



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/02480/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House via *Microsoft Teams*
On 24 May 2021

Decision & Reasons Promulgated
On 14 June 2021

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

NAOMI WINNER KADIRI
(ANONYMITY DIRECTION NOT MADE)

Appellant

-and-

ENTRY CLEARANCE OFFICER, SHEFFIELD

Respondent

DECISION AND REASONS

Representation:

For the Appellant: Mr. J Flynn, Sponsor

For the Respondent: Mr. M Diwnycz, Senior Presenting Officer.

Introduction

1. The appellant is a national of Nigeria who seeks an EEA family permit as the spouse of an Irish national who resides in Northern Ireland. Her application falls

to be considered under the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regulations').

2. Her appeal was initially refused by the First-tier Tribunal (Judge Fox) by a decision dated 19 December 2019. She was granted permission to appeal to this Tribunal and by a decision dated 17 February 2021 I allowed her appeal to the extent that the decision of the First-tier Tribunal was set aside, and the decision was to be remade by this Tribunal. No findings of fact were kept.

Hearing

3. The hearing before me was a Microsoft Teams video conference hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by Mr. Flynn and Mr. Diwnycz in exactly the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

Anonymity

4. No anonymity direction was issued by the First-tier Tribunal and no application for such direction was sought by the parties.

Background

5. The appellant is a national of Nigeria and is presently aged 30. She is married to Mr. John Flynn, a national of the Republic of Ireland who resides in Northern Ireland.
6. The couple met in 2010 and a relationship commenced thereafter. They agreed to marry in 2014 and officially became engaged in 2016, with an engagement ring being purchased. They married in December 2016. Prior to the application for an EEA Family Permit, the couple met between three to six times a year in Nigeria, spending between six and fourteen weeks a year living together.
7. The application for an EEA Family Permit was made in April 2017 and refused by an entry clearance officer ('ECO') whose decision was dated 13 June 2017. It was not accepted that the appellant had established that she was a family member of her sponsor, Mr. Flynn: regulation 7 of the 2016 Regulations. Alternatively, the ECO concluded that the appellant was not in a durable relationship with an EEA national: regulation 8(5) of the 2016 Regulations.

8. An entry clearance manager ('ECM') confirmed the decision on 10 January 2019. Somewhat surprisingly, the ECM believed that the ECO had refused the application on 'marriage of convenience' grounds and proceeded to reaffirm the decision, purportedly made with reference to regulation 2(1) of the 2016 Regulations, on this basis. It was not said in the alternative that the marriage was not genuine or subsisting.
9. I note at this juncture that there is no reference to regulation 2(1) in the ECO's decision nor is a reasonable suspicion raised that the marriage was one of convenience.

Evidence

10. Before the First-tier Tribunal the appellant relied upon detailed evidence as corroborating the genuine intentions of both herself and Mr. Flynn when they entered into their marriage. Such evidence included a letter from the appellant which stood as her witness statement; photographs of the couple taken over various years between 2010 and 2017; photographs of the couple's wedding; email correspondence between the couple from 2012 to 2015 which predates the wedding; a receipt for the appellant's engagement ring; records of WhatsApp communication between the couple from 2017 to 2018 and evidence of financial remittances from Mr. Flynn to the appellant.
11. The email correspondence relied upon runs to 10 pages and the WhatsApp records run to 93 pages. They clearly evidence a close and loving relationship between the couple.
12. Also filed with the Tribunal was evidence of Mr. Flynn's regular visits to Nigeria in the form of a copy of his passport with relevant visa stamps for the years 2010, 2011, 2014, 2015, 2016 and 2017. This evidence was submitted with the appeal notice filed in January 2019.
13. At the hearing before me the appellant relied upon a 307-page bundle. Included within the document were letters from two long-standing friends of Mr. Flynn, namely Dr. Patrick McIlwee and Mr. David Brown, attesting to their regular contact with the appellant when they visit Nigeria and her lengthy and loving relationship with Mr. Flynn.

