**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2022-004052
First-tier Tribunal No: EA/00248/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**
**On 28 April 2023**

**Before**

**UPPER TRIBUNAL JUDGE RIMINGTON**
**DEPUTY UPPER TRIBUNAL JUDGE SAFFER**

**Between**

**FOLUSHO DAMILOLA ASHIRU**
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr Osifeso a Legal Representative
For the Respondent: Mr Walker, Senior Home Office Presenting Officer

**Heard at Field House on 22 March 2023**

**DECISION AND REASONS**

1. The Appellant is a citizen of Nigeria. He is aged 34 having been born on 19 January 1989. He appealed against the decision of the Respondent dated 16 December 2021, refusing his EU Residence Card application as the spouse of an EEA citizen.

2. As he had failed to attend interviews to discuss the application on 3 occasions, the Respondent

> "concluded that there are reasonable grounds to suspect that his marriage with the EEA citizen is one of convenience entered into as a means to circumvent the requirements for lawful entry to or stay in the UK".

3. He appeals against the decision of First-tier Tribunal Reed, promulgated on 17 May 2022, dismissing the appeal.

## Permission to appeal

4. Permission was refused by First-tier Tribunal Judge Boyes on 10 June 2022 for the following reasons:

> "3. The appellant maintains that although he elected to have his case heard without an oral hearing, he rescinded that consent by way of letter dated 24th February 2022 which was sent to the POU in Birmingham and to the Court.
>
> 4. The letter contained in the application is signed which, if it is a file copy strikes me as unusual? There is no explanation as to why this is the case. There is no date of posting, no correspondence by e-mail which is the preferred method, no chasing of the court or POU by e-mail evidenced and nothing which supports the contention that this document was both sent and received. It is suggested that this is the actual letter?
>
> 5. As at the date of hearing of the case therefore, there is nothing to indicate that the court or the Judge were aware of the claimed change of mind. On that basis there is no error as the learned Judge was entitled to proceed on the basis of the known wishes of the appellant."

5. Permission was granted by Upper Tribunal Judge Pickup on 12 October 2022 for the following reasons:

> "3. The grounds assert that the EUSS decision is unlawful but the claim is not particularised. The appellant had elected for his appeal to be decided on the papers but he claims that he sought to change to an oral hearing. The grounds exhibit a solicitor's letter of 24.2.22 requesting the appeal to be varied to an oral hearing. That request does not appear to have reached the First-tier Tribunal Judge either before the appeal was decided on 13.4.22 or before it was promulgated on 17.5.22. Whilst the judge of the First-tier Tribunal refusing permission was suspicious as to the circumstances of the 24.2.22 letter. However, if the appellant can demonstrate that the request was made in time, there is an arguable error of law in the Tribunal proceeding on the papers only.
>
> 4. Whilst not raised in the grounds, I also note that the First-tier Tribunal Judge misstated the burden of proof as to the respondent's assertion that the marriage was one of convenience. All these matters can be aired at a hearing in the Upper Tribunal but the appellant is on notice that he will be required to satisfactorily demonstrate that the 24.2.22 letter was indeed sent to the First-tier Tribunal."

## The First-tier Tribunal decision of 13 April 2022

6. Judge Reed made the following observations on the law and findings:

> "20. The burden of proof is on the Appellant to show that the requirements of the rules have been met. The standard of proof is the balance of probabilities.

> 21. The Appellant must show that he is a "family member of a relevant EEA citizen". The definition of a family member includes "spouse". However, the definition of "spouse" does not include a marriage of convenience.
>
> 22. Where the Respondent has provided evidence suggestive that the marriage was one of convenience, the burden of proof is on the Appellant to show that the marriage was not one of convenience.
>
> 23. I am satisfied that the Appellant's failure to respond to the Respondent's three interview requests which were sent to the e-mail address supplied by the Appellant, is prima facie evidence that the marriage was one of convenience.
>
> 24. The burden of proof therefore falls on the Appellant to show that the marriage was not one of convenience.
>
> 25. Given the lack of evidence from the appellant, there being no witness evidence or other documentary evidence, I am not satisfied that the marriage was not one of convenience."

