



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

Appeal Number: IA/36443/2013

THE IMMIGRATION ACTS

**Heard at Glasgow
on 03 September 2014**

**Determination
Promulgated
On 11 September 2014**

Before

**The President, The Hon. Mr Justice McCloskey
and
Upper Tribunal Judge Deans**

Between

YAYA KONATE

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant: Mr A Boyd of Temple and Co Solicitors
Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

INTRODUCTION

1. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department, the Respondent herein, dated 10 September 2013, whereby the Appellant's application for a residence card under the Immigration (EEA) Regulations 2006 was

refused. The First-tier Tribunal (the “FtT”) dismissed the Appellant’s ensuing appeal.

2. The core passage in the Respondent’s detailed letter of decision is the following:

“Regulation 2 states that ‘spouse’ does not include a party to a marriage of convenience. On the basis of the discrepancies in your marriage interview, your application has been refused on [sic] the belief that your marriage is one of convenience

Also during your interview you admitted to using a counterfeit passport to enter the United Kingdom. As explained above, you have [also] misled your local Council by way of the amount of Council Tax you pay and the extension fee, which should be paid to your landlord, you have tried to avoid by not adding yourself onto the tenancy agreement or informing the Council of your occupancy.

With this in mind, the Home Office has reason to question the genuine nature of your relationship and the genuine nature of the information that has been provided.”

The letter further intimated to the Appellant that while Article 8 ECHR had been floated on his behalf, a proper application under this guise had not been presented and informed him of his entitlement to do so, at his election.

3. At the conclusion of the hearing, judgment was given *ex tempore*. It was clear that the decision of the FtT was erroneous in law, in two respects. First, there was a failure to give effect to the decision of the Upper Tribunal in Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 0038 (IAC). There it was held that where it is suggested, in this legislative context, that a marriage is one of convenience, an evidential burden rests on the Secretary of State. The discharge of this burden requires the adduction of evidence that could support a conclusion that the marriage is one of convenience. Where this evidential burden is not discharged, the Appellant has no case to answer. However, where the Secretary of State burden is discharged, there is a shift and it is incumbent on the Appellant to show that the marriage is not one of convenience. The standard of proof is the balance of probabilities. The determination of the FtT does not acknowledge these rules of evidence and, moreover, the passage in [23] is suggestive of an approach whereby the Secretary of State had no burden of any kind and the only onus was one imposed on the Appellant.
4. Second, I consider that the Judge erred in law in [21]-[23] of the determination, which contain an assessment of whether the Appellant’s sponsor was a “*qualified person*” within the meaning of the statutory regime i.e. a person exercising Treaty rights and a conclusion that the

sponsor was not such a person. This was not an issue in the appeal to the FtT because it did not feature as a reason for refusal in the impugned decision. The error of law thereby committed was twofold. In the first place, the FtT found against the Appellant on a non-existent issue. Secondly, to do so was procedurally unfair, since the Appellant was given no opportunity to meet the case against him on this point.

5. Ultimately, Mrs O'Brien on behalf of the Secretary of State acknowledged the errors of law adumbrated above.

DECISION

6. For the reasons elaborated above the decision of the FtT is hereby set aside. Having considered the representations of the parties and with particular reference to the procedural unfairness dimension of the second of the errors of law which I have found, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 I remit the case for rehearing and fresh determination by a differently constituted FtT.

Seamus McCloskey

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE

UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER
Dated: 10 September 2014