



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/06299/2016

THE IMMIGRATION ACTS

Heard at Field House
On 29 June 2018

Decision & Reasons Promulgated
On 17 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

MR DIOMANDE VASSE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Y Din (Counsel)
For the Respondent: Mr S Walker (Home Office Presenting Officer)

DECISION AND REASONS

1. The Appellant is a national of the Ivory Coast born on 27 September 1974. He applied for a permanent residence card as the family member of an EEA national under Regulation 15 of the Immigration (EEA) Regulations 2016.

2. The Respondent refused his application on 17 May 2016 on the basis he was not satisfied that he had provided evidence that his EEA national family member had resided in accordance with the Regulations for a five year period. Further the Respondent concluded that his marriage to his family member which took place by proxy in the Ivory Coast was a marriage of convenience. The marriage was contracted between the Appellant and Ms Marie France Chantal, a French national.
3. The Appellant appealed against that decision under Section 82(2) of the Nationality, Immigration and Asylum Act 2002 and his appeal came before First-tier Tribunal Judge R G Walters.
4. In a decision and reasons promulgated on 19 December 2017 the First-tier Tribunal dealt with the Appellant's appeal without a hearing and dismissed it, finding that the Appellant was party to a marriage of convenience and that he had not demonstrated that he was the family member of Ms Chantal for a five year period.
5. The Appellant sought permission to appeal the decision of the First-tier Tribunal and permission was granted on renewal to the Upper Tribunal on 4 May 2018. In granting permission Upper Tribunal Judge Finch found it arguable that the First-tier Judge had not correctly applied the case of **Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038**. In granting permission Judge Finch found it arguable that the Judge of the First-tier Tribunal erred in finding that the fact that the Appellant's immigration status was unknown at the date of his marriage and no reason had been given for their decision to enter into a marriage by proxy was sufficient to indicate their marriage was one of convenience.
6. The appeal therefore comes before the Upper Tribunal to determine whether or not there was an error of law in the decision of the First-tier Tribunal and if so whether to set it aside. At the hearing Mr Walker conceded that for the reasons set out in the grounds there was a material error of law in the decision of the First-tier Tribunal. Having read the decision of the First-tier Tribunal, the grounds seeking permission and the skeleton argument of the Appellant's Counsel, I find that that concession is duly made and there was a material error such that this decision must be set aside.
7. With the agreement of the parties my brief reasons are as follows. At paragraph 5 of the decision the Judge states that in EEA appeals the burden of proof lies on the Appellant and the standard of proof is the balance of probabilities. It is apparent both from that self-direction and from reading the decision as a whole that at no point did the Judge correctly direct himself in relation to the burden of proof in this matter. The Supreme Court held in the case of **Sadovska and Another (Appellants) v Secretary of State for the Home Department (Respondent) (Scotland) [2017] UKSC 54** that it was not for an Appellant to establish that the relationship was a genuine and lasting one in circumstances where the allegation is that it is a marriage of convenience. It was for the Respondent to establish that it was a marriage of convenience.

8. The First-tier Tribunal finds at paragraph 9 that there is prima facie evidence that there was a marriage of convenience because it was unclear what the Appellant's immigration status was when he entered into the marriage. It is clear from that paragraph that the First-tier Tribunal was placing the burden on the Appellant to adduce evidence of the genuineness of his marriage rather than placing the burden on the Respondent to prove it was a marriage of convenience. Whilst his immigration status may have been one of the matters that the judge was entitled to look at, he misdirected himself in finding that his immigration status was prima facie evidence of a marriage of convenience.
9. The second material error of law occurs at paragraph 22 of the determination where the Judge requires that in order to demonstrate that the Appellant was the family member of an EEA national over the requisite five year period that cohabitation must have taken place. This is not in accordance with the relevant case law as it is clear that cohabitation is not a requirement of EEA law when the marriage still subsists. In **Rosa [2016] EWCA Civ** 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.
10. In the circumstances therefore and with the agreement of the parties the decision is set aside and in view of the extent of the fact-finding that must take place will be remitted to the First-tier Tribunal for a de novo hearing before a Judge other than Judge Walters.

Notice of Decision

The decision of the First-tier Tribunal is set aside and is remitted to the First-tier Tribunal before a Judge other than Judge Walters.

No anonymity direction is made.

Signed

Date



Deputy Upper Tribunal Judge L J Murray