



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

Appeal Number: EA/07041/2016

THE IMMIGRATION ACTS

**Heard at Bradford
On 25 October 2018**

**Decision and Reasons
promulgated
On 14 November 2018**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**NYIMA SANYANG
(anonymity direction not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Greer instructed by Ison Harrison Solicitors.

For the Respondent: Mr Diwnycz - Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-Tier Tribunal Judge Mensa, promulgated on 14 May 2018, in which the Judge dismissed the appellant's appeal under the EEA regulations.

Background

2. The appellant was born on 19 March 1979 and applied for a residence card as the family member of an EEA national through marriage. The Judge noted in a previous application the respondent had assessed that the marriage was a marriage of convenience.
3. The Judge noted at [6] that the appellant was ill in hospital which had led to previous adjournments and that her representative was not pursuing a further adjournment on that basis as he was not able to say the appellant will be in a position to attend even if the adjournment was granted. The matter proceeded on the basis of submissions only.
4. The Judge notes at [8] that the two issues in the appeal are whether the appellant is in a genuine and subsisting marriage with her husband and whether he was exercising treaty rights. The appellant's representative argued that even though the appellant's husband's employment ended in January 2016 if he had been exercising treaty rights the appellant will be entitled to a retained right of residence.
5. The Judge notes a previous determination dated 1 October 2015 by First-Tier Tribunal Judge Wilson who concluded '*I no more believe the sponsors various accounts of the alleged genuineness and subsistence of the marriage then I did the appellant's shifting and unreliable accounts*'. Both were found not to be witnesses of truth and Judge Wilson found the appellant had failed to demonstrate the sponsor had resided in the UK for a continuous period of 5 years whilst exercising treaty rights.
6. The Judge considered the evidence made available before concluding at [16]:
 16. Taking that limited evidence and weighing it against the far greater evidence before Judge Wilson I find the appellant has failed to demonstrate with this fresh evidence that the findings of Judge Wilson should not stand. In fact the weight of the findings by Judge Wilson has in my view remain completely unaffected by the weak evidence filed before me. I find the appellant has failed to demonstrate she was ever in a genuine and subsisting relationship with the sponsor. In those circumstances I dismiss the appeal as there is no need to consider further whether the sponsor was a qualified person as a marriage of convenience is a complete bar to status under the EEA regulations.
7. Permission to appeal was granted by another judge of the First-tier Tribunal on 13 June 2018 on the grounds the Judge appears to have confused the issue of whether a marriage is a marriage of convenience under the EEA Regulations with whether a marriage is genuine and subsisting, as did Judge Wilson in the earlier decision.

Error of law

8. The Judge was right to refer to the earlier decision of Judge Wilson in accordance with the Devaseelan principles which formed the starting point of the deliberations in this appeal.
9. Judge Wilson set out in that decision the issues that Tribunal was asked to consider at [5] in the following terms:
 5. The respondent refused the Appellant's application for reasons detailed in the refusal letter. In summary he stated that the appellant failed to meet regulation 15 of the 2006 regulations and that she was unable to show her EEA national sponsor, claimed to be a Spanish national, had resided in the United Kingdom in accordance with the 2006 regulations. This is because there were significant gaps amounting to 2 years in his proven United Kingdom employment history. Furthermore, the appellant's claim to be lawfully married to the sponsor was unproven to the extent that she was unable to show that the marriage was genuine within the terms of the 2006 regulations.
10. Judge Wilson sets out findings of fact from [9] of the decision under challenge. Mr Greer accepted that this appeal is not a second appeal against the decision of Judge Wilson, but it is important to set out findings made in that earlier decision which were clearly considered to be also determinative of the current appeal.
11. Judge Wilson finds at [9] the two issues lying at the heart of the appeal are whether or not the sponsor was resident in this country in accordance with the 2006 regulations and secondly whether or not she was genuinely married to the sponsor. At [10] Judge Wilson states *"I remind myself that the burden of proof lay upon the appellant to show that she was lawfully married to the sponsor and that she has resided in the United Kingdom in accordance with the 2006 regulations for a continuous period of 5 years. However having examined the whole of the evidence I am satisfied that she failed to discharge this burden by some distance. This is because she not only failed to show that she came within the requirements of regulation 15 but also the evidence in support of the application and the appeal was both confused and inconsistent and in parts completely implausible"*.
12. Having examined the evidence of both the appellant and the sponsor Judge Wilson writes:
 25. I find that as with the appellant, the sponsor was not a witness of truth. I find that he was not a witness of truth in relation to Amie Bojang's application or in relation to the marriage certificate that showed that he was married to her, or in relation to the other documentation brought into question by the respondent. I find that the evidence was that he was untruthful about whom he married, about his relationships and about other key issues in relation to both of these matters. I find that the evidence clearly pointed to him living with Amie Bojang and not with the appellant because he was in a relationship with Amie Bojang and not with the appellant. It furthermore follows from all of my findings that I find the appellant's evidence was equally untruthful for the

