Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33898/2014

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 28 August 2015 **On 07 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

UMAR FAROOQ
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr M. Iqbal, Counsel, instructed by Synthesis Chambers Solicitors
For the Respondent: Ms J. Isherwod, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I see no need for, and do not make, an order restricting reporting of this case.

2. In a decision promulgated on 16 January 2015, the First-tier Tribunal dismissed the appellant's appeal against the respondent's decision to refuse to issue him with a residence card under the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations").

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The Appellant

3. The appellant is a citizen of Pakistan born on 15 October 1991. He entered the United Kingdom on 27 February 2011 as a student with a visa valid until 31 May 2014.

4. On 28 April 2014 he married a Slovakian citizen, having previously undergone an Islamic marriage ceremony with her on 9 December 2013.

5. On 27 May 2014 the appellant applied for a residence card as the spouse of an EEA national under the 2006 Regulations as confirmation of his right to reside in the UK. The respondent refused the application for two reasons:

   a. firstly, that the marriage was one of convenience for the sole purpose of enabling the appellant to remain in the UK; and

   b. secondly, that the appellant's sponsor was not exercising Treaty Rights in the UK as a qualified person under Section 6 of the 2006 Regulations.

The First-tier Tribunal decision

6. The appellant appealed and his appeal was heard by First-tier Tribunal Judge Hodgkinson ("the judge").

7. The judge heard evidence regarding the sponsor's employment and was satisfied that she was a qualified person exercising Treaty Rights in the UK as a worker. This finding was not appealed and was not at issue before me.

8. The larger part of the judge's decision, and the findings that are the subject of this appeal, concerned whether the appellant and his sponsor were in a marriage of convenience.

9. The respondent's refusal letter, dated 14 August 2014, gave the following reason for finding that there was sufficient evidence to believe the marriage was one of convenience:

> "On 9/8/14 at 07.06am, a visit was undertaken by immigration officers to your home address. The visit findings were that you were not present at the property nor was your EEA sponsor. The Immigration officers were admitted to the address by the landlady. She stated that you had left for work and that your EEA sponsor was away for a month visiting family. She continued to state that [the sponsor] had left around one and a half weeks ago.
>
> The officers were given access to your bedroom. They noted a made bed with pink sheets on, a clean towel resting on a chair with [the sponsor's name] on it and there were 3 pictures on a table next to a television. Given the time in the morning, the bedroom appeared to the officers to be too unlived in for someone who had just recently left for work. The bedsheets were uncreased and the room appeared to be presented in such a way as to suggest it was not inhabited.

> The officers also noted there was nothing in the bedroom to suggest that your sponsor was returning and that she has no family in the United Kingdom."

10. The respondent included in her bundle a document purporting to be a statement by an Immigration Officer, but which was anonymous and unsigned with no Statement of Truth. This document will be referred to hereinafter as "the Statement". The Statement, which inexplicably, and presumably in error, is dated 7 December 2010, sets out the same information as quoted above from the refusal letter. However, there is a sentence in the Statement that was not included in the refusal letter, which is as follows: *"When asked if she thought their relationship was genuine, she [the Landlady] straight away said yes".*

11. The judge made the following finding with respect to the Statement:

> "Having had the opportunity to consider the content of that statement, and the fact that the maker thereof, whoever that might be, did not attend the Tribunal hearing, I have given only limited weight to the content of the statement in question, as I do not know by whom it was made and the maker of statement did not attend in order to give evidence. However, I do find that, on its face, it nevertheless raises a reasonable suspicion....placing upon the appellant a burden to demonstrate that [the marriage] is not one of convenience."

12. The judge heard oral evidence from the appellant, his landlady and the sponsor. At paragraph [30] he stated that the oral evidence from the landlady was that she was personally aware that the appellant and sponsor lived together as husband and wife in the accommodation they rented from her. However he went on to find that there were three material discrepancies in the oral evidence given by the appellant and her sponsor:

    a. First, the appellant said that most days he worked from 6.30am until about 1pm or 2pm whereas the sponsor said that the appellant would generally get home in the early evening.

    b. Second, the appellant said that he asked the sponsor to marry him when on their way to a restaurant and standing in a park, whereas the sponsor said they were in a restaurant.

    c. Third, they gave inconsistent evidence about which side of the bed they slept on.

