



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

Appeal Number: IA/25195/2014

**THE IMMIGRATION ACTS**

**Heard at Newport  
On 5 January 2016**

**Decision & Reasons Promulgate  
On 15 January 2016**

**Before**

**UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**ROSE UDE  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr I Richards, Home Office Presenting Officer

For the Respondent: No Representative and no attendance

**DETERMINATION AND REASONS**

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Suffield-Thompson) allowing the appeal of Rose Ude (hereafter "the claimant") against a decision of the Secretary of State taken on 3 June 2014 to revoke her residence card as confirmation of her right to reside in the UK as the spouse of an EEA national under the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003 as amended).

## **Background**

2. The claimant is a citizen of Nigeria who was born on 15 November 1977. In 2012, the appellant met Mr Stanislav Karchnak in the UK. They became friends. At that time, they were both married to other individuals. Each subsequently divorced their previous spouse. The relationship between the claimant and Mr Karchnak developed and in August 2013 they married in the UK. The appellant applied for a residence card as a spouse of an EEA national as Mr Karchnak is a national of Slovakia working in the UK.
3. Following the application, the claimant and her husband attended for a marriage interview in Liverpool. Following that interview, the claimant was issued on 26 January 2014 with a residence card confirming her right of residence in the UK as the family member of an EEA national. The claimant's evidence is that she and Mr Karchnak lived together as a married couple.
4. On 14 February 2014 Immigration Officers attended at the claimant's address. The claimant was not at home and was said to be at work. However, present in the property were the claimant's ex-husband and the three children of the claimant and her ex-husband.
5. As a result of the visit, the Secretary of State concluded that the claimant was a party to a "marriage of convenience" and on 3 June 2014 revoked the claimant's residence card.

## **The Appeal to the First-tier Tribunal**

6. The claimant appealed to the First-tier Tribunal. She attended and gave evidence but her husband, Mr Karchnak did not attend.
7. Before the Judge, the Secretary of State relied upon the evidence of the Immigration Officers who had attended the claimant's address on 14 February 2014 and the absence of the claimant's husband to corroborate her claim that their marriage was genuine.
8. The claimant gave evidence before the Judge that her marriage was genuine and that her husband was not present because his elderly mother was ill and that he had to visit her in Slovakia. He had previously attended the marriage interview in Liverpool and an earlier appeal hearing in late 2014 which had been adjourned.
9. At paragraph 19, the Judge directed herself that:

"In this case the burden is upon the respondent to show that the appellant is not (sic) a party to a marriage of convenience."
10. Clearly, the word "not" has been mistakenly inserted in that self-direction. The Judge plainly meant that it was for the respondent to show that the claimant was a party to a marriage of convenience in order to justify the revocation of her residence card. That is also clear from paragraph 8 of the determination where, again, the Judge places the

burden of proof upon the respondent to prove on a balance of probabilities that the marriage is not a genuine and subsisting one.

11. Having, therefore, placed the burden of proof upon the respondent, the Judge went on to consider the evidence and the submissions made. Having heard the claimant give evidence, at paragraph 21 the Judge found that the claimant was a credible witness and accepted her evidence on the basis that “she did not exaggerate or try to mislead the Tribunal”.
12. Then at paragraphs 22-28, the Judge dealt with the evidence as follows:
  - “22. The Appellant and her new husband were interviewed by the Respondent’s Immigration Officers who are very experienced in the work that they do. They are used to seeing people day in and day out who lie about their” marriages”. The interviewing officers were clearly of the view that the Appellant and her husband were in a genuine marriage and thus the Residence Card was issued.
  23. The only evidence that the Respondent now has to suggest that the Appellant is not really married is the report from the Immigration Officers who attended the house on the 14 February 2014. The Appellant was at work and therefore there is nothing suspicious about her ex-husband minding his own children whilst she is not there. There was a photograph of the children with their father and one of him on his own. I do not find this to be indicative of her still being married. She gave evidence that her children love their father and that he is very close to his eldest son so there is nothing odd about their being family photos of them with their father on display if that makes the children happy.
  24. The Immigration Officers did not go upstairs. Had they done so they would have seen the Appellant’s husband’s clothes. I do not see how a proper assessment can be made as to whether a person is living in a house if all their rooms are not checked. Her new husband is unlikely to keep all his clothes and toiletries in a living room. The Appellant stated his shoes were there and I can only assume they saw a pair of men’s shoes and decided they belonged to the Appellant’s husband as he was there at the time.
  25. The Respondent did not supply the Tribunal with the notes from the Immigration Officer so we only have an account via the Appellant’s ex-husband who does not have English as a first language. It may have been that the officers did not understand what was said or perhaps the Appellant’s husband was confused. It is not a matter for speculation but a matter for the parties and on the Tribunal.
  26. The Appellant brought a mix of original photos to court. Some were of the wedding and some of them as a couple in various places. The most significant photos provided to me were the ones taken at Christmas where the Appellant, her new husband and her children are all together. I find that these photographs were not posed and they were totally natural family photos of children laughing and playing with two adults they clearly felt very relaxed with. I find that the photographs are genuine and reflect the

family relationship between the Appellant, her children and her new husband.

