Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/16276/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st October 2015	**On 29th October 2015**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MR ABIOLA WASIU OLOWU OLOWU
(Anonymity Direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Ariyo (Apex Solicitors)
For the Respondents: Mr S Walker (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal, with permission, by the Appellant with regard to a Decision and Reasons promulgated by Judge Carroll of the First-tier Tribunal on 22nd May 2015. In his Decision Judge Carroll dismissed the Appellant's appeal against the Secretary of State's decision to refuse to issue him with a residence card under the EEA regulations as the spouse of an EEA national who is exercising Treaty rights in United Kingdom.

2. The Secretary of State's reasons for the refusal were twofold: firstly the Secretary of State was not satisfied that the EEA sponsor was a qualified person because the evidence provided in relation to her employment was

unreliable and secondly the Secretary of State's believed that the marriage was one of convenience.

3. In his Decision and Reasons Judge Carroll found in favour of the Secretary of State's arguments.

4. The grounds on which permission to appeal was sought challenge the Judge's findings on the basis of the evidence before him and suggest that the judge failed to make findings of fact on matters that went to the core of the claim. However, permission to appeal was granted only on the basis that there was an arguable error of law at paragraph 19 of the Decision by the Judge where he indicated that the burden of proof rests with the Appellant. This was arguably wrong in law in relation to the question of a marriage of convenience in line with the case of Papajorgji (EEA spouse-marriage of convenience) Greece [2012] UKUT 00038 (IAC).

5. In Papajorgji the President of the Upper Tribunal held that "Although neither the Directive nor the Regulations define it, as a matter of ordinary parlance and the past experience of the U.K.'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 cohabitation is quite inconsistent with such a definition." Additionally the European Commission has produced a handbook which defines a marriage of convenience as a marriage contracted for the predominant purpose of conferring a right to 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 that 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.

6. So far as the burden of proof is concerned in IS (marriages of convenience) Serbia [2008] UKAIT 00031 the Tribunal held that the burden of proving that a marriage is not a "marriage of convenience" for the purposes of the EEA Regulations rests on the Appellant: but he is not required to discharge it in the absence of evidence of matter supporting a suspicion that the marriage is one of convenience (i.e. there is an evidential burden on the Respondent). In Papajorgji the Tribunal held that (i) there is no burden at the outset of the application on the Appellant to demonstrate that a marriage to an EEA national is not one of convenience and (ii) IS establishes only that there is an evidential burden on the claimant to address evidence justifying reasonable suspicion that the marriage was entered into for the predominant purpose of securing residence rights. The Tribunal in Papajorgji made it clear at paragraph 33 that they did not accept that there was a burden as such on the Appellant and at paragraph 39 stated "in summary, our understanding is that, where the issue was raised on appeal the question for the Judge will therefore be "in the light of the totality of the information before me, including the

assessment of the claimant's answers and any information provided, am I satisfied that it is more probable than not that this is a marriage of convenience?" At paragraph 27 of Papajorgji the Tribunal said that there is no burden at the outset of an application on a claimant to demonstrate a marriage to an EEA national is not one of convenience unless the circumstances known to the decision-maker give reasonable grounds for suspecting this was the case. At paragraph 28 the Tribunal suggested that a suspicion cannot arise by a failure to produce evidence not asked for. At paragraph 32 the Tribunal held that a visa should be issued promptly on application unless the decision maker has reasonable grounds to suspect a marriage of convenience and the evidential onus of showing that there are such reasonable grounds in the first place rest on the decision maker.

7. Before me Mr Ariyo submitted that the Secretary of State failed to discharge the burden of proof which rested upon her. He argued that the statements of the couple had given clear explanations about the discrepancies in the marriage interview that the Judge had failed to look at. On the basis of the interview, he submitted, the Judge should not have found against the Appellant because, although there were a number of errors, he did not give credit for the number of questions that they got right. He submitted that there were no justifiable reasonable suspicions to indicate that this was a marriage of convenience. He submitted that the questionable divorce certificate was not enough to invalidate the marriage and explanations about the flaws in that certificate were before the Judge in the Appellant's bundle. He argued that the divorce certificate was not submitted to the Secretary of State with the application because the Secretary of State in refusing an earlier application had not accepted that first marriage to be a valid one. In relation to the question of the EEA sponsor's employment he said that at paragraph 12 of the Decision the Judge fell into error in saying there was no letter from the employer when there was one in the bundle.

8. I will deal firstly with the question of the marriage itself because if the marriage is either invalid or a marriage of convenience then it matters not whether the EEA Sponsor is a qualifying person because the appellant cannot then succeed.