Law

14. The burden is upon the appellant to establish that she meets the requirements of the 2016 Regulations. The standard of proof is the ordinary civil standard, namely the balance of probabilities.

15. Further considerations arise where the respondent asserts that a marriage is one of 'convenience' and therefore falls under the definition of such marriage at regulation 2(1) of the 2016 Regulations. The Court of Appeal confirmed in *Rosa v. Secretary of State for the Home Department* [2016] EWCA Civ 14; [2016] 1 WLR 1206 that in EU free movement law cases the burden for proving that a marriage is one of 'convenience' rests with the respondent. As the Supreme Court observed in *Sadovska v. Secretary of State for the Home Department* [2017] UKSC 54; [2017] 1 WLR 2926 as to the burden of proof in 'marriage of convenience' cases: 'One of the most basic rules of litigation is that he who asserts must prove'.
16. In *Papajorgji (EEA spouse – marriage of convenience) Greece* [2012] UKUT 00038 (IAC), [2012] Imm AR 447, at [37] this Tribunal confirmed:
 - '37. It is not enough that the ECO honestly suspects there is a marriage of convenience; the claimant will only be disqualified if it is established that it is. Adverse inferences may be drawn by a claimant's failure to provide data reasonably open to her in the course of the investigation or appeal; but that cannot form the sole or decisive reason for the conclusion. ...'
17. The approach adopted in *Papajorgji* was endorsed by the Court of Appeal in *Agho v Secretary of State for the Home Department* [2015] EWCA Civ 1198, [2016] I.N.L.R. 411 and approved by the Court of Appeal in *Rosa*, at [24].
18. The Supreme Court in *Sadovska* further approved the approach adopted in *Papajorgji* that the Tribunal is to form its own view of the facts from the evidence presented.
19. The Court of Appeal held in *Rosa* 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 Court confirmed that the First-tier Tribunal was correct to have looked 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.
20. I observe at this juncture that the ECO only considered the marriage in terms of whether it was subsisting, and therefore on its face the decision implicitly accepts that the intentions of the couple when they married were genuine. The ECM was simply erroneous when asserting that the ECO had concluded the marriage to be one of convenience. Mr. Diwnycz accepted before me that such conclusion could not properly be drawn from the ECO's decision. I address this in more detail below.

21. I observe that the European Commission has produced guidance by means of a handbook addressing the issue of 'alleged marriages of convenience between EU citizens and non-EU citizens in the context of EU law': ref *SWD (2014) 284 final* (26 September 2014). It defines a marriage of convenience as a marriage contracted for the predominant purpose of conferring a right of free movement and residence under EU law to a person who would otherwise not have such a right and explains that as 'sole purpose' is an autonomous EU law concept it is not to be interpreted literally as being the unique or exclusive purpose. There is no definition of 'predominant' but the handbook indicates that the phrase is used because someone may have more than one abusive purpose (such as a tax advantage). The key is whether there is abuse.
22. The Supreme Court considered the guidance offered by the handbook in *Sadovska*, [29]:
 - '29. ... Although it is defined in the Directive and the 2009 Communication as a marriage the sole purpose of which is to gain rights of entry to and residence in the European Union, the 2014 Handbook suggests a more flexible approach, in which this must be the predominant purpose. It is not enough that the marriage may bring incidental immigration and other benefits if this is not its predominant purpose. Furthermore, except in cases of deceit by the non-EU national, this must be the purpose of them both. Clearly, a non-EU national may be guilty of abuse when the EU national is not, because she believes that it is a genuine relationship.'
23. Therefore, 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 cannot be considered to be a marriage of convenience simply because it brought an immigration advantage.

