



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/03177/2014

THE IMMIGRATION ACTS

Heard at Field House, London  
On 12 March 2015

Determination Promulgated  
On 31 March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IATIZAAZ AHSAN WARRICH

Respondent

**Representation:**

For the Appellant: Mr M Shilliday, Home Office Presenting Officer

For the Respondent: Mr E Nicholson, instructed by Veja & Co Solicitors

**DETERMINATION AND REASONS**

1. Whilst this is an appeal by the Secretary of State for the Home Department for convenience I will refer to the parties in the determination as they appeared before the First-tier Tribunal.
2. The appellant, a national of Pakistan, appealed to the First-tier Tribunal against the decision of the Secretary of State of 21 November 2013 to refuse his application for a residence card as confirmation of a right to reside in the UK under the Immigration (European Economic Area) Regulations 2006 (the EEA Regulations) as the spouse of Norah Langan, an Irish national. The respondent interviewed the appellant and his spouse and concluded that the marriage is one of convenience. First-tier Tribunal Judge Hunter allowed the appeal.
3. The issue in this appeal is whether the First-tier Tribunal Judge properly applied the burden of proof in considering whether the marriage is one of convenience.

4. In this appeal the respondent carried out an interview with the appellant and his spouse. The record of interview is contained in the Reasons for Refusal letter. The Judge heard oral evidence from the appellant's wife but not from the appellant. The Judge set out the submissions and said at paragraph 44 *"I then heard from Mr Nicholson [for the appellant] who said that the burden of proving a marriage was one of convenience was on the Respondent."* The Judge said at paragraph 52; *"I accept Mr Nicholson's submission that the burden of proof is on the Respondent to show that a particular marriage is one of convenience."*
5. The respondent contends in the grounds of appeal to the Upper Tribunal that the Judge erred in reversing the burden of proof onto the respondent to show that the marriage is one of convenience.
6. The Tribunal gave guidance on the appropriate burden of proof in the case of IS (marriages of convenience) Serbia [2008] UKAIT 31 where it said;

*"14. As we have said, these three reasons taken together lead us to the view that the burden of proving that a marriage is not one of convenience lies on the appellant. We would, however, also associate ourselves with the wording of the Council Resolution to this extent. Not every applicant needs to prove that his marriage is not one of convenience. The need to do so only arises where there are factors which support suspicions for believing the marriage is one of convenience. Translated into the technical language of the English law of procedure and evidence, that means that there is an evidential burden on the respondent. If there is no evidence that could support a conclusion that the marriage is one of convenience, the appellant does not have to deal with the issue. But once the issue is raised, by evidence capable of pointing to a conclusion that the marriage is one of convenience, it is for the appellant to show that his marriage is not one of convenience."*
7. The Tribunal confirmed this guidance when it considered this matter again in Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC) where the Tribunal summarised its findings in the head note as follows;

*"i) There is no burden at the outset of an application on a claimant to demonstrate that a marriage to an EEA national is not one of convenience.*

*ii) IS (marriages of convenience) Serbia [2008] UKAIT 31 establishes only that there is an evidential burden on the claimant to address evidence justifying reasonable suspicion that the marriage is entered into for the predominant purpose of securing residence rights."*
8. The Tribunal concluded;

*"39. 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?'"*
9. These cases confirm that there is an initial burden on the Secretary of State to produce evidence justifying a reasonable suspicion that the marriage is entered into for the predominant purpose of securing residence rights and the burden then shifts to the

appellant to demonstrate that the marriage is not one of convenience. In light of this guidance I accept that in stating that the burden of proof is on the respondent the First-tier Tribunal Judge has over-simplified the position. The proper application of the burden of proof is that set out above. However the issue is whether that misstatement of the burden of proof is material in light of the Judge's findings overall.

10. Mr Shilliday submitted that the mistake is material as it infected all of the Judge's findings in relation to the marriage. He submitted that the Judge applied the wrong standard as demonstrated by his use of the phrases not 'implausible' [57] and 'perhaps understandable' [59]. I do not accept that the use of these phrases in isolation demonstrate that the Judge applied the wrong standard of proof. The determination read as a whole reveals no error in relation to the standard of proof.
11. Mr Shilliday submitted that the Judge had wrongly failed to weigh against the appellant his decision not to give oral evidence. However the Judge explained at paragraph 55 that he found it plausible that the appellant did not want to be questioned on the issues raised in a witness statement submitted by the Secretary of State on the morning of the hearing in relation to allegations that the appellant was working illegally. I am satisfied that this finding was open to the Judge on the evidence before him and that he considered this explanation in attaching weight to the appellant's written evidence about the relationship.
12. Mr Nicholson submitted that the cases of IS and Papajorgji were decided in the context of EEA Family Permits and that neither refer to the issue of residence cards as in the current appeal. However it is clear that Citizen's Directive, the EEA Regulations and the guidance of the EU Commission (referred to by the Tribunal in IS) deal with a marriage of convenience in terms of the rights of spouses of EEA nationals exercising free movement rights to move and reside freely within member states. I do not accept that the restrictions on parties to a marriage of convenience apply only to the right of entry as suggested by Mr Nicholson.
13. Mr Nicholson relied on the European Casework Instructions which are reproduced in the appellant's Rule 24 response. This guidance states that the burden of proving that a marriage is one of convenience is on the Secretary of State. I accept that this guidance states that the burden is on the Secretary of State whereas, as stated above, European law and guidance and the guidance of the Tribunal is more nuanced than this. The correct approach must be to follow European law and case law rather than the respondent's guidance.
14. Mr Nicholson also submitted that the respondent had not produced any evidence as to the intentions of the parties at the time of the marriage. I agree that the emphasis should be on the intentions of the parties at the time the marriage is contracted. I also agree that in this case the questions reproduced in the Reasons for Refusal letter all relate to current circumstances whereas the couple have been married since 2009. However current circumstances can cast light on a couple's intentions at the time of their marriage. It should be clear that this is how such evidence is being viewed. It is not clear from the Reasons for Refusal letter that this was in the mind of the interviewer or decision maker.

15. Mr Nicholson submitted that it is clear from the determination of the First-tier Tribunal Judge that the evidential burden did not shift in the current case as the Secretary of State did not submit sufficient evidence to discharge the burden upon her. In the alternative he submitted that, if the Secretary of State did discharge the burden, the appellant then discharged the burden on him in light of the oral evidence from the appellant's wife and the other evidence submitted.
16. I accept this latter submission in light of my reading of the determination as a whole. The First-tier Tribunal Judge dealt with all of the submissions made by the presenting officer at the hearing. He accepted that the interview carried out by the respondent demonstrates that there have been some difficulties in the couple's relationship but that it is '*a long way short of demonstrating that there (sic) marriage is one of convenience*' [60]. It is clear from this that the Judge did not accept that the interview in itself demonstrated that the marriage is one of convenience. However the Judge did not stop there but considered all of the evidence before him. He said that he found the evidence of the appellant's wife credible and accepted that she and the appellant lived together in Spain before coming to the UK in 2012 and since their arrival. He accepted that, whilst there may have been periods when the couple are apart, for example when the appellant's wife goes to Ireland, '*their relationship remains a genuine one and is not a marriage of convenience*' [61].
17. In considering the evidence in this way I am satisfied that the Judge took the correct approach, that recommended by the Tribunal in Papajorgji to ask himself whether in light of all the evidence he was satisfied that '*it is more probable than not this is a marriage of convenience*' [39].

Conclusion:

The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

The decision of the First-tier Tribunal shall stand.

Signed

Date: 30 March 2015

A Grimes  
**Deputy Judge of the Upper Tribunal**