13. The judge found these discrepancies to be determinative in relation to the appeal and concluded that he found *"as a fact, with reference to the available evidence, that the marriage between the appellant and the sponsor is one of convenience".*

14. The judge made several references to the burden of proof. At paragraph [19] he stated that the burden was on the appellant. Later in his decision, at paragraphs [28] and [36] he explained that because he had found the evidence adduced by the respondent to be sufficient to raise a reasonable

suspicion, the burden then fell on the appellant. He stated at paragraph [36]:

> "I am satisfied that there is an evidential burden upon the appellant to establish that [the marriage] is not one of convenience, as I reiterate that I conclude that the evidence adduced by the respondent, although far from being determinative, is sufficient to raise a reasonable suspicion, thereby placing a burden upon the appellant to establish otherwise."

15. The grounds of appeal submit that, with respect to the burden of proof, the judge failed to follow *Papajorgji (EEA spouse – marriage of convenience) Greece* [2012] UKUT 00038 (IAC) and improperly placed the burden on the appellant. It is also argued that the judge, by finding that the Statement raised a reasonable suspicion, gave it too much weight as it was no more than the "subjective opinion of an Immigration Officer who might not have encountered such a neat and tidy couple". Permission to appeal was granted by First-tier Tribunal Judge Lever.

<u>Submissions</u>

16. Mr Iqbal, for the appellant, referred to and relied upon the grounds of appeal. He submitted that at paragraphs [19] and [36] of the decision the judge had reversed the burden of proof, improperly placing it on the appellant, and that in so doing he had failed to follow *Papajorgji.*

17. Mr Iqbal also argued that the judge materially erred in finding that the Statement was sufficient to give rise to a reasonable suspicion of there being a marriage of convenience. He contended that there was not even a conceivable basis for such a finding, not only because the Statement was anonymous and unsigned and therefore of no evidential value, but also because it did not describe anything that could reasonably be considered suspicious. All the Immigration Officer had found was a tidy room. Mr Iqbal argued that because the respondent had failed to discharge the burden of establishing a reasonable suspicion, there was simply no case for the appellant to answer and on that basis alone the judge ought to have found in the appellant's favour.

18. He further argued that the judge materially erred in putting too much weight on the inconsistencies in the oral evidence given by the appellant and sponsor. Understood in context, and taken together with the totality of the evidence, these were insufficient to find that the appellant and sponsor were in a marriage of convenience.

19. Ms Isherwood, for the respondent, argued that the Statement was sufficient to raise a reasonable suspicion and it was open to the judge to make this finding. She argued that the judge had identified and applied the correct burden of proof in accordance with *IS (marriage of convenience) Serbia* [2008] UKAIT 00031 and *Papajorgji*, and that because the respondent had raised a reasonable suspicion the burden shifted to the appellant.

20. She recognised that the Statement was not strong evidence and noted that the judge had clearly acknowledged this by stating that he gave it only limited weight.

21. Ms Isherwood further noted that the judge had the benefit of hearing oral evidence and contended that the inconsistencies he found in that evidence were significant, making it open to him to find there was a marriage of convenience.

The relevant law

22. A party to a marriage of convenience is not entitled to a residence card under the 2006 Regulations. This is because Regulation 2 of the 2006 Regulations stipulates that where the term “spouse” is used in the 2006 Regulations that “does not include a party to a marriage of convenience”.

23. Marriage of convenience is not defined by the 2006 Regulations but it is described in preamble 28 to Direction 2004/38/EC (Citizen’s Free Movement) as being *“for the sole purpose of enjoying the right of free movement and residence*”. Blake J in *Papajorgji* defined it as:

> “a marriage entered into without the intention of matrimonial cohabitation and for the primary reason of securing admission to the country.”

