Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00705/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 November 2017	**On 18 January 2018**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MRS IMMACON MARQUEZ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Krushner, Counsel
For the Respondent: Mr J Singh, Senior Home Office Presenting Officer

DECISION AND REASONS

1. On 7 February 2017, at Taylor House, the appellant appeared before First-tier Tribunal Judge Coll to appeal against the respondent's decision refusing to issue her with a residence card in recognition of a right to reside in the United Kingdom as the family member of a qualified person. The judge's decision, in which the appeal was dismissed, was promulgated on 27 February 2017.

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2. The appellant sought permission to appeal which was granted by First-tier Tribunal Judge Landes on 6 September 2017. The judge makes various points in the grant, paragraph 2 of which reads:

> "It is arguable as set out at paragraph 2 grounds that the judge erred so far as the burden of proof was concerned. The judge placed the burden on the appellant at [2] and her expression at [79] "establishing that the marriage is not a marriage of convenience" also suggests that she considered that the burden was on the appellant. I recognise that at [90] the judge made the positive finding that this was a marriage of convenience and made a number of significant credibility findings against the appellant and sponsor. However if, as I find, it is arguable that the judge applied the wrong burden of proof, I consider it must be arguable that the error was a material one in the sense it may have affected the result."

3. At paragraph 2 of the decision under challenge Judge Coll writes the following:

> "As to this decision, Section 86 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") provides that I must allow the appeal insofar as I think that the decision against which it is brought was not in accordance with the law (including the Immigration Rules) or that a discretion exercised in making the decision should have been exercised differently. I may consider evidence about any matter which I consider relevant to the substance of the decision, including evidence concerning a matter arising after the date of the decision. The onus of proof in establishing these matters lies upon the appellant. The standard of proof is that of the balance of probabilities, as it is also for any related Human Rights issues, save in relation to issues of removal, where it is that of reasonable likelihood or real risk: **Box [2002] UKIAT 02212**."

4. It is not disputed before the Upper Tribunal that that legal direction is wrong in law. It is wrong for two prime reasons. Firstly, as confirmed by the Court of Appeal in **ZH Afghanistan [2009] EWCA Civ 1061** EU matters are governed by the 2006 Regulations and not by the Immigration Rules. This is a European matter.

5. The second point, as we were reminded by Blake J, is in the case of **Papajorgji (EEA spouse: marriage of convenience) Greece [2012] UKUT 38**. Although neither the Directive nor the Regulations define it as a matter of ordinary parlance and past experiences of the UK Immigration Rules and case law, a marriage of convenience in this context is a marriage contracted for the sole or decisive purpose of gaining admission to the host state. A durable marriage with children and cohabitation is quite inconsistent with such a definition. In **Rosa [2016] EWCA Civ 14**, it was held that the legal burden of proving this issue was upon the Secretary of State. It was required to prove that an otherwise valid marriage was a marriage of convenience so as to justify the refusal of a residence card under the EEA Regulations. The legal burden of proof in relation to a marriage lay on the Secretary of State but if she adduced sufficient evidence capable of pointing to the conclusion that the marriage was one of convenience the evidential burden shifted to the applicant. It

is therefore not as simple as saying that in paragraph 2 the judge set out the wrong burden of proof and that is the end of the matter.

6. Although I accept that paragraph 2 does suggest an error of law, as it is quite clearly on the face of it a 'cut and paste' paragraph, it is necessary to read the decision as a whole to establish whether, notwithstanding the content of paragraph 2, the approach adopted by the judge does indicate that the judge in fact followed the guidance supported by the Court of Appeal in **Rosa**. The starting point therefore has to be the impugned decision, the decision under challenge to refuse to issue the appellant with a residence card. The judge was clearly aware of that decision and makes specific reference to it. If one reads the reasons for refusal it is clear that in that document the Secretary of State does give sufficient reasoning and evidence to discharge the evidential burden. There is reference to the visit by the Immigration Officer, curtailment of leave as a result, and subsequent notice of marriage. There is reference to the EEA national sponsor being very vague in answers that he gave approximately about the date of the marriage and it was concluded by the decision-maker that it was abundantly clear from the details outlined in the reasons for refusal that the appellant herself had fatally and irreparably damaged the credibility of her claim to be in a genuine relationship with the EEA national.

