Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32105/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 July 2017	**On 16 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MRS CONEY ACOBA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Krushner of Counsel
For the Respondent: Mr C Avery, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a Philippine national born on 21 March 1986. She entered the UK as a Tier 4 (General) Student with a visa valid until 11 May 2011 on 20 September 2009.

That visa was subject to two subsequent extension applications which were both rejected. On 5 January 2012 further leave to remain was refused. Thereafter, presumably, the appellant remained here illegally. However, in January 2015 she became engaged to Jose Javier Marti Lorite, the sponsor, a Spanish national whom she married on 21 February 2015. Consequently, on her marriage the appellant applied for a residence card on 21 February 2015. In her application, the appellant supplied an address ([ ] Seedly (sic) Park Road, Salford) but correspondence to that address was returned marked "undelivered". On 20 April 2015, her EEA sponsor advised the respondent that he believed the appellant had only married him to get a residence card. He confirmed this in writing on 21 April 2015. This led the Home Office to conclude that the marriage to the appellant, who had failed to provide the respondent with a valid postal address, was "one of convenience". Nevertheless, the appellant sent a letter under the Pre-action Protocol for Judicial Review Claims on 8 September 2015 challenging the respondent's delay in dealing with the application for a residence card. By this point the appellant confirmed her address. However, the respondent refused the application for a residence card.

2. The appellant appealed the refusal to grant a residence card by a notice of appeal received on 29 September 2015. The appeal was heard by First-tier Tribunal Judge I. Ross (the Immigration Judge) who subsequently announced his decision to dismiss the appellant's appeal against the respondent's refusal of a residence card on 1 December 2016.

3. On 8 December 2016, the appellant sought to appeal to the Upper Tribunal from the decision of the First-tier Tribunal (FtT). The grounds state that the Immigration Judge had followed the "wrong legal test", pointing out that the cases referred to of **Papajorgji** and **IS (Serbia)** had been overruled by a decision of the Court of Appeal in **Agho [2015] EWCA Civ 1198** and **Rosa [2016] EWCA Civ 14**. It was not correct for there to be merely reasonable suspicion as to the authenticity of the appellant's marriage to the sponsor. The respondent bore the "full burden of showing a sham marriage to the civil standard (higher than a 'reasonable suspicion')". The appellant emphasised in his grounds that the Immigration Judge had put the burden on the appellant, rather than the other way around. Additionally, the Immigration Judge made a serious error where he stated that there was no "independent" evidence of cohabitation. There was "material evidence" which he had failed to consider. Thirdly, the Immigration Judge made adverse credibility findings that the appellant and her husband were only together for five months before marrying and only a month afterwards they split. The length of the relationship can "never" by itself be a ground for adverse findings. If the judge wishes to make an adverse finding he needs to explain why a short relationship is suspicious. The explanation for the early breakup of this relationship related to alleged domestic violence and the Immigration Judge should have accepted that explanation. Finally, the Immigration Judge was criticised for not availing the appellant of a sufficient opportunity to explain the appellant's theory that the letter written by the sponsor in April 2015 was written out of spite. The Immigration Judge should not have denied the appellant the opportunity to explain her theory. This was a procedural error which rendered the

proceedings unfair. Finally, the Immigration Judge failed to make findings on the version of the P60 and pay slips the sponsor had produced and the fact that the sponsor had written a letter to the respondent after his letter to the Home Office. This would have contradicted the sponsor's adverse comments to the respondent and it might have led the Immigration Judge to give less weight to those comments.

The Upper Tribunal Proceedings

4. Judge of the First-tier Tribunal Ransley gave permission to appeal the decision of the FtT on 7 June 2017 because he found that all grounds were at least arguable. Standard directions were sent out notifying the parties if further evidence needed to be admitted by the Upper Tribunal an application had to be made under Rule 15(2A) indicating the nature of that evidence and explaining why it was desired to be submitted with an explanation as to why it had not been admitted before the FtT.

