



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

Appeal Number: IA/12057/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 1 July 2019**

**Decision & Reasons Promulgated
On 15 July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**MRS MARTHA KAMMOGNE WOGUIA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Fitzsimmons, Counsel instructed by Duncan Lewis & Co Solicitors

For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant has been granted permission to appeal from the decision of the First-tier Tribunal (Judge Parkes sitting at Birmingham on 23 December 2015) dismissing her appeal against the decision of the respondent to refuse to issue her with a residence card as confirmation of her right to reside in the United Kingdom as the spouse of an EEA national exercising Treaty rights here. There were two grounds of refusal. The first was that there was sufficient evidence to believe that her marriage to her EEA national sponsor was one of convenience for the sole purpose of her remaining in the UK. The second was that it was appropriate to refuse her

application on grounds of public policy and public security pursuant to Regulation 20(1) of the Immigration (EEA) Regulations 2006. I was not asked to make an anonymity direction, and I do not consider that such a direction is warranted on the facts of this case.

Relevant Background

2. The appellant is a national of Cameroon, who is recorded as having entered the UK in January 2012. On 10 December 2013 the appellant married her EEA national sponsor, Mr Alfred Thiem (aka "Tiem"), a French national. She then applied for a residence card as his spouse. She and the sponsor were requested to attend a marriage interview on 6 June 2014. It is admitted by the appellant that she had attended the interview with Idriss Nsangou, not Alfred Thiem. But, with her connivance, Mr Nsangou pretended to be Mr Thiem by presenting an identity card belonging to Mr Thiem.
3. In the course of his interview, it was put to Mr Nsangou that he was not the person shown in the photograph of the identity card belonging to Mr Thiem, and he readily admitted that the card did not belong to him.
4. On 2 October 2014 the appellant, in the name of "Marthe Woquia" (according to the transcript), was convicted at Liverpool Crown Court of conspiring with Mr Nsangou to commit an immigration offence involving the circumvention of immigration controls by fraud. She was sentenced to a term of imprisonment of 18 months, while Mr Nsangou received a term of imprisonment of 16 months.
5. In his sentencing remarks, His Honour Judge Watson said:

"It is the case that you and someone with an identity card in the name Alfred Tiem went through a ceremony of marriage on 10th December, but there is, it seems to me, scant evidence to suggest that this was anything other than an arrangement of convenience. Certainly, when you were called for interview it was not the case that there has been any suggestion that you told the Immigration authorities that your husband had departed to France suddenly or unexpectedly or anything of that nature. You instead went about fielding a substitute husband and that is how Idriss Nsangou came to be with you travelling to Liverpool that day, he having been provided with the identity card of your purported husband, Mr Tiem, and also a bank card in his name which was evidence doubtless that the two of you hoped to persuade someone, if they questioned the identity card, to accept his, Mr Nsangou's identity as that of Mr Tiem, your purported husband ...

It is the fact, however, that your [Mr Nsangou's] motivation for involving yourself in this has never been explained fully or properly and it is, it seems to me, in the absence of any suggestion of a close personal loyalty to Mr Tiem or Ms Woquia, inevitable that I would have to conclude that there was some financial advantage of one sort or another that led you into this position.

The simple fact is this: that there is a real and legitimate concern by everybody resident in this country to know who is here and whether

they are properly here in this country. The restrictions on immigration, whether it be by visa or anything of that nature, the restrictions on residency are properly in place because there is a huge public concern to know that people who are resident here are here properly and have the authority to be here. Arrangements such as this strike at the very heart of public confidence in that very important issue.

It is for that reason that a prison sentence for both of you is inevitable.

... In both your cases the starting point after trial for this serious offence to circumvent the immigration controls is a trial sentence of two years.”

6. On 12 March 2015, the appellant made a fresh application for a residence card as confirmation of her right to reside in the UK as the spouse of Alfred Thiem.

