Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/00435/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 December 2017	**On 9 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

MRS NOLWAZI PEARL PEARFIDIA ZWANE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Ume-Ezeoke, Counsel
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. On 21 June 2016, the appellant applied through her legal representatives for a residence card as confirmation of her right to reside in the UK. She relied on her marriage to Mr Adrian Hriban, a Romanian national, whom she had married on 14 July 2011. Evidence was produced to show that Mr Hriban was employed by a company called [ ]. On 4 January 2017, the respondent refused the appellant's application. Two reasons were given for the decision.

2. Firstly, the respondent considered that the appellant's marriage to Mr Hriban was a marriage of convenience and therefore fell outside the

definition of family member provided for in Regulation 2 of the Immigration (European Economic Area) Regulations 2006. The respondent relied on records of a so-called "pastoral visit" to the claimed matrimonial home in [ ] conducted by Immigration Officers on 16 August 2011. Mr Hriban was not there at the time of the visit and, after interviewing the appellant and telephoning Mr Hriban, the officers concluded that the relationship was not genuine.

3. Secondly, the respondent considered the appellant had failed to provide sufficient evidence to demonstrate that Mr Hriban was a "qualified person" so as to fall within the definition of 'worker' in Regulation 6 of the EEA Regulations.

4. The appellant appealed and requested that her appeal be decided on the papers. The First-tier Tribunal upheld the decision of the respondent on both points. The appellant applied for permission to appeal raising three grounds.

5. Ground 1 argued that the First-tier Tribunal Judge had misdirected himself by placing the burden of proof of showing the marriage was not one of convenience on the appellant. Ground 2 argued that the judge had erred by drawing an adverse inference from the fact the appellant requested a paper hearing. Ground 3 effectively argued the First-tier Tribunal Judge had not engaged fully with the evidence regarding Mr Hriban's employment. Permission to appeal was granted by the First-tier Tribunal in relation to the first ground but it was left open whether permission was granted on all grounds and I therefore heard submissions on all three.

6. Mr Ume-Ezeoke who appeared for the appellant relied on all three grounds. He submitted that paragraphs 9 and 10 of the decision contain a correct exposition of the approach to be applied but he argued that at paragraph 16 the judge did not follow that approach. In relation to the other grounds his submissions essentially followed the written grounds seeking permission to appeal.

7. Ms Everett for the respondent resisted all of those submissions and I do not need to set out what she said here. Having carefully read the decision and considered the submissions made to me I have concluded that the decision of the First-tier Tribunal does not contain a material error of law and shall stand. The appellant's appeal is dismissed. My reasons are as follows.

8. In *Sadovska & Another v Secretary of State for the Home Department* [2017] UKSC 54 the Supreme Court upheld an appeal against the decision in which the First-tier Tribunal Judge had held that the burden of proof was on the appellant to establish that their proposed marriage was not a marriage of convenience. The Supreme Court made it clear that the burden of establishing that the proposed marriage was one of convenience fell on the Secretary of State and remitted the case for a full hearing in the First-tier Tribunal. The Supreme Court also explained that the objective of obtaining a right of entry and residence must be the predominant purpose

for the marriage to be one of convenience and the marriage could not be considered to be a marriage of convenience simply because it brought an immigration advantage.

9. In this case the judge did not refer to the case of *Sadovska*. He relied on the case which is also relied on in the grounds seeking permission to appeal to the Upper Tribunal, namely *Papajorgji (EEA spouse – marriage of convenience)* [2012] UKUT 38 (IAC), in which the Upper Tribunal held that there was no burden at the outset of an application on a claimant to demonstrate that a marriage was not a marriage of convenience. The earlier case of *IS (marriages of convenience) Serbia* [2008] UKAIT 31 only established that there was an evidential burden on the claimant to address evidence justifying reasonable suspicion that the marriage had been entered into for the predominant purpose of securing residence rights. The Upper Tribunal made it clear throughout the decision that they did not accept there was a burden as such on the appellant and at paragraph 39 stated:

> "In summary our understanding is that where the issue is raised in an appeal the question for the judge will therefore be 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?"

10. The grounds draw attention to the judge's self direction in paragraph 10 of his decision. In that paragraph, he cited *IS* as authority for the proposition that the burden of proving that a marriage is not one of convenience lies on the appellant. I note that permission to appeal was granted because, in the view of the First-tier Tribunal Judge, it was arguable there was an error of law as to the nature and incidence of the burden of proof concerning the issue of a marriage of convenience.

11. However, in my judgment, paragraph 10 of the First-tier Tribunal's decision has been misconstrued. If *IS* had been cited as authority for the proposition that the burden of proving that the marriage was not one of convenience rested on the appellant throughout then this would have been a clear misdirection in law. However, a full reading of paragraphs 9 and 10 of the decision shows that the First-tier Tribunal clearly understood there was no burden at the outset of an application on a claimant to demonstrate that a marriage was not one of convenience. *IS* established only that there is an evidential burden on the claimant to address evidence justifying reasonable suspicion that the marriage had been entered into for the predominant purpose of securing residence rights. The First-tier Tribunal Judge quoted from *Papajorgji* in relying on *IS* in paragraph 10 of his decision. The judge reminded himself that not every applicant needed to prove that her marriage was not one of convenience and there was only a need to do so where there were factors which supported suspicions for believing the marriage to be one of convenience. I did not understand Mr Ume-Ezeoke to disagree with this analysis.

12. In paragraph 13 the judge explained that the respondent had adduced sufficient evidence to discharge the evidential burden on her for believing

that the marriage was one of convenience. In other words the discrepant answers provided at the interview together with the absence of physical evidence of a cohabiting couple raised reasonable suspicion that the marriage, when it was entered into, was one of convenience. At that point, there was an evidential burden on the appellant to address the evidence giving rise to reasonable suspicion and the First-tier Tribunal Judge was perfectly entitled to consider that she had failed to address the issues adequately and this was explained in paragraph 16 of the decision. I do not agree with Mr Ume-Ezeoke that paragraph 16 can be read as meaning the judge improperly directed himself that the burden was on the appellant.

13. I do not propose to spend much time on the second and third grounds. In short, I would say I disagree that the judge drew an adverse inference from the fact the appellant chose to have her appeal determined on the papers. The First-tier Tribunal Judge pointed out that this deprived her of the opportunity of producing further evidence but he did not carry that over into an adverse inference. There was no requirement on him to adjourn the case. Any error with regard to the judge's consideration of the evidence purporting to show that Mr Hriban was exercising treaty rights is immaterial because there was no error in the primary finding that the marriage was one of convenience when it was entered into.

14. For these reasons I uphold the First-tier Tribunal decision and dismiss the appellant's appeal.

Notice of Decision

The appeal is dismissed. The decision of the First-tier Tribunal dismissing the appeal is confirmed.

No anonymity direction is made.

Signed Date 5 January 2018

Deputy Upper Tribunal Judge Froom