

Subject-matter concerned	<input type="checkbox"/> 1) non-discrimination on grounds of nationality <input checked="" type="checkbox"/> 2) freedom of movement and residence - linked to which article of the Directive 2004/38 – Article 35 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
Full reference	<i>Rosa v Secretary of State for the Home Department</i> , Court of Appeal (Civil Division), 15 January 2016, [2016] EWCA Civ 14, available at: www.bailii.org/ew/cases/EWCA/Civ/2016/14.html .
Decision date	15 January 2016
Deciding body (in original language)	Court of Appeal (Civil Division)
Deciding body (in English)	/
Case number (also European Case Law Identifier (ECLI) where applicable)	[2016] EWCA Civ 14
Parties	Rosa v Secretary of State for the Home Department
Web link to the decision (if available)	www.bailii.org/ew/cases/EWCA/Civ/2016/14.html
Legal basis in national law of the rights under dispute	Regulation 17 of the Immigration (European Economic Area) Regulations 2006

<p>Key facts of the case (max. 500 chars)</p>	<p>Mrs Rosa is a Brazilian national who was removed from the United Kingdom in 2007 as an overstayer. In July 2008 she married a Portuguese national, Mr De Oliveira, in Portugal. He was living in the United Kingdom at the time. She joined him in the United Kingdom three months after the wedding. In January 2009 he was arrested at Heathrow Airport on suspicion of importing cocaine, an offence to which he subsequently pleaded guilty. He was sentenced to five years' imprisonment, from which he was released in September 2011. Prior to his release a decision was taken to deport him, but he appealed successfully to the First-tier Tribunal against that decision. Mrs Rosa gave evidence to the tribunal in support of that appeal. In April 2012 Mrs Rosa applied for a residence card under Regulation 17 of the EEA Regulations as Mr De Oliveira's spouse. Her application was refused by the Secretary of State, on the ground that her marriage to Mr De Oliveria was a "marriage of convenience". Her appeal against that decision was dismissed by the First-tier Tribunal and a further appeal was dismissed by the Upper Tribunal. Before the Court of Appeal, she claimed (mainly) that the First-tier Tribunal wrongly concluded that the appellant bore the legal burden of proof on the issue of marriage of convenience.</p>
<p>Main reasoning / argumentation (max. 500 chars)</p>	<p>The Court held that the EEA Regulations had to be interpreted and applied in line with the Directive which they implement. Although the Directive is silent as to burden of proof, the European Commission had issued guidance which provided the key to the correct approach under it. The Court referred to Article 35 of the Directive and held that, as a matter of general principle, the burden of proving that an exception applied should lie on the authorities of the Member State seeking to restrict rights conferred by the Directive, as confirmed by the Commission's guidance. Therefore, the Court held that the Secretary of State indeed had the legal burden of proof of marriage of convenience so as to justify refusing an application for a residence card. Therefore, the Court of Appeal stated that the First-tier Tribunal was in error in proceeding on the basis that the appellant had the burden of proof but held that the error was not material because the case did not turn on where the burden of proof lay. The findings of the tribunal had been sufficient to shift the evidential burden onto the appellant. The Court concluded that the tribunal had reached an empathetic decision that the marriage was one of convenience because of inconsistencies in the evidence of the husband and wife. Its decision would not have been different if it had approached the burden of proof differently.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The Court interpreted and explained who has the burden of proof in cases of marriages of convenience.</p>
<p>Results (e.g. sanctions) and key consequences or implications of the case (max. 500)</p>	<p>The appeal was dismissed.</p>