The Reasons for Refusal

7. On 26 March 2015 the Department gave their reasons for refusing the application. They noted that the Trial Judge had not accepted that Alfred Thiem had actually attended the wedding. Based on the fact that she had a history of deceiving the Home Office and of applying fraudulently for a residence card, there was no basis for the Home Office to be satisfied that she had married her claimed sponsor and not another impostor. Her deception cast doubt on the authenticity of her whole application (including any submitted documentation) and the genuineness of any claim which she had made to be in a relationship with her claimed sponsor. The Trial Judge was not satisfied that she had entered into a lawful marriage with Alfred Thiem.
8. Alternatively, taking into account the Judge’s sentencing remarks that there was scant evidence to suggest that this was anything other than an arrangement of convenience, there was sufficient evidence to believe that the marriage undertaken was one of convenience for the sole purpose of her remaining in the UK.
9. In the further alternative, the refusal to issue the confirmation that she sought was justified on grounds of public policy and public security. The fact that she now claimed that her real husband had returned to the UK and had continued to sponsor her highlighted a continued willingness to employ a similar deception on the Home Office. This showed the potential danger she posed to society as the Judge had already deemed her marriage to be one of convenience and did not accept their relationship. Taking her personal conduct in the UK into account, her continued presence in the UK was considered to pose a genuine, present and sufficiently serious threat to the fundamental interests of society.

The Decision of Judge Birk

10. The appellant's appeal came before Judge Birk sitting at Birmingham on 28 May 2015. Both parties were legally represented, and Judge Birk received oral evidence from the appellant and Mr Thiem.
11. Judge Burk found that there was an evidential burden on the appellant to address the evidence justifying reasons for suspicion that the marriage had been entered into for the predominant purpose of securing residence rights. She found that a reasonable suspicion "*very easily arises in this case*", and that the appellant had the burden to prove that it was not a marriage of convenience. Her reasoning at [17] was as follows:

"This is because of the criminal conviction of the Appellant which is directly relevant as she was prepared to attempt to deceive the immigration authorities on the precise issue of her marriage to the sponsor. She did this knowingly and with preparation as she had to engage the services of an impostor. I do not find it credible that her friend who was not, on the evidence, a close friend was willing to do this for nothing bearing in mind that she and he would be aware of the seriousness of their actions. I find that the Appellant in her oral evidence was unable to provide any credible reason as to why this person who was not a close friend would be prepared to be an impostor if it was not for financial reward. I find that this indicates the lengths to which she was prepared to go to deceive the Respondent. Further she has failed to provide any reason ... as to why she did not simply explain to the Respondent what she says happened which is that her husband had a row and left her to go to France. She did not seek to re-arrange the interview. I find that this compounds her readiness to deceive the Respondent rather than explaining the circumstances that had arisen on her account."
12. However, Judge Birk went to allow the appeal as he found that the weight of the evidence fell heavily on the side of establishing that the marriage was genuine and subsisting.

The Decision and Directions of the Upper Tribunal

13. In a decision promulgated on 1 October 2015, UTJ Eshun gave her reasons for finding that Judge Birk had made an error of law such that her decision could not stand. In short, she had not given adequate reasons for her conclusion, given "*the very strong findings the Judge made at paragraph 17*". She remitted the appeal to the First-tier Tribunal for a rehearing. She directed that the findings made by Judge Birk at paragraph [17] were to stand.

The Hearing Before, and the Decision of, the First-tier Tribunal on Remaking

14. The appeal came before Judge Parkes for remaking. Both parties were legally represented, and Judge Parkes received oral evidence from the appellant and Mr Thiem.

15. In his subsequent decision promulgated on 8 January 2016, Judge Parkes found in the appellant's favour on the first issue raised in the RFRL. He accepted that the appellant had married Mr Thiem, and not someone posing as Mr Thiem.
16. In relation to the issue of whether the marriage was one of convenience, the Judge found that the appellant had not been truthful about what had happened in the lead-up to the marriage interview and how she came to have assistance from Mr Nsangou. At the end of [17], Judge Parkes said: *"The view of the Circuit Judge who sentenced them seems to be the most likely explanation and the appellant's continued prevarication further undermines her position."*
17. At paragraph [19], the Judge noted that there was a conflict of evidence between the appellant and her husband as to what had happened after he had left and gone to France. He said that he had tried to contact the appellant from France, but she did not say that she was aware of any efforts to contact her or that she had ignored them. The Judge observed that, in any event, her husband remained in France until October 2014. The husband said that he stayed with his father, but the appellant's evidence was that he stayed in France in different places.
18. At [20], the Judge drew an adverse inference from the fact that, despite the husband saying he realised quickly that he had made a mistake, and that he had tried calling and had found out that his wife had been remanded in custody, he had nonetheless remained in France until October 2014 and had only visited the appellant in custody on a limited number of occasions.
19. At paragraph [21], he accepted that the appellant was now pregnant, following her release from prison in August 2015. But he held that the paternity of the child was presently unknown. Given her history of deception, he said that he had to consider whether she was using *"this"* as a means of remaining in the UK and that it might not be a reflection of a genuine relationship. The Judge continued in [22]:

