Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/04804/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 April 2017	**On 9 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MRS CECILIA ASARE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - ACCRA

Respondent

Representation:

For the Appellant: Mr K Siaw instructed by KPP Oplex
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is a citizen of Ghana born on 10 September 1976. She sought admission to the United Kingdom as the spouse of a European Economic Area national exercising treaty rights in the United Kingdom. On 12 January 2015 the respondent refused the appellant's application. The reasons for that refusal were that the respondent considered that the appellant was party to a marriage of convenience and therefore was not satisfied that the appellant met all the requirements of Regulation 12 of the Immigration (European Economic Area) Regulations 2006.

2. The appellant appealed against that decision to the First-tier Tribunal.

The appeal to the First-tier Tribunal

3. In a decision promulgated on 25 July 2016 First-tier Tribunal Judge R Callender Smith dismissed the appellant's appeal. The judge found that on the balance of probabilities the appellant's marriage to the sponsor, Mr Philip Nomafo, a Swedish national living and working in the UK, was not a genuine and subsisting marriage and that the intention of the parties was for the appellant to gain the benefit of the fact of a marriage to an EEA national so that she could make an application to enter the UK. The judge was also satisfied that the appellant was a party to a marriage of convenience and was not therefore a family member of an EEA national in accordance with Regulation 7 of the EEA Regulations.

4. On 19 October 2018 the appellant applied for permission to appeal against the First-tier Tribunal's decision. The application for permission to appeal was received nearly three months after the Tribunal's decision was promulgated. First-tier Tribunal Judge Kelly extended time for lodging the application for permission to appeal. The grounds of appeal assert that the First-tier Tribunal Judge applied an incorrect test and therefore arrived at the wrong decision. Reference is made to paragraph 22 of the First-tier Tribunal decision where the judge sets out that it is for the appellant to discharge the burden of proof and the standard of proof to be applied is the balance of probabilities. It is submitted that the burden of proof is on the respondent as per the case of **Rosa v SSHD [2016] EWCA Civ 14 ('Rosa')**. The grounds assert that the respondent did not submit any evidence to discharge the burden of proof. The grounds also asserted that the judge had erred in the record of the oral evidence of the appellant.

5. Permission to appeal was granted by First-tier Tribunal Judge Kelly on 10 February 2017 only in respect to the ground of appeal that the judge erred in applying the incorrect burden of proof. The claim that the Tribunal had not accurately recorded the oral testimony was refused.

The Appeal before the Upper Tribunal

6. Mr Siaw submitted that the questions asked by the Respondent were all concerned with the subsistency of the appellant's relationship with the sponsor. He referred to several of the questions asked by the Entry Clearance Officer and submitted that they were all concerned with assessing the genuineness of the ongoing relationship. He submitted that in the case of **Rosa** it was made clear, at paragraph 40, that the focus in relation to a marriage of convenience should be on the intention of the parties at the time the marriage was entered into whereas the question as to whether a marriage is subsisting looks to whether the relationship is a continuing one:

7. He submitted that the question asked at the hearing before the First-tier Tribunal regarding the sponsor's Swedish passport had not been put to the appellant at the time of the application or in the interview with the Respondent. Neither the appellant nor the sponsor had been asked the question as to what their intention was at the time that they entered into the marriage.

8. Mr Siaw submitted that the First-tier Tribunal had erred in law by referring to the burden of proof being on the appellant. He referred to the cases of **Rosa** and **Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00384 (IAC) ('Papajorgji')**. He submitted that it is made clear by the case of **Rosa** that the burden is on the Home Office to prove that the marriage is a marriage of convenience and that merely by showing reasonable suspicion cannot discharge the burden. There was no evidence before the First-tier Tribunal Judge to discharge the burden of proof on the Home Office that this was a marriage of convenience. He submitted that there was only one question regarding the European passport from which the First-tier Tribunal Judge arrived at the conclusion that this was a marriage of convenience.

9. Ms Isherwood submitted that there was no material error of law in the First-tier Tribunal's decision. The Respondent was entitled to assess and test the evidence in this case. The appellant was interviewed by the Respondent in order to assess the genuineness of the relationship. Providing that there is sufficient evidence to satisfy the evidential burden then the burden reverts to the appellant. She submitted that the appellant has failed to discharge the evidential burden as she has not satisfactorily responded to the points raised in the refusal letter. There was no further evidence to satisfy the judge that the Respondent's concerns were addressed. She conceded that paragraph 22 of the First-tier Tribunal's decision is incorrect but asserted that it is not material. The First-tier Tribunal at paragraphs 24 and 25 considered the relevant case law of **Rosa** and **Papajorgji**. The judge considered all the evidence, at paragraphs 5 to 8, and considered all of the documentary evidence as set out in paragraph 12 of the decision. She submitted that there was no material error of law despite the incorrect reference in paragraph 22.

