



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/27273/2015**

Appeal Numbers:

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 3 March 2017

Promulgated

On 24 May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

**MD MOHI UDDIN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Martin, of Counsel, instructed by Hubers Law
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Background and Matters in Issue

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge N.M.K. Lawrence promulgated on 26 September 2016, in which he dismissed the appeal of the appellant against the decision of the Secretary of State to refuse to issue him with a residence card as confirmation of his right of residence in the United Kingdom pursuant to the Immigration (European Economic Area) Regulations 2006.

2. The Secretary of State had refused to issue a residence card on the basis that the marriage between the appellant and his wife, Maria-Angelica Mihali, a Romania national, is one of convenience. It was further not accepted that Mrs Mihali was exercising treaty rights in the United Kingdom.
3. The Secretary of State's case that the marriage is one of convenience is set out in the refusal letter. It refers to findings following a pastoral visit by Immigration Officers to the claimed matrimonial home where the appellant and Mrs Mihali were encountered and questioned. Following observations made about the state of the room the couple occupied and their unsatisfactory responses to questioning, Immigration Officers concluded that the marriage is one of convenience. As for Mrs Mihali exercising treaty rights, it was noted that there was insufficient evidence of her employment and the respondent's verification checks revealed that she was no longer employed.

The Decision of the First-tier Tribunal

4. At the appeal before the First-tier Tribunal the Secretary of State was not represented. The appellant was however represented albeit by a different firm of representatives. The judge heard oral evidence from the appellant and Mrs Mihali and received submissions from the appellant's then representative. The judge referred to **Rosa v SSHD** [2016] EWCA Civ 14 and **Papajorgi** [2012] UKUT 00038 and made various observations and conclusions on the evidence at [9] - [12]. The judge was intrigued by the fact that the couple travelled to Scotland for the purposes of participating in a marriage ceremony and noted that Mrs Mihali conceived the appellant's child shortly after the pastoral visit. She subsequently gave birth on 24 March 2016. The judge further noted there was no explanation for the couple marrying in Scotland and returning the same day; and found that it was not credible they could not remember the place where they married.
5. In his omnibus conclusion, the judge stated thus at [13]:

"In my view, the respondent has demonstrated, to the correct standard, that this is a marriage of convenience. The appellant and the sponsor rely on the fact of the birth of a child to demonstrate that this is not a marriage of convenience. This would have been a cogent argument had it been demonstrated that the test provider is one approved by the Home Office. Accordingly, I attach no weight to the document."
6. The judge accordingly found that the Secretary of State had made out her case and dismissed the appeal.
7. The appellant sought permission to appeal on the grounds that the judge had misdirected himself in rejecting the DNA evidence, and that the judge erred in finding the respondent had satisfied the legal burden of proving the appellant's marriage to Mrs Mihali is one of convenience to the

required level; it being argued that there was a failure to examine relevant evidence and a failure to give weight to material matters.

8. Permission to appeal was granted by First-tier Tribunal Judge Shimmin on 17 January 2017.
9. Before me, Mr Kotas submitted that for the reasons set out in the letter produced pursuant to Rule 24 and dated 10 February 2017, the appeal was not opposed as it was apparent that the judge erred in law.
10. I indicated that I was satisfied that the decision of the First-tier Tribunal did involve the making of an error of law. It is not necessary to traverse all the grounds in detail considering the respondent's concession, so I set out my reasons briefly below.

The Error of Law

11. At the hearing before me Mr Martin submitted that the decision of the judge contained errors of law such that it should be set aside. Although there were a number of grounds his primary challenge related to the approach taken to where the burden of proof lay and the judge's treatment of the evidence.
12. The Court of Appeal has recently considered the issue of burden of proof in regard to marriages of convenience in both **Agho v Secretary of State** [2015] EWCA Civ 1198 and **Rosa** (supra). The proper test is clearly set out by the Court of Appeal in particular in **Rosa** at [24] and more particularly at [29]. It appears however from the decision of the First-tier Tribunal, in particular at [6] and [13], that the judge misunderstood how the test is properly to be applied in practice. It is acknowledged by Mr Kotas that no notes or contemporaneous records were provided of the Immigration Officers visit other than the details provided in the refusal letter. It cannot be said that a refusal letter is in itself evidence, and in that sense the judge erred in law in accepting as evidence assertions of fact which are not in fact supported by evidence which was not provided by the Secretary of State.
13. Further, as Mr Martin pointed out, the judge's approach to the evidence is erroneous in that the child was conceived prior to the pastoral visit and the DNA test provider was indeed approved by the Home Office. There is no dispute, and I accept, that the judge's conclusions to the contrary were clearly in material error.
14. It follows that the decision must be set aside in its entirety and I do so.
15. Accordingly, the decision must be remade.