reasons given when I addressed her evidence. Crucially I am satisfied that the respondent was in possession of a marriage certificate showing that the appellant was married to the sponsor, and further satisfied that the respondent was in possession of a second marriage certificate showing that the sponsor was married to Amie Bojang, this presented on 10 July 2014 in support of a separate application relating to Amie Bojang, with whom the sponsor was still living at the time of the instant application and at time of the hearing before me. The second marriage certificate was submitted less than 3 months before the appellant's application was lodged. Consequently I conclude from all the evidence before me that the appeal fails under the 2006 regulations because the appellant failed to show that she resided in the United Kingdom with the sponsor in accordance with the 2006 regulations for a continuous period of 5 years. I find that she demonstrably failed to show that her claimed marriage to the sponsor was lawful, genuine and subsisting.

13. There are two issues relevant to this application being firstly the correct test if the allegation is that a marriage is a sham marriage or a marriage of convenience, and secondly the correct test for establishing whether a marriage is genuine and subsisting which is a term that appears in the immigration rules which is separate from the question of whether a marriage is a marriage of convenience which can be a valid marriage and therefore genuine in terms of the legal requirements but not recognised under the Regulations as a result of the purpose for which the marriage was entered into.
14. Although the 2016 regulations define a marriage of convenience this was not the position under the 2006 regulations. The definition was, however, considered in cases such as Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038(IAC) (Blake J) in which the Tribunal held that "Although neither the Directive nor the Regulations define it, as a matter of ordinary parlance and the past experience of the UK's Immigration Rules and case law, a marriage of convenience in this context is a marriage contracted for the sole or decisive purpose of gaining admission to the host state. A durable marriage with children and co-habitation is quite inconsistent with such a definition".
15. The 2016 regulations (reg 2) now define a marriage of convenience: "marriage of convenience" includes a marriage entered into for the purpose of using these Regulations, or any other right conferred by the EU treaties, as a means to circumvent - (a) immigration rules applying to non-EEA nationals (such as any applicable requirement under the 1971 Act to have leave to enter or remain in the United Kingdom); or (b) any other criteria that the party to the marriage of convenience would otherwise have to meet in order to enjoy a right to reside under these Regulations or the EU treaties."
16. In Rosa [2016] EWCA Civ 14 it was held that the focus in relation to a marriage of convenience ought to be on the intention of the parties at the time the marriage was entered into, whereas the question of

whether a marriage was subsisting looked to whether the marital relationship was a continuing one. Nonetheless, the FtT was correct to look at the evidence concerning the relationship between the Claimant and the Sponsor after the marriage itself, since that was capable of casting light on their intention at the time of marriage.