10. In reply Mr Siaw submitted that at paragraphs 40 and 41 of **Rosa** it makes it clear that questions regarding the subsistence of relationship, in this case the questions about money being transferred and about communication are all evidence of subsistence which, as held in **Rosa**, are not relevant to the question of marriage of convenience. They are concerned with whether or not a relationship is genuine and subsisting.

Discussion

11. The First-tier Tribunal refers at the beginning of the decision to Regulation 12 of the EEA Regulations. Whilst it is correct that the appellant must satisfy a judge on appeal that she meets the requirements of Regulation 12 and therefore the burden is upon the appellant to prove the case, in this case the issue was whether or not the marriage between the appellant and the sponsor was a marriage of convenience. It was not disputed that the marriage itself was a valid marriage. Therefore the burden of proof lies on the respondent. In **Rosa** at paragraph 29 the Court of Appeal having considered in detail the legal test summarised and explained the test in the following manner:

> "29. ...The result that I think the Tribunal must have intended is achieved if the legal burden of proof lies on the Secretary of State throughout but the evidential

> burden can shift, as explained in *Papajorgji*. In my judgment, that is the correct analysis."

12. The First-tier Tribunal clearly erred in law at paragraph 22 in stating that it is for the appellant to discharge the burden of proof.

13. There are two distinct aspects to the appellant's grounds of appeal. The first is that the focus was incorrectly on whether the marriage was genuine and subsisting rather than if it was a marriage of convenience and, secondly, whether or not the First-tier Tribunal Judge, having incorrectly considered that it was for the appellant to discharge the burden of proof, his approach to the evaluation of the evidence was infected by that error.

14. Dealing with the first matter the judge set out the details given in the refusal letter including the answers given by the appellant in her interview. At paragraph 12 the judge sets out that he has read carefully the information that was before the respondent, the material in the appellant's bundle and heard oral evidence from the sponsor. The judge sets out in paragraphs 14 to 21 details of the sponsor's evidence both from his written witness statement and oral testimony. The judge then set out from paragraph 23 his findings and reasons. At paragraph 23 the judge stated:

> "23. The main issue in this Appeal is whether, from the start, the marriage was in effect genuine and subsisting. The transcript of the interview of the Appellant is not particularly helpful one way or another in determining that."

15. It is clear that the judge in this paragraph is incorrectly considering that the issue is whether the marriage is genuine and subsisting. The correct issue to be decided in this appeal was whether or not the marriage was one of convenience. However, the judge then, in the immediately subsequent paragraph, refers directly to the correct issue. At paragraphs 24 and 25 the judge set out:

> "24. As the Appellant's legal representative reminds me in his skeleton argument, the key paragraph of the case of *Rosa v SSHD* [2016] EWCA Civ 14 states that the 'focus in relation to a marriage should be on the intention of the parties at the time the marriage was entered into'.
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> 25. He also reminds me of the case of *Papajorgji (EEA Spouse – marriage of convenience) Greece* [2012] UKUT 00384 (IAC). In essence that case states that it is wrong for Respondents to make assertions that an individual's marriage is one of convenience without providing basis of proof for doing so."

16. It can be seen from these paragraphs that the judge was aware that the issue was whether, at the time of entering into the marriage, it was one of convenience. That is evident from the following paragraphs.

> "26. The Sponsor's evidence is that, before or at the time of his marriage to the Appellant in Ghana, she asked him specifically whether he had a European passport.

27. I find this is a good indication that she was seeking to establish, from the start, more about her potential rights married to an EEA national than she was interested in simply marrying the Sponsor because he was a fellow Ghanaian.

28. I note that they met and married within a very short space of time, so short a space of time that there appears to have been something rather more methodical than instant love at first sight to their marriage.

29. The Respondent was entitled, from the start, to regard that kind of meeting leading to a marriage with suspicion.

30. The short space of time between the parties meeting and marrying is sufficient prima facie evidence to raise the enquiry and the Respondent is entitled to do this even in the face of the two cases quoted above in paragraph 23.

31. These are not two individuals who had met before and there is a significant enquiry by the Appellant of the Sponsor about whether he had a European passport in effect, in addition to his Ghanaian passport, which he tells me he used to enter and leave Ghana."

17. This evidence is relevant to establishing the intention of the appellant at the time she entered into the marriage. The judge then return to consideration of the genuine and subsisting nature of the relationship:

"32. I find, on the balance of probabilities, that this was not a genuine and subsisting marriage but that the intention of the parties was for the Appellant to gain the benefit of the fact of a marriage to an EEA national so that she could, as she did, then make an application to join the Sponsor in the UK.

33. I accept that the Sponsor has been sending her a documented amount of around £300 but I do not find that probative of whether there is a genuine relationship that was or continues here.

34. I, like the Respondent, am not satisfied that, on the evidence submitted with the application, on the responses in interview and on the balance of probabilities, that there was a continuing and meaningful relationship with the Appellant's Sponsor in respect of this marriage."