The Re-Made Decision

16. At the hearing the parties were in a position to proceed with the remaking of the decision. I heard oral evidence from the appellant and Mrs Mihali in English. Both relied on their respective witness statements and were cross examined by Mr Kotas. It was clear that Mrs Mihali found the stress of giving evidence particularly difficult as she became distressed during the course of her evidence. Nevertheless, I was satisfied that both she and the appellant were able to comprehend the proceedings throughout. At the close of evidence both representatives made submissions following which I reserved my decision. In reaching my conclusions I have considered the evidence and submissions before me and applied the civil standard of proof namely the balance of probabilities.
17. I remind myself that the legal burden is on the respondent to prove that the marriage is one of convenience. The Upper Tribunal in **Papajorgji** (supra) 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.”*
18. Mr Kotas properly acknowledged that the respondent had still failed to produce any evidence at all to support the assertions made in the refusal letter. In the absence of such evidence it is difficult to discern how it could be said that there was evidence justifying a reasonable suspicion that the marriage is a sham. While Mr Kotas could point to the fact that the appellant did not dispute the visit took place; that is not the point – some of what happened and, what was said, is challenged by the appellant.
19. I consider that in this case the Secretary of State has not produced any evidence which is capable of being relied upon. What is said in the refusal letter are simply assertions. They are not in and of themselves evidence. There are no notes of what is said to have transpired on the day of the visit or witness statements from the Immigration Officers concerned. There was thus no evidential burden for the appellant to discharge.
20. In the instance of the contra position being established, namely, that it could be said that there was evidence justifying a reasonable suspicion that the marriage is one of convenience, I am satisfied having heard the evidence of the appellant and Mrs Mihali that the marriage should be accepted as genuine.

21. The appellant arrived in the United Kingdom on 10 October 2009 as a Tier 4 General Student with entry clearance conferring leave to enter until 31 December 2012. His leave in that capacity was extended until 24 March 2014. An application to further extend his leave was refused and the appellant duly appealed to the First-tier Tribunal, but withdrew his appeal in 2015 in order to pursue an application perhaps understandably for a residence card. By this stage the couple had married in a ceremony conducted in Inverness on 27 November 2014 and had been living together since. While I acknowledge that the evidence presented is not particularly detailed or overwhelming there is nothing inherently suspicious in the above background.
22. There is no dispute that Immigration Officers encountered the couple in an upstairs bedroom where they resided. Immigration Officers observed the presence of both male and female clothes and photographs of the appellant and Mrs Mihali on a bedside table. There were some blankets and sheets laid out on the floor which was suggestive of the couple sleeping separately, but both the appellant and Mrs Mihali confirmed that they were sleeping on the floor together because of the warm weather. While that may appear odd to some, I accept that it is a plausible explanation and one that was not materially challenged before me. On the other hand, even if the appellant was found sleeping separately on the floor, it does not necessarily suggest this is a marriage of convenience.
23. While further reliance is placed on the appellant and Mrs Mihali being unable to name immediately to the Immigration Officers the place they married, I note that Mrs Mihali was able to recall that they married in Inverness. In evidence the appellant and Mrs Mihali provided cogent and consistent explanations as to why they did so, having made efforts to marry in the United Kingdom only to be told on two occasions that the appellant could not do so without a passport. Further still, while they had planned to stay in Scotland for longer than a day, following the marriage they returned to the United Kingdom at Mrs Mihali's request who had not prepared herself for the inclement weather conditions in Scotland during the winter season. While this evidence was rightly tested in cross-examination by Mr Kotas, I am satisfied that the appellant and Mrs Mihali gave a consistent and innocent explanation for their actions.
24. I find that all of this together with the fact that the couple have a child conceived prior to the pastoral visit is a strong indicator corroborative of a genuine relationship.
25. Bearing in mind that the burden in this case is on the Secretary of State to show on the balance of probabilities the marriage is one of convenience, I consider that she has not provided sufficient evidence to do so and that accordingly, reviewing the evidence as a whole, I am satisfied that this is not a marriage of convenience and I so find.

26. There remains an issue as to whether Mrs Mihali is exercising treaty rights in the United Kingdom. This issue was not determined by the First-tier Tribunal. There is evidence supporting Mrs Mihali's economic activities up to May 2016 in the form of payslips and corresponding bank statements. This evidence supports her account that at the time of refusal she was working, but had simply began working at a different branch of the same company. However, since the refusal and the hearing before the First-tier Tribunal Mrs Mihali took maternity leave. She says that she returned to work four weeks' ago, working at a care home; her first monthly salary will be paid soon. While I have been invited to accept that evidence at face value, I agree with Mr Kotas that this is insufficient to discharge the burden that falls squarely on the appellant to establish that Mrs Mihali is exercising treaty rights in the United Kingdom. Given the complete lack of any documentary evidence supportive of Mrs Mihali's claimed employment, I am not satisfied on balance that the appellant has proven to the requisite standard that his wife is a qualified person and is exercising treaty rights as at the date of hearing as a worker. That is a matter however, should it be the case that Mrs Mihali is so employed, that can be readily resolved by providing such evidence to the respondent.
27. It follows that the appeal must be dismissed as I am not satisfied that the requirements of regulation 6 are met.

Decision

28. The decision of the First-tier Tribunal is set aside.
29. I remake the decision in the appeal as follows: the appeal is dismissed with reference to regulation 6 of the Immigration (European Economic Area) Regulations 2006.
30. I was not asked to make a direction for anonymity and on the facts, I see no reason to do so.

Signed

Date: 20 May 2017

Deputy Upper Tribunal Judge Bagral

TO THE RESPONDENT **FEE AWARD**

As I have dismissed the appeal there can be no fee award.

Signed

Date: 20 May 2017

Deputy Upper Tribunal Judge Bagral