



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No.: UI-2022-002303
FtT No.: EA/08795/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 19 June 2023

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ERGIT PONARI

(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr S Walker, Senior Presenting Officer

For the Respondent: Mr J Collins, Counsel, instructed by Sentinel Solicitors

Heard at Field House on 25 May 2023

DECISION AND REASONS

Introduction

1. The appellant before the Upper Tribunal is referred to as the Secretary of State, the respondent as Mr. Ponari.
2. The Secretary of State appeals a decision of Judge of the First-tier Tribunal Chohan ('the Judge'), sent to the parties on 2 March 2022, allowing Mr. Ponari's appeal in respect of a decision made under the European Union Settlement Scheme ('EUSS').
3. The Secretary of State appeals to this Tribunal with permission.

Brief Facts

4. Mr. Ponari entered the United Kingdom unlawfully. He subsequently met Mrs. Anamaria Silaghi, a Romanian national, who was exercising European Union treaty rights in this country. They initially met in a nightclub in April 2019 and commenced a relationship soon afterwards. In August 2019 they decided that they wished to live together, and they married each other on 20 January 2020.
5. Following his marriage, Mr. Ponari applied for a residence card under the Immigration (European Economic Area) Regulations 2016. The couple were invited to an interview by the Secretary of State, which they failed to attend, asserting that they were suffering from symptoms of COVID-19. A second interview was scheduled, which they again failed to attend. The Secretary of State proceeded to refuse the application by a decision dated 16 December 2020, concluding that the marriage was one of convenience.
6. Mr. Ponari made an application under the EUSS in February 2021 which was refused by a decision dated 17 May 2021. The Secretary of State concluded that Mr. Ponari had provided insufficient evidence to confirm that he was a spouse of a relevant EEA citizen. The Secretary of State again identified the marriage to be one of convenience.
7. The appeal against the Secretary of State's decision came before the Judge sitting in Birmingham on 21 February 2022. Mr. Ponari attended the hearing with a witness, Mr. Blerim Rrustemaj. Mrs Silaghi did not attend. Mr. Ponari informed the Judge that his wife had developed a temperature the night before and was unable to travel to the hearing centre.
8. The Judge concluded that Mr. Ponari's marriage to Mrs Silaghi was not a marriage of convenience and he met the requirements of the EUSS as the spouse of a European Union national.

Grounds of Appeal

9. The Secretary of State's grounds of appeal are succinct:
 - '3. It is submitted that whilst the legal burden is always on the SSHD the evidential burden clearly switched to the appellant. It was incumbent for the appellant to discharge that burden. The appellant had only provided to the Home Office an unsigned tenancy agreement dated 5 June 2020, a council tax bill for the year of 2021/ 2022 and photographs at the wedding reception. The FTT Judge appears to have allowed the appeal merely on the basis of the photographic evidence and evidence of a witness. He concludes at [8] that there is nothing to suggest the marriage was not legitimate. However the issue was whether or not this was a marriage of convenience and or a sham marriage.
 4. In a hearing in which the issue was genuineness of the marriage it was unsatisfactory that the appellant's EEA national spouse did not attend the hearing. It was merely claimed that she was not

feeling well. No medical evidence of any sort or a statement from the EEA national spouse was sought by the FTT Judge for just disposal of the case. In a case where there was previous non attendance at scheduled interviews the sponsor's attendance it is submitted was of utmost importance. It is extremely surprising as to why the appellant did not seek an adjournment to be able to prove his case but wished to proceed with the hearing.

5. It is submitted that the appellant had failed to discharge the evidential burden on him. The judge's findings lack adequate analysis and is devoid of sufficient reasoning. At [9] of the determination the judge rather erroneously deemed that on balance the evidential burden was on the respondent. It is clear that the judge has also misdirected himself in law.'
10. The Secretary of State was granted permission to appeal by a decision of Upper Tribunal Judge Blundell, dated 16 August 2022. Judge Blundell reasoned, *inter alia*:
 - '3. At [4], the judge referred to there being an evidential burden on the respondent. At [9], he concluded that the respondent had failed to discharge that evidential burden. As contended at [3] of the grounds of appeal, however, the judge also appears to have concluded that the burden 'switched' to the appellant, since he considered the evidence adduced by the appellant at [8]. The judge seemingly did not conclude, therefore, that this was a case such as *Papajorgji* [2012] UKUT 38 (IAC); [2012] Imm AR 3 in which there was simply no evidence before the respondent which provided a reasonable suspicion that the marriage was one of convenience. The conclusion at [9] is arguably at odds, therefore, with the analysis which precedes it.'

Discussion

11. In respect of an otherwise valid marriage, the burden is placed upon the Secretary of State to establish that it is a marriage of convenience: *Sadovksa v. Secretary of State for the Home Department* [2017] UKSC 54, [2017] 1 WLR 2926, *per* Lady Hale at [28]:
 - '28. ... Furthermore, although the Regulations permit the respondent to take steps on the basis of reasonable grounds to suspect that that is the case, Ms Sadovska is entitled to an appeal where the facts and circumstances must be fully investigated. That must mean, as held in *Papajorgji* , that the tribunal has to form its own view of the facts from the evidence presented. The respondent is seeking to take away established rights. One of the most basic rules of litigation is that he who asserts must prove. It was not for Ms Sadovska to establish that the relationship was a genuine and lasting one. It was for the respondent to establish that it was indeed a marriage of convenience.'

