



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/02995/2015

THE IMMIGRATION ACTS

Heard at Field House
On 25 January 2018

Decision and Reasons Promulgated
On 14 February 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

NAVALPREET SINGH
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R de Mello (counsel)

For the Respondent: Ms J Isherwood (Home Office Specialist Appeals Team)

DECISION AND REASONS

1. This is the appeal of Navalpreet Singh, a citizen of India born 1 February 1984, against the decision of the First-tier Tribunal of 5 June 2017 dismissing his appeal, itself brought against the refusal of an EEA residence card as the spouse of an EEA national of 13 November 2015.
2. The Appellant entered the UK as a student with leave extended until April 2015, which was curtailed to end on 30 May 2013. In November 2013 he applied for a residence card on the basis of his marriage to a Dutch national, Sakinatou Minoungou, which was refused in February 2014. That refusal was on the grounds that the Sponsor was thought to have married previously, according to information she had given in an application of August 2010, and that she had not shown she was now free to marry again. He made a further application on 22 May 2015 leading to this appeal, again based on his relationship with Ms Minoungou.

3. The present application was refused because the Respondent had suspicions as to the genuineness of the relationship between the Appellant and Ms Minoungou. Her Dutch identity card had been provided in support of an earlier application as a spouse by another third country national and her explanation for the circumstances leading to this was not considered adequate. Furthermore, the information given in the Appellant's application form was not considered consistent with his marriage being genuine: no documents had been provided to indicate that he had been in a relationship with her prior to their marriage, and the evidence of cohabitation so far provided did not show that theirs was a genuine relationship.
4. Before the First-tier Tribunal Ms Minoungou denied any involvement with the earlier application. It had been made by a friend, Fatima, who had abused her friendship and somehow obtained a copy of Ms Minoungou's identity card (she had sometimes stayed at the Sponsor's home, so might have had access to that document), and used that identity to enter into a marriage, that marriage then founding an application to be made as the spouse of an EEA national. Indeed, Ms Minoungou claimed to have been in Ghana at the time of Fatima's application, and had been informed of what had happened by a cousin living in the UK on the telephone; she was surprised as to how documents supposedly showing her working in the UK could have been provided in support of the bogus application.
5. The First-tier Tribunal directed itself that the burden lay upon the Appellant, following *IS Serbia*, albeit that an individual only needed to discharge that burden where the Home Office produced evidence raising relevant suspicions. Having set out the evidence before it, the Tribunal did not accept the explanation for the Sponsor's innocence of the asserted past dishonesty:
 - (a) It was implausible that the police would not have taken her complaint seriously, and her evidence that they had laughed at her plight rather than register a crime was thus not accepted, bearing in mind that she had produced no written police report to evidence her attempts to press the matter with the authorities; furthermore, whilst at one point in her evidence she had claimed that she had not known who might have misused her identity when dealing with the police, on her own account it was clear that she had known that Fatima was likely to have responsible from the time she first became aware of the fraud;
 - (b) She did not report the abuse to the Home Office, and it was not accepted that a solicitor would have advised her to fail to do so: had they done so, it would be reasonable to expect that a complaint would have been made against them once the fallibility of that advice became apparent;
 - (c) There was an inconsistency in her evidence, given that she stated that she had been in Ghana when she received the call from her cousin, but also stated that

she had travelled to Ghana to make her own investigations into the abuse of her identity;

- (d) The Appellant's own evidence as to the abuse of Ms Minoungou's identity was unsatisfactory, because he claimed that he did not know whether she had contacted Fatima: this gap in his knowledge was of concern given he could reasonably have been expected to take this matter very seriously, given its impact on his own ability to obtain residence;
 - (e) As to the evidence of the Appellant and Sponsor regarding their own relationship, there was differing information given as to the date they had met, as to whether the Appellant attended the temple, and as to the precise family relationship between Ms Minoungou and Fatima; furthermore the Appellant had stated Ms Minoungou had no children, when in fact she did.
6. In the light of those findings, the First-tier Tribunal concluded that "Respondent has demonstrated even to the higher end of the balance of probabilities standard that the Appellant's marriage ... is a marriage of convenience".
7. Grounds of appeal argued that
- (a) The burden of proof had been misstated;
 - (b) There was an error of fact made as to the evidence before the First-tier Tribunal: the Appellant had not stated that he did not attend the temple;
 - (c) There were various mistakes made in the record of the evidence as it appeared in the decision: for example, there was some confusion in the way evidence was recorded, leaving it unclear whether answers were given in re-examination rather than in response to a question from the judge; the decision failed to record the evidence that the Sponsor had lacked information to make any enquiries in Ghana sooner than she did, as the 2014 application had only been refused because she was said to have been still married to a person whose identity had not then been disclosed to her; furthermore she had stated that the police would not help her because she held the documents which she said had been misused;
 - (d) Relevant evidence had been overlooked: particularly the evidence regarding Ms Minoungou having married a Ghanaian national in 2010, and vis-à-vis whether their solicitor had failed to advise them of two marriage interviews.
8. The First-tier Tribunal granted permission to appeal on 12 December 2017 on the basis that the misdirection as where the burden of proof lay might have had an impact on the assessment of the evidence.