Decision

24. At the commencement of the hearing Mr. Diwnycz confirmed that having read the decisions of the ECO and the ECM as well as the evidence relied upon by the appellant, he presented little resistance to the appellant's appeal, observing that he had no instructions to concede the appeal.
25. Mr. Diwnycz further confirmed that it was not reasonably possible to read the ECO's decision in this matter as asserting that the applicant's marriage to Mr. Flynn was one of convenience. The decision of the ECO was very clearly concerned solely with the genuine and subsisting nature of the marriage, and not the intentions held by the couple when they entered into it.
26. I am satisfied that Mr. Diwnycz was correct to adopt the approach adopted. It is entirely clear from the evidence presented to the ECO and subsequently filed with this Tribunal that the appellant has been in a genuine, long-term and loving

relationship with Mr. Flynn for several years prior to the marriage. It is clearly established that Mr. Flynn has through his employment regularly worked in West Africa, and in particular Nigeria. There is photographic evidence of the couple having known each other since 2010 and both photographic and written evidence as to their relationship having developed and blossomed since such date. The email and WhatsApp communication between the parties clearly identify a loving and close relationship. There are messages written in 2013 that confirm Mr. Flynn's intentions to spend his life with the appellant once his divorce is finalised. Emails from this time confirm that Mr. Flynn was in communication with the appellant's family and also as to his family knowing about his relationship with the appellant, which strongly indicates the genuineness of the relationship.

27. I am satisfied that consequent to the issuing of a decree absolute in April 2014 Mr. Flynn felt able later that year to ask the appellant to marry him. The fact that an engagement ring was bought in 2016 does not undermine the email evidence of the continuing, loving bond between the couple after 2014.
28. Mr. McIlwee confirmed that he is a business consultant who met Mr. Flynn in Nigeria in or around 2010 and met the appellant soon afterwards. He has conveyed presents between the United Kingdom and Nigeria on behalf of the couple over the years to help bypass the difficulties inherent in the Nigerian postal service. He has also passed on personal messages between the couple.
29. Mr. Brown detailed by means of his letter, dated 13 March 2017, that he has known Mr. Flynn for over 25 years and had regularly travelled to Nigeria with him over some 8 years as at the date of the letter. Mr. Brown was introduced to the appellant in 2010 and has met her many times since. He watched the relationship develop over the years and was invited to the wedding in December 2016 though, ultimately, he was unable to attend.
30. The respondent's case before me is solely that the marriage is one of convenience. The appellant has filed with the Tribunal a copy of her marriage certificate confirming her marriage to Mr. Flynn at the Federal Marriage Registry, Lagos, on 17 December 2016. The legal burden falls upon the respondent to establish that there is evidence capable of establishing a reasonable suspicion that the marriage is one of convenience, thereby transferring the burden of proof onto the appellant. I find that the respondent is simply incapable of meeting the required threshold. The evidence submitted, both to the ECO, and now before this Tribunal can only be considered to establish the genuine nature of the couple's long-term relationship and that they entered the marriage with genuine intentions to live together as husband and wife. No reasonable suspicion as to the genuine intentions of the couple can properly be identified in this matter.

31. For the sake of completeness, I am satisfied having considered the evidence before me that the marriage is genuine and subsisting.
32. In the circumstances, the appellant's appeal is allowed.

Postscript

33. The appellant applied for an EEA Family Permit in April 2017. As I have concluded above, the marriage is a loving one and Mr. Flynn enjoyed the right as an EEA national exercising EEA Treaty rights in this country to be joined by his wife.
34. The application was refused by an ECO in June 2017. I observe that the decision provides limited express consideration of the documentary evidence relied upon and adopts a narrow approach of criticizing perceived inconsistencies without engaging with the wider corroborative evidence.
35. Consequent to a failure by the ECO to note that an EEA Family Permit could at the relevant time only be refused in respect of a spouse if there was a reasonable suspicion that the marriage is one of convenience, the application was erroneously refused on 'genuine and subsisting' grounds which played no part in the consideration of this application, with an alternative decision that the couple were not in a durable relationship. As the marriage was not considered to be one of convenience, the EEA Family Permit should properly have been granted.
36. Almost 4 years has now passed since the ECO failed to appreciate the true legal position.
37. The appellant filed an appeal, which was initially considered on 'review' by an ECM. I have considerable concern as to the approach adopted by the review decision, dated 10 January 2019, which was undertaken some 10 months after the appeal was lodged.
38. Firstly, whilst not critical for the purposes of this matter, the ECM proceeded on the basis that Mr. Flynn was 'an EEA national of Irish descent'. Mr. Flynn is an Irish citizen and an EEA national. He does not hold British citizenship. Whether he is Irish by descent is irrelevant to the consideration of the appellant's application.
39. Secondly, the introduction to the ECM's decision detailed,

'The ECO was satisfied that the appellant's marriage to her EEA sponsor was one of convenience and her application was refused under Reg 2(1) which defines a 'spouse' not to include a party to a marriage of convenience.'