12. The legal burden lies upon the Secretary of State throughout, but the evidential burden may shift: *Papajorgi (EEA spouse - marriage of convenience) Greece* [2012] UKUT 00038 (IAC), [2012] Imm AR 447, at [20], approved by the Court of Appeal in *Rosa v. Secretary of State for the Home Department* [2016] EWCA Civ 14, [2016] 1 WLR 1206, at [29].
13. The Judge's reasoning in this matter is concise. At [5] he was unimpressed with the reasons provided by Mr. Ponari as to why he and his wife did not attend the first interview. At [6] the Judge expressly accepted Mr. Ponari's reasons as to why he and his wife did not attend the second interview, finding that the couple were not aware of the interview date.
14. Whilst the Judge may have been aided by hearing oral evidence from Mrs. Silaghi, the Secretary of State provided no representative on the day and so she would not have been subject to cross-examination. It was reasonably open for the Judge to accept Mr. Ponari's evidence that Mrs. Silaghi had developed a temperature and was unable to travel on the day of the hearing. Whilst other judges may have required medical evidence to be provided, it cannot properly be said that no reasonable Judge could accept the evidence of Mr. Ponari on this issue. The judicial conclusion as to Mrs. Silaghi's ill-health cannot be said to be irrational.
15. The Judge then proceeded to consider the evidence placed before him:
 - '7. As part of his application to the respondent, the appellant included his tenancy agreement, a council tax bill and photographs of the appellant's wedding. In short, the respondent was not satisfied with this evidence. Mr Azmi submitted I should attach weight to the signed tenancy agreement and other documentary evidence including the wedding photographs. Mr Azmi also referred to the evidence of the witness who attended the hearing. According to the witness's written statement, he has known the appellant and his family since their time in Albania. The witness goes on to testify that he has seen the appellant and the sponsor as a couple and, in effect, corroborates the evidence of the appellant and sponsor that they are a genuine couple.'
16. The core of the Judge's decision is located at [8] - [9]:
 - '8. It is somewhat unfortunate that the appellant and sponsor were unable to attend the first interview due to illness and the second interview due to the fault of their legal representatives. Such evidence would have shed greater light on the marriage and the relationship of the appellant and sponsor. Therefore, one must look at other evidence. The tenancy agreement and council tax bill, per se, do not establish that the appellant and sponsor are together. However, the photographic evidence of the appellant's wedding day shows the appellant, the sponsor and other guests. There is nothing to suggest that the marriage itself is not legitimate, in respect of which permission had been granted by the respondent. The evidence of the witness corroborates the evidence of the appellant to the effect that the appellant and sponsor are a genuine couple and are living together. I must

emphasise here that in the absence of a marriage interview, the respondent had an opportunity to cross-examine the appellant, but for whatever reason, no presenting officer attended the hearing. That opportunity for cross-examination was lost. At no time did the respondent make an application for an adjournment in order to field a presenting officer and undertake cross-examination.

9. Considering the evidence in its totality, on balance, I find that the respondent has not discharged the evidential burden of proof that the marriage is one of convenience. On balance, I find that this is not a marriage of convenience and the appellant meets the requirements of the EUSS.'
17. I am satisfied the Judge found, at [8] of his decision that, consequent to the evidence accompanying the application, the Secretary of State was permitted to conclude a reasonable suspicion arose that the marriage was one of convenience. Therefore, the evidence burden shifted and was placed upon Mr. Ponari.
18. Whilst the Judge may have meant to say that the legal burden of proof had not been satisfied at [9], the reference to "evidential burden of proof" strongly suggests that the Judge did not clearly have in mind the shifting of the evidential burden. Such failure in this matter can only constitute an error of law.
19. However, I must consider whether the error was material. What is clear from reading the decision is that the Judge accepted the evidence of Mr. Rustemaj as to his having known the couple to have been living together since August 2019, having attended their wedding in January 2020, having visited them in November 2020 to bring them food whilst they were isolating consequent to COVID-19 symptoms, and having celebrated their two year anniversary in a restaurant. The Judge therefore expressly accepted Mr. Rustemaj's evidence that he had no doubts whatsoever that the couple were in a genuine and loving relationship.
20. Whilst the consideration of the facts arising were short, I agree with Mr Collins' submission that at its heart there was but one question before the Judge: Is this is a marriage of convenience? It is perfectly reasonable for that question to be answered concisely, so long as adequate and lawful reasons are given. Upon the Judge accepting the evidence of Mr Rustemaj as to his knowledge of the couple and their lives together, and such finding of fact is not challenged by the Secretary of State, I consider that the error identified above is not material. A reasonable Judge accepting Mr Rustemaj's evidence could only find that the couple are genuinely together and consequently that the marriage is not one of convenience.
21. In those circumstances the Secretary of State's appeal is dismissed.

Notice of Decision

22. The decision of the First-tier Tribunal sent to the parties on 2 March 2022 is not subject to material error of law and stands.
23. The Secretary of State's appeal is dismissed.
24. No anonymity direction is made.

D O'Callaghan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

12 June 2023