5. At the hearing of the appeal Mr Krushner said the Immigration Judge had misinterpreted the **Papajorgji** case. The Immigration Judge had erred in appearing to require the appellant to prove anything. The burden rested on the Secretary of State. Additionally, the judge was wrong to find no evidence of cohabitation, there were bank statements to show the couple lived at the same address. These provided independent evidence to back up the appellant's case. Although the couple had spilt soon after their marriage, this did not harm the appellant's credibility given the explanation she provided. There were wedding photographs and other documents to corroborate the marriage. The Immigration Judge had ignored material evidence which he should have considered. Furthermore, refused to hear evidence from the appellant which would have provided her explanation for the sponsor's letter to the respondent.

6. By way of reply, Mr Avery pointed out that the Immigration Judge had applied the correct burden and standard of proof, referring me to paragraph 9 of the decision. He said there were several serious credibility issues about this marriage, including its shortness. The appellant had a number of opportunities to produce corroborating evidence, and although this was not a strict requirement, such evidence might have gone some way to establishing that the relationship was not one of convenience. I was then referred to the Court of Session case of **XA [2016] CSIH 51** and to paragraph 20 thereof. A judge deciding a case such as this one had to decide whether it is "more probable than not that the marriage is one of convenience 'in the light of the totality of the information', the court had". It was submitted that very little evidence was produced to support the appellant's case and the refusal letter was relied on in full. Evidence in the form of bank statements the limited number of bank statements available which showed the appellant and the sponsor living at the same address was not pertinent. When fully considered, it would not have made any difference to the outcome. Mr Avery therefore sought to uphold the decision.

7. Mr Krushner replied to the effect that even if the evidence which the judge ignored (i.e. the bank statements showing the appellant and the sponsor were living at the

same address) was not crucial, it should have been considered by the judge and the fact that it was not considered meant the judge's overall conclusion was undermined. That evidence may have been material. There were also wedding photographs which the judge appears to have taken no account of. The appellant ought to have been allowed to give evidence as to the explanation her husband had supplied to her (i.e. hearsay evidence) as to why he had written to the Home Office in the terms he had. Towards the conclusion of Mr Krushner's submissions he introduced some new evidence. He accepted this has not been adduced in accordance with directions. Mr Avery, fairly, took no objection to it. It consists of a new witness statement from a Mr Bezon. I suggested that it would be helpful to hear the appellant's explanation of the sponsor's letter to the respondent as I would then be able to form a view as to the merits of the appellant's submission that the judge had failed to consider material evidence. That may well amount to a material error of law. Neither party objected to this course.

8. The appellant was then asked to adopt both her witness statements. She was also asked some supplementary questions, the answers to which I noted in the Tribunal file. The appellant said that she and the sponsor were hoping to form a new life in the UK but the marriage broke down quickly. One of the causes of the breakdown was that the sponsor's insistence that the couple go to live in Manchester. In addition, the sponsor had a drinking habit and took cannabis. He would drink between seven and ten pints at a time. She said that following the letter to the respondent she had met up with the sponsor. He said how sorry he was to have provided information to the Home Office. The appellant said that she no longer loved her husband. She believed at the time he wrote the letter he did it out of anger and frustration of their relationship breaking up to "get back at her".

9. Mr Avery briefly cross-examined the appellant. She said in response to his questions that she came to the UK initially for study but the course had closed. Her parents had sponsored her to do that course. She was asked how she was financing herself at the time of the date of the hearing. The appellant said that she was working twenty hours per week. The appellant was asked why she had not left the UK when she concluded her studies and she said that she wanted to stay in the UK. The appellant was asked why she had not wanted to return home and continue in her studies there. She said that she would earn more money in the UK, she wanted to stay here and although she had initially wanted to go back she realised that this was economically contrary to her interests.

10. There was no re-examination.

11. Mr Avery submitted that the appellant's motivation in applying for a residence permit was a desire to stay in the UK and not to form or continue a relationship with an EEA national. This had always been here intention. It appears the appellant had entered a sham marriage solely for facilitating her immigration into the UK.

12. Mr Krushner submitted that the appellant had supplied all the evidence that she could reasonably have been expected to provide. Although this was limited, given the shortness of the relationship this was unsurprising. I was asked to consider photographs, bank statements and other documents not considered by the Immigration Judge and find that they may have made a material difference to the outcome of the appeal to the FTT. The appellant had demonstrated that she has entered a genuine relationship but it had quickly "gone wrong" and this was not a sham. The legal burden had not been discharged by the respondent. It was not enough to have mere suspicion.

