IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003064

First-tier Tribunal No: EA/00117/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:

5th December 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Ermir Qarr
(NO ANONYMITY DIRECTION MADE)

Applicant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: The appellant did not appear and was not represented
For the Respondent: Mr E. Terrel, Senior Home Office Presenting Officer

Heard at Field House on 7 October 2024

DECISION AND REASONS

1. The issue in these proceedings is whether First-tier Tribunal Judge Hillis ("the judge") reversed the burden of proof to which the Secretary of State is subject when taking a decision under the EU Settlement Scheme ("EUSS") on the basis that an applicant is a party to a marriage of convenience.

Factual background

2. The issue arose in the context of an application submitted by the appellant, a citizen of Albania born in 1988, for pre-settled status under the EUSS in respect of his marriage to Lilia Bandalac, a citizen of Romania ("the sponsor"). They married in Athens, Greece, on 7 October 2020. In the course of considering the EUSS application, the Secretary of State invited the appellant and the sponsor to a marriage interview, twice. They did not attend. They provided no explanatory details and made no effort to rearrange.

3. The Secretary of State refused the appellant's EUSS application by a decision dated 7 July 2023 on the basis that there were reasonable grounds to conclude that his marriage to the sponsor was one of convenience.

4. The appellant enjoyed a right of appeal under Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. He opted for the appeal to be heard on the papers before the First-tier Tribunal.

Decision of the First-tier Tribunal

5. By a decision dated 30 May 2024, the judge dismissed the appeal. In the course of his lengthy and detailed decision, the judge analysed the evidence relied upon by the appellant, and the written reasons given by the appellant for disagreeing with the Secretary of State's decision, and concluded that the marriage was one of convenience.

6. At para. 3, the judge said that the appellant's case was that his marriage to the sponsor was genuine and subsisting. Having summarised the respondent's case, the judge set out the issues in dispute in the following terms, at para. 6:

> "The parties agree that the following issues are in dispute:
>
> (a) Has the Respondent shown that there is an evidential basis for concluding that there is a reasonable suspicion that the parties' marriage was entered into for the predominant purpose of securing residence rights?
>
> (a) if (a) above is established, has the Appellant addressed the evidence justifying the reasonable suspicion that this marriage is one of convenience and shown that his marriage is, in fact, genuine?"

7. At para. 9, the judge said:

> "9. To succeed on the facts asserted here the appellant must show that there is no evidential basis for the respondent concluding that his marriage to the sponsor was entered into predominantly to secure residence in the UK. If there is an evidential basis for that conclusion it is for the appellant to show, on the balance of probabilities, that his marriage is not one of convenience.
>
> …
>
> 11. The standard of proof is the balance of probabilities."

8. In his operative analysis, the judge said that he had carefully considered *Papajorgji (EEA spouse – marriage of convenience) Greece* [2012] UKUT 00038(IAC). The first two paragraphs to the headnote to *Papajorgji* state:

> "i) There is no burden at the outset of an application on a claimant to demonstrate that a marriage to an EEA national is not one of convenience.
>
> ii) *IS (marriages of convenience) Serbia* [2008] UKAIT 31 establishes only that there is an evidential burden on the claimant to address evidence justifying reasonable suspicion that the marriage is entered into for the predominant purpose of securing residence rights."

9. The judge's findings are at paras 12 to 27. In summary, he observed that there was no evidence from any witnesses at the wedding ceremony, nor were there any photographs of the ceremony itself. There was no evidence from any friends

or family about the couple living together as man and wife, and nor was there any evidence that gifts or cards had been provided on the occasion of their marriage. There were no photographs of the appellant and sponsor together at any time. At para. 17, the judge said:

> "I, therefore, conclude that there was a valid evidential basis for the respondent concluding that there was a reasonable suspicion that the marriage was predominantly entered into for the appellant to gain residential status in the UK and was one of convenience."

10. At para. 18, the judge said that the respondent had a valid reason for inviting the appellant and the sponsor to marriage interviews. He considered the explanations that the sponsor had provided in a document entitled "skeleton argument", namely that she was heavily pregnant in Romania at the time, and could not fly to the UK. The judge set out a series of concerns arising from that aspect of the appellant's case, concluding that there was no medical evidence to demonstrate that the sponsor was not fit to attend a marriage interview either due to being 31 weeks pregnant at the time, or due to any other complications. Against that background, the judge said (para. 21) that he ascribed little weight to the Romanian birth certificate which named the appellant is the child's father. The judge also noted that there were no photographs of the appellant with his purported child.