27. I do not find that the absence of the Appellant's husband from the hearing is suspicious. It is confirmed that he attended the interview in Liverpool and that he also came to what he believed was the final hearing in December 2014 and that court had adjourned the case. Had he not been genuine he would not, I find, have attended the last hearing. His mother is clearly ill and I accept the Appellant's testimony that he was sorry not to have come but had to go to his mother. I also accept that the Appellant could not face another adjournment in her condition. She has had complications with all her pregnancies and her baby is due at the end of June so an adjournment could have taken weeks.
28. The Respondent has not discharged her burden of proof. I find that the Appellant is married and has a subsisting relationship with her new husband and that she is entitled to a Residence Card. I allow the appeal."

13. Consequently, the Judge allowed the appellant's appeal.

### **The Appeal to the Upper Tribunal**

14. The Secretary of State sought permission to appeal to the Upper Tribunal on two grounds. First, the Judge had erred in law in placing the burden of proof upon the Respondent to establish that the Appellant was a party to a marriage of convenience. The Secretary of State relied upon the decision in Papajorgji (EEA Spouse - Marriage of Convenience) Greece [2012] UKUT 0038 (IAC). Secondly, the grounds argue that the Judge had failed to take into account the lack of corroborative evidence concerning the absence of the claimant's husband in order to visit his ill mother in Slovakia. As a consequence, the Judge had failed to provide adequate reasons why he had accepted the claimant's oral evidence on that issue.
15. On 15 May 2015, the First-tier Tribunal (DJ McClure) granted the Secretary of State permission to appeal on both grounds.
16. Thus, the appeal came before me on 5 January 2016.
17. In an email sent to the Tribunal on 5 January 2016, the claimant indicated that she would not be attending the hearing as her baby had become sick overnight. She nevertheless invited me to hear the appeal despite her absence. In the light of that, I considered it appropriate to hear the appeal in the absence of the claimant in the interests of justice under rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended).

### **Discussion**

18. Shortly before the hearing, I provided Mr Richards, who represented the Secretary of State, with a copy of the recent decision of the Court of

Appeal in Agho v SSHD [2015] EWCA Civ 1198. In that case, the Court of Appeal considered the issue of the burden of proof where the Secretary of State alleges that a marriage is a marriage of convenience. In his judgement, Underhill LJ (with whom Vos and Moore-Bick LJ agreed) concluded that the burden of proof that the marriage was a marriage of convenience lay upon the Secretary of State. Underhill LJ considered the Upper Tribunal's decision in Papajorgji and continued as follows: at [13]:

“...What it comes down to is that as a matter of principle a spouse establishes a prima facie case that he or she is a family member of an EEA national by providing the marriage certificate and the spouse's passport; that the legal burden is on the Secretary of State to show that any marriage thus proved is a marriage of convenience; and that that burden is not discharged merely by showing “reasonable suspicion”. Of course in the usual way the evidential burden may shift to the applicant by proof of facts which justify the inference that the marriage is not genuine, and the facts giving rise to the inference may include a failure to answer a request for documentary proof of the genuineness of the marriage where grounds for suspicion have been raised. Although, as I say, the point was not argued before us, that approach seems to me to be correct – as does the UT's statement that the standard of proof must be the civil standard, as explained by the House of Lords in *Re B (Children)* [2008] UKHL35, [2009] 1 AC 11.”