chars)	
Key quotations in original language and translated into English with reference details (max. 500 chars)	<p>“In my judgment, the legal burden lies on the Secretary of State to prove that an otherwise valid marriage is a marriage of convenience so as to justify the refusal of an application for a residence card under the EEA Regulations. The reasoning to that effect in <i>Papajorgji</i>, as endorsed in <i>Agho</i>, is compelling”. [Para. 24]</p> <p>“I do not accept Mr Kellar's submission that the burden of proof is a matter for national law alone. The EEA Regulations have to be interpreted and applied in line with the Directive which they implement. Although the Directive is silent as to burden of proof, the Commission's guidance (paragraph 20 above) provides the key to the correct approach under it. Article 35 of the Directive provides that the rights otherwise conferred by the Directive may be refused, terminated or withdrawn in the case of abuse of rights or fraud, such as marriages of convenience. As a matter of general principle, one would expect that the burden of proving that an exception applies should lie on the authorities of the Member State seeking to restrict rights conferred by the Directive – in this case, that it should lie on the Secretary of State when seeking to rely on the existence of a marriage of convenience as a reason for refusing a residence card to which the applicant is otherwise entitled. That is the approach set out clearly in the Commission's guidance, and there is no reason to doubt the correctness of the guidance on the point”. [Para. 25]</p> <p>“The guidance also shows the subsidiary role that national procedural rules have in this context. As a matter of EU law, the burden of proof lies on the authorities of the Member State seeking to restrict rights under the Directive, but it is for the national court to verify the existence of the abuse relied on, evidence of which must be adduced in accordance with the rules of national law. <i>Emsland-Stärke GmbH</i> is fully consistent with that approach and provides no support to Mr Kellar”. [Para. 26]</p> <p>“In any event, I do not accept that the relevant provisions of national law lead to the conclusion that Mr Kellar seeks to draw from them. Regulation 17 of the EEA Regulations provides that the Secretary of State must issue a residence card on application and production of a valid passport and proof that the applicant is a family member of a relevant EEA national. On the face of it, production of a marriage certificate is sufficient proof that the applicant is such a family member. It is true that, by the combined effect of regulation 7 and regulation 2, "family member" does not include a party to a marriage of convenience. But Mr Kellar rightly stopped short of submitting that every applicant for a residence card on the basis of marriage has to produce proof that the marriage was not one of convenience. He said that such proof needed to be produced only where the Secretary of State raised a reasonable suspicion that the marriage was not</p>

one of convenience. 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". [Para. 27]

"Mr Kellar's reliance on rule 53 of the tribunal procedure rules is misplaced. An applicant appealing against the refusal of a residence card under regulation 17 of the EEA Regulations is asserting that regulation 17 applies; he or she is not asserting that the definition of "spouse" in regulation 2 does not apply. I do not think that rule 53 is of any help". [Para. 28]

"What I have set out above does little more than to expand upon paragraphs 33 to 37 of the decision in *Papajorgji* and to reject Mr Kellar's criticisms of the reasoning in those paragraphs. It seems to me that paragraph 14 of the decision in *IS Serbia*, which prompted the tribunal in *Papajorgji* to say what it did about the legal burden of proof, was seriously confused. It stated that the burden of proving that a marriage is not one of convenience lies on the appellant, but it also stated that if there is no evidence that could support a conclusion that the marriage is one of convenience, the appellant does not have to deal with the issue. If, however, the legal burden lies on the appellant, the appellant has to adduce some evidence in order to discharge that burden: in the absence of any evidence either way, the appellant will fail. I do not think that that can have been the result intended by the tribunal. The result that I think 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*. In my judgment, that is the correct analysis". [Para. 29]

"I have already held that the legal burden of proof on the issue of marriage of convenience lies throughout on the Secretary of State. It follows that the First-tier Tribunal was indeed in error in proceeding on the basis that it was for the appellant to show on the balance of probabilities that the marriage was not a marriage of convenience. In my judgment, however, the error was not material. This was not one of those rare cases that turns on where the legal burden of proof lies. The answer to the question whether the appellant's marriage was a marriage of convenience was clear-cut. The findings of the previous tribunal in her husband's appeal were sufficient to shift the evidential burden in this case onto the appellant, as was effectively recognised in her counsel's concession that the issues raised by the previous determination had to be dealt with. The appellant produced a body of evidence in an attempt to deal with them. But the tribunal found that the inconsistencies in the evidence of the appellant and her husband supported the conclusion of the previous tribunal that the marriage was one of convenience and that there was no satisfactory evidence that it had ever been the appellant's intention to live with her husband as husband and wife. The emphatic finding in paragraph 26 that "I am entirely satisfied that it is a marriage of convenience and always has been" is a fair reflection of the tribunal's overall reasoning and is the clearest of indications that the outcome did not turn

	on the tribunal's direction as to the burden of proof. It is fanciful to suggest that the finding might have been different if the tribunal had approached the matter on the basis that the legal burden of proof lay throughout on the Secretary of State". [Para. 39]
Has the deciding body referred to the Charter of Fundamental Rights. If yes, to which specific Article.	No.