"If the Appellant's marriage to Mr Thiem is genuine there is a surprising lack of evidence from other people who know them and who can provide information about their relationship. Given the history of the case and the observations above, I find the concerns raised by the Secretary of State about the genuineness of the marriage are entirely justified. To the extent that there is an evidential burden on the appellant to rebut the evidence of the Secretary of State, and that is only a practical matter, I find that she has not shown that the marriage is genuine. On the evidence, and reminding myself that the burden of proof legally rests on the Secretary of State, I find that the Appellant cannot be said to be genuinely married to Mr Thiem."

The Reasons for the Initial Refusal of Permission to Appeal

20. On 10 June 2016, a First-tier Tribunal Judge gave his reasons for refusing to grant the appellant permission to appeal. He held that the grounds

were simply a disagreement with the Judge's findings and appeared to ignore the appellant's persistent dishonesty.

The Reasons for the Eventual Grant of Permission to Appeal and for Extending Time

21. On 7 June 2019 UTJ Perkins decided to extend time as the appellant's representatives had tried to serve an application for permission on 27 June 2016 by facsimile, and reasonably believed that they had. Further, they had made several attempts to re-serve the grounds. He continued: "*The decision is more thoughtful than the grounds suggest but each of the grounds is arguable. That said, it might be helpful to begin by considering if the correct burden of proof is applied and, in any event, if the decision to dismiss the appeal on public policy grounds should stand.*"

The Hearing in the Upper Tribunal

22. At the hearing before me to determine whether an error of law was made out, Mr Whitwell produced documentary evidence of the appellant having obtained a *decree nisi* in February 2018. Ms Fitzsimmons agreed that the appellant was probably divorced by now, but she submitted that this was a matter that needed to be checked. In any event, she submitted that the appeal was not academic as it was of value to the appellant to establish that the adverse findings made by Judge Parkes should not stand.
23. She developed the grounds of appeal in support of the case that the decision of the First-tier Tribunal was vitiated by a material error of law. Mr Whitwell submitted that the Judge had directed himself appropriately, and that the findings which he made were sustainable on the particular facts.

Discussion

24. Ground 1 relates to the issue of paternity. It is pleaded that it was materially unfair for the Judge to make a finding at [21] that the paternity of the baby *in utero* was in question when this was not put to the appellant or her husband; and, in any event, the starting point on the issue of paternity is that a child born to a married couple is deemed to be the biological child of that couple.
25. The issue was whether the parties had entered into marriage in December 2013 with the sole or dominant purpose of facilitating the appellant remaining in the UK. Judge Parkes recognised that the appellant being pregnant at the date of the hearing two years later was capable of supporting the appellant's case that the marriage was genuine from the outset. But it was open to him not to treat the fact of her pregnancy as establishing this, in the light of the very strong findings of Judge Birk, that had been expressly preserved by Judge Eshun, and which had been reiterated by Judge Parkes earlier in his decision. Given this background, it

was not incumbent on the Judge to assume that the appellant had been impregnated by Mr Thiem. But even assuming that this was the case, it did not change the fact that the circumstances surrounding the marriage interview engendered strong grounds for believing that the marriage was a sham at that time, and that it had been a sham marriage at its inception.

