



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/03494/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 12 March 2018

**Decision & Reasons
Promulgated
On 3 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**KADIATOU DIALLO
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - UKVS SHEFFIELD

Respondent

Representation:

For the Appellant: Mr R Jesurum, D J Webb & Co Solicitors
For the Respondent: Ms Z Ahmad, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal of Mrs Kadiatou Diallo. The Appellant is a national of Guinea born on 14 September 1993. On 3 May 2015 she married an EEA Dutch national, Mr Mohamed Kabba Bah, in Sierra Leone. An application for entry clearance to the UK was subsequently sought but was refused on 18 August 2015 for the following reasons:-

"In support of your application, you have provided your marriage certificate and five wedding photos.

In addition you have provided two money transfers, but these are not proof of your relationship as claimed. You have provided no other documentary evidence of your relationship or communication between you. In view of your failure to provide satisfactory evidence, I am not satisfied that you are the family member of an EEA national in accordance with Regulation 7 of the Immigration (European Economic Area) Regulations 2006.

Furthermore, I am satisfied that you are party to a marriage of convenience and are therefore not the family member of an EEA national in accordance with Regulation 7 of the Immigration (European Economic Area) Regulations 2006."

2. An appeal was lodged against this decision which was considered by an Entry Clearance Manager on 2 August 2016 and the decision was upheld. The appeal came before Judge of the First-tier Tribunal Rodger for hearing on 25 May 2017. In a Decision and Reasons promulgated on 1 June 2017, the judge dismissed the appeal under the EEA Regulations finding at [28]:-

"28. Having considered all of the evidence both individually and in the round, I am satisfied that it is more probable than not that this is a marriage of convenience ..."

Permission to appeal was sought in time on 23 June 2017. The grounds of appeal were drafted by the Appellant and essentially raised issues of fact.

3. In a decision dated 2 January 2018 Designated First-tier Tribunal Judge McCarthy granted permission to appeal in the following terms:-

"4. I am satisfied the grounds of application do not identify an arguable legal error. The grounds merely seek to answer some of the concerns raised by the judge in the decision and reasons statement. Permission to appeal can only be granted if there is an arguable legal error in the decision and reasons statement. A judge cannot be faulted for failing to consider evidence or argument not presented, particularly where, as here, the Appellant was legally represented at the hearing.

5. However, I have concerns about Judge Rodger's approach to the burden and standard of proof. Her summary of the three leading cases, Papajorgi, Agho and Rosa is somewhat confused, particularly since in Rosa (at [39]) it is clear that the burden of proof lies on the Respondent throughout. This undermines not only Judge Rodger's self-direction at [10] and [11], but also her comment at [25] that the burden had shifted to the Appellant.

6. In addition, I have concerns that Judge Rodger (like the ECO who refused to issue an EEA family permit) focused on whether the relationship was genuine and not whether the marriage was one of convenience. At the end of [24], Judge Rodger makes her decision on the basis of 'reasonable suspicion of a non-genuine

marriage'. As the Court of Appeal identified in Rosa at [41], this confusion can lead to legal error.

7. *Although not raised in the grounds of application, these problems are so obvious that they cannot be ignored, particularly where the Appellant is without legal representation."*

4. There was no Rule 24 response lodged on behalf of the Respondent.

Hearing

5. At the hearing before me, I heard submissions from Mr Jesurum on behalf of the Appellant who sought, in addition to the jurisprudence cited by Designated Judge McCarthy in the grant of permission to appeal, to also rely on the judgment of the Supreme Court in Sadovska and another v Secretary of State for the Home Department (Scotland) [2017] UKSC 54. He asserted in light of Sadovska and the judgment of Lady Hale with whom the remainder of the court agreed, that it was clear from [28] that the court were endorsing the approach in Papajorgi that the Tribunal has to form its own view of the facts from the evidence presented:-

"One of the most basic rules of litigation is that he who asserts must prove. It was not for Ms Sadovska to establish that the relationship was a genuine and lasting one. It was for the Respondent to establish that it was indeed a marriage of convenience."

The Supreme Court went on to note at [29] that "'marriage of convenience' is a term of art" and at [31] that the First-tier Tribunal had erred in finding that the burden of proof is upon the Appellant. The Court at [24] further had regard to the European Commission and the position set out therein at Recital 28 and in the Handbook dated 26 September 2014. This provides that a marriage of convenience is a marriage contracted for the sole purpose of enjoying the right of free movement and residence under the Directive, that someone would not have otherwise and that sole purpose should be interpreted not literally, but rather as meaning that the objective to obtain the right of entry and residence must be the predominant purpose of the abusive conduct.

6. I gave Ms Ahmad the opportunity to consider the judgment in Sadovska, following which she accepted that the judge had erred materially in law in her application of the burden of proof in this particular appeal.

Decision

7. I accept Ms Ahmad's concession. It is clear that despite making reference in the decision to the judgments of Papajorgi [2012] UKUT 0038 (IAC) at [10] and the judgment of the Court of Appeal in Rosa [2016] EWCA Civ 14 at [11], the judge directed herself at [9] that the onus is on the Appellant to prove that she met the requirements of the EEA Regulations and found at [24]:-

“Whilst I note that the reasons for refusal letter wrongly states that the wedding took place on 05/06/15 and the ECM letter wrongly refers to Pakistan, I am satisfied that there was a sufficient lack of evidence provided by the Appellant to support a suspicion, belief or conclusion on the part of the Respondent that the marriage is one of convenience, such as to give shift the evidential burden to the Appellant to deal with this issue.”

8. I find that the judge was confused about the burden of proof and whether or not this would shift to the Appellant. Mr Jesurum submitted and I accept that the legal burden is upon the Secretary of State to prove that the marriage is one of convenience and the question initially is whether there is a *prima facie* case that the marriage is one of convenience. If that is so, then the burden shifts to the Appellant. In this case, in light of the reasons provided in the refusal of entry clearance by the Entry Clearance Officer, it is clear that no *prima facie* case was disclosed so as to justify the inference taken by the Entry Clearance Officer that the marriage is one of convenience. Whilst there was a lack of evidence in support of the application which might merit refusal of the application, the lack of evidence in itself does not support a consequent implication that the marriage is one of convenience. Consequently I find that the judge further fell into error at [24] in finding, despite errors in the decisions of the ECO and the ECM, that the lack of evidence by the Appellant supported the conclusion that the marriage is one of convenience, a finding which is legally erroneous.

9. It follows that the decision of First-tier Tribunal Judge Rodger cannot stand. It is set aside and the appeal is remitted back to the First-tier Tribunal at Taylor House for a hearing *de novo*. None of the findings of fact shall stand and the appeal shall be listed before a judge other than First-tier Tribunal Judge Rodger.

10. No anonymity direction is made.

Signed Rebecca Chapman

Date: 29 March 2018

Deputy Upper Tribunal Judge Chapman