9. Before me, Mr de Mello submitted that a great volume of documents, including utility bills and tax documents, placed the parties to the marriage at the same address. Given the existence of a marriage certificate attesting to the marital status of an EEA national, as shown by *Rosa*, the burden of proof lay firmly upon the Secretary of State. The error as to burden was exacerbated by the lack of focus on the intention of the parties to marriage when it was contracted. The strong adverse finding that the Sponsor must have taken money in return for her dishonest support of a bogus application was one open to a judge only on the basis of the very clearest evidence.
10. Ms Isherwood acknowledged the burden of proof lay upon the Secretary of State, but argued that the structure of the decision and the detailed reasons in fact showed a model application of the standard of proof overall, notwithstanding the infelicity of the direction early on in the material reasons. In so far as the grounds alleged evidence other than recorded by the First-tier Tribunal was properly before it, no full transcript was provided and so the full scope of the oral evidence could not be properly assessed: it was wrong to try and go beyond that recorded by the First-tier Tribunal absent a fuller record. There was no duty on the Secretary of State to provide a copy of the Appellant's application given the contents had never been denied. The Judge's approach was unremarkable given the detailed reasons they had provided, and it was telling that no complaint had been raised against the former representatives. The documents said to have been overlooked could not have swayed a reasonable decision maker: they were sometimes repetitive and indeed some were untranslated.
11. In his reply, Mr de Mello maintained that the documents before the First-tier Tribunal, such as those relating to the proxy marriage which the earlier application had attributed to her, required individual treatment before her marriage was rejected as a sham.

Findings and reasons

12. The essential issue in this appeal is whether the First-tier Tribunal was entitled to find that the Secretary of State had discharged the burden of proof upon her to establish that the relationship relied upon was a marriage of convenience.
13. *Papajorgji* [2012] UKUT 00038 (IAC) explains that at the outset of an application, there is no burden on a claimant to demonstrate that a marriage to an EEA national is not one of convenience: there was merely 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. At [27] *Papajorgji* sets out that "there is no burden on the claimant in an application for a family permit to establish that she was not party to a marriage of convenience unless the circumstances known to the decision maker give reasonable ground for suspecting that this was the case."

14. In *Rosa* [2016] EWCA Civ 14 the Court of Appeal examined the question of the burden of proof in EEA marriage of convenience cases, upholding the reasoning in *Papajorgi* and finding that
 - (a) The legal burden lies on the Secretary of State to prove that an otherwise valid marriage is a marriage of convenience [24] – whilst the legal burden remains on the national authorities throughout proceedings, the evidential burden may nevertheless shift [29];
 - (b) It is for the national court to verify the existence of any abuse relied upon by the authorities of a Member State, evidence of which must be adduced in accordance with rules of national law [26].
15. Mr de Mello also reminded me of the decision of the Supreme Court in *Sadovska* [2017] UKSC 54, though it is difficult to see that it adds anything to *Rosa* in this particular context.
16. The Appellant’s strongest point is the issue of burden of proof. It is clear that the First-tier Tribunal misdirected itself as to where the burden lay at the outset of its decision. It relied on the reasoning of the Asylum and Immigration Tribunal in *IS Serbia* [2008] UKAIT 00031 that it was for an appellant to prove that his marriage was not a marriage of convenience. That decision was clearly disapproved in *Rosa* §29, its conclusion being treated as “seriously confused”; the ruling in *Papajorgi* was accepted as a more accurate statement of the legal principles.
17. However, I do not consider this was a *material* error in this case. Firstly, notwithstanding the misguided reference to *IS Serbia*, the Tribunal below was clearly aware both that there was an evidential burden on the Secretary of State to raise the question of marriage of convenience, and also that the ultimate legal burden was upon her: that is clear from the decision at §27 and §43. In the numerous paragraphs lying between those two passages, detailed reasons were given for finding that the explanations put forward by the Appellant and Sponsor were inadequate to answer the case as put by the Home Office. In those circumstances, it is unsurprising that the First-tier Tribunal found that the ultimate legal burden upon the Secretary of State had been discharged.
18. Secondly, it seems to me that the detailed reasons given by the First-tier Tribunal are legally adequate, and that it is quite clear the question of burden of proof was not determinative of the appeal in any event. This was not a finely-balanced case where the judge was left in doubt, such that the question on who the burden ultimately lay might resolve the matter in one party’s favour. The Tribunal below forcefully and thoroughly rejected every aspect of the evidence relied upon by the Appellant and Sponsor.
19. Mr de Mello’s eloquent submissions did not dissuade me from this conclusion. He argued that the misdirection on the burden of proof took on greater force once it was appreciated that the First-tier Tribunal gave excessive attention to the

