other 83 questions'. The implication that a success rate of 83 out of 140 answers is acceptable is irrational."

It was argued that he had given undue weight to the documentary evidence and the bank statements.

18. Permission having been granted the appeal came before me. Once again there was no appearance by either appellant but, as I have stated, there was evidence that the first appellant had absconded.

19. Ms Fijiwala referred to the notes of interview and to the discrepancies therein. She stated that it was clear that the evidence in the interview was such that the respondent discharged the burden of proof upon her. She accepted that the allegation the marriage was one of convenience had not been put to the appellants before the decision was made.

20. She referred to the discrepancies as to the hours that the sponsor had worked the previous day, the issue of the ring and details of what had happened after the wedding, as well as the earnings of the first appellant and the rent paid and the contact the appellant had with the sponsor's children.

21. She asked me to find that the decision of the judge was not open to him and to allow the respondent's appeals. She did not address me specifically with regard to the factual matrix of the allegations against the sponsor.

## Discussion

22. The judge, as accepted by Ms Fijiwala, correctly set out the relevant law and referred at length to the appropriate case law. He was entitled to rely on the decision in **Papajorgji** notwithstanding, of course, that the factual matrix in that case was entirely different as Mrs Papajorgji had been married to her husband for fourteen years and they had two children and had lived in a common household and indeed she had applied for a visa to come to Britain with her husband. Those circumstances are clearly very different from those in the present case.

23. The issue before the judge was whether or not this was a marriage of convenience and he correctly pointed out that the burden of proof lay on the respondent, the standard of proof being the balance of probabilities. The fact that the appellants did not attend the appeal is clearly, following the judgment of the Court of Appeal in **Agho v SSHD [2015] EWCA Civ 1198**, an irrelevant factor as it is not for the judge to consider all the evidence before him and then make a decision as to whether or not this was a marriage of convenience, but rather it is for him to decide first of all whether or not the Secretary of State has discharged the burden of proof upon her to prove that this was a marriage of convenience and, if he finds that she has not, then that is the end of the matter.

25. As I have said, this is a detailed determination. The judge did take into account the documentary evidence and he was fully entitled to place weight on the evidence shown in the tenancy agreement, the joint bank account and the contracts of employment. He also did consider the discrepancies which he clearly had in mind as he set these out in paragraph 21 of the determination, and was entitled to find that many of these were not in fact discrepancies but merely a situation where two answers were given both of which were correct or on occasion no answer was given by one appellant.

26. I consider that the judge did take into account the evidence and applied the appropriate standard of proof, that of the balance of probabilities, and reached conclusions which were open to him. While I accept that it might be that a different judge might have reached a different conclusion, I can only conclude that his conclusions were fully open to him and that, as is made clear in the judgment of the Court of Appeal in **Mukarkar [2006] EWCA Civ 1045** it would be inappropriate to set aside his decision.

27. I therefore find that the judge was entitled to find that this was not a marriage of convenience and that the decision of the judge with respect to both of the appellants shall stand.

Signed Date

Upper Tribunal Judge McGeachy