



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/43072/2013**

THE IMMIGRATION ACTS

Heard at Field House

On September 17, 2014

**Determination
Promulgated**

**On September 18,
2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR SERGE ERIC STEPHANE GOHOU

Appellant

and

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

Respondent

Representation:

For the Appellant: Mr Diavewa (Legal Representative)
For the Respondent: Ms Everett (Home Office Presenting
Officer)

DETERMINATION AND REASONS

1. The appellant, born November 23, 1974 is a citizen of the Ivory Coast. He entered the United Kingdom as a student in December 2002 and his leave was extended until June 9, 2005. On October 27, 2005 he was granted a certificate of approval for marriage and on January 12,

2006 he married Tania Gladys Marcelle Assi Kacou Epse Gohou, a French national. On November 27, 2007 he was granted a residence card as a family member of an EEA national. On November 16, 2012 he sought a permanent residence card as confirmation of his right to reside in the United Kingdom. The respondent refused his application on September 10, 2013, as she believed the marriage was a marriage of convenience.

2. On October 14, 2013 the appellant appealed under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 and Regulation 26 of the Immigration (European Economic Area) Regulations 2006 arguing the Regulations had been met because the appellant was living with his wife and his marriage was not a marriage of convenience.
3. The matter was listed before Judge of the First-tier Tribunal Troup (hereinafter referred to as “the FtTJ”) on June 25, 2014. In a determination promulgated on July 8, 2014 he dismissed the appeal under 2006 Regulations.
4. The appellant appealed that decision on July 17, 2014. Permission to appeal was granted by Judge of the First-tier Tribunal Osborne on July 30, 2014. He found the FtTJ may have erred in finding the marriage was a marriage of convenience.

PRELIMINARY ISSUES

5. Mr Diavewa indicated he wished to call additional evidence but I advised him that as this was primarily an error of law hearing further evidence would not be admitted. If permission was given then I would consider the additional evidence and whether to admit it.
6. I also raised with Mr Diavewa the fact that the FtTJ had also found the appellant’s wife had not been working for the five years pre-dating the date of the application. He insisted that as the respondent had originally granted a permanent residence permit then that part of the Regulations (Regulation 15) was met. I indicated to him that I would need persuading on that issue because the FtTJ’s findings had not been appealed.

ERROR OF LAW ARGUMENTS

7. Mr Diavewa relied on his grounds of appeal and submitted that the FtTJ had attached too much weight to the evidence of Miss Francis and had failed to have

regard to the evidence of the appellant and his wife, the fact they had been married for sometime, they had a child and other supporting evidence contained in the appellant's bundle. He further argued the FtTJ should have had regard to the best interest of the child (Maxendre) and whilst his colleague had not specifically addressed this issue in the First-tier Tribunal it was an obvious point for the FtTJ to deal with. Finally, he reiterated that the respondent had previously been satisfied with the appellant's wife's working record and therefore the requirement of Regulation 15 had been met.

8. Ms Everett adopted the Rule 24 letter dated August 7, 2014. She submitted that even if the FtTJ had been wrong about the marriage the appeal had been refused on financial grounds and this finding had not been appealed. As regards the findings on the marriage she submitted the decision was not perverse as alleged in the grounds of appeal. The FtTJ had taken a great deal of evidence and had noted the inconsistencies in Miss Francis's evidence but had concluded in paragraph [43] of his determination that her answers to the immigration officer were unprepared and at paragraph [45] her evidence was accepted as compelling. He accepted her evidence that she and the appellant had had an affair and cohabited for two years and he preferred her evidence to that of the appellant. She noted the appellant's wife had not attended and she submitted that the FtTJ had carefully considered all of the evidence and gave reasons for dismissing the appeal. The FtTJ was entitled to attach weight to the appellant's wife's absence despite the explanation proffered. With regard to the previous grant of a permanent residence card the respondent had reviewed this grant in light of the disclosure by Miss Francis and that was why the address had been visited and the application reviewed and refused. The FtTJ's findings on finances remained and in so far as the child was concerned she submitted the child lived in France with his grandparents and this issue did not go to the merits of this appeal.
9. Mr Diavewa responded to these submissions and referred me to correspondence in the bundle from Ealing Council regarding occupants at Miss Francis's address. He also reiterated the FtTJ had failed to have regard to the best interests of the child.

