



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/07692/2016

THE IMMIGRATION ACTS

Heard at Field House
On 23 May 2018

Decision & Reasons Promulgated
On 14 June 2018

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MR SAMUEL IKEKHUAME EHIKHAMETALOR TAYLOR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr F Farhat, Solicitor

For the Respondent: Ms Z Ahmad, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born in 1983. On 18 March 2015 he was issued with a permanent residence card as confirmation of the right to reside as the spouse of an EEA national, whom I shall identify simply as Lily. She is a citizen of Portugal and they married on 15 December 2008.
2. As a result of a visit by immigration officers on 10 June 2015 to an address in Bexleyheath, a decision was made by the respondent on 17 November 2015 to revoke the appellant's permanent residence card on the basis that his marriage to Lily was, and still is, one of convenience. The decision cites Regulation 2 of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

3. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge Hussain ("the FtJ") on 12 January 2018 which resulted in the appeal being dismissed. In summary, the FtJ decided that the respondent had established that the appellant's marriage to Lily was a marriage of convenience and she was therefore entitled to revoke the appellant's permanent residence card.

The Grounds of Appeal and Submissions

4. The appellant's grounds of appeal are 19 pages long and, it must be said, repetitious and unfocused. Fortunately, given that the appellant's account of his relationships is factually complex, a note clarifying grounds 2-7 was provided on behalf of the appellant at the hearing before me, and which provides a clear and more succinct summary of the grounds.
5. In essence, it is contended that the FtJ did not apply the burden of proof correctly and had made findings based on a failure to consider evidence or that there was otherwise an inadequacy of reasons.
6. In further detail, complaint is made about the FtJ's conclusion that the appellant had invented the fathering of a child (N), suggesting that no such child exists. However, N's birth certificate was in the supplementary bundle. Further, although the FtJ had appeared to suggest that it was not true that another woman whom he had a relationship with, S, was threatened with eviction, the Home Office Landlord Checking Service document in the supplemental bundle confirmed that she had no right to rent.
7. It is further argued that the FtJ had misread (or misunderstood) the appellant's witness statement in terms of his having kept clothes at S's house. The FtJ had concluded that it was "quite bizarre" that he would keep his "clothes" at her house, but the appellant's evidence in his witness statement was that he kept one or two items of clothing at her address.
8. At [27] the FtJ said that the appellant had sought to put forward an explanation as to how he came to be the father of M, who was S's son. However, he had also claimed to be the father of S's daughter, G, but the immigration officer's report of the visit on 10 June 2015 indicated that S claimed that another person was the father. In relation to the FtJ's consideration of that issue, it is argued that the FtJ made no findings as to the appellant's explanation which was that G's paternity was initially in doubt and that he was not at G's birth and was retrospectively placed on the birth certificate as her father.
9. It is further asserted that the FtJ failed to consider, assess or refer to any of the several hundred pages of relevant material in the appellant's bundles. That was pertinent because, for example, it was evident from that documentation that the appellant had tried to live in Portugal with Lily, learn Portuguese and had searched for jobs there, as well as having travelled around the world with her to Nigeria and several European destinations. The FtJ had made no findings on that documentary evidence.

10. Overlying all these complaints about the FtJ's decision is the fact that the only evidence provided by the respondent is contained in a report of a visit by immigration officers to an address in Bexleyheath on 10 June 2015. In respect of that visit no contemporaneous notes by the immigration officers were provided, there were no transcripts of any conversation that is said to have taken place between the immigration officers and S, or any note of what one of the children is said to have said. In addition, although photographs of what were described as clothes in a wardrobe and pictures of the appellant and S together were said to have been taken, copies of those photographs were not provided. Furthermore, there were no witness statements from the immigration officers.
11. In submissions, Mr Farhat relied on the grounds. I was informed that although at the hearing before the FtJ the Presenting Officer made an application for an adjournment to obtain the supporting evidence, the FtJ refused the adjournment because the Presenting Officer, after enquiries, indicated that nothing could be found on the electronic file. The FtJ therefore decided that there would be no point in adjourning the hearing. As to why no application for an adjournment was made on behalf of the appellant, Mr Farhat submitted that the initial burden was on the respondent and it was not for the appellant to ask for an adjournment to assist the respondent to establish her case. Otherwise, in submissions before me, aspects of the grounds were reiterated or emphasised.
12. Ms Ahmad referred to [5]-[22] of the FtJ's decision in support of the submission that the FtJ had in mind all the evidence when he made his decision. At [28] the FtJ expressly stated that he had given careful consideration to the appellant's detailed evidence. In that same paragraph the FtJ had found that the appellant's evidence was not truthful in terms of the claim that whilst married to Lily he simply had "two flings" as he had called them, with S. The FtJ did not accept that he had had a second fling with a woman B with whom he claimed to have fathered the child N. The birth certificate for N does not show that the appellant is the father and there were clearly issues with the appellant's evidence in any event.
13. The appellant had claimed to be married to an EEA national but the evidence suggested he lived with another person.
14. In relation to S's eviction from her property, the FtJ had referred to this at [15]. He was plainly fully aware of the evidence in support of this aspect of the appellant's claim. In relation to the ground complaining about the FtJ's consideration of the appellant keeping his clothes at S's house, it was open to the FtJ at [29] to conclude that the appellant did keep his clothes there. The immigration officer's report referred to there being clothes in the wardrobe.
15. In terms of what is said about the FtJ failing to take into account documentary evidence of the appellant's attempts to live in Portugal with Lily, in his summary of the evidence at [12] he referred to that aspect of the appellant's claim. At [28] he said that he had given careful consideration to the appellant's detailed evidence and at [32] said that he had considered the totality of the evidence, including the