24. In *Miah (interviewer's comments: disclosure: fairness)* [2014] UKUT 00515 (IAC) McCloskey J noted that:

> “The phrase "marriage of convenience" is not defined. The purpose of this discrete provision is clear: it is designed to prevent abuse of the rights and privileges available under the 2006 Regulations by those who contract sham marriages.”

25. The main issue raised in this appeal is whether the judge properly applied the legal burden of proof when considering whether the appellant’s marriage to the sponsor was one of convenience. Both parties cited *Papajorgji* as the relevant authority and accordingly I have given it careful consideration.

26. *Papajorgji* was a case in which the claimant sought to accompany her EEA national husband, with whom she had been married for many years and had two children, on a visit to the UK. Her application for admission as a family member was refused on the basis that her marriage was one of convenience because she had not provided documents, such as wedding photographs, to substantiate her application despite no such documentation being required with the application. The Tribunal found that there was not a burden on the claimant to establish she was not a party to a marriage of convenience and that in the absence of any evidence giving rise to reasonable suspicion the application should have been granted without more. It was found that an applicant only needs to provide evidence about his or her marriage in the event that there is a reasonable basis for suspicion, in which case he or she should be invited to respond to the basis of suspicion by providing evidential material to dispel

it. Blake J found there was no such suspicion in this case, describing the notion that there was a marriage of convenience as "ludicrous"*.*

27. The finding by Blake J in *Papajorgji,* as described above, concerns when a claimant is expected to provide evidence to dispel a reasonable suspicion. This should not be confused with the question of where the burden of proof lies when a tribunal judge considers an appeal in which the Secretary of State (or Entry Clearance officer, as was the case in *Papajorgji)* alleges there has been a marriage of convenience. This question was not determined by Blake J, who stated at paragraph [33] that the whole issue will need further examination in a future case where the nature of the dispute requires it to be decided. However, he made clear his view that he would have serious reservations about an argument that the legal burden of proof shifts to the applicant once reasonable suspicion had been raised. Blake J, at paragraph [36], went on to state (emphasis added):

> "It is clear that the justification for exclusion of marriages of convenience from those otherwise entitled to a residence document under the Directive is to be found in the EU law principle of fraud or abuse of rights. That very much suggests that in any dispute on appeal as to the nature of the marriage, **it would in the last instance be for the respondent to satisfy the judge of the factual basis of the personal conduct of the claimant relied on to exclude her from the entitlement**. Thus if the respondent were to allege that the claimant were a spy or a drug runner or involved in other conduct detrimental to public policy, on the ordinary principle that he who alleges must substantiate, it would fall on the respondent to make that suggestion good, although the Judge would be alive to the difficulties of proof (see the recent decision by SIAC in SC/103/2010 Ekaterina Zatuliveter v SSHD, 29 November 2011.)"

28. At paragraph [37] he commented:

> "We observe that the guidance of the European Commission issued in respect of the Citizens Directive COM 2009 313 2 July 2009 is explicit in placing the burden of proof on the state and invites the state to set out indicative criteria for and against the proposition that the marriage is one of convenience....We consider this guidance is likely to prove helpful for Judges who have to decide such questions in the future although it is not binding as a piece of EU legislation".

29. Blake J concluded his decision by stating that where the issue of marriage of convenience is raised in an appeal, the question for the judge is whether

> "in the light of the totality of the information before me, including the assessment of the claimant's answers and any information provided, am I satisfied that it is more probable than not this is a marriage of convenience?".

Consideration

30. For the reasons set out below I find that the judge erred in law but that his errors were not material and accordingly I conclude that his decision should stand.

31. The only evidence put forward by the respondent to establish that the marriage between the appellant and his sponsor was one of convenience was the Statement. The judge clearly recognised the Statement was of limited value – he stated that he gave it only "limited weight" – but nonetheless found it to be of sufficient weight to raise a reasonable suspicion.