## The Appellant's grounds seeking permission to appeal

7. The grounds asserted that:

> "2. The appellant selected a paper appeal prior to receiving legal advice. He however sought to vary his appeal to an oral one to afford him the opportunity to attend an oral hearing with his spouse, however his variation request was neither acknowledged nor implemented. Please refer to solicitors letter dated 24/02/2022. It is therefore argued that this error of fact is of such severe magnitude to constitute error of law.
>
> 3. The appellant's request for variation to an oral hearing is clearly to afford the respondent (and himself) an opportunity for cross examination to determine the genuineness or otherwise of his marriage. This request is clearly not consistent with the conduct of a party involved in a sham marriage. Accordingly, the conclusion of the honourable IJ in this regard is flawed.
>
> 4. The appellant argued within the grounds of appeal that he neither received the invitation to attend the interview nor the refusal letter until 28 December 2021 as both correspondence were in his junk mail. He was therefore looking forward to his appeal to enable him and his spouse attend.
>
> 5. In conclusion, it is submitted that the decision is unlawful because it deprives the appellant of his right to fair trial …"

## Rule 24 notice

8. There was no rule 24 notice.

## Oral submissions

9. Mr Osifeso submitted that an e-mail was sent to the Upper Tribunal on 22 March 2023, the morning of the hearing before us, saying that there was an entry in the record of the solicitor then instructed on behalf of the Appellant saying a letter was sent by them to the First-tier Tribunal on 24 February 2022 by first class post and that was included in their postal book. No copy of those entries was produced to us. The burden of proof in relation to whether there was a marriage of convenience was on the Respondent at all times. The refusal letter merely states the facts. It did not establish that a marriage of convenience interview was necessary. Accordingly the Respondent had not discharged the burden of proof in establishing that the Appellant was seeking to gain an immigration advantage. The Appellant had been waiting for an oral hearing date and the letter was not sent by recorded or special delivery.

10. Mr Walker submitted there was nothing to show that the letter from 24 February 2022 had been received. No further evidence had been submitted. There was no material error of law.

## Discussion

11. There is no material error of law identified in ground 1 for these reasons.

12. The Respondent is entitled to interview whomsoever they wish who makes an application to her in relation to any matter. The assertion that the refusal letter did not warrant an interview request has no merit as the interview request is based on the information submitted which the Respondent is entitled to test in interview.

13. The Appellant conceded that interview letters were sent to him in the correct manner but had gone into his junk e-mail file. He did not check his junk e-mail file. That is his responsibility.

14. The concerns expressed by First-tier Tribunal Judge Boyes regarding the letter subsequently produced seeking conversion of the hearing to an oral one and the lack of the a request being followed up have not been addressed. The Appellant ignored the standard directions issued by the First-tier Tribunal in appeals that are to be considered on the papers to file evidence upon which he intended to rely.

15. There is no cogent evidence that a letter was sent on 24 February 2022 seeking to convert the appeal from being considered on the papers to being considered at an oral hearing. The e-mail to which reference was made from the then solicitor confirming an entry on their log of a letter having been sent, is insufficient to establish that one was indeed since as it assumes that the log is accurate. We have not had sight of the e-mail and there is no statement from the solicitor to which we have been referred.

16. There is no material error of law identified in ground 2 for these reasons.

17. We note that as explained in *Sadovska and another v Secretary of State for the Home Department [2017] UKSC 54* at [28] that

> "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."

18. However, whilst the Judge initially wrongly identified that there was a burden on the Appellant, we conclude that error was not material because the Judge proceeded to apply the correct burden of proof and made findings available on the evidence at [23] that;

> "… the Appellant's failure to respond to the Respondent's three interview requests which were sent to the e-mail address supplied by the Appellant, is prima facie evidence that the marriage was one of convenience"

And at [25] that;

> "Given the lack of evidence from the appellant, there being no witness evidence or other documentary evidence, I am not satisfied that the marriage was not one of convenience."

19. We agree that the refusal letter states the facts in relation to the lack of attendance at interview. As stated previously, at [13] the Judge's assessment of the marriage interview issue was open to him. In that context, and in the face of a total absence of evidence on the part of the appellant, despite having been served with directions to provide any evidence the appellant wished to adduce whether for a paper determination or oral hearing, it was entirely open to the judge to make the findings he did.

20. Accordingly the Respondent had discharged the burden of proof in establishing that the Appellant was seeking to gain an immigration advantage and the finding that it was indeed a marriage of convenience was open to the Judge.

**Notice of Decision**

21. There was no material error of law in the decision of First-tier Tribunal Judge Reed and the decision shall stand.

*Laurence Saffer*

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 March 2023

**NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

**5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**

**6. The date when the decision is "sent' is that appearing on the covering letter or covering email**.