



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/06471/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 24 June 2019**

**Decision & Reasons Promulgated
On 09 July 2019**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**MR BABA AMINU
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms H Gore, Counsel

For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Cohen dismissing his appeal against the decision of the respondent to refuse to issue him with a residence card as confirmation of his right of residence.
2. The Secretary of State's case is that the marriage is not a genuine marriage, that conclusion being based both on the appellant's immigration history, which is set out at paragraph 2 of the judge's decision, and the responses to questions in interviews carried out between the appellant

and his wife. There is a partial transcript of that which appears in the refusal letter although I note that a number of questions are omitted.

3. Having recorded that he had heard oral evidence from the appellant, the judge directed himself as follows
“The burden of proving that the decision of the respondent was not in accordance with the law and the relevant Regulations rests upon the appellant. The standard of that proof is the balance of probabilities. The relevant date for the consideration of the evidence is for the purposes of this appeal is the date of the hearing”.
4. The judge then goes on to analyse the evidence over the following pages although it is not at all clear what, if any, weight he attached to the oral evidence he had heard. Indeed the judge appears to have forgotten when writing his decision that he had heard oral evidence.
5. The appellant sought permission to appeal on the grounds that the judge had erred in failing properly to direct himself as to the burden of proof which, in the case of A marriage of convenience lies throughout on the Secretary of State, following **Rosa v SSHD [2016] EWCA Civ 14**.
6. Permission to appeal was granted by Judge Andrew on 29 May 2019. I heard brief submissions from both parties.
7. Despite her best efforts Ms Pal was unable to persuade me that the judge had, despite clearly misdirecting himself in law at paragraph 21, in that he failed to note that of course the burden is on the Secretary of State to prove a marriage of convenience, had nonetheless properly applied the correct burden. She accepted also that it was not evident whether the judge had evaluated the oral evidence or what he made of it.
8. I am satisfied that the judge did make an error of law in this case. There was a failure properly to set out the correct burden of proof in line with **Rosa** and whilst that might have been cured had there been some other indication in the remainder of his determination that he had indeed applied the proper burden of proof, there is no such evidence.
9. It is also worrying that nowhere in the decision is there any indication of the weight attached to the oral evidence. As noted earlier it is almost as though the judge forgot that it had been given.
10. For these reasons I find that the decision of the First-tier Tribunal involved the making of an error of law and I set it aside. I am satisfied that in this case given the fundamental error with regard to the burden of proof and the failure properly to evaluate the oral evidence, that it will be necessary for the entire application to be reheard and for proper findings of fact to be made.
11. In the circumstances therefore I consider that it is appropriate to remit the appeal to the First-tier Tribunal for it to be determined afresh by a judge other than Judge Cohen.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. The appeal is remitted to the First-tier Tribunal for a fresh decision on all issues.

Signed

Date 3 July 2019

A handwritten signature in black ink, appearing to read 'Jeremy Rintoul', written in a cursive style.

Upper Tribunal Judge Rintoul