Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48280/2014

THE IMMIGRATION ACTS

Heard at: Field House
On: 2nd November 2015

Decision Promulgated
On: 10th November 2015

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Adaman Ismail Doumbia
(no anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms A Vatish, David Wyld & Co Solicitors
For the Respondent: Mr Tarlow, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of the Côte D'Ivoire date of birth 5th March 1976. He has permission[1] to appeal against the decision of the First-tier Tribunal (Judge Blair) to dismiss his appeal against the Respondent's decision to refuse to issue him with a residence card confirming his right of residence as

[1] Permission to appeal to the Upper Tribunal granted by First-tier Tribunal Judge Simpson on the 26th August 2015

the family member (spouse) of an EEA national exercising treaty rights in the United Kingdom.

Background and Matters in Issue

2. On the 18th July 2014 the Appellant made an application for a residence card. He stated that he was living in the United Kingdom with his French wife Ms Namadogo Karamoko.

3. The application was refused on the 19th November 2014. The Respondent noted that the applicant and his wife had been interviewed and found there to have been a "large number of inconsistent and conflicting answers" given. The letter sets out those discrepancies. The Respondent concluded that this was a marriage of convenience, and thus an attempted abuse of the Immigration (European Economic Area) Regulations 2006.

4. When the appeal came before the First-tier Tribunal the Appellant and his wife were called to give live evidence and were extensively cross-examined before Judge Blair. He was not impressed. Although he recognised that they gave consistent evidence about what had happened at the interview, he found there to be significant discrepancies in areas of the evidence which could not be described as peripheral. These related to the couple's engagement and the names of the Sponsor's children. The determination also notes omissions in the evidence which might reasonably be expected to have been corrected had the application been genuine: Judge Blair considered that the lack of photographs or evidence of shared interests or social life pointed to a lack of substance in the relationship. The Tribunal held that this was a marriage of convenience and the appeal was dismissed.

5. The Appellant now appeals on the ground that the First-tier Tribunal made a material misdirection in law in that it failed to have regard to the lead case of Papajorgi (EEA Spouse – Marriage of Convenience) Greece [2012] UKUT 00038 (IAC).

6. The written grounds submit that this case establishes that the "burden rests on the Respondent and good evidence is needed to discharge it", and that "it is for the Respondent to prove the allegation of a marriage of convenience". The Appellant further complains that the matters taken against him were "overplayed". The discrepancies identified in the determination were not, on a fair reading, discrepancies at all.

7. Before me Ms Vatish did not seek to amend the written grounds but sought to refine the point. She argued that since the full interview record was not produced before the Judge, the Respondent had not discharged the evidential burden upon her, and in those circumstances there was no obligation on the Appellant to prove that his marriage was genuine.

8. The Secretary of State opposes the appeal on all grounds. Mr Tarlow submitted that the evidential burden was discharged by way of the refusal letter setting out the extensive discrepancies arising from the interview, which could not properly be described as "peripheral" at all. The credibility issues were fundamental and the Appellant had failed to show that his marriage was genuine and subsisting.

Error of Law

9. Papajorgi is not authority for the propositions made in the written grounds of appeal. It does not state that the burden of proof rests on the Respondent and that it can only be discharged by the production of good evidence. Papajorgi endorses the guidance given in IS (marriages of convenience) Serbia [2008] UKAIT 31 to the effect that

   a) Not every applicant need prove that his marriage is not one of convenience;

   b) The need to do so only arises where there are factors which support suspicions for believing the marriage is one of convenience. There is therefore an evidential burden on the Respondent;

   c) Where the Respondent can identify such factors, it is for the applicant to prove his case according to the normal burden and standard of proof, i.e. balance of probabilities.

10. In this case the Respondent set out with clarity why she believed this to be a marriage of convenience. The refusal letter sets out each of the discrepancies arising from the interviews. I am satisfied that this was sufficient to discharge the evidential burden upon the Respondent. There were reasons why she had her suspicions, and she explained them all to the Appellant. Although it is unfortunate that the Respondent saw fit not to produce the actual interview transcript, it cannot be said that the Appellant was ignorant of the case against him, or why the decision was reached: cf. Miah (interviewer's comments: disclosure: fairness) [2014] UKUT 00515 (IAC). The Respondent had discharged the evidential burden, and it was thereafter for the Appellant to prove that his marriage was genuine. There was therefore no misdirection or error in approach by the First-tier Tribunal.

11. This leads to the second of the grounds, which is whether the reasons given in the determination are sustainable. Criticism is made of the findings that

   a) The Appellant should have produced more evidence as to the quality of the relationship;

   b) There was a difference between the description of the wedding ring as 'white gold' and alternatively 'silver';

   c) It was incredible that the Appellant would let his brother buy an engagement ring on his behalf;

d) That the Appellant was unable to give the correct names for his stepchildren.

12. The First-tier Tribunal has given the Appellant credit for the fact that he and the witness were able to give consistent evidence about some matters: see paragraphs 17-18. Further, some of the points made in the refusal letter are expressly rejected: see paragraph 19. The Tribunal was however satisfied that the marriage was one of convenience for the following reasons. Firstly, there was a "dearth" of evidence. The Appellant knew what the case against him was. It was therefore up to him to produce what evidence he wished to rely on. There is no error in the Tribunal taking into account the fact that evidence which one might ordinarily expect to see in such a case is absent: paragraphs 21-23 refer. Secondly, those discrepancies identified by the First-tier Tribunal as "fundamental" did indeed merit that description. The First-tier Tribunal was entitled to weigh against the Appellant the fact that he and his wife could not give a remotely consistent account of how they came to be engaged, or what the engagement ring looked like. The determination recognises that there is little difference in the description of "white gold" and "silver" [at 27]: the point made however is that someone might be expected to recall that the ring contained a diamond, as opposed to a "design on the top aspect", (not least if that person is the one who presumably paid for it). As to the matter of the children's names, the Tribunal was entitled to weigh against the Appellant the fact that he could not, when asked, give the proper names for children whom he claims to be his stepsons.

Decisions

13. The decision of the First-tier Tribunal contains no error of law and it is upheld.

14. I was not asked to make a direction as to anonymity and on the facts I see no reason to do so.

Upper Tribunal Judge Bruce
2nd November 2015