11. As to the other evidence, the judge found that the joint bank statements relied upon by the appellant did not take matters further, and nor did any of the other financial evidence or billing documents the appellant had relied upon. The judge also said that it was significant that the appellant had chosen not to opt for an oral hearing, but instead sought to rely on documentation alone to establish his case. The appellant's bank statements demonstrated a high turnover, meaning that it could not have been a lack of funds which explained the appellant's desire to have his appeal determined on the papers.

12. The judge's conclusion was at para. 28, in the following terms:

> "…because I have found that the appellant has failed to show that he is a party to a genuine and subsisting relationship and that his marriage to the sponsor is not one of convenience designed to circumvent the Immigration Rules I am not satisfied, on the balance of probabilities, that the appellant meets the requirements for leave under Appendix EU (Family Permit) to the Immigration Rules."

Issues on appeal to the Upper Tribunal

13. The appellant sought permission to appeal against the judge's decision on the basis of what Judge I. D. Boyes, determining the application for the First-tier Tribunal, considered to be a series of disagreements. That view was shared by Upper Tribunal Judge Bulpitt who considered the grounds as pleaded to be without merit.

14. However, Judge Bulpitt considered that there was an obvious point that was arguable in favour of the appellant which he had not identified for himself and which, since the appellant was a litigant in person, it was appropriate to identify on his behalf. Judge Bulpitt considered that it was arguable that the judge had reversed the burden of proof, and had expected the appellant to disprove the Secretary of State's allegation that he was a party to a marriage of convenience, rather than expecting the Secretary of State to prove that allegation.

The hearing before the Upper Tribunal

15. The matter was listed for a hearing at Field House on 7 October 2024. Shortly before the appeal hearing, the appellant submitted document making written submissions in support of his case, the contents of which I shall turn to in due course. He did not attend the hearing itself. He did not explain his non-attendance and did not apply for an adjournment.

16. I therefore considered under rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 whether to proceed in the appellant's absence. I was satisfied that he had been given notice of the hearing.

17. The second question was whether it was in the interests of justice to proceed in the appellant's absence.

18. I concluded that it was; put simply, I decided that the appellant had chosen not to attend. The appellant, of course, opted for a paper hearing before the First-tier Tribunal. Shortly before the hearing in the Upper Tribunal, he provided written submissions in support of his case, inviting the appeal to be allowed.

19. Drawing those factors together, I concluded that the appellant's choice was for the matter to be considered in his absence. I was satisfied that he had had the ability to attend, had he chosen to do so. I had the benefit of his written submissions in addition to the grounds of appeal and the grant of permission to appeal by Upper Tribunal Judge Bulpitt, meaning that I would be able to decide his case fairly in his absence, by reference to the overriding objective to decide cases fairly and justly.

20. Accordingly, pursuant to rule 38, I concluded that it would be in the interests of justice for the hearing to proceed without the appellant.

Grounds as pleaded: without merit

21. I agree with Judges I. D. Boyes and Bulpitt that the grounds as pleaded are a series of disagreements of fact and weight. The only specific criticism of the judge's decision is said to be his failure to consider the Romanian birth certificate which was included in the bundle. That document appears to demonstrate that on 2 January 2024, the sponsor gave birth to a baby boy in Romania. The appellant is named as the father.

22. The specific criticism raised by the appellant is that the judge overlooked this document. That is plainly not the case; the judge referred to the birth certificate at para. 21, concluding that it did not demonstrate that the appellant was the child's father, and that it took matters no further. The judge was entitled, in my judgment, to approach the birth certificate in that way. By itself, it did not prove that the appellant and the sponsor had not entered a marriage of convenience. Moreover, as the judge observed, there were a range of reasons why the overall evidential picture the appellant sought to establish through relying on the birth certificate, and other documents relating to the sponsor's pregnancy, lacked weight. For example, there was no medical evidence from the birth, and there were no photographs of the appellant with his purported child.

23. I find that, as pleaded, the grounds amount to a series of disagreements which both fail to engage with the contents of the judge's decision, and his reasoning.