40. The ECM then proceeded to outline with clarity the relevant law and precedent concerned with the consideration of marriages of convenience. I am satisfied that this establishes that the ECM had a clear and correct understanding of the relevant law.
41. The ECM concluded that the ECO had discharged the burden of proof by raising a reasonable suspicion that the marriage was one of convenience. The ECO was said to have based such conclusion on the absence of 'any evidence to the effect that [the appellant's] relationship with her EEA national spouse did in fact continue, beyond the marriage certificate and some photographs in support of her case'.
42. It is abundantly clear from the ECO's decision that no such suspicion as to the marriage being one of convenience was expressly raised. It is of grave concern to this Tribunal that the ECM took such a course of action. It strongly suggests a clear understanding that consequent to the ECO's reasoning an EEA Family Permit should have been granted. It further strongly suggests an effort being made to distort the ECO's reasoning to ground an alternative basis for refusal. The fact that the ECO had not raised a reasonable suspicion required the ECM to invent the ECO as having had such suspicion. On the papers before me, I am satisfied that the approach adopted was inappropriate. If it had been undertaken by a legal representative before me, I would have given serious consideration to exercising the Tribunal's 'Hamid' jurisdiction and considered whether to take steps to report the legal representative to their professional regulator: *R. (on the application of Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 (Admin).
43. A further concern is that having secured legal representation, the appellant filed with her appeal notice further documentary evidence as to her relationship with Mr. Flynn, including email and phone records as well as copies of Mr. Flynn's passport stamps confirming his regular admission into Nigeria. The ECM failed to expressly consider these documents, as required on review, and failed to place them in the bundle which was served upon the Tribunal. The failure to consider such evidence, which clearly established the strength of the relationship, strongly suggests that the ECM adopted from the outset a position that the review's conclusion was to be a negative one. Such approach is wholly inappropriate.
44. Almost 2 ½ years has now passed since the ECM adopted an irregular approach to the consideration of this matter.
45. It is unfortunate that the appeal proceeded to the First-tier Tribunal where a decision was issued that was wholly unsatisfactory, for the reasons detailed in my decision dated 17 February 2021.
46. I am satisfied on considering the papers before me that both the ECO, and in particular the ECM, wholly failed to properly recognise that the right enjoyed by

Mr. Flynn to reside in this country with his wife was established by EU law. Upon confirming that the appellant's appeal was allowed at the hearing I observed Mr. Flynn, a professional man used to the rigours of the World, break down with emotion. He explained to me the stress and strain that being separated from his wife and participating in these proceedings has placed upon him over the last 4 years. I am satisfied that the appellant should have been granted an EEA Family Permit in 2017, and at the very least upon the conclusion of an appropriately conducted review in January 2019. In the circumstances, a loving couple engaged in a genuine relationship have been separated for over 4 years consequent to very poor decision making. Such process as has been adopted by the ECO, and in particular the ECM, in this matter is of grave concern to the Tribunal.

Notice of Decision

47. By means of a decision dated 17 February 2021 this Tribunal set aside a decision of the First-tier Tribunal promulgated on 19 December 2019 pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.
48. The decision on the appellant's appeal on this issue is re-made, and the appeal is allowed.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan
Date: 28 May 2021

To the Respondent **Fee Award**

The appellant's appeal has been allowed. For the reasons detailed above, the respondent's defence of this matter was unreasonable from the outset. The initial application for an EEA Family Permit should properly have been allowed.

In the circumstances the appellant is awarded her fee of £280.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan
Date: 28 May 2021