ERROR OF LAW ASSESSMENT

10. The FtTJ dismissed this appeal and it is apparent from the determination that he dismissed the appeal on two grounds namely:
 - a. The marriage was a sham marriage.
 - b. He was not satisfied the appellant's wife had been exercising treaty rights for five years preceding the date of application.
11. Mr Diavewa insisted that the financial issue was not a matter to concern me but that overlooked the fact the FtTJ made findings. Those findings remain unless challenged. The appellant did not challenge those findings and they are binding today. Even though leave to appeal had not been sought on that issue I invited submissions on why I should not be bound by them. The only response was that the respondent had earlier issued a permanent residence card on the same evidence. This submission carries no weight in light of the fact concerns had been raised about the relationship and therefore the whole marital circumstances were up for assessment.
12. I am satisfied that regardless of any finding on the state of the marriage this appeal must fail because the FtTJ's findings on the appellant's wife's working history remained and consequently this appeal could not succeed on the current facts.
13. I turn now to the main thrust of the argument. This appeal was fully contested and the appellant and Miss Francis both gave evidence on two occasions. Unusually, both witnesses were recalled to address issues that had arisen over Miss Francis's evidence. An extremely detailed record of the evidence is contained in the determination. The FtTJ noted the absence of the appellant's wife and made findings on this.
14. The FtTJ was fully aware of the appellant's marriage and the fact a child had been born. In paragraph [41] he noted the burden of proof in showing the marriage was a sham marriage lay on the respondent. The case law of IS (marriages of convenience) Serbia [2008] UKAIT 00031 and Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038(IAC) deals with the approach to be taken. The Tribunal in Papajorgji stated-
 1. 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;
2. [IS \(marriages of convenience\) 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;
 3. The guidance of the EU Commission is noted and appended. The Tribunal in [Papajorgji](#) made it clear at paragraph 33 that they did not accept there was a burden as such on the Appellant and at paragraph 39 stated "In summary, our understanding is that, where the issue is raised in an appeal, the question for the judge will 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?'"
15. The FtTJ was satisfied there was reasonable suspicion and was then obliged to consider the evidence. He was not satisfied with the appellant's explanations and whilst he noted the inconsistencies in Miss Francis's evidence he nevertheless preferred her evidence to the other evidence.
 16. The FtTJ stated at paragraph [45] that the inconsistent evidence would "on the face of it undermine irretrievably the credibility of the witness" but he concluded in paragraph [47] that the marriage was a marriage of convenience.
 17. This is a determination that contained reasons and whilst not examining each piece of evidence the FtTJ gave sufficient reasons for rejecting the appellant's claim. Ms Everett accepted a different judge may have reached a different finding but that does not mean this determination was flawed. The FtTJ considered the evidence and reached findings open to him.
 18. The best interest of the child was raised today but this was not an argument presented on the last occasion. In any event, the child lives in France and there were no persuasive arguments to support the claim that this would have made a difference. If the child was here or intending to live here and the appellant's wife had


attended there may have been a different outcome.

19. In summary I find:-

- a. The findings on the marriage were open to the FtTJ. He gave ample reasons for his conclusions.
- b. The child has been living in France and there is no evidence that the child ever intends to be brought here to live and this issue was not raised before the FtTJ in any event.
- c. The FtTJ's findings on the appellant's wife's employment were open to him and remain unchallenged.
- d. The additional new witness evidence does not assist me in assessing whether the FtTJ erred.

Decision

20. There is no material error of law and the original decision shall stand.

21.  Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No request for anonymity has been and no order is made

22. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed:

Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I do not make a fee award for the same reasons as

previously given.

Signed:

Dated:

Deputy Upper Tribunal Judge Alis

SPAR