IAC-TH-WYL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/49005/2014

THE IMMIGRATION ACTS

Heard at Field House
On 23 March 2016

Decision & Reasons Promulgated
On 11 April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

MUHAMMAD NAEEM
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss N Hashmi, Counsel
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Pakistan who entered the United Kingdom on 26 December 2009 as a Tier 4 (General) Student. He applied for a residence card as

the spouse of an EEA national exercising treaty rights in the United Kingdom. His application was refused on 19 November 2014 and he subsequently appealed.

2. That appeal was considered on papers by Judge of the First-tier Tribunal M D Dennis who in a decision promulgated on 4 September 2015 dismissed it.

3. The appellant sought permission to appeal. This was granted by Judge of the First-tier Tribunal Pooler who on 29 January 2016 gave his reasons for so doing. They state:-

> "1. Judge Denis dismissed without a hearing the appellant's appeal against the decision of the respondent to refuse to issue a residence card as confirmation of a right of residence as the family member of an EEA national.
>
> 2. The appellant was unrepresented in the appeal and has submitted his grounds without legal representation, although they are couched in terms which suggests that their author was conversant with the relevant jurisprudence. I have nevertheless read the decision with particular care.
>
> 3. The grounds submit that the judge misdirected himself as to the burden of proof where it is alleged that a marriage is one of convenience.
>
> 4. At [8] the judge referred to <u>*Papajorgi*</u> *(EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC)*. He stated that the respondent must have some basis for raising the issue of the marriage of convenience and that the burden on her was to provide satisfactory grounds for entertaining suspicion; thereafter it was for the appellant to provide satisfactory evidence that the marriage was not one of convenience.
>
> 5. This issue was recently considered by the Court of Appeal in <u>*Rosa v SSHD*</u> *[2016] EWCA Civ 14*. In light of that authority, in which <u>*Papajorgji*</u> was considered and explained, it is arguable that the judge misdirected himself in law."

4. Thus the appeal came before me today.

5. Miss Hashmi referred me to two authorities being **<u>Papajorgi</u> (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC)** and **<u>Rosa v SSHD</u> [2016] EWCA Civ 14**. In particular she asked me to accept that in light of the findings of Judge Dennis the respondent could not be said to have built "a convincing case" in terms of the issue of burden of proof. In short therefore the judge's starting point for his analysis contained a material error of law thereby infecting the totality of it.

6. Mr Melvin relied on his own skeleton argument. At paragraph 7 he states that the burden of proof lies on the authorities of the Member states seeking to restrict rights under the Directive. He acknowledged that it had to be a "convincing case" while respecting all the material safeguards described. He asserted that there was ample

material before the judge to find a "convincing case" and that following the relevant authorities the burden or proof had been properly applied. As with the Rule 24 notice of 15 February 2016 Mr Melvin also relied on the choice of the appellant "not to fully engage with the Appellate provisions" having opted for a paper hearing and that this was despite the serious allegation of a sham marriage and the need for the appellant and spouse to provide evidence to address the very significant evidence relied upon by the respondent.

7. I have carefully considered the judge's decision and for all the reasons put forward in the grounds and the submissions of Miss Hashmi I find that the judge has materially erred and that there is an irrationality in his decision to allow the appeal in light of his findings in relation to the respondent's own case. Accordingly the First-tier Tribunal decision contains an error of law and has to be set aside in its entirety. The way forward is for this appeal to be heard orally before a First-tier Tribunal.

Notice of Decision

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh, pursuant to Section 12(2)(b)(i) of the Tribunal's Court and Enforcement 2007 and Practice Statement 7.2(b), before any judge aside from Judge M D Dennis.

No anonymity order is made.

Signed Date 30 March 2016.

Deputy Upper Tribunal Judge Appleyard

<u>DIRECTIONS</u>

1. This appeal is to be heard at Taylor House on the first available date.

2. The time estimate is two hours.

3. Any party wishing to file additional evidence must do so no later than ten working days prior to the hearing.

Signed Date 30 March 2016.

Deputy Upper Tribunal Judge Appleyard