documentary evidence. It was not necessary for the FtJ to refer to every piece of evidence put before him.

16. It was accepted on behalf of the respondent that the issue of whether the marriage was one of convenience needed to be assessed as at the date of the marriage but the respondent's case was that the marriage was, and still is, a marriage of convenience. That was made clear in the decision letter.
17. In reply, Mr Farhat submitted that although the FtJ had referred to aspects of the evidence in his summary of it, he had made no findings on issues such as S's eviction and the evidence supporting the contention that the appellant and Lily visited numerous places together, including Portugal and the evidence in support of his having intended to settle there with Lily. There was no indication that he had considered the documents in support of those aspects of the appellant's claim. I was referred to the documentary evidence adduced by the appellant at the hearing before the FtJ. At [28] he stated that he had given careful consideration to the appellant's detailed evidence but it is not clear from that whether that was only a reference to the appellant's witness statement.
18. The evidence adduced by the respondent did not satisfy the initial burden of proof of establishing that the marriage was one of convenience. The visit by immigration officers was not made within, say, a couple of months of the marriage but several years later. The information provided in the immigration officer's report was not supported by photographs, witness statements, or any transcripts of conversation.

Assessment and Conclusions

19. I raised with the parties the question of whether the FtJ needed to assess revocation on the basis of whether the marriage of convenience issue needed to be decided with reference to the circumstances that existed at the time of the marriage. In other words, was it necessary for him to decide that the marriage, at its inception, was one of convenience. Both parties agreed that that was the case.
20. It is apparent from the respondent's decision that her case is that the marriage was, and is, a marriage of convenience. So much is clear from what is said in the decision letter. In addition, at [25] the FtJ said that the respondent's case appears to be that the appellant's claimed marriage to the Portuguese EEA national is one of convenience and that as a result he never had the right to any permanent residence because that right arose as a result of him being a family member of the EEA national which could not have accrued to him because of reg 2 of the EEA Regulations excluding a person from being a spouse if the marriage is one of convenience. I am satisfied that the FtJ assessed the issue of whether the marriage was one of convenience from the correct standpoint.
21. It is not suggested on behalf of the appellant that the FtJ failed to recognise that the initial burden of proof, or evidential burden, was on the respondent. Thus, in *Rosa v Secretary of State for the Home Department* [2016] EWCA Civ 14, after reviewing existing authorities and the domestic and European legal framework the court decided that there is an evidential burden on the Secretary of State to provide

evidence of reasonable suspicion that the marriage was one of convenience. At [24] the court also said that 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.

22. At [24] of his decision the FtJ concluded that the legal as well as the evidential burden was on the Secretary of State to prove that the appellant's marriage was one of convenience. I do not accept what is said in the grounds about the FtJ failing to identify exactly what evidential material was provided by the respondent to discharge the evidential burden, nor what is asserted at [10] of the grounds to the effect that the respondent provided no evidential material whatsoever in relation to the evidential burden. Under the sub-heading "My Findings", the FtJ referred in detail to the report or note of the visit made on 10 June 2015 to the address where they met the woman S. He set out in detail the contents of that report. Regardless of what may be said about shortcomings in terms of the lack of any supporting evidence with reference to that report, the FtJ was entitled, indeed bound, to take it into account in deciding whether or not this was a marriage of convenience.
23. The report, to summarise, states that allegations were made that the appellant was in a relationship with S and that they had children together. S was present at the property with her two children and S stated that the appellant was the father of her eldest child M (surname the same as that of the appellant) but her daughter G, with a different surname, was the child of the male partner who was the subject of her EEA application. When S was asked for the birth certificates and passports for the children she apparently stated that they were with her representatives. She went on to state that she lived alone with her children and at times her aunt stayed. The report refers to photographs of S and the appellant and the child, and male belongings also being present in the main bedroom. S stated that it was just her room but the eldest child stated that they were "daddy's clothes" and that he was in Nigeria and would be gone for two months. Photographs were apparently taken of the clothes in the wardrobe and the pictures of them together which, according to the report, were now on the "visit file".
24. When S was questioned by Immigration Officer Baker, she refused to answer if she was in a relationship with the appellant. There were apparently no signs of S's EEA partner there or of any relationship between them, although she apparently stated that she saw him last week.
25. The report is signed by a Heidi Patel. It is on headed Home Office paper with the title of Immigration Enforcement at the head of the page.
26. I do not accept any contention that the contents of that report, compiled by an immigration officer, does not raise a suspicion that the marriage between the appellant and Lily, was one of convenience, in the light of what is said in that report about the evidence of his relationship with S.
27. It is not evident from the FtJ's decision, or from the appellant's witness statement or oral evidence, that there was any dispute about the contents of the immigration officer's report, except in relation to whether or not the appellant had clothes in the

wardrobe at S's address or just one or two items. S was not called to give evidence and there was no written statement from her disputing the contents of the report. The appellant was asked at the hearing as to why she was not present, for which the explanation was that she was taking the children to school.

