Upper Tribunal
(Immigration and Asylum Chamber)Appeal Number OA/17009/2013

THE IMMIGRATION ACTS

Heard at Field House | **Decision and Reasons promulgated**
On 9 December 2014 | **On 10 December 2014**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Entry Clearance Officer, Tirana
Appellant

and

Pranvera Kadriaj
(No anonymity order made)
Respondent

Representation
For the Appellant: Ms. J. Isherwood, Home Office Presenting Officer.
For the Respondent: Mr. P. Ward of James & Co.

DECISION AND REASONS

1. This is an appeal against the decisions of First-tier Tribunal Judge Oliver promulgated on 23 September 2014, allowing Ms Kadriaj's appeal against the decision of an Entry Clearance Officer ('ECO') dated 18 September 2013 to refuse entry clearance as a partner.

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2. Although before me the ECO is the appellant and Ms Kadriaj is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Ms Kadriaj as the Appellant and the ECO as the Respondent.

Background

3. The Appellant is a national of Albania born on 29 March 1992. On 29 July 2013 she applied for entry clearance as the partner of her husband, Shkelquim Kadriaj ('the sponsor'), who holds dual British and Albanian nationality.

4. The Respondent refused the application for reasons set out in a Notice of Immigration Decision dated 18 September 2013 with particular reference to paragraphs E-ECP.2.6 and 2.10 of Appendix FM of the Immigration Rules. In addition to the references to the particular requirements of the Immigration Rules – that the relationship be genuine and subsisting and that the parties intend to live together permanently in the UK – the Notice of Immigration Decision also contained the following passage "*… I am not satisfied this is not a marriage of convenience in order to facilitate your entry to the UK*".

5. The matters that informed the Respondent's decision are essentially twofold: photographs submitted with the application were not dated and the decision-maker was unable to ascertain when they were taken; telephone records showing calls made from the sponsor's telephone to the Appellant's telephone "*do not confirm who was contacted or why*".

6. I pause to note that the reasons expressed in the Notice of Immigration Decision are, in my judgement, not substantial.

7. The Appellant appealed to the IAC. The First-tier Tribunal Judge allowed the appeal under the Immigration Rules for reasons set out in his determination.

8. The Respondent sought permission to appeal to the Upper Tribunal which was granted by Upper Tribunal Judge Deans on 7 November 2014.

9. The Appellant has lodged a Rule 24 response, albeit that it was submitted as late as the morning of the appeal hearing.

Consideration

10. The decision of the First-tier Tribunal Judge contains the following passage at paragraph 8:

> *"The onus is on the appellant in immigration appeals to prove his or her case on the balance of probabilities, but that burden is to show that he or she meets the requirements of the rule, not to disprove a negative raised by the respondent. Where the respondent alleges that the marriage is one of convenience, which effectively is her position, the onus is on her to establish it (**Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 38**)."*

11. The Respondent's challenge as set out in the grounds in support of the application for permission to appeal identify by way of background, that the Appellant's application was refused because the Respondent was not satisfied that the sponsor and the Appellant's marriage was genuine and subsisting (grounds at paragraph 1). It is then observed, following reference to **Papajorgji**, that this was not a marriage involving an EEA national (paragraph 2), and it is emphasised that "*the onus is on the appellant to demonstrate that the marriage is genuine and subsisting*". Although in my judgement not clearly articulated in the grounds, the essential challenge – as indeed was recognised by Judge Deans in granting permission to appeal – was that the First-tier Tribunal Judge had misdirected himself as to the burden of proof.

12. I reject that challenge.

13. As is observed in the Rule 24 response, it was the Respondent that first introduced the concept of 'marriage of convenience' in the context of the instant application and appeal. In such circumstances the First-tier Tribunal Judge is not to be criticised for also making reference to this concept thus raised. The question really is, in so doing, did the Judge allow himself to be distracted as to where the burden of proof lay?

14. Although in an EEA a case where the Respondent alleges marriage of convenience the burden may be upon the Respondent, it is, in my judgement, absolutely clear that the First-tier Tribunal Judge had well in mind that it was for the Appellant to demonstrate that her marriage was genuine and subsisting. The Judge says so in terms in the opening stanza of the first sentence of the paragraph 8 (quoted above). Although the Judge then goes on to make comment and observation in respect of the Respondent's allegation that this was a marriage of convenience, he thereafter states "*I find that the marriage is subsisting*" and does so pursuant to a self-direction regarding relevant case law - **GA Ghana*** and **Goudy**. It is also to be noted that the finding that the marriage is subsisting follows immediately from the Judge's expression of his finding that the

sponsor was a reliable witness. Contextually it is clear that the Judge is expressing satisfaction as to the evidence advanced by and on behalf of the Appellant – which is demonstrative of his recognition that the burden of proof was on the Appellant.

15. The Respondent has also submitted that the Judge failed to give adequate reasons for his findings that the sponsor was a reliable witness and that the marriage was subsisting.

16. I pause to note that the conclusion that the marriage was subsisting follows on naturally from the conclusion that the sponsor was a reliable witness, and accordingly the challenge really is focused upon the Judge's acceptance of the supporting evidence provided by the Appellant by way of documentary evidence and the oral testimony of the sponsor.

17. I am prepared to accept that the Judge's reasoning is brief. However, this must be seen in the context of a Respondent's decision where the only matters of challenge to the Appellant's application were an absence of information: there was nothing concrete, for example in the nature of discrepancy or false documentation, that was suggestive of a lack of candour on the part of either the Appellant or the sponsor. The Judge identifies at paragraphs 5 and 6 particular aspects of the evidence before him that both addressed the concerns in the Notice of Immigration Decision, and otherwise was demonstrative of a genuine relationship. The Judge stated in terms that he rejected the notion that the Appellant and sponsor had not shown sufficient contact. Having done so, and having thereby essentially rejected the Respondent's reasoning in the Notice of Immigration Decision, there was no outstanding issue that undermined the Appellant's case.

18. In all such circumstances, in my judgement, the reasons advanced by the First-tier Tribunal Judge whilst brief were adequate in the context of this particular case.

19. I detect no error of law on the part of the First-tier Tribunal Judge, and accordingly his decision stands.

Notice of Decision

20. The decision of the First-tier Tribunal Judge contained no error of law and stands.

21. I dismiss the ECO's appeal against the decision of the First-tier Tribunal.

Deputy Judge of the Upper Tribunal I. A. Lewis 10 December 2014