



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/03406/2016

THE IMMIGRATION ACTS

Heard at Field House
On 16 May 2018

Decision & Reasons Promulgated
On 23 May 2018

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

CHARLES FRIMPONG
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Revill, Counsel, instructed by M & K Solicitors

For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Ghana. His date of birth is 4 August 1972.
2. The appellant made an application for a residence card under Immigration (European Economic Area) Regulations 2006 ("2006 EEA Regulations") on 24 June 2015. This application was refused by the respondent on 16 November 2015. It was the respondent's case that the appellant's marriage to an EEA national was a marriage of convenience. The appellant appealed and his appeal was dismissed by First-tier Tribunal Judge Ferguson in a decision promulgated on 27 September 2016,

following a hearing on 22 August 2017. The appellant attended the hearing and gave evidence. Permission was granted to the appellant on 26 March 2018 by First-tier Tribunal Judge of the Norton-Taylor.

The background

3. The appellant was granted a residence card as a family member of an EEA national (Gabriela Mrzygold, a Polish national) on 27 September 2011. However, he was questioned by immigration officers on 22 April 2014 when returning to the UK from a trip to South Africa and interviewed on 28 April 2014. Following this his residence card was revoked. The appellant did not appeal against the decision to revoke his residence card. He made an application for a residence card, based on his marriage to Gabriela Mrzygold, on 9 July 2014 which was refused on 29 July 2014. The appellant did not appeal. He made a further application on the same basis giving rise to the decision of 24 June 2015.

The interview on 28 April 2014

4. When the appellant was interviewed on 28 April 2014 he told immigration officers that he did not know the whereabouts of his wife (however, he stated on 22 April when he was initially questioned that she was in Poland). He then said she was in London. He stated that they had had a misunderstanding. He had tried to call her but could not get through and he could not find her. He said initially that she could contact him on his phone. He then said that she had no number for him because he had a new mobile phone and that nobody knew his number (he was during the interview contacted by a friend). He said that there had been a fight and perhaps she was angry and that is why she had not tried to contact him. He was unable to say when she was last in Poland, the date of marriage, when they first met, the day he last saw her (he then stated that he left her at home in London and later in the interview stated that he spoke to her the previous Sunday) and the name of the shop in Southampton where she worked. He did not have details to enable him to contact her at work. The appellant had not been able to contact his wife since his arrival in the UK on 22 April 2014 and she had not contacted him.

The Appellant's witness statement of 27 July 2017

5. The appellant's witness statement is very detailed about his relationship with the sponsor and about the sponsor and her family. In summary, they moved in together in London after the marriage in 2011. She commuted daily to Southampton to work in a florist shop. During his time in South Africa he "was always in contact with Gabriela" and would call her on the hotel phone. She would ask him how he was doing and she was waiting for him to return. When he arrived at the airport in UK, her number was not working. He was upset and concerned. He felt stressed and anxious. He could not concentrate and was worried about his wife. He was crying and upset. On 28 April he was similarly upset and confused.
6. Directions for removal following the revocation of his family permit were revoked and removal directions served. These were deferred as the appellant was unwell. He

lodged an out of time application to appeal against the revocation, but the court refused to extend time. He was subsequently declared unfit to fly and further removal direction were cancelled. A fresh application was made for a family permit and refused for lack of evidence. There were concerns about the appellant's mental health.

7. The appellant was detained until August 2014 when he was bailed. He returned home and found his wife's belongings had gone. She had abandoned him without leaving a note. He lodged another application for a residence card. He thought that his solicitor had dealt with the divorce; however, he discovered this not to be the case. He instructed the present solicitor to initiate divorce proceedings. He cannot produce evidence that his wife is exercising treaty rights because he has been abandoned.

The decision of the FtT

4. The judge did not find the appellant to be credible. His evidence was wholly rejected by the judge.

The grounds of appeal

5. The grounds argue that the judge applied the wrong burden of proof at [5], he failed to consider all the evidence including the answers the appellant gave during his interview and he did not explain why he rejected the evidence that supported the appellant. The judge's findings are not distinct from matters of fact and he did not independently assess the evidence. The judge reached conclusions not open to him.

Oral submissions

6. I heard oral submissions from both parties. Ms Revill expanded on the grounds. She asserted that the judge did not consider the appellant's witness statement and the findings made were unreasoned. She accepted that there probably was enough evidence to show reasonable suspicion. Ms Everett conceded that the judge erred in respect of the burden and standard of proof, but that it was not material.

The error of law

7. The judge at [5] made an error. He purported to direct himself in respect of *Rosa* [2016] EWCA Civ 14, but did not do so. It may be that he misunderstood the decision. However, the legal burden is on the respondent throughout to establish that the marriage is one of convenience although the evidential burden can shift to the appellant. However, for the following reasons I do not find that the error was material.