32. The Statement cannot reasonably be said to raise any suspicion whatsoever about the appellant. On the contrary, if anything, it is supportive of him being in a genuine marriage with the sponsor and might go some way to dispelling suspicion that could have arisen from other factors, such as the proximity in time between the marriage and expiry of the appellant's leave to remain in the UK as a student. The Statement says that immigration officers visited the premises and spoke to the landlady who, when asked if the appellant and sponsor were in a genuine relationship immediately said "yes". The landlady told the officers that the appellant was at work and the sponsor abroad visiting family. The officers then entered the appellant's room and found pictures of the appellant and sponsor's wedding day and items strongly suggestive of them both living there. They also found the room to be neat and tidy with a "perfectly made bed" and uncreased sheets. The findings of the immigration officers, as documented in the Statement, cannot on any reading be construed as giving rise to a reasonable suspicion and I find that the judge has erred in law by giving any weight to this evidence. In light of the comments attributed to the appellant's landlady in the Statement, it would have been open to the judge to consider the Statement as evidence, albeit of limited weight, supporting the view that the appellant and sponsor were in a genuine marriage.

33. It is also apparent from the decision that the judge has mis-directed himself as to where the legal burden of proof lies. The judge appears to have construed *Papaajorgji* as holding that once a reasonable suspicion is raised the legal burden shifts to the appellant. This is not the case. As explained by Blake J in *Papajorgji*, although a reasonable suspicion triggers an evidential burden on the appellant to address the suspicion, that does not mean the legal burden has shifted. By conflating the issue of when the appellant is required to provide evidence to dispel a suspicion with where the legal burden of proof lies the judge fell into error.

34. However, despite finding the above described errors, when reading the decision as a whole, it is apparent that the judge has taken the proper approach to consideration, and weighing, of the evidence before him. The task for the judge, in accordance with *Papaajorgji,* was to look at the totality of the information before him to determine whether he was satisfied that it was more probable than not the marriage was one of convenience. This was required of the judge irrespective of whether he

found the Statement was sufficient to raise a reasonable suspicion. Mr Iqbal submitted that if the respondent had not discharged the burden of establishing a reasonable suspicion there was no need for the case to go any further. However, the matter for the judge to determine on appeal was not whether the respondent had followed the proper approach with respect to the evidential burden but whether on the balance of probabilities there was a marriage of convenience, and in answering this question the judge was required to look at the totality of the evidence before him.

35. It is clear from the decision that this is what the judge has done. He has carefully taken into consideration all of the evidence before him, including the written statements of the appellant, sponsor and their landlady, the letter from the sponsor's employer, the GP registration cards, the Statement, and the oral evidence he heard at the hearing.

36. It is apparent that the judge found the oral evidence – and the contradictions he identified therein - to be determinative of the appeal, significantly outweighing any importance he might have attached to the other evidence, including that of the Statement, which he described as being "far from being determinative".

37. Having considered the overall approach to the evidence taken by the judge, I am satisfied that, irrespective of how he formulated or understood the legal burden of proof, he has given proper consideration to the totality of the information before him and reached a decision open to him based on that information as to whether it was more probable than not the marriage between the appellant and sponsor was one of convenience. Although I consider the judge to have erred by giving even limited weight to the Statement, I am satisfied that he did not treat the Statement as a significant factor weighing against the appellant and therefore that the weight he gave to it did not have a material effect on the overall assessment based on the totality of the evidence.

38. Accordingly, I find that any errors of law in the decision were not material and that it was open to the judge, based on the evidence before him and for the reasons he gave - in particular the discrepancies he identified in the oral evidence, which were by no means insignificant - to find that on balance it was more probable than not this was a marriage of convenience.

Notice of Decision

39. The appeal is dismissed.

40. The decision of the First-tier Tribunal did not contain a material error of law and shall stand.

41. No anonymity direction is made.

Signed
Deputy Upper Tribunal Judge Sheridan

Dated