



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/27363/2014**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Decision and Reasons

Promulgated

On 5 April 2016

On 29 April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

**RAYMOND IHUNDA
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance

For the Respondent: Mr E Tufan (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Raymond Ihunda, a citizen of Nigeria born 24 October 1971, against the decision of the First-tier Tribunal of 18 September 2015 dismissing his appeal against the decision of 4 June 2014 to refuse his application for a residence card confirming his asserted right to reside as the spouse of Margarida Domingas Sanha, a German national.
2. The application was refused partly due to doubts as to the provenance of documents said to corroborate their cohabitation, but principally on account of a visit to the address given for the matrimonial home, [

], on 28 May 2014, details of which were set out in a dated report by a named immigration officer, whereby the absence of the Appellant and his wife gave rise to concerns, particularly given that a male living at that address said that the Appellant had moved out in the latter part of 2013 or early 2014 and only occasionally returned, to collect his mail. He said that the Appellant's room had been a ground floor one which he had shared with another male, which had always contained two single beds. So far as he was aware (and he had been in residence at the date that the Appellant had claimed to have been living at the same address with Ms Sanha), no female had ever lived there and he was not aware that the Appellant had ever been married or had a girlfriend.

3. The First-tier Tribunal effectively adopted the Respondent's reasoning, adding that "Based on the information detailed in the immigration reports which I have seen, the Respondent I note had sufficient evidence to believe that the marriage ... is one of convenience for the sole purpose of the appellant remaining in the UK". Additionally the First-tier Tribunal was concerned as to the authenticity of the letters with which the Home Office had already taken issue, as their headers and signatures were very blurred and bore marks which gave cause for concern as to whether they were truly copies of original documents or had been somehow tampered with. The unsigned witness statement provided by the Appellant asserting that his marriage was genuine (and stating his belief that the case did not require his physical presence) did not dispel these doubts; on balance of probabilities the First-tier Tribunal rejected their claim to be in a genuine marriage.
4. Grounds of appeal contended that the credibility of the witness whose hearsay evidence bore so heavily on his case had been untested by cross examination, and asserted that in reality that evidence had been of vindictive authorship; additionally the mere appearance of the Croydon letters should not have counted against their reliability. Additionally the First-tier Tribunal had erred in law by placing the burden of proof on the Appellant to show that the marriage was genuine once the matter had been raised. The failure to produce the earlier decision was a matter that could equally well have been held against the Secretary of State.
5. Permission to appeal was granted by the First-tier Tribunal on 15 February 2016 on the basis that there was indeed an arguable misdirection as the burden of proof and as to the appropriate approach following *Papajorgi*. A Rule 24 Response from the Secretary of State of 3 March 2016 set out that the statement that the Respondent had sufficient evidence to believe the marriage was one of convenience dealt sufficiently with the burden of proof.

Findings and reasons

6. *Papajorgji* [2012] UKUT 00038 (IAC) explains that at the outset of an application, there is no burden on a claimant to demonstrate that a marriage to an EEA national is not one of convenience: there is merely an evidential burden on the claimant to address evidence justifying a

reasonable suspicion that the marriage was entered into for the predominant purpose of securing residence rights. At [27] *Papajorgji* sets out that “there is no burden on the claimant in an application for a family permit to establish that she was not party to a marriage of convenience unless the circumstances known to the decision maker give reasonable ground for suspecting that this was the case.”

7. In *Rosa* [2016] EWCA Civ 14 the Court of Appeal examined the question of the burden of proof in EEA marriage of convenience cases, upholding the reasoning in *Papajorgji* and finding that
 - (a) The legal burden lies on the Secretary of State to prove that an otherwise valid marriage is a marriage of convenience [24] – whilst the legal burden remains on the national authorities throughout proceedings, the evidential burden may nevertheless shift [29];
 - (b) It is for the national court to verify the existence of any abuse relied upon by the authorities of a Member State, evidence of which must be adduced in accordance with rules of national law [26];
 - (c) Cases will only rarely turn on questions of the burden of proof [39] although where there is an error as to burden the court should not lightly conclude that the outcome would inevitably have been the same with had a correct direction been made [38].
8. I do not consider that the concerns as to the appearance of the letters alone could have justified any suspicions as to the *bona fides* of the marriage: the link between that evidence and the substance of the relationship is too remote. However, the information gained from the Appellant’s former housemate during the Respondent’s visit to the Appellant’s claimed matrimonial home did give real cause for concern over the genuine nature of the marriage, sufficient to permit the Respondent to raise the matter as one requiring determination in these appeal proceedings: to put it another way, it shifted the evidential burden onto the Appellant. Although the grounds of appeal contend that the hearsay evidence of the immigration officer’s interlocutor at the Appellant’s address should not have been accepted absent cross examination, the more remarkable absence at the hearing below was that of the Appellant, who had he attended that hearing would have had the opportunity to answer in person any doubts raised by that visit.
9. He might additionally have sought a witness summons against the individual who he claims passed on malicious falsehoods to the authorities so that the latter’s evidence might have been tested; alternatively the Appellant might have put forward character witnesses of his own. As noted by Stanley Burnton LJ in the very context of EEA appeals in *Amos* [2011] EWCA Civ 552, the First-tier Tribunal’s Procedure Rules authorise the Tribunal to allow oral, documentary or other evidence to be given of any fact which appears to be relevant to an appeal even if that evidence would be inadmissible in a court of law. So there is no doubt that evidence emanating from the visit was admissible, though the

weight to be given to it was a matter for the Judge below. Absent any cogent evidence being provided to contradict it, the resolution of the appeal against the Appellant is unremarkable.

10. Furthermore, it is clear from reading the decision below that this was not an appeal in which the Judge was left in any doubt as to where the truth lay, and thus as to which the question of burden of proof might have been determinative: because, as it was put in *Rosa* at [39], the answer to the question was clear-cut.
11. For these reasons I consider that there is no error of law in the decision of the First-tier Tribunal.

Decision:

The decision of the First-tier Tribunal is upheld as there is no material error of law within it. The appeal is dismissed.

Signed:

Date: 27 April 2016

A handwritten signature in black ink, appearing to read 'MAS', with a long, sweeping underline that extends to the left and then curves back towards the right.

Deputy Upper Tribunal Judge Symes