24. Turning to the matter identified by Judge Bulpitt, those concerns are superficially attractive. The law is as set out in *Papajorgji*, quoted above. The principles which applied under the pre-Brexit free movement of persons regime apply by analogy to the EUSS, so to that extent, *Papajorgji* continues to represent good law. In the quotes I have set out above, the judge did, at times, suggest

that the burden was on the appellant to prove that his marriage is not one of convenience, rather than the Secretary of State bearing the burden to prove that it was.

25. However, properly understood, I do not consider that the judge's decision involved an error in this respect. My reasons for this conclusion are as follows.

26. First, the judge's summary of the law at para. 6 was entirely accurate. It correctly addressed the evidential burden being on the respondent to demonstrate that there was a reasonable suspicion that the parties' marriage was one of convenience. Moreover, it correctly identified that the appellant's obligation to address the evidence relied upon by the Secretary of State was only engaged in the event that the Secretary of State had, in fact, established that there was an evidential basis for concluding that the marriage was one of convenience.

27. That was the correct basis for the judge to approach his analysis.

28. Secondly, at para. 12, the judge said that he had carefully considered *Papajorgji*. *Papajorgji* is a leading authority at Upper Tribunal level on the evidential burden to establish that a marriage is one of convenience falls on the Secretary of State, rather than the appellant.

29. Thirdly, the judge's operative analysis from paragraphs 14 to 16 led to the conclusion, at para. 17, that there was a "valid evidential basis" for the respondent's concerns that the appellant's marriage to the sponsor was one of convenience. That demonstrates that, in practice, the judge was treating the evidential burden as being on the Secretary of State.

30. Fourthly, the appellant's skeleton argument (for want of a better term; it is perhaps more accurately described as the sponsor's witness statement, albeit a witness statement containing legal submissions) before the First-tier Tribunal did not take issue with the Secretary of State's discharge of the evidential burden. Its focus was on a series of reasons why the appellant contended the marriage was not one of convenience. Read as a whole, in light of the appellant's approach in that document, the judge's analysis focussed on the issues raised by the appellant, addressing them in turn.

31. It was in that overall context that the judge addressed the appellant's evidence. As set out above, the judge's findings of fact were entirely open to him, for the reasons he gave.

32. The reality was that the appellant had provided a very limited range of evidence in support of his appeal, none of which satisfied the judge that the shifting evidential burden to demonstrate that the marriage between him and the sponsor was not one of convenience had been discharged.

33. While I accept that some of the judge's terminology, particularly that at para. 9, suggests that the burden was on the appellant to *disprove* the allegation, when the decision is read as a whole, it is clear that the judge adopted the correct approach. As a specialist tribunal, it is probable that in understanding and applying the law in his specialist field, the judge will have got it right (as to which, see *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22 at para. 72(i)).

34. There is another reason why this tribunal should not set the decision aside. While ordinarily an appellate judge in my position would be at a structural disadvantage when seeking to analyse the facts and the evidence considered by

a first instance judge (see, for example, *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at para. 114), the position is different in the circumstances of this case. The appeal took place entirely on the papers. I have therefore had the benefit of considering precisely the same evidence that the judge had considered.

35. On the basis of the evidence before the judge, he would have been bound to reach the conclusions he reached. The Secretary of State's evidential burden was plainly satisfied by the appellant's failure to attend the marriage interview, despite being invited on two occasions. That being so, the judge was bound to look to the appellant's purported "innocent explanation" to address whether he had provided an adequate explanation in response. The evidence relied upon by the appellant for not attending the interviews featured weaknesses, as identified by the judge. The evidence pertaining to the relationship between the appellant and the sponsor was incredibly weak. At its highest, it took the form of a number of documents in which the appellant and the sponsor were financially linked. As stated above, by itself the appellant's name on the birth certificate did not establish his fathership of the child. There was no evidence of any sort of relationship aside from that. There were no photographs, messages, supporting witness statements or letters, and the appellant's own witness statement was notable for its lack of detail. It is difficult, if not impossible, to see how any judge could rationally have found that the appellant's evidence relied upon before the First-tier Tribunal in these proceedings discharged the evidential burden which the judge rightly found had shifted to him.

36. Drawing this analysis together, I conclude that, read as a whole, the judge applied the correct legal framework, and reached a decision that not only was rationally open to him on the evidence before him, but was the only rational decision open to him on that evidence.

37. This appeal is dismissed.

Notice of Decision

This appeal is dismissed.

The decision of the First-tier Tribunal did not involve the making of an error of law such that it must be set aside.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

2 December 2024