



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: EA/05926/2016
IA/33864/2015

THE IMMIGRATION ACTS

Heard at Field House

On 21st September 2017

**Decision & Reasons
Promulgated**

On 27th September 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**STELLA IYABO THOMAS
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs G Fama of Counsel instructed by Apex Solicitors

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against the decision of Judge I Ross of the First-tier Tribunal (the FTT) promulgated on 30th December 2016.
2. The Appellant is a female Nigerian citizen born 7th February 1962. On 10th February 2015 the Appellant applied for a residence card on the basis of a retained right of residence, having been divorced from an EEA citizen. That application was refused on 26th October 2015. The Appellant lodged an appeal against that decision. On 24th November 2015 while the first

appeal was outstanding, the Appellant applied for a permanent residence card on the same basis as her previous application. That application was refused on 5th May 2016.

3. The reasons for refusal issued by the Respondent are the same, and contend the marriage entered into by the Appellant was solely for immigration purposes.
4. The appeals were linked together and heard by the FTT on 6th December 2016. Both appeals were dismissed. The FTT heard evidence from the Appellant and her cousin and did not find that evidence credible. The FTT noted the Respondent's contention that the Appellant had been a party to a marriage of convenience, on the basis that her former spouse had sponsored three different applicants all claiming to be his spouse, when he was supposed to be in a genuine and subsisting marriage with the Appellant.
5. The FTT found that the Appellant had ignored this assertion made by the Respondent and found that the Appellant had failed to deal with the serious credibility issues raised in the refusal letters, and therefore dismissed the appeals, as the Appellant had not proved on a balance of probabilities that she satisfied the Immigration (European Economic Area) regulations 2006.
6. The Appellant applied for permission to appeal to the Upper Tribunal. In summary it was contended that the FTT had erred by failing to recognise that the legal burden of proof was on the Respondent, when it was alleged that an Appellant had entered into a marriage of convenience. It was pointed out that the Appellant in her appeal had denied being a party to a marriage of convenience. It was contended that the FTT had erred by making a mistake of fact, in finding that the Appellant entered the UK in 2009 rather than 2007, and adverse credibility findings had been affected by the mistake of fact. It was contended that the second application made by the Appellant was based on domestic violence and the FTT had erred by failing to make any findings on this issue.
7. Permission to appeal was granted by Judge Farrelly who found it arguable that the FTT had erred by failing to recognise that the burden of proof was on the Respondent in relation to a claimed marriage of convenience, and noted that the FTT had not considered the claim of domestic violence.
8. Following the grant of permission the Respondent submitted a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, contending in summary that the central issue in both appeals was the contention that the Appellant had entered into a marriage of convenience, and the FTT had not erred on this issue.
9. The Appellant submitted a written response dated 7th September 2017, relying upon Sadovska [2017] UKSC 54, and Rosa [2015] EWCA Civ 1198,

which confirmed the legal burden of proof is on the Respondent when it is alleged that an individual is a party to a marriage of convenience.

10. Directions were issued making provision for there to be a hearing before the Upper Tribunal to ascertain whether the FTT decision contained an error of law such that it should be set aside.

The Upper Tribunal Hearing

11. Mr Tarlow did not rely upon the rule 24 response but conceded that the FTT had materially erred in law as contended on behalf of the Appellant, and had not applied the correct burden of proof. It was accepted that the FTT decision was flawed and could not stand and should be set aside. Mrs Fama added that a further material error was the FTT's failure to address at all, the issue of domestic violence.
12. Both representatives submitted that it was appropriate for these appeals to be remitted back to the FTT to be heard afresh with no findings preserved.

My Conclusions and Reasons

13. I announced at the hearing that the decision of the FTT was set aside. In my view the concession by Mr Tarlow was rightly made. The Court of Appeal in Rosa confirmed that the legal burden of proof, when it was alleged that a marriage was one of convenience lay with the Respondent, but if the Respondent adduced evidence capable of pointing to the conclusion that the marriage is one of convenience, the evidential burden shifts to the Appellant.
14. In this case the Respondent produced no evidence capable of pointing to the conclusion that the marriage was one of convenience. An assertion was made to this effect in the refusal letter but no evidence submitted. Therefore as accepted by Mr Tarlow, the evidential burden did not shift to the Appellant, and the legal burden remained with the Respondent.
15. This was not the approach adopted by the FTT and this amounts to an error of law. In addition, I find that it was an error of law not to consider at all the issue of domestic violence, which was raised by the Appellant in her second application.
16. In deciding that it is appropriate to remit these appeals to the FTT, I have taken into account paragraph 7.2 of the Senior President's Practice Statements. Credibility is in issue and the extent of judicial fact-finding which will be required, makes it more appropriate for this to be dealt with by the FTT.
17. No findings of fact are preserved. There will be a further hearing before the FTT, and the appeals will be heard by a judge other than Judge Ross. The parties will be advised of the time and date of the hearing in due course.

Notice of Decision

The decision of the FTT involved the making of an error of law such that it is set aside. The appeals are allowed to the extent that they are remitted to the FTT with no findings of fact preserved.

Anonymity

The FTT made no anonymity direction. There has been no request for anonymity and I see no need to make an anonymity order.

Signed

Date 21st September 2017

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

No fee award is made by the Upper Tribunal. The issue of any fee award will need to be considered by the FTT.

Signed

Date 21st September 2017

Deputy Upper Tribunal Judge M A Hall