19. At [14], Underhill LJ concluded that the approach in Papajorgji “clearly places the burden of proof on the Secretary of State (or ECO)”.
20. When I drew these passages to the attention of Mr Richards initially he continued to rely upon the Secretary of State's ground, namely that the Judge had been wrong to place the burden of proof upon the respondent. However, despite his initial enthusiasm for that position it is, in my judgement, wholly unsustainable in the light of the passages I have cited from Agho. Although the Court of Appeal recognised that the issue was not one that arose directly in the case before it, the view of Underhill LJ (with whom the other judges agreed) was a considered view, and one with which I agree, and which I should follow.
21. As a consequence, the Secretary of State's first ground is unsustainable. The Judge was correct to place the burden of proof upon the Respondent to establish that the claimant's marriage was one of convenience.
22. Mr Richards, however, maintained in his submissions the second ground of appeal which he expanded orally. He submitted that the evidence before the Judge could not rationally support her finding that the marriage was a genuine one. There was the evidence of the Immigration Officers and there was no corroborative evidence from the claimant's spouse. He submitted that the Judge was not entitled on the evidence of the claimant alone to find that the Secretary of State had not discharged the burden of proving that the claimant's marriage was one of convenience only.
23. This is a case where the claimant had established that she was married to an EEA national. The evidence presented on behalf of the Secretary of

State did raise suspicions about the genuineness of that marriage. The claimant's ex-husband was found in what was said to be the matrimonial home of the claimant and no clothes of the claimant's husband were seen and there were photographs of both the claimant's ex-husband with their children and one of him on his own. As the Court of Appeal recognised in Agho the proof of facts which raise a "reasonable suspicion" that a marriage is not genuine may, in effect, shift an evidential burden to the applicant whilst leaving the ultimate legal burden of proving that the marriage is only one of convenience upon the Secretary of State.

24. Here, however, the claimant did provide evidence that sought to explain the circumstances relied upon by the Secretary of State. First, on the day of the visit she was out at work and her ex-husband was "minding" their children. The photographs were present because of the close relationship between her ex-husband and their children who lived with the claimant. Further, there was nothing suspicious about the Immigration Officers not finding any clothes of the claimant's husband as they had not gone upstairs. They had only looked downstairs and her husband's clothes and toiletries were not kept downstairs. She pointed out that there was a pair of shoes in the living and that these belonged to her husband.
25. In addition, the claimant provided a number of supporting photographs showing her with her husband and children together including ones taken at Christmas. The claimant also explained that the husband had been unable to attend the hearing because his elderly mother was ill and he had to visit her in Slovakia but he had attended the earlier hearing which had been adjourned.
26. The Judge heard the claimant give evidence. Having done so, she concluded that the claimant was a truthful witness who had not sought to "exaggerate or try to mislead the Tribunal". She accepted the claimant's evidence. She concluded that the photographs relied upon were "not posed" and were "totally natural family photos". She also accepted the claimant's explanation for the absence of her husband at the hearing.
27. The assessment of an individual's oral evidence is quintessentially a matter for the Judge of fact. An appellate court or tribunal should be cautious indeed in interfering with a Judge's assessment of the veracity of a witness based upon their oral evidence. Of course, if a Judge were to ignore other evidence which cast doubt on a witness's veracity that might call into question the Judge's assessment. Here, there is no such contradictory evidence. The claimant was not required, as a matter of law, to corroborate her oral evidence concerning the basis for her husband's absence. The reliance in the grounds upon TK (Burundi) v SSHD [2009] EWCA Civ 40 at [21] that a Judge may take into account the absence of "independent supporting evidence" which is "readily available within the jurisdiction" when assessing the credibility of an individual's evidence, does not support the Secretary of State's contention that the Judge was not entitled to accept the claimant's oral evidence in the

absence of supporting documentary evidence whether from the claimant's husband himself or elsewhere.

28. In his oral submissions, Mr Richards pitched the Secretary of State's challenge at the level of irrationality, namely that the Judge was not rationally entitled to find that the respondent had failed to establish that the claimant's marriage was one of convenience. That is a high threshold indeed requiring a conclusion that no reasonable Judge could have made the finding that this Judge made. As I have already made clear, the Judge was entitled to accept the claimant's oral evidence. That evidence went to rebut the "reasonable suspicion" raised by the evidence presented on behalf of the Secretary of State based upon the Immigration Officers' visit on 14 February 2014. Throughout the appeal, the burden lay upon the Secretary of State to establish on a balance of probabilities that the claimant's marriage was one of convenience only. I see no proper basis upon which the Judge's finding that the respondent had failed to discharge that burden could be said to be unsustainable as a matter of law.
29. For these reasons, I reject the Secretary of State's challenge to Judge Suffield-Thompson's decision to allow the claimant's appeal.

### **Decision**

30. Thus, the decision of the First-tier Tribunal to allow the claimant's appeal under the EEA Regulations did not involve the making of an error of law and that decision stands.
31. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb  
Judge of the Upper Tribunal

Date:

### **FEE AWARD**

Judge Suffield-Thompson made a fee award in respect of any fee paid or payable by the claimant. I see no basis for reaching any other conclusion and I affirm that decision.

Signed

A Grubb  
Judge of the Upper Tribunal

Date: