



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/06575/2017

THE IMMIGRATION ACTS

Heard at Field House
On 5 November 2018

Decision & Reasons Promulgated
On 19 November 2018

Before

UPPER TRIBUNAL JUDGE BRUCE
DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MR YVES PENTECOTE AMAKOUE ANANI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K Joshi, solicitor from Joshi Advocates
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge Kainth (the judge), promulgated on 25 June 2018, in which he dismissed the Appellant's appeal against a decision of the Respondent, dated 14 July 2017, refusing to issue him with a residence card under the Immigration (European Economic Area) Regulations 2016 (the Regulations).
2. In essence, the Appellant's case was that he had undertaken a proxy marriage in 2014 with an EEA national (a citizen of France) under the law of Benin. He asserted that this was a perfectly genuine marriage and that he had been in a subsisting and genuine relationship ever since. In refusing the application, the Respondent had concluded

that no such valid proxy marriage had in fact taken place in Benin and, in the alternative, that any marriage contracted was one of convenience only.

The judge's decision

3. The Appellant opted to have his appeal determined without an oral hearing. The judge noted that although there was no Respondent's bundle before him, one had been provided by the Appellant, in compliance with standard directions of the First-tier Tribunal.
4. In respect of the proxy marriage issue, the judge cites two decisions of the Upper Tribunal, Kareem (Proxy marriages - EU law) [2104] UKUT 24 (IAC) and Cudjoe (Proxy marriages - burden of proof) [2016] UKUT 180 (IAC). He directed himself that it was for the Appellant to prove that the proxy marriage in Benin was valid according to the laws of that country. In assessing the evidence he noted the existence of a letter from the Benin Consulate in the United Kingdom, dated 11 May 2018, which attested to the genuineness of the marriage certificate, which had also been provided. At [15] the judge noted that the originals of the letter and marriage certificate had not been sent in to the Tribunal. He concluded that he could not therefore attach any real weight to the photocopied documents. In addition he stated that he had not been directed to any "Benin legislation" which suggested that the Consulate in the United Kingdom was a "designated and authorised authority" able to confirm the validity of the marriage certificate. In light of this the judge concluded that the Appellant had failed to show that his proxy marriage was valid according to the laws of Benin.
5. The judge then moves on to the marriage of convenience issue. He cites Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC) (although not the passage relating to the location of the burden of proof). The judge then notes the failure of the Appellant and the EEA national to attend interviews with the Home Office on two occasions. He finds that no good reason for these failures had been provided [19]-[20]. In relation to other documentary evidence before him, he again notes the absence of originals and therefore places "little weight" on this evidence [20]. Finally, at [21] he comments on the lack of detail in the witness statements as regards the claimed relationship and concludes that "the Appellant has failed to discharge the civil standard of proof in his favour." The appeal was duly dismissed.

The grounds of appeal and grant of permission

6. The grounds of appeal focus very much on the judge's treatment of the proxy marriage issue. It is said that he erred in failing to place due weight on the evidence from the Benin Consulate as to the validity of the marriage and criticises the judge for requiring original documents when none had been requested by the Tribunal in the directions and in circumstances where the Respondent had not taken any issue with the lack of originals.
7. Permission to appeal was granted by First-tier Judge Grant-Hutchison on 20 September 2018.

The hearing before us

8. At the outset of the hearing we indicated to Ms Joshi that our preliminary view was that the judge had erred in respect of his approach to the proxy marriage issue, having regard to the evidence before him, relevant case law, and questions of procedural fairness relating to the production of original documents.
9. Mr Clarke, in his customary fair and pragmatic manner, accepted that the judge had erred, as claimed.
10. We then pointed out to Ms Joshi that the grounds of appeal did not specifically challenge the judge's alternative findings and conclusion on the marriage of convenience issue (although the point taken in respect of the original documents did have some bearing on the issue). She candidly acknowledged this. Her response was to seek permission from the Tribunal to amend the grounds and expressly include a challenge to the judge's approach.
11. Again, Mr Clarke adopted a pragmatic position and did not object to the amendment of the grounds.
12. Having regard to all the circumstances, including the obvious merit in the proposed amended ground, and in view of Mr Clarke's stated position, we permitted the amendment on an exceptional basis. It is unclear to us why the point was not set out expressly in the grounds as initially drafted, but there were clearly real questions as to the correctness of the judge's approach to the marriage of convenience issue.
13. Ms Joshi argued that the sole basis put forward by the Respondent for concluding that the marriage was one of convenience was the couple's failure to attend the two interviews. In light of Regulation 22 of the Regulations the Respondent had been entitled to draw an adverse inference from the failures, but was not entitled to base his decision solely upon this point. She submitted that the judge had only really adopted the same reasoning in his decision and he had been wrong to reject the other documentary evidence out of hand because the originals were not before him. This documentary evidence included information relating to cohabitation and the genuineness of the relationship which, Ms Joshi submitted, went to the issue of the parties' intentions at the time of the marriage itself. It was also argued that the judge had simply failed to state that the legal burden rested with the Respondent and had failed, as a matter of substance, to consider the issue on a correct legal footing.
14. For his part Mr Clarke submitted that the judge was entitled to have concluded that the marriage was one of convenience. He had taken into account not simply the interview issue but the paucity of the information contained in the witness statements and the fact that the Appellant had chosen not to have an oral hearing, thereby avoiding the ability of the Respondent to test the evidence.