Conclusions

8. Were it not for the error of law in respect of the burden of proof, I would not have found an error of law in the decision. Whilst I accept that the judge did not set out his decision with great clarity, a proper reading of it makes it sufficiently clear that

his findings are at [6] – [13] under the heading “Discussion”. It was not incumbent on the judge to set out every piece of evidence. The judge clearly had regard to the appellant’s witness statement as he considered the evidence of abandonment at [6]. The judge did not accept that this was credible. The judge considered the interview and rationally concluded that the appellant was unable to answer basic questions about his wife and he did not have a contact number to call her when he arrived at the airport. In addition, she did not try to call him whilst he was in South Africa. I am satisfied that he considered the witness statement. There was no need for the judge to set it out in any detail or make findings on each issue raised in the statement. Whilst I accept that the discussion section of the decision, appears on first blush to contain statements of facts, a proper reading of the decision makes it clear that they are the judge’s findings.

9. I have considered the evidence contained in the appellant’s witness statement and it is wholly lacking in credibility. In respect of how the appellant was feeling during the interview I note that he indicated at the start of the interview that he was fit. He sought to distance himself from what was said in the interview at the hearing before the FtT. The appellant’s evidence that he was abandoned is not capable of belief. It is wholly lacking in credibility that the appellant’s wife would abandon him in the circumstances put forward by the appellant; following an historic argument about clothes when she had been speaking to him normally, according to his witness statement, whilst he was in South Africa. In any event, he failed to mention this communication whilst in the interview.
10. The grounds argue that the judge did not consider what the appellant knew about his wife as disclosed in the interview. However, this is a hopeless argument because he knew very little. That he knew her nationality, she worked in a florist shop in Southampton and that they did not have a joint bank account does not support the marriage having been genuine by any stretch of the imagination. He did not have a valid contact number for her. He stated that he had a number but could not get through to his wife. His knowledge of his wife was dismally poor considering that they had been married since 2011. The statement on which he relied is an attempt to fill the gaps. The appellant is now able to give further details; however, there is no cogent reason why he was not able to provide the information during his interview. There is no support for the account that the appellant’s wife would abandon him and ensure that he could not contact her effectively disappearing from his life without trace when it would have been open to her just to end the marriage.
11. At the time he was interviewed the appellant had been in the country for 6 days and had not managed to contact his wife. He did not know where she was and stated that they had had a misunderstanding. I accept that he gave immigration officers a number to contact her, but it was not a contact number in the sense that it made contact possible.
12. When interviewed the appellant did not know the date his wife last travelled to Poland, the date of the marriage, when they first met, the last day he saw her before travelling to South Africa, the name of the florist shop where she worked or the

location of the business. It is worth mentioning that the appellant's evidence was that his wife worked in Southampton but they lived together in London. The judge was entitled to conclude that the appellant's account advanced at the hearing and in his witness statement; namely, that he had effectively been abandoned by his wife on return to the UK, lacking in credibility.

13. At the hearing before the FtT, the appellant produced photographs of him and his wife. His evidence was that they were taken on separate occasions between January and February 2011. The judge assessed this evidence and reasonably concluded that these were the only photographs of the couple together wearing the same clothes and taken at the same location. The judge reasonably concluded that the photographs were taken on the same occasion in 2011 for the purpose of making the initial application. Having assessed the evidence, myself this conclusion is inevitable. It did not assist the appellant that the documents relating to his wife that he was able to produce date back to the same time. I take into account his evidence that his wife had taken all her belongings, but the account of abandonment was wholly lacking in credibility. The inference drawn by the judge; namely, that the documents were given to him to support the original application was irresistible.
14. The FtT considered the statements from others the appellant claimed were friends. They did not attend the hearing before the FtT. Their evidence is lacking in detail. The judge was entitled to attach no weight to the evidence when considering the evidence in the round.
15. The decision when considered in its entirety was adequately reasoned. It is sufficiently clear that the appeal was dismissed by the judge because he did not find the appellant to be credible. This was because he attached significance to the interview, which did not assist the appellant, and found his evidence to be lacking in credibility, in the light of the interview and lack of supporting evidence (in respect of the subsistence of the marriage and the abandonment by the sponsor).
16. The legal burden of proof on the issue of marriage of convenience lies throughout on the Secretary of State. The error of the judge was not material. This was not a case that turned 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. Counsel for the appellant effectively conceded that the interview was sufficient to shift the evidential burden in this case onto the appellant. The appellant produced a witness statement to mitigate the damage of the interview. However, the FtT found that the interview and the evidence generally including the statement supported the conclusion the marriage was one of convenience. 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. If I were to remake the decision, I would reach the same conclusion. It is my view that to allow the appeal would be perverse in the light of the evidence.
15. The appeal is dismissed under the 2006 EEA Regulations.

Signed *Joanna McWilliam*
Upper Tribunal Judge McWilliam

Date 17 May 2018