9. The immigration history of the Appellant in this case is highly relevant to that evaluation and is set out in paragraphs 3 to 6 of the Judge's decision. The Appellant, a Nigerian national, came to the UK in September 2004 as a student and his visa was renewed successfully until 2010 when he was granted leave to remain as a post-study work migrant until March 2012. In March 2012 he made application for leave to remain on the basis of his marriage to an EEA national, a Miss Kimberly Bito. That application was refused on April 2012. On 30th August 2012 the Appellant submitted another application for leave to remain this time on the base of his private life. That application was refused on 17th October 2013. On 31st October 2013 the Appellant again applied for leave to remain as the spouse of an EEA national and it was the refusal of that application that was the subject of the appeal before the First-tier Tribunal.

10. The Appellant's wife on this occasion was a different EEA national, Fanta Keita-Doumbia, a French national.

11. Following the application the couple were interviewed by the Secretary of State in March 2014.

12. At paragraph 18 of the Decision the Judge refers to those interviews as being very lengthy and the bundle contained the full interview record. That record he said revealed inconsistencies and discrepancies of the most fundamental nature between the Appellant and his EEA sponsor as set out by the Secretary of State in her Letter of Refusal. The discrepancies included basic information relating to the finances of the Appellant and his EEA sponsor and showed a complete lack of knowledge also on the part of the EEA sponsor of personal details relating to her claimed husband, including the reason he did not wear his wedding ring.

13. On the basis of the Papjorgji as set out above, the Secretary of State must have reasonable grounds to suspect the marriage to be one of convenience. Mr Ariyo submitted that there was insufficient in this case to justify the Secretary of State's suggestion that this is a marriage of convenience. I disagree. In the first place, the Secretary of State sets out over two pages of the Letter of Refusal the considerable number of significant discrepancies in the interview. The Secretary of State also noted the validity of the marriage itself was in question as the Appellant had previously claimed to be married to another EEA national but had provided no evidence that he was divorced from her and therefore free to marry. Additionally, the Appellant’s immigration history including two separate applications as a spouse to different women and an application to remain on the basis of his private life indicating a determination by him to remain in the UK.

14. Once the Secretary of State has raised on the basis of reasonable grounds the suggestion that it is a marriage of convenience then that is a matter to be addressed by the Appellant in evidence. Although the Judge did not specifically refer to Papajorgji, it is quite clear in this case on the basis of what the Judge did say about the marriage that he accepted there were reasonable grounds for the Secretary of State to consider that this was indeed a marriage of convenience such that the Appellant should have put forward evidence that that assumption was incorrect. It is clear from the Decision that the Judge, as he was entitled to, attached considerable weight to the discrepancies in the interview. The witness statements relied upon by the Appellant’s representative did not satisfactorily explain the discrepancies. The statements were before the Judge and indeed it is clear from the markings on them that the Judge had read them. They offer various explanations including interpreter difficulties for his wife and the passage of time and memories fading in relation to the wrong answers. However, the judge was entitled to find that the discrepancies amounted to very significant difficulties in the evidence and he was also entitled to attach considerable weight to the fact that he had no oral evidence from either the Appellant or his Sponsor.

15. In the Decision the Judge sets out at paragraph 9 that the Appellant had indicated in his Notice of Appeal that he wished to have an oral hearing. That was initially set down for 24 November 2014 but was adjourned for the Appellant to be provided with a copy of the interview report. That was a proper application and a proper reason to adjourn. The hearing was then fixed for 20 April 2015. On the last working day prior to the hearing date the Tribunal received a letter from the Appellant's solicitors, the same who continue to represent him, including additional documents and saying that the Appellant had now "elected that his appeal should be decided on the papers".

16. Mr Ariyo sought to explain that this was because the Appellant's father had been taken ill. That may well have been the case. However, it does not explain why the Appellant should elect to have his appeal dealt with on the papers. There is no reason why an adjournment application could not have been made on the basis that it is clearly crucial in a case where the subsistence of the marriages is in question that the Judge should hear from both parties to that marriage. There was no reason why the solicitor and the Appellant's wife could not have attended the hearing but they chose not to do so. It is entirely unsurprising in a case such as this, with immigration history such as this that the Judge was entirely satisfied that this was a marriage of convenience.

17. So far to the validity of the marriage itself is concerned the Judge was also entitled to find difficulties with that. It was submitted to me that the reason why the Appellant had not submitted his divorce certificate to the Secretary of State was because the Secretary of State had not considered his first marriage to be valid. The Appellant however had asserted that it was a valid marriage and therefore it was up to him to show that marriage had been terminated. He cannot have it both ways. A purported divorce certificate was produced for the purpose of the appeal but the Judge pointed out various difficulties with the certificate and found, as he was entitled to do, that he could attach no weight to it.

18. The Judge would have been entitled to dismiss this appeal either because there was no valid marriage or that any marriage was a marriage of convenience.

19. Given those inescapable conclusions on the evidence whether or not the EEA sponsor was in truth a qualifying person becomes irrelevant.

20. The appeal to the Upper Tribunal is dismissed.

Signed Date 28th October 2015

Upper Tribunal Judge Martin

Direction regarding anonymity

I make no anonymity direction.

Signed Date 28th October 2015

Upper Tribunal Judge Martin