13. At the end of the hearing I reserved my decision which I will give after the following discussion.

Discussion

14. The legal principles are set out in the Scottish case of **Sadavska (also known as XA) [2016] CSIH 51** where the Lord President gave the opinion that following **Papajorgji [2012] UKUT 38** the question before a Tribunal would be: whether it is more probable than not that the marriage is one of convenience "in the light of the totality of the information"? As Mr Krushner pointed out, the burden rests on the respondent. The standard of proof is that of a balance of probabilities. Therefore, it was wrong for the Immigration Judge in the final sentence of paragraph 9 to suggest that there is an evidential burden on an appellant to address the evidence justifying the reasonable suspicion that the marriage has been entered into for the predominant purpose of securing residence rights. As Mr Krushner explained, the law has moved on since **Papajorgji.** In particular, the law is correctly summarised in his grounds of appeal at paragraph 1. I refer to the cases of **Agho [2015] EWCA Civ 1198** and **Rosa [2016] EWCA Civ 14** also referred to there.

15. The first issue therefore is whether the omission to refer to those cases and to set out the burden and standard of proof in the manner described by the Lord President amounts to a material error of law?

16. If one removes the last sentence of paragraph 9 of the decision, the Immigration Judge's description of the burden and standard of proof is correct. I am satisfied that he had in mind the need for the respondent to bear the burden of showing that the marriage was one of convenience in the light of all the circumstances of the case.

17. The second identified error on which permission to appeal was given relates to the Immigration Judge's assertion that there was "no independent evidence" that the appellant ever lived with her husband in Manchester. The Immigration Judge asserted that there was a "complete lack of any independent evidence" that the appellant ever lived with the sponsor in Manchester. It is pointed out that in fact there were "bank statements" and "letters" which supported their cohabitation at an address known as [ ] Seedley Park Road, Salford. Strictly, there was some evidence therefore and the Immigration Judge's statement was incorrect. In addition, there

was evidence relating to the sponsor's employment, for example, a letter from Elliott Baxter & Company. That company claims to have employed the sponsor with effect from Monday 16 February 2015 as a forklift truck driver. Dave Seddon, the warehouse manager, purported to sign an appropriate declaration in support of the application. There were also two bank statements, one for each party to the marriage. The first is by the sponsor, which has a different spelling of the word Seedley than that given by the appellant and it records a deposit of 0.50 pence on 2 February 2015 at Manchester Trafford. The statement was printed on 19 February 2015, shortly before the application. There is also a Barclays' statement purporting to relate to an account in the appellant's name at the same address. That records transactions between 2 February and 23 February and records money out of £ 7.50 and money in of £60. Those single bank statements with no transaction history raise more questions than they answer. They do not, in my view, help to establish any period of cohabitation. Whilst it might not have been accurate for the Immigration Judge to say there was "a complete lack of any independent evidence", it would have been accurate to say that there was a lack of convincing evidence given that two documents referred to could easily have been generated, as they appear to have been, very shortly before the application solely for the purposes of showing that the parties lived at the same address but without any transaction history behind them. No explanation was given as to how either party came to be living in the Manchester area.

18. I am informed that there were also utility bills. These have not been produced and it is not entirely clear they were produced before the FtT. There appears to be no reference to them in the Immigration Judge's summary of the evidence.

19. Turning to the third ground of appeal on which permission was granted, the appellant claims that she left "the house due to arguments and aggression from the sponsor" and she goes on to criticise the Immigration Judge for giving no reason for rejecting that explanation. I can find no reference to an allegation of actual violence towards the appellant in the summary of the evidence and submissions before the FtT. In her form IAFT5, box 6 the appellant asserts that the marriage broke up "because I wanted us to go to London together and he was using drugs after we cohabited/married". The appellant goes on to assert that the sponsor became bitter and alleged the marriage was sham as a form of "revenge". Nowhere does it allege there was actual aggression and there is no adequate explanation anywhere of why the sponsor would go to the trouble of contacting the Home Office and subsequently backing it up with a letter in April 2015. If the appellant alleged actual violence or threats of violence there should have been some evidence of this and no doubt she would have sought protection by way of an injunction had such violence been threatened.

