Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19843/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st December 2017	**On 15th January 2018**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

KHURRAM SHAHZAD VIRK
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Briddock, Counsel instructed by Visa Legal Solicitors
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The Secretary of State refused the appellant's application for a residence card as the spouse of an EEA national under the Immigration (European Economic Area) Regulations 2006 on the basis that it was a sham marriage. That decision followed interviews of both the appellant and his sponsor. The appellant's appeal against the Secretary of State's refusal was dismissed by the First-tier Tribunal.

2. The grounds for permission to appeal to the Upper Tribunal advanced that the First-tier Tribunal Judge had erred in law by not applying **Rosa v**

SSHD [2016] EWCA Civ 14 properly. It was asserted that the Secretary of State must first discharge the evidential burden showing the marriage was one of convenience prior to the burden shifting to the appellant. The judge failed to adopt that approach in practice. Further, the judge erred in his reliance on the interviews which were fundamentally flawed. The conduct of the interviews was aggressive and intimidatory and their evidential worth limited. The judge did not taken into account the evidence of the appellant and submissions in relation to the interviews such that the interviews were carried out in an inappropriate manner. The judge failed to take into account or given weight to the evidence before him as to the alleged discrepancies.

3. I find that there is indeed an error of law and the decision shall be set aside for the following reasons.

4. I make these brief observations. At paragraph [18] the judge stated that the burden was on the *appellant* to establish the facts in respect of matters relied upon. That is not correct. Although there followed a citation from **Papajorgji (EEA spouse - marriage of convenience) Greece** [2012] 00038 (IAC) nowhere was it manifest that the judge followed and applied the procedure laid down in **Papajorgji** and now established in **Rosa v SSHD** [2016] EWCA Civ 14. The burden of proof lies on the authorities seeking to restrict rights under the Directive 2004/38/EC. The legal burden of proving the marriage is one of convenience lies throughout on the SSHD but the evidential burden may shift to the appellant by proof of facts which justify the inference that a marriage is not genuine. The judge did not in practice deal with this.

5. Even if the Secretary of State had discharged the initial evidential burden which then passes to the appellant, the evidence and explanations produced by the appellant needed to be addressed by the judge. The appellant's evidence was not adequately addressed or its rejection explained. The judge factored into his deliberations the interview conducted by the Secretary of State but there were significant concerns raised in respect of those interviews at the time of the hearing before the First-tier Tribunal. The judge does not address those concerns.

6. For example, at question 12 of the immigration interview of the sponsor (who was pregnant at the time), the interviewer sets the tone of the interview explaining at the outset that the sponsor was advised that she could be

> *'committing a range of offences should you enter into a marriage for immigration purposes. The penalties can include up to 14 years imprisonment for an EEA National.*
>
> *...*
>
> *you or your husband could be kept at a detention centre, so that could happen if it's decided the relationship's not genuine today your husband could be taken to a detention centre and then removed from the UK, all right'*

This is merely an extract of the warnings given. It is no doubt correct that a clear picture of the consequences of giving false information should be transmitted to an interviewee but the warnings outlined above are not the only indication that the interview might be construed as overbearing from the outset and thus deficient. The interview proceeded to 125 questions and continued after the sponsor stated at question 112 that she wanted

'to stop the interview because I feel like throwing up.'

The interviewer was therefore told by the sponsor that she was not well enough to continue as she was pregnant, but the interviewer nevertheless persisted. It would appear indeed that although the interviewer accepted that the interview would have to be concluded, he nonetheless continued and proceeded to ask further questions. These were not of a minor nature and as the interviewer stated at question 121 '*I'm asking a serious question'*.

7. The difficulty is that the judge did not make any reference to the nature and content of the interview notwithstanding that its conduct was challenged. It is a matter for the judge as to the weight to be accorded to the evidence but Mr Briddock drew my attention to an array of criticisms of the interview which, if correct, would substantially undermine the value of such evidence. The judge did not address the concerns which were identified in both the witness statements of the appellant and sponsor as to the conduct of the interview and nor did the judge make any reference to the explanations by the appellant and sponsor of the explanations of the discrepancies. That is an error of law.

8. Mr Duffy conceded that the interviews were at the least questionable. In relation to such interviews, I suggest the possible application of the Police and Criminal Evidence Act 1984 and its attendant Codes of Practice (which attempts to strike a balance between the powers of the authorities and the rights and freedoms of the public) should perhaps be drawn to the attention of the Secretary of State. At the very least the conduct of such interviews should be reviewed and possibly the subject of training because of the profound implications for justice and resources.

9. I declined, however, to allow the appeal outright as there can be no preserved findings of fact. I will set aside the decision in its entirety.

10. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Signed Helen Rimington Date 21st December 2017

Upper Tribunal Judge Rimington