



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

Appeal Numbers: IA/09822/2015
& IA/10134/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 29 January 2016**

**Decision & Reasons Promulgated
On 23 February 2016**

Before

DEPUTY JUDGE DRABU CBE

Between

**BILAL MOHAMMAD
&
Ms ATTILA GYOERGYNE BALOGH**

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E King of Counsel instructed by Rahman & Company,
Solicitors.

For the Respondent: Mr S Staunton, Senior Presenting Officer

DECISION AND REASONS

1. The first appellant is a national of Pakistan. He was refused a residence card as the spouse of an EEA national who was exercising her treaty rights in the United Kingdom. The second appellant is a Hungarian national who has been residing in the UK since 2007. The two appellants started living together after meeting in 2012 and got married on 31 August 2014. The

application of the first appellant for issue of Residence Permit was refused on 10 March 2015 and in respect of the second appellant the respondent made a decision to remove her on the basis of “abuse of rights.”

2. Their appeals were heard by First Tier Tribunal Judge Courtney on 6 July 2015 at Richmond Centre. She dismissed the appeals, for reasons given in her determination of 28 July 2015.
3. The appellants sought and were granted permission to appeal to the Upper Tribunal. The first appellant by Upper Tribunal Judge Rintoul on 8 January 2016 and the second by Judge Saffer, a Judge of the First Tier Tribunal in decision dated 11 December 2015. In granting permission, Judge Rintoul inter alia said, “It is arguable that in the light of **Agho v SSHD [2015] EWCA Civ 1198** First Tier Tribunal Judge Courtney misdirected herself in respect of the burden of proof that the marriage was one of convenience. All the grounds are arguable”. Judge Saffer in his decision granting permission to second appellant said, “Ground 3 is arguable as the Judge may have gone behind a concession by the respondent and also said, “Ground 4 is arguable as it is unclear if the Judge took the Appellant’s length of time and status into account in requiring her to leave.”
4. In its Rule 24 response to the appeal of the first appellant, the Respondent contended that the ratio of **Agho V SSHD [2015] EWCA Civ 1198** was “very much fact specific” where the Court concluded that as the genuineness of that marriage had not been successfully impugned, the appellant was entitled to a residence card. It was also contended that Judge Courtney’s determination was comprehensive and the “plethora of discrepancies that had emerged undermined the assertion that this was a genuine marriage. The determination is well reasoned and cannot in anyway said to be irrational.”
5. In its Rule 24 response to the appeal of the second appellant the respondent inter alia said, “It does not appear to have been advanced at the hearing that the appellant had a permanent right of residence. It was stated at paragraph 2 that the appellant was exercising treaty rights.” The respondent also stated, “In any event on preliminary consideration the respondent does not accept that the appellant’s permanent right of residence, if established, is a material consideration in a case of the appellant.” It also makes one or two other points which are not worthy of reproducing in this determination.
6. At the hearing before me Ms King took me through the relevant parts of the determination of Judge Courtney in respect of the appellants pointing out that the Judge had clearly erred in law in placing the burden of proof upon the appellant to demonstrate that the marriage was genuine and not one of convenience. She asked me to take note of the UT decision in **Lindita Papajorgji [2012] UKUT 00038** which was specifically approved in **Agho** by the Court of Appeal and in paragraph 14 of its judgement given by Lord Justice Underhill it stated “Consistently with prior discussion,

that formulation clearly places the burden of proof on the Secretary of State (or ECO).

7. It is fair to say that Mr Staunton did not put up much resistance to the argument advanced by Ms King that the decision of the First Tier be set aside for reasons advanced in the grounds for obtaining permission. I announced my decision to set aside the decisions of the First Tier Tribunal as I found both to be vitiated by material errors of law.
8. I reserved my decision on the way forward, having been reminded by Mr Staunton that the proper course would be to remit the matter for further consideration of the claims by the respondent. Having carefully considered all matters including the suggestion made by Mr Staunton and not resisted by Ms King, I allow these appeals for the Secretary of State to re-consider her decisions in these two cases.

K Drabu CBE
Deputy Judge of the Upper Tribunal.
15 February 2016