Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/16879/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 June 2017	**On 21 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

[B S]
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H Kannangara, Counsel
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION ON ERROR OF LAW

1. The appellant has been given permission to appeal the decision of First-tier Tribunal Judge Devittie in which he dismissed the appellant's appeal against the respondent's decision of 17 April 2015 to refuse to issue him a residence card as the spouse of an EEA national exercising treaty rights in the UK.

2. The appellant is a national of Sri Lanka born on [ ] 1986. He was last admitted to the UK on 2 October 2010. He said at paragraphs 15 and 16 of his witness statement, he came to the United Kingdom as a student to study Information Technology. He did not pass the final examination and

therefore did not finish his course. He then joined another college to study 3D Animation and Media which included photography as part of the course. He completed this course. The college lost its licence in June 2012 and he was sent a 60 days' curtailment letter by the respondent. He applied as a student of Khalsa College to renew his Tier 4 student visa. He submitted his application through Khalsa College around August 2012. As Khalsa College was not a highly trusted sponsor, he was not allowed to start the course until he received his student leave. Since his previous college (Harrow International) lost its licence, he was not attending any college. He did not hear anything from the Home Office and finally they refused his application around February 2013. He appealed against that decision and the appeal was allowed in November 2013.

3. In April 2014 the respondent granted him three months' leave to remain valid until 29 July 2014. He met his wife for the first time in November 2012 and throughout their relationship he was not attending any college. They began to cohabit in October 2013. They attempted to marry on 25 June 2014 but on the day, an official from the Home Office took them away for questioning. They were able to marry at the Islington registry on 16 July 2014. On 28 July 2014 before the expiry of his leave to remain, he made he made the application that forms the subject of this appeal.

4. Mr Tufan submitted that it was immaterial that the appellant made his application at a time when he had leave to remain. This is because an application for a residence card under the EEA Regulations can be made at any time without the applicant being here lawfully at the time of the application.

5. The main issue on which the appellant was granted permission to appeal the judge's decision was that the judge arguably failed to set out in fuller detail the question of the switching of the burden of proof. Mr Tufan relied on the Court of Appeal's decision in **Rosa v SSHD [2016] EWCA Civ 14** where it was held at paragraph 27 as follows:

> "… *When translated into the position before the tribunal, that is tantamount to saying that the legal burden of proof in relation to marriage of convenience lies on the Secretary of State but that if the Secretary of State adduces evidence capable of pointing to the conclusion that the marriage is one of convenience, the evidential burden shifts to the applicant*."

6. At paragraph 29 the Court of Appeal held:

> "… *The result that … the tribunal must have intended is achieved if the legal burden of proof lies on the Secretary of State throughout but the evidential burden can shift, as explained in Papajorgji … that is the correct analysis*."

7. In the respondent's Rule 24 reply, the respondent accepted that the judge may not have strictly followed the process set out in **Papajorgji** but argued that in the absence of the EEA spouse or any real evidence from her there was in reality nothing to address the concerns of the Secretary of State, there no material error on the part of the judge.

8. I disagree. The appellant submitted a bundle of 189 pages, of evidence from family and friends, photographs of the history of the relationship between him and his EEA spouse and evidence of their cohabitation at various addresses. There had been a visit by Immigration Officers to the address where the appellant and the sponsor were staying and the Immigration Officers found them at that address. I find that there was no mention of this by the respondent in her refusal letter and I also find that the judge failed to take this evidence into account.

9. The judge said he was not drawing any adverse inference from the fact that the appellant's partner did not attend the hearing, yet he failed to consider that the partner had submitted a joint statement with the appellant. I find that whilst the judge may have a point in asserting that the thousand or so questions put to the appellant and the sponsor by the Home Office interviewing officer may have been questions of clarifications or elaborations, I find that he failed to adequately consider the questions which both the appellant and the sponsor had answered correctly.

10. I find that at page 5 of the determination the judge repeated the reasons given by the respondent which the judge had already recorded at paragraph 3 as his reasons for finding that the sponsor had a very superficial knowledge of the appellant's academic career. In the absence of his consideration of the other evidence submitted by the appellant, it cannot be said with some certainty that the judge considered whether the evidential burden had shifted to the appellant and if it had, whether the appellant had satisfied the evidential burden upon him. Accordingly, I find that the judge failed to follow the process set out in **Papajorgji**.

11. In the light of the above, I find that the judge's decision disclosed a material error of law such that his decision cannot stand. I set it aside in order for it to be re-made.

Notice of Decision

12. The appellant's appeal is remitted to be heard in Taylor House by a judge other than FtTJ Devittie.

Directions

1. Time estimate – 2 hours.

2. The appellant and the EEA spouse should submit a supplementary bundle dealing with all the issues that are to be relied on.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 20 June2017

Deputy Upper Tribunal Judge Eshun