26. Ground 2 is that the Judge failed to consider material evidence which, it is said, tended to undermine the respondent's case that the marriage was entered into without the intention of matrimonial cohabitation or for the primary purpose of securing leave to remain in the UK. The evidence in question is (a) the sponsor's evidence and (b) the documentary evidence of cohabitation and joint financial arrangements.
27. It was never in dispute that there was documentary evidence of cohabitation and of joint financial arrangements. The issue was always whether the outward manifestations of a genuine marital relationship corresponded to the underlying reality.
28. The Judge did not ignore the sponsor's evidence on this issue. On the contrary, it was clear from the passages which I have cited earlier in this decision that the Judge engaged with the sponsor's evidence and drew attention to the respects in which it was inconsistent with the evidence given by the appellant. It was also open to the Judge to attach considerable weight to the absence of evidence from other people who knew the appellant and the sponsor, and who could provide information about their relationship.
29. Ground 3 is that the Judge gave inadequate reasons for concluding that the appellant had not shown that her marriage was genuine. It is pleaded that he reached this conclusion solely by reference to the appellant's criminality surrounding events of 6 June 2014; and that her criminality at this time cannot be a complete answer to the question of whether the marriage on 10 December 2013 was one of convenience.
30. The appellant's criminality surrounding the events of 6 June 2014 provided a very strong evidential basis for inferring that her marriage to the sponsor six months earlier was one of convenience, especially as, according to the preserved findings of Judge Birk, the appellant had in effect increased suspicion (a) by not giving a credible account of her arrangement with Mr Nsangou; and (b) by failing to give a credible explanation as to why she did not simply seek to postpone the interview and/or to explain at the time to the respondent that she had had a row with her husband and he had left her to go to France.
31. It was open to the Judge to take as his starting point the criminal conviction and the sentencing remarks made by His Honour Judge Wilson. It is not correct to characterise the Judge as looking no further, and treating the above matters as his end point. The Judge also took into account the lack of supporting evidence from third parties as to there being a genuine and subsisting marital relationship, and the

inconsistencies in the oral evidence given by the appellant and the sponsor to which I have referred earlier in this decision.

32. Ground 4 is that the Judge misdirected himself as to the burden of proof in paragraph [22]. I accept that the Judge made an error at paragraph [2], where he said that the burden of proof lay on the appellant; and that the appellant had to show that the requirements of HC395 were made out on the balance of probabilities. But this error was not material. For the Judge correctly directed himself at paragraph [5] that the case was governed by the EEA Regulations (and not by the requirements of HC395).
33. When he revisited the issue at [22], the Judge correctly directed himself that the burden of proof legally rested on the Secretary of State. He did not impermissibly reverse the burden of proof.
34. In **Collins Agho -v- SSHD [2015] EWCA Civ 1198** at paragraph [13], Underhill LJ said:

“What it comes down to as a matter of principle is a spouse establishes a prima face case that he or she is a family member of an EEA national by providing a marriage certificate or the spouse’s passport; for 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 a “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.”
35. This is a case where the respondent had proved facts which justified the inference that the marriage was not genuine. Thus, the evidential burden had shifted to the appellant, albeit that the legal burden remained on the respondent throughout. The Judge’s self-direction in paragraph [22] is in line with the guidance given by the Court of Appeal in **Agho**, which the Judge cited earlier in his decision.
36. Ground 5 relates to the Judge’s finding under Regulation 20(1) of the regulations 2006. It is pleaded that the Judge erred in failing to consider whether the refusal of a residence card complied with all the relevant requirements of Regulation 21(5), including the requirement at subparagraph (c) that the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.
37. On a careful reading of the RFR, the ground on which the relevant decision was said to satisfy Regulation 21(5)(c) was that the appellant was fraudulently persisting in her claim that her marriage to the EEA national sponsor was genuine, when a Judge had already deemed that the marriage was one of convenience. In short, the respondent was not contending that Regulation 20 should apply if in fact the marriage was found not to be one of convenience. Accordingly, I find in the appellant’s

favour on Ground 5. The Judge erred in finding that Regulation 20 applied in the alternative. The Judge did not give adequate reasons for finding that the decision complied with Regulation 21 if (contrary to his primary finding) the marriage was genuine. However, the Judge's error is not material as he made a sustainable finding that the marriage was one of convenience.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed

Date 4 July 2019

Deputy Upper Tribunal Judge Monson