Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/36856/2014**

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 4 April 2016	**On 16 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

HEMEN NAMIK ABDULLRAHMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Thornhill, of Thornhill Solicitors
For the Respondent: Ms C Johnstone, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant appeals, with permission granted by Upper Tier Tribunal Judge Storey, against the decision of First-tier Tribunal Judge Ennals dismissing the appellant's appeal against the refusal by the Secretary of State to grant him a residence card as a family member and a spouse. The appellant is a citizen of Iraq, born on 6 October 1978 and originally came to the UK to claim asylum and was removed to Germany on 27 May

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2002. On 5 January 2009 he was served with removal directions, having returned to the UK and claimed asylum again. This was also refused and confirmed by the Tribunal on 6 April 2010.

2. On 27 March 2014 he married a Latvian national and applied for an EU residence card which was refused on 4 September 2014.

3. The reasons for refusal referred to a number of discrepancies between the two interviews, that of the appellant and his sponsor wife. The respondent regarded the marriage as a sham and the judge stated at paragraph 13, "in the light of the appellant's immigration history and the speed with which this relationship developed, it is not hard to see why the suspicion arose".

4. The judge at paragraphs 15, 16, 17 and 18 found that both appellant and sponsor were able to give information about each other but there were inconsistencies. However he accepted that the discrepancies were explainable by misunderstandings either by the interviewer or interviewees. [16]. The discrepancy over the date of the marriage certificate the judge accepted as a clerical error. He did place little weight on four letters from friends giving character witnesses

5. In his oral submissions before me, Mr Thornhill pointed out that the judge had not appreciated that the burden of proof rested with the Secretary of State, had failed to make any findings on the evidence or oral evidence of the appellant's wife and pointed out that although the Home Office had relied on the inconsistencies and discrepancies in the interviews but that was not the case for the judge who found that there were plausible explanations.

6. The answers to the questions as he indicated were such that the appellant and sponsor went through a Muslim marriage ceremony and then a civil marriage but then undertook the Muslim marriage because they were afraid of having a child out of wedlock and both gave a similar answer in their interview responses. This was important.

7. Mr Thornhill referred to **Collins Agho v Secretary of State for the Home Department [2015] EWCA Civ 1198** and particularly paragraph 13.

> *"13. ...What it comes down to is that as a matter of principle a spouse establishes a prima facie case that he or she is a family member of an EEA national by providing the marriage certificate and the spouse's passport; that the legal burden is on the Secretary of State to show that any marriage thus proved is a marriage of convenience; and that that burden is not discharged merely 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] IAC 11."

8. Ms Johnstone relied on the Reasons for Refusal Letter and stated that the judge had taken into account the oral evidence and had made clear findings.

9. The difficulty with the determination from Judge Ennals is that he sets out the burden and standard of proof at paragraph 9 stating that:

"*It is for the appellant to discharge the burden of proof and the standard of proof to be applied is the balance of probabilities*."

10. That is not correct as can be seen from the paragraph cited from **Collins Agho** above. It was accepted that the appellant was married and thus the legal burden is on the Secretary of State to show that the marriage thus proved is a marriage of convenience. As stated in **Collins Agho** the burden is not discharged merely by showing reasonable suspicion. Indeed in this case it would appear that the judge did find that there were plausible explanations for the discrepancies in the interviews. It is clear from the decision that the judge did approach the evidence on the basis that the burden was on the appellant rather than the Secretary of State, for example the judge at paragraph 18 stated that he gave the character referee's letters "little weight" and with reference to the photographs at paragraph 19 the judge stated:

"*It was said that Mr Konosonka's father, sister and brother had visited the UK to attend the civil marriage in March 2014. I was shown photographs of the couple, with these family members. I have no way of corroborating that the people in the photographs are indeed the family members I am told they are. Mrs Fell commented that it was noteworthy that no documentary evidence of these visits had been provided. Nor were there any witness statements from these family members, and none had attended court to support the couple. This was particularly remarkable since her brother was said to be visiting currently. I certainly find this omission from the appellant's case surprising. Evidence from his wife's family, and their confirmation of the genuineness of the marriage, would have been significant evidence*."

11. At paragraph 21 the judge states:

"*In the photographs are people who could be Ms Konosonka's close relatives, and the photographs of the couple together appear to show a happy couple. I have to bear in mind that if this were a marriage of convenience then one might expect this sort of photograph to be created to support the 'story'*."

12. Importantly the judge proceeded at paragraph 22 to state:

> "*I do not find the minor inconsistencies in their interview accounts to be very significant. I accept that in all probability they did get married, both Islamically and in a civil ceremony, and they do live at the same address. Is there any reason I should not accept the appellant's evidence*?"

13. There is no doubt that the appellant has had a chequered immigration history and he had been living in the UK since 2009 and he had a history of being an untruthful witness. The judge also remarked on the fact that they had met in an internet dating site. The judge stated, "I find the circumstances of their meeting, commencing cohabitation and then marrying, within such a short time frame to be wholly implausible" [paragraph 24].

14. To my mind the approach by the judge was in legal error on the basis that even if this constituted a reasonable suspicion the burden was not discharged merely by showing a reasonable suspicion and the judge had sought corroboration of evidence regarding the photographs. I also note that the judge had not taken into account the appellant's wife's evidence. As such the judge appeared to have shifted the burden of proof to that of the appellant rather than the respondent which is an error in law.

15. I therefore set aside the decision. Ms Johnstone indicated that she considered the findings could not stand and owing to the extent and nature of the required findings the matter should be remitted to the First-tier Tribunal. Bearing in mind the judge appeared to approach an assessment of the evidence overall with the wrong burden of proof which would be fundamental to the findings, the matter should be returned to the First-tier Tribunal._

Notice of Decision

16. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Direction

A specific direction to be respondent to serve on the appellant and the Tribunal by **10th June 2016** a copy of the interviewer's comments. I note that the Reasons for Refusal Letter and the interview were undertaken by a different Immigration Officer.

Signed   Date 4th May 2016

Deputy Upper Tribunal Judge Rimington