Error of law decision

15. As we announced to the parties at the hearing, we conclude that the judge has materially erred in law. Our reasons for this conclusion are as follows.

16. Starting with the proxy marriage issue, we find that Mr Clarke was correct to have conceded the error. We note that the judge relied on Kareem, a decision that was overturned by the Court of Appeal in Awuku [2017] EWCA Civ 178, over a year before he considered the Appellant's case. Notwithstanding that, the decision in Cudjoe remains sound and the judge did correctly direct himself that it was for the Appellant to show that the proxy marriage was valid under the law of Benin. However, in the circumstances of this case the judge was wrong to have effectively rejected the evidence not only of the marriage certificate, but also the letter from the Consulate almost out of hand for the reasons that he has stated in [15]. There had been no direction from the First-tier Tribunal for the Appellant to produce the original documents. The standard Tribunal directions do not require originals to be sent in. The judge had not taken it upon himself to issue a direction once he had inspected a file and forming the view that the originals had to be seen.
17. In light of Cudjoe, the marriage certificate combined with the letter from the Consulate was, on its face, sufficient for the Appellant to prove this element of his case. Furthermore, we cannot see any justification in the judge requiring the Appellant to provide any "Benin legislation" which specifically indicated that the Consulate was able to confirm the validity of the marriage certificate or the marriage itself. There was no justification for seeking to go behind the face of these two documents (bearing in mind as well our previous conclusion that if the judge had wanted to inspect the originals, he could and should have issued a direction to that effect before deciding the appeal).
18. We turn now to the marriage of convenience issue. The reasons for refusal letter does not specifically cite Regulation 22 of the Regulations despite the fact that it seems clear enough that this provision was in the decision-maker's mind when the application was considered. The Appellant and his spouse had indeed failed to attend interviews on two occasions, thereby triggering the Respondent's ability to draw adverse inferences (Regulation 22(4)). We note that this was the only basis upon which led the Respondent to conclude that the relationship/marriage was one of convenience. The judge essentially adopts this reasoning and clearly places significant weight upon it when reaching his conclusion on the marriage issue. He was not impressed by the explanation given for the failure to attend the interviews, and his finding on this was, in our view, open to him, insofar as that goes. It was also potentially open to the judge to place weight on what he perceived to be the lack of detail in the witness statements.
19. We are willing to accept that the failure to attend the two interviews and the application of Regulation 22(4) was sufficient for the Respondent to discharge the evidence burden of raising a *prima facie* case against the Appellant. In turn, the judge may have been entitled to adopt this point in his decision.
20. However the judge's approach has gone awry in the following respects. Putting aside the absence of any structured legal framework to the marriage issue, we focus on the substance of what has been done. As with his rejection of the Consulate letter and marriage certificate, it was unfair of the judge to simply reject the other documentary evidence going to the marriage and relationship issue simply because originals had

not been provided. Thus, the judge had not taken account of evidence which had a potential bearing on a material matter. This is an error of law.

21. Next, the judge has failed to state at any stage that the legal burden of proving that a marriage was one of convenience rested firmly with the Respondent. He makes no reference to either Rosa [2016] EWCA Civ 14 or Sadovska [2017] UKSC 54, binding authorities which had been handed down at least a year before this appeal was decided. We fully appreciate that substance is almost always more important than form and this applies to the question of whether the correct burden of proof has been applied. However when one looks at [21] of the judge's decision it is clear enough to us, that he has, as a matter of substance, placed the burden of proof upon the Appellant. His reference back to [16] does nothing to rectify the error as in that earlier passage he had quite clearly also placed the burden upon the Appellant. Although the evidence before the judge may well have been less than ideal and that deciding appeals without oral hearings can be a difficult task, we are satisfied that the judge has gone materially wrong in his approach.
22. In light of the above, we set the judge's decision aside.

Disposal

23. Following our error of law decision we had a discussion with the representatives as to the next steps in this appeal. Mr Clarke accepted that the sole issue is now whether the Appellant's marriage was one of convenience: the question of the proxy marriage has effectively been resolved in the Appellant's favour. Mr Clarke suggested that the appeal should be remitted on the single issue, whilst Ms Joshi thought that it could remain in the Upper Tribunal.
24. We take the view that this appeal must be remitted to the First-tier Tribunal. We do not make that decision lightly, and have had full regard to paragraph 7.2 of the Practice Statement. Having done so, we note that the issue of the proxy marriage is now resolved in the Appellant's favour however, the marriage of convenience issue is one involving credibility, with the consequential need for clear and detailed findings of fact to be made. Given the fact that there was no previous oral hearing and that there is very little by way of fact-finding in the judge's decision, remittal is appropriate.
25. We shall issue directions to the parties and the First-tier Tribunal below.

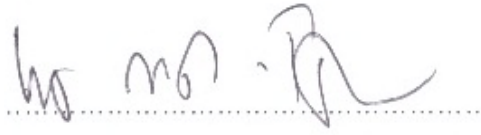
Notice of Decision

The decision of the First-tier Tribunal contains material errors of law.

We set that decision aside.

We remit this appeal to the First-tier Tribunal.

No anonymity direction made.

A handwritten signature in black ink, appearing to read 'W. Norton-Taylor', is written over a horizontal dotted line.

Signed

Date: 11 November 2018

Deputy Upper Tribunal Judge Norton-Taylor