Sponsor's lack of innocence regarding an attempt to mislead the Secretary of State into granting a residence card to a person who was not a spouse. Accordingly this finding on involvement with historic deception had unduly impacted on the assessment of the true intention of the parties to the marriage.

20. Of course, it must be accepted that the mere fact that an EEA national may acted dishonestly cannot lead to a conclusion that any subsequent relationship they claim to have formed can be rejected out of hand. But this is not what happened here. There are several paragraphs of detailed reasoning which assess the evidence of the Appellant and Sponsor in the context of their claimed relationship. There is no indication that the First-tier Tribunal was unduly influenced, when assessing the present relationship, by its prior finding as to the EEA Sponsor's honesty.
21. However, once the First-tier Tribunal had found that the Sponsor's claim of innocence vis-à-vis the attempted deception was not made out, it was to my mind entitled to treat her further evidence with a degree of caution, so long as it bore in mind that Secretary of State bore both the evidential and ultimate burden of proof. As already indicated, it was perfectly well aware of where the burden lay..
22. The grounds assaulting the adequacy of the findings essentially proceed by setting out what is said to be a verbatim note of extracts of the proceedings below, though without providing a full transcript which the Secretary of State might have been invited to agree as accurate. They then proceed to criticise the First-tier Tribunal for failing to adequately summarise the oral evidence. However, tellingly, those submissions barely touch upon the material reasons that appear in the latter part of the decision appealed: they mainly relate to the recitation of evidence before it comes to its conclusions.
23. Finally, I do not consider that the First-tier Tribunal overlooked any documents that could have had a material outcome to its ultimate conclusions. It is unfortunate that it does not refer to the Appellant's bundle of supporting evidence. But when one examines the copy documents therein, they amount to no more than utility bills and similar documents that are said to place the Appellant and Sponsor at the same address, and photographs which are suggested as showing real family life between them. But it is very hard to see how material of this nature could outweigh the very real concerns set out above arising from the history of the case as a whole and the inadequacies of the explanations provided to the judge. It is perfectly possible for people to cohabit without being man and wife, and the corroborative value of photographs almost wholly depends on the broader context of the evidence. Plainly scenes ostensibly showing mutual devotion or broader family life might very well be posed.
24. Mr de Mello sought to vary the grounds of appeal to raise two further points. Firstly he submitted that there was no evidence before the First-tier Tribunal to show that the Appellant had indeed stated in his application that his wife had children. However, this arose from a representation made in the Appellant's own application that he did not dispute as accurate at the hearing below.

25. Secondly, it was said that the marriage certificate that was produced as part of the bogus application in which the Sponsor's identity document had been misused should have been before the First-tier Tribunal for it to deliberate upon. However, I do not see that this could have seriously borne upon the First-tier Tribunal's conclusions: its reasoning was quite independent of any concerns as to the circumstances in which that document might have been produced.
26. Furthermore, both these points were made without any notice whatsoever to the other side, and, involving as they did reference to documents not available at the hearing, would have seriously disadvantaged the Secretary of State without an adjournment being offered. No application for an adjournment was made: quite properly, given that any further delay in the appeal's resolution would not be merited. I accordingly refused permission for him to do so.
27. I find that there is no error of law in the decision of the First-tier Tribunal.

Decision:

The appeal is dismissed.

Signed:

Date: 25 January 2018

A handwritten signature in black ink, appearing to read 'M.A.S. Symes', with a long, sweeping underline that extends to the left and then curves back under the signature.

Deputy Upper Tribunal Judge Symes