7. So far as the legal burden lay upon the Secretary of State, it was clear the evidence before the judge showed that she had adduced evidence capable of pointing to a conclusion that the marriage was one of convenience. The burden therefore passed to the appellant and if one reads the decision under challenge, as Mr Krushner submitted in arguing an error of law has been made was required, the bulk of the documents bar the introductory paragraphs really do focus upon the evidence that was given by the appellant and her team in support of the appeal. There is mention of nine separate elements within the determination that troubled the judge. The conclusion of the judge having looked at that evidence is that the evidence of both the husband and wife, the appellant and the EEA national was permeated with 'inconsistency and implausibility'. In fact, at paragraph 65 the judge states, "save only for the fact that as evidenced by the marriage certificate whose authenticity is not specifically challenged, they went through a ceremony of marriage I accept none of their evidence".

8. The reasons start at paragraph 67, the first of which is 67 to 69, the second at paragraphs 70 to 71, the third reason at paragraphs 72 to 77, the fourth reason at 78 to 79, the fifth reason in paragraph 80 alone, the sixth reason in paragraphs 81 to 83, the seventy reason in paragraphs 84 to 88, the eighth reason in paragraph 89, the ninth in paragraphs 92 and 93, leading to the conclusion in 94. In paragraph 90 the judge did find based on the lack of credibility, in particular of the wife and husband and the lack of substantiating evidence, that this is a marriage of convenience. The judge clearly did not accept on the basis of the information made

available that the appellant had discharged the evidential burden that had shifted to her following the reasons for refusal.

9. In paragraph 94 the judge wrote as follows:

> "In conclusion, I find, on the overwhelming evidence before me, that this is a marriage of convenience. The evidence points to a friendship between the wife and the mother-in-law and an amicable relationship between the wife and the husband such that he could have been willing to enter into the marriage to assist his mother and thereby the wife. Everything (lack of photographic records of the relationship, lack of knowledge and use of the joint bank account, lack of knowledge of the husband about the wedding date and the wife's previous accommodation, the bedroom arrangements, and the inconsistencies between the wife and the husband in their testimony) points to a marriage of convenience."

10. In relation to specific points that have been raised by Mr Krushner this morning I deal with those by making a finding of fact in the following terms. Firstly, that the judge clearly considered the evidence that had been made available with the required degree of anxious scrutiny and, secondly, that the judge has given adequate reasons in support of the findings made. I do not find it has been made out that there is any element of irrationality or perversity in the judge's conclusions. As a result of there having been the required degree of anxious scrutiny and adequate reasons, the weight to be given to the evidence was a matter for the judge. On the submissions made it has not been made out that the weight given by the judge to points, in particular the visit by the Immigration Officer, has fallen outside the range of that the judge was entitled to give when considering the evidence as a whole.

11. It has been submitted that some of the findings of the judge may be classed as being speculative when perhaps speaking of an individuals' reactions to various points. There may be some merit in Mr Krushner's submissions so far as some of those points are concerned but I do not accept that he has established that even if that amounts to error that it amounts to material error impacting upon the conclusions, when considering the evidence as a whole. Had it been found that Mr Krushner's submissions in relation to the primary point relating to the application of the burden of proof had been made out, or was arguable, then a different conclusion may have been reached. I do not accept it has been made out before me that when one reads this decision as a whole the judge did misdirect herself in law in a manner material to the decision to find this is a marriage of convenience and therefore to dismiss the appeal. For that reason, I find no arguable legal error made out material to the decision to dismiss the appeal which shall therefore stand.

Notice of Decision

There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.

No anonymity direction is made.

Signed Date: 15 January 2018

Upper Tribunal Judge Hanson