Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24759/2014

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly Decision & Reasons Promulgated
On the 18th March 2016 On the 6th April 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MR ZESHAN MAHMOOD
(Anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Barton (counsel)
For the Respondent: Mr Harris (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Martins promulgated on the 8th June 2015 in which he dismissed the Appellant's appeal against the decision of the Secretary of State to refuse to issue with him with a residence card as the spouse of an EEA national

exercising Treaty Rights, pursuant to the Immigration (EEA) Regulations 2006.

2. Permission to appeal against that decision has been granted by Deputy Upper Tribunal Judge Archer on 12 October 2015, on the grounds that the Judge arguably applied the wrong burden of proof. However, he granted permission to appeal on all of the grounds set out within the grounds of appeal.

3. Within the grounds of appeal it is argued that the First-tier Tribunal Judge erred in respect of the burden and standard of proof and that at paragraph [69] the Judge stated that "In accordance with the case of IS (marriages of convenience) Serbia [2008] UKAIT 00031, the burden of proving that a marriage is not a “marriage of convenience" for the purposes of EEA Regulations rests on the Appellant; but he is not required to discharge it in the absence of evidence of matters supporting the submission that the marriage is one of convenience, in other words there is evidential burden on the Respondent." It is argued the Judge failed to take account of the Upper Tribunal case of Papajorgji *(*EEA Spouse – marriage of convenience*)* Greece [2012] UKUT 00038 (IAC).

4. Next argued within the grounds of appeal it is argued that the Judge made procedural errors amounting to errors of law, in that the Judge had erred in taking account of all evidence given by the sponsor including the evidence given by her at the first hearing when that hearing had been adjourned by the Judge because of problems with interpretation and it is argued that the Judge should have disregarded evidence purportedly given by sponsor on that occasion. It is further argued that the transcript of the interview was not produced by the Respondent until the resumed appeal hearing and it is argued that the Judge erred in admitting this document halfway through the appeal and after the Appellant given evidence. Within the third ground of appeal it is argued that it was not open to the First-tier Judge to find that the sponsor was not exercising Treaty Rights in absence of any evidence to show that the payslips and P60 tax form produced by her were forgeries. Finally it is argued that the interview which consisted of 1364 questions, when no interpreter been

provided and in circumstances where it was not signed neither by the Appellant or the sponsor, nor by the officers who carried out the interview, should not have been given any weight.

5. Within the Rule 24 reply on behalf the Respondent it is argued that the Judge found discrepancies with the Appellant's evidence regarding the tenancy agreement, the transport arrangements for the registry office and in respect monies in the joint bank account and found discrepancies the documents regarding the sponsor's employment. It is argued that the Judge made findings which were open to him and had considered all of the evidence and that although he is not specifically referred to the case of Papajorgji he had considered the principles in that case. It is argued that the Judge directed himself appropriately.

6. At the Upper Tribunal appeal hearing, Mr Harris, quite properly, on behalf the Respondent made several concessions. He agreed that in the light of the latest Court of Appeal case of Agho v Secretary Of State for the Home Department [2015] EWCA Civ 1198, it was clear that the First-tier Tribunal Judge had got the burden of proof wrong at paragraph [69] of his decision. He further agreed that was wholly unsafe for the Judge to have relied upon the evidence of the sponsor given on the first appeal hearing in circumstances where that hearing had to be abandoned as a result of a lack of understanding and problems with interpretation between the sponsor and the interpreter. He agreed that these amounted to material errors of law.

7. Ms Barton further argued that the Judge's findings in respect of the payslips and tax forms were also unsafe, as these were tainted by the same errors. Both advocates agreed that the case would need rehearing before the First-tier Tribunal, given the errors contained within the decision of First-tier Tribunal Judge Martins.