18. Although the judge can be seen in the preceding paragraphs to confuse the two issues the evidence was relevant to evaluation of whether this was a marriage of convenience. The judge, having evaluated the evidence, made a specific finding on this in paragraph 35:

"35. I, also, am satisfied that the Appellant was a party to a marriage of convenience and was not, therefore, a family member of an EEA national in accordance with Regulation 7 of the EEA Regulations."

19. I acknowledge that the Tribunal's language and the structure of the decision is not particularly precise. At paragraphs 40 and 41 of **Rosa** the Court of Appeal set out:

"40. Mr Southey submitted that the tribunal misdirected itself by focusing on the question whether the marriage was 'genuine and subsisting'. That terminology

can be seen to run through the determination: it appears, for example, in the last sentence of paragraph 3 ('I was satisfied that it was for the Appellant to show … that the marriage was genuine and subsisting'), in the first sentence of paragraph 26 ('I am not satisfied on the evidence … that they are now or ever have been in a subsisting relationship of husband and wife') and in paragraph 29 ('I am not satisfied that the Appellant is in a subsisting relationship with her husband …'). But it relates to the different issue that arises in applications by non-EEA spouses for leave to remain under the Immigration Rules. It has no place in relation to the issue of marriage of convenience on an application under regulation 17 of the EEA Regulations, where the relevant question is whether the marriage was 'concluded … with the sole aim of circumventing the rules on entry and residence of third-country nationals and obtaining for the third-country national a residence permit or authority to reside in a Member State' (see paragraph 10 above)."

41. ...It may be useful to contrast a marriage of convenience with a genuine marriage (indeed, Underhill LJ treated them as antonyms at paragraph 6 of his judgment in *Agho*), but the focus in relation to a marriage of convenience should be on the intention of the parties at the time the marriage was entered into, whereas the question whether a marriage is 'subsisting'. ...The tribunal was correct to look at the evidence concerning the relationship between the appellant and her husband after the marriage itself (both before, during and after the husband's period of imprisonment), since that was capable of casting light on the intention of the parties at the time of the marriage."

20. In considering the judge's approach and the evidence overall in this case I am satisfied that he he did consider, in addition to the question of the genuine and subsisting nature of the relationship, the correct question as to whether or not the marriage was one of convenience. As held in **Rosa** it is correct for a Tribunal to look at the evidence concerning the ongoing relationship between the appellant and the sponsor because that is the evidence that is capable of casting light on the intention of the parties at the time of the marriage. As the judge noted the appellant and the sponsor met and married within a very short space of time. The appellant asked the sponsor whether he had a European passport before or at the time of his marriage to the appellant. Those are matters that do cast light on the intention of the parties at the time of the marriage. The other evidence that the judge took into consideration about the level of knowledge that the appellant had of the sponsor, whether there was any financial contribution and the level of communication between them are also capable of casting light on the intention of the parties at the time of the marriage. I therefore do not consider that the judge erred when considering evidence that went to whether or not the marriage was genuine and subsisting. There was a clear finding in paragraph 35 that the appellant was party to a marriage of convenience.

21. With regard to the incorrect burden the judge did refer to the case of **Papajorgji** and set out that it is wrong for a Respondent to make assertions without providing a basis of proof for doing so. The judge considered that there was a sufficient basis for the Respondent to investigate further. At paragraph 31 the judge clearly considers that there had been a significant enquiry by the appellant with regard to the sponsor's passport. That coupled with the very short period of time between the

parties meeting and marrying was sufficient in the judge's view to shift the evidential burden of proof.

22. Although the First-tier Tribunal was in error in proceeding on the basis that it was for the appellant to show, on the balance of probabilities, that the marriage was not a marriage of convenience I do not accept Mr Siaw's submission that there was no evidence from the Respondent to discharge the legal burden, which of course remained with the Respondent throughout, to demonstrate that this was a marriage of convenience. The judge evaluated the evidence including the oral testimony of the sponsor and made an emphatic finding, in paragraph 35, that he was **satisfied** that the appellant was a party to a marriage of convenience. That language does not suggest that the judge considered that the appellant had not proved that the marriage was not one of convenience. It reflects the test that it was for the respondent to satisfy the judge. The finding of the judge reflects correctly that the test was that he had to be satisfied that the appellant was a party to a marriage of convenience. That is the burden that was on the respondent and is correctly reflected in the finding by the judge. This indicates that the outcome of this appeal did not turn on the Tribunal's incorrect record as to the burden of proof. I consider therefore that this error was not material.

Notice of Decision

23. The First-tier Tribunal's decision did not contain a material error of law. The appellant's appeal is dismissed.

24. No anonymity direction is made.

Signed P M Ramshaw Date 8 May 2017

Deputy Upper Tribunal Judge Ramshaw