17. In Sadovska v Secretary of State for the Home Department [2017] UKSC 54 it was found that the objective to obtain the right of entry and residence must be the predominant purpose for the marriage to be one of convenience and a marriage could not be considered to be a marriage of convenience simply because it brought an immigration advantage. “Should the tribunal conclude that Mr Malik was delighted to find an EU national with whom he could form a relationship and who was willing to marry him, that does not necessarily mean that their marriage was a “marriage of convenience” still less that Ms Sadovska was abusing her rights in entering into it”.
18. In relation to the burden standard of proof, in Rosa it was held that the legal burden was on the Secretary of State for the Home Department to prove that an otherwise valid marriage was a marriage of convenience so as to justify the refusal of a residence card under the EEA Regulations. The legal burden of proof in relation to marriage lay on the Secretary of State, but if she adduced evidence capable of pointing to the conclusion that the marriage was one of convenience, the evidential burden shifted to the applicant (paras 24 - 27).
19. In Agho v Secretary of State for the Home Department [2015] EWCA Civ 1198 it was held that where an applicant sought an EEA residence card on the basis that he was married to an EEA national, he simply had to produce his marriage certificate and his spouse's passport. As a matter of principle, a spouse established a prima facie case that he was the family member of an EEA national by providing the marriage certificate and his sponsor's passport. The legal burden was on the Secretary of State to show that any marriage thus proved was a marriage of convenience and that burden was not discharged merely by showing ‘reasonable suspicion’. The evidential burden might shift to the applicant by proof of facts that justified the inference that the marriage was not genuine. The facts giving rise to the inference included a failure to answer a request for documentary proof of the genuineness of the marriage where grounds for suspicion had been raised: Papajorgji (EEA spouse - marriage of convenience) [2012] UKUT 38 (IAC) considered (para 13).
20. That the burden of proof is on the respondent is now put beyond doubt by Sadovska v SSHD [2017] UKSC 54 an appeal from the First Division of the Inner House of the Court of Session, see above.
21. The statement by Judge Wilson at [10] that the burden lay upon the appellant to show she was lawfully married is true if the only issue was whether a valid lawful marriage ceremony had been undertaken which is normally evidenced by the production of a genuine marriage certificate. That is not the position in relation to a case alleging a marriage is a marriage of convenience.

22. If the Judge was therefore considering whether the marriage was a sham marriage the burden of proof would fall upon the Secretary of State to establish the same.
23. A marriage can be a genuine marriage in terms of the fulfilment of legal requirements but then break down at a later stage to the extent it no longer can be said to be a genuine or subsisting marriage. A subsisting marriage is one that must be valid which continues thereafter. Considering whether person enjoys a genuine and subsisting relationship, unless the word genuine is taken as referring to the assertion the marriage is a marriage of convenience, is arguably applying the wrong test as argued in the grounds seeking permission to appeal. If genuine does relate to the question of whether this is a marriage of convenience then, in accordance with the case law above, the burden would fall upon the Secretary of State to prove this although consideration of facts after the date of the marriage may be of relevance.
24. It was accepted on behalf the Secretary of State that the appellant had established arguable legal error material to the decision under appeal. Although Judge Wilson's decision has not been challenged, matters have moved on in terms of the appropriate legal test and manner in which such cases much be considered; admitting arguable error in the reliance of the Judge upon Judge Wilson's decision, which reversed the burden of proof, rather than in assessing the matter for herself in accordance with the accepted position.
25. Although there are a number of concerns arising from the evidence recognised by the Judge it is not made out at this stage that the decision will be exactly the same if the proper legal test is applied and evidence considered. I set the decision of the Judge aside on the basis of the accepted error. As the Judge does not appear to have considered the matter properly it is necessary for extensive findings of fact to be made. To this end, considering the Presidential guidance on the issue of remittal, I find this is a case in which it is appropriate to remit the appeal to the First-tier Hearing Centre at Bradford for the matter to be heard afresh by a judge other than Judge Mensah.

Decision

26. **The Judge materially erred in law. I set aside the decision of the original Judge. I remit the appeal to the First-tier Tribunal sitting at Bradford to be heard a fresh by a judge other than Judge Mensah appointed by the Resident Judge.**

Anonymity.

27. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 2 November 2018