



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/49212/2014**

Appeal Numbers:

IA/49214/2014

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

**On 9 March 2016
Extempore**

**Promulgated
On 30 March 2016**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**TEMILOLA OLANIYI
ISABELLA GRACE IYANUOLWA OGHENERHO
(ANONYMITY DIRECTION NOT MADE)**

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Balroop, Counsel, instructed by Duncan Lewis & Partners

For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge I S Lamb promulgated on 1 September 2015 in which he dismissed the appeal of the appellant against the decision of the Secretary of State to refuse to issue them with residence cards as confirmation of

their right of residence in the United Kingdom pursuant to the Immigration (European Economic Area) Regulations 2006.

2. The Secretary of State had refused to issue the residence cards requested on the basis that the marriage between the first appellant and her husband, a German national who it is accepted was exercising treaty rights in the United Kingdom, was one of convenience.
3. The Secretary of State's case that the marriage is one of convenience is set out in the refusal letter and it can be summarised as falling into two separate sets of reasons. The first relates to the appellant and her husband's arrival late on the day which was she said was not explained. The second set of reasons are to do with what was disclosed in the interview and it is said there are discrepancies regarding when they met, when they started living together, when the proposal was made and where the second appellant attends school.
4. It is not in dispute that in this case there is no transcript of the interview available nor has the Secretary of State sought to adduce any file notes nor any other evidence in support of the assertions made in the refusal letter.
5. At the appeal before the First-tier Tribunal the Secretary of State was not represented. The appellants were represented there as before me by Mr Balroop. The judge records the submissions made by Mr Balroop and accepted that there was no interview available. What the judge does say is at [20]

"I do not agree with the submission of Mr Balroop that the simple failure of the respondent to serve a full record of the interview, coupled with the explanation for its absence, entitles the appellant to succeed on her appeal without more. I cannot take into account the evidence of the appellant and her witness about their difficulty arising from inability to recall the interview because he did not tender that evidence, even though there was no one present to challenge it."

6. The judge appears also to have considered that what Mr Balroop was submitting was that the appeal should be allowed on the basis of the procedural failure. That, I accept, appears to have been an error. The judge found that the Secretary of State had made out her case and dismissed the appeals.
7. The appellant sought permission to appeal on the grounds in summary first, that the judge had misdirected himself as to the relevant test to be applied as set out in the case of **Papajorgji** and, second, had erred in his approach to the evidence in that he had taken into account as evidence matters in the refusal letter which were simply assertion. Permission to appeal was granted by First-tier Tribunal Judge Landes on 26 January 2016.

8. Mr Balroop before me relied upon the grounds of appeal. Mr Duffy submitted that for the reasons set out in the letter produced pursuant to Rule 24 and dated 2 February 2016 it was clear that the judge had directed himself properly.
9. I indicated, having heard submissions that I was satisfied that the decision of the First-tier Tribunal did involve the making of an error of law for the reasons which I now give.
10. The Court of Appeal has recently considered the issue of burden of proof in regard to marriages of convenience in both **Agho v Secretary of State** [2015] EWCA Civ 1198 and **Rosa v Secretary of State** [2016] EWCA Civ 14. The proper test is clearly set out by the Court of Appeal in particular in **Rosa** at [24] and more particularly at [29]. It appears however from the decision of the First-tier Tribunal, in particular at [10] and [11] that the judge misunderstood how the test is properly to be applied. It also appears from the judge's decision that he believed that there was some evidential burden on the appellants which would in the circumstances of this case be incorrect. It cannot be said that a refusal letter is in itself evidence particularly where the facts of which it is said have to be proved by the author of the letter and in that sense the judge has erred in law in accepting as evidence assertions of fact which are not in fact supported by evidence which was not provided by the Secretary of State.
11. I note in passing that the circumstances of this case are significantly different from both **Agho** and **Rosa** in that there were in those cases a substantial involving of material provided by the Secretary of State including reports of visits to the relevant properties.
12. I consider that it was not open to the judge to reach the findings of fact which he did given the failure properly to direct himself in law and accordingly the decision has to be remade.
13. In remaking the decision I heard submissions both from Mr Balroop and from Mr Duffy. Mr Balroop submitted that there was nothing in this case for the appellant to prove. She had shown and it was not disputed that she was married to a German national who resided in the United Kingdom and who is a qualified person by virtue of employment. It was submitted that in this case the Secretary of State has simply failed to provide any evidence to support the contention that this was a marriage of convenience. Mr Duffy accepted that he was in some difficulty in this case in the absence of evidence and relied on the refusal letter.
14. I consider that in this case the Secretary of State has not produced any evidence which is capable of being relied upon. What is said in the refusal letter are simply assertions. They are not in and of themselves evidence. There is no transcript of the interview. There are no notes of what is said to have transpired on the day of the interview.
15. Bearing in mind that the burden in this case is on the Secretary of State to show on the balance of probabilities the marriage is one of convenience, I

consider that she has not provided sufficient evidence to do so and that accordingly, reviewing the evidence as a whole, I am satisfied that this is not a marriage of convenience and that accordingly the appellants meet the requirement of the Immigration (European Economic Area) Regulations 2006 and therefore ought to be issued with residence card as confirmation thereof.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I remake the decision by allowing the appeal under the Immigration (European Economic Area) Regulations 2006.
3. No anonymity direction is made.

Signed

Date: 18 March 2016



Upper Tribunal Judge Rintoul

TO THE RESPONDENT **FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of any fee which has been paid or may be payable as the respondent has consistently failed to provide any evidence to support her contention.

Signed

Date: 18 March 2016



Upper Tribunal Judge Rintoul