20. Having heard submissions from both representatives it was clear that the Immigration Judge's conduct of the hearing was less than ideal in that he prevented the appellant giving any evidence to support her assertion as to the sponsor's motivation in writing the letter to the Home Office. However, I am satisfied the

Immigration Judge was aware of the appellant's case including her assertion that her husband had alleged that they had entered a sham marriage as a form of revenge. Unfortunately, for the appellant, they constitute no more than assertions. The appellant's own interpretation of events of hearsay evidence of conversations with her husband was unlikely to be given significant weight. The Immigration Judge understood the allegation by the appellant that the sponsor had made a representation to the Home Office "out of revenge for her leaving him". However, he rejected it. Therefore, the procedural irregularity in not allowing an appellant to give evidence on every potentially material point, does not appear to have affected the outcome of the case.

21. The appellant's next point was that the sponsor had supplied additional evidence, following his contact with the Home Office, which undermined his assertions regarding his relationship with the appellant.

22. The documents that I understand to be relied on in support of this submission are far from compelling. Pay slips have been produced for the sponsor dating from 6 February 2015 and 13 February 2015. It is not clear how that period of employment relates to the period of employment that began on 16 February 2015 with Elliott Baxter. Elliott Baxter in any event is a company based in Feltham, Middlesex. It may have a branch in the Salford area, although this is not explained. I do not consider that these documents were likely to alter the overall conclusion that this was a sham marriage.

Conclusions

23. The appellant was entitled upon marrying an EEA national to the benefit of the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations). The appellant was entitled to be treated as the family member of another person (her spouse) by virtue of Regulation 7 of those Regulations. Furthermore, by Regulation 16 of the 2006 Regulations the respondent was required to issue a registration certificate to a qualifying person on being produced with a valid identity card or passport for the EEA state and proof that the person qualifies. The respondent must then issue a residence card which subsequently translates into a permanent right of residence. However, Regulation 2 of the 2006 Regulations states that a "spouse" does not include a party to a marriage of convenience.

24. I am satisfied that the respondent produced sufficient evidence to show that the marriage to the sponsor was one of convenience in that it was solely for the purposes of remaining in the United Kingdom. The appellant's oral evidence before the Upper Tribunal made it clear that after the appellant was forced to abandon her studies in the UK she desired to stay here at all costs. She wished to improve her economic prospects by remaining in the UK. This evidence supports the respondent's original conclusion and the FtT's dismissal of her appeal. It seems unlikely that she ever intended to embark on a serious relationship of marriage with the sponsor.

25. The appellant's evidence was inadequate. For example, she did not produce any witness statement or letter in support from any person who attended the wedding ceremony or a neighbour to confirm their cohabitation. Although the appellant referred in her application form (in box 5.14) to having regular contact with the sponsor by telephone and text, she produced no evidence of either of these communications having place. It is also noteworthy that when she gave the date of their wedding in the letter in support (at K1-K2 of the respondent's bundle) she was unable to give the correct date – the date on the certificate being 21 February, not 22nd. The fact that she was unable to spell the name of the address that she lived at in the same way on all the documents is also suspicious. Furthermore, the appellant's application to the respondent was only 48 hours after the wedding service. This evidence was also such as to make the respondent suspicious. The suspicions were reinforced by the sponsor writing in April 2015 to the effect that he regarded it himself as a marriage of convenience. Additional factors which were relevant included the fact that the appellant had not contacted the respondent since April 2015 despite attempts by the respondent to get in touch with her. It appears that correspondence to the address she had given were returned "undelivered".

26. The conduct of the hearing was less than ideal analysis and the legal analysis left something to be desired. However, it appears that the Immigration Judge's overall conclusions were justified on the evidence. Although it was not accurate to say there was a "complete lack" of evidence of cohabitation there were highly suspicious circumstances in this case. Having heard all the evidence the Immigration Judge reached a conclusion which he was entitled to come to on that evidence. Therefore, the Upper Tribunal will not interfere with the decision because errors of law identified were not material.

Notice of Decision

The decision of the First-tier Tribunal does not contain any material error of law and that decision stands. Accordingly, the respondent's decision to refuse a residence card also stands.

There is no anonymity direction in this case.

Signed Date: 12 August 2017

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date: 12 August 2017

Deputy Upper Tribunal Judge Hanbury