My findings on error of law and materiality

8. As had been properly conceded on behalf the Respondent by Mr Harris, the Court of Appeal in the recent case of Agho v Secretary of State for the

Home Department [2015] EWCA Civ 1198 in which the Court of Appeal gave clear guidance as to the burden and standard proof in marriage of convenience cases, having considered the original decision of IS (marriage of convenience) Serbia [2008) UKAIT 31 and the subsequent case of Papajorgji *(*EEA Spouse – marriage of convenience*)* Greece [2012] UKUT 00038 (IAC). The Court of Appeal at paragraph 13 stated that :

"13. What it comes down to is that as a matter of principle the spouse establishes a prima face the case that he or she is a family member of an EEA national by providing the marriage certificate and sponsor's passport; but the legal burden is on the Secretary of State to show that any marriage thus proved is a marriage of convenience; and burden is not discharged simply by showing 'reasonable suspicion'. Of course in the usual way the evidential burden may shift to the applicant by proof of facts which justify the inference that the marriage is not genuine, and the facts giving rise to the inference may include a failure to answer a request for documentary proof of the genuineness of the marriage where grounds for suspicion have been raised. Although, as I say, the point was not argued before us, that approach seems to me to be correct – as does the UT's statement that the standard of proof must be the civil standard, as explained by the House of Lords in *Re B (Children)* [2008] UKHL 35, [2009] 1 AC 11." The Court of Appeal referred specifically within paragraph 14 to the conclusion within Papajorgji that "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 ?'" The Court of Appeal stated that consistent that such formulation clearly places the burden of proof on the Secretary of State or ECO.

9. In light of the consideration of this issue both by the Upper Tribunal in Papajorgji and the subsequent consideration of the burden and standard proof by the Court of Appeal in Agho, I entirely agree with the concession made by Mr Harris that First-tier Tribunal Judge Martins erred in law at [59] when finding that "In accordance with the case of IS (marriages of

convenience) Serbia [2008] UKAIT 00031, the burden of proving that a marriage is not a “marriage of convenience" for the purposes of EEA Regulations rests on the Appellant; but he is not required to discharge it in the absence of evidence of matters supporting the submission that the marriage is one of convenience, in other words there is evidential burden on the Respondent."

10. The Court of Appeal has made it clear that in fact the legal burden rests not on the Appellant but on the Respondent, and that although the evidential burden may shift to the Appellant, the legal burden remains on the Respondent throughout. First-tier Tribunal Judge Martins having got the burden of proof wrong, this does amount to a material error of law.

11. I further completely agree with the concession made by Mr Harris on behalf the Respondent that it was wholly unsafe the First-tier Tribunal Judge to rely upon any of the evidence given by the sponsor on the first hearing date on the 10th February 2015, in circumstances where the interpreter provided was a Lithuanian as opposed to Latvian speaker, and hence difficulties in understanding as described by the Judge at [13] and [46] materialised, even though they tried to give evidence in Russian, the Judge noting that this was this "was not satisfactory, the sponsor could not express that herself properly". In such circumstances when the hearing resumed on the 17th March 2015, the sponsor's evidence should have been given again from the start, in order to ensure that her evidence was an accurate reflection of what she intended to say, rather than the Judge resuming from where the evidence had left off the previous occasion. This clearly amounts to a procedural error which does amount to a material error of law. This clearly would have affected the Judge’s assessment as to the Appellant’s and her sponsor’s credibility and further affected his assessment as to the sponsors credibility in respect of her employment and his consideration of the documents produced in respect thereof.

12. It was argued by Ms Mason that the Judge was wrong to admit into evidence the interview record which was only produced at the resumed hearing. I do not consider that it was inadmissible as evidence, but clearly the alleged difficulties with interpretation at the interview, and the fact

that it had not been signed were matters which were relevant to the weight to be attached to the interview.

13. I find that the decision of First-tier Tribunal Judge Martins does contain material errors of law and is set aside. The matter is remitted back to the First-tier Tribunal for a hearing de novo before any First-tier Tribunal Judge other than First-tier Tribunal Judge Martins.

Notice of Decision

The decision of First-tier Tribunal Judge Martins does contain material errors of law and is set aside;

The matter is remitted back to the First-tier Tribunal for rehearing *de novo*, in front of any First-tier Tribunal Judge other than First-tier Tribunal Judge Martins.

Signed

R McGinty

Deputy Upper Tribunal Judge McGinty Dated 18th March 2016