28. I do not accept that the FtJ ignored the documentary evidence provided on behalf of the appellant. At [20], in relation to the point about the appellant seeking to establish himself in Portugal with Lily, there is reference to the questions put to the appellant in that respect and in relation to the documents, in cross-examination. The FtJ recorded that the appellant confirmed that he had considered living in Portugal between May and August 2013. He referred to there being a tenancy agreement in the bundle to confirm his residence in Portugal with his partner. The appellant was asked why the documents he provided only showed his name and not that of Lily. The appellant had said that Lily was included on his car insurance but that there was no council tax or utility bills because those were included in the rent. The Sky bills as well as the energy bills were in her name and the appellant acknowledged that there were no old bills. At [22] there is reference to documents that had been provided to the Home Office having been returned to Lily.
29. At [18] the appellant's evidence that he wanted to live in Portugal is referred to. At [32] the FtJ said that whilst there was some documentary evidence supporting a cohabiting relationship between the appellant and Lily, given the totality of the evidence, that documentary evidence paled into insignificance. Therefore, it is apparent that the FtJ during the course of his summary of the evidence given by the appellant recognised that there was some documentary evidence provided to support the claimed relationship, and he expressly said so at [32]. In the circumstances, I reject the suggestion that the FtJ failed to take into account the documentary evidence. It may be that had the FtJ made more detailed reference to the documents that were before him that would have avoided the complaint that is now being made on this issue. However, I do not accept that there is any merit in the contention that the FtJ failed to take into account material evidence, namely the documentary evidence put before him.
30. At [28] the FtJ said that he had given careful consideration to the appellant's detailed evidence and recognised the effort he had made to explain the position he was in. However, he concluded that there was no truth in the claim that whilst married to Lily he simply had two flings, as he called them, with S.
31. At [29] he referred to the appellant's evidence that in March 2016, when S was threatened with eviction, he allowed her and their children to move in to live with him. Until then she was living on her own with the children. He had also claimed that since 2012 she had been distant from him. In those circumstances he considered it "quite bizarre" that he would keep his clothes in her house. The FtJ said that "At most" he would be going to see her in order to visit the children.
32. Thus, in the context of what the appellant said was his relationship with S, he did not accept that he would keep his clothes in her house. He said that he appreciated that given the nature of the appellant's work he would wish to change his clothes often.

That was plainly a reference to the appellant's evidence that he kept one or two items of clothing there to change into. However, the FtJ rejected that evidence, stating that he would have been able to do that from his own house as he would have been aware of his shifts, rather than changing into clothing in the house of a woman with whom he claimed to have had no more than two flings, and I would add, a person with whom he was not apparently in a relationship, according to him.

33. The FtJ did not reject the appellant's evidence because he did not accept that S was threatened with eviction. Although he did not refer in his findings to the landlord's checking service document, the complaint raised in this regard is not material; the FtJ did not say that he did not accept that she was threatened with eviction.
34. At [27] the FtJ referred to the appellant's explanation as to how he came to be the father of M, the son of S. He said that however, the appellant also claimed to be the father of S's daughter, G, whilst the immigration officer's report indicated that S claimed that another person was the father. The grounds complain that the FtJ failed to take into account the appellant's evidence that G's paternity was initially in doubt and that he was not at her birth and was then retrospectively placed on the birth certificate as her father. However, the evidence in the report was that S said that her daughter G was someone else's child. This was not a defining or definitive aspect of the FtJ's decision but merely one further instance of the unsatisfactory account given by the appellant.
35. At [31] the FtJ expressed the view that the absence of Lily from the hearing rendered her statement of very limited value. He quoted from her witness statement which he described as a mixture of statement of fact and advocacy on behalf of the appellant. She disagreed with the suggestion that the appellant's marriage to her was one of convenience. The statement said that she and the appellant had tried for a child on several occasions and had fights over his infidelity and that if she did not believe that the marriage was genuine she would not try to have a child with him. The witness statement goes on to say that her Portuguese ID documents reflect her marriage to the appellant and she had gone to great lengths to register the marriage with the Portuguese authorities in London, in Lisbon, in Angola and in Nigeria. The statement says that she finds the allegation of their's being a marriage of convenience disturbing and an affront to her integrity.
36. However, the FtJ concluded that it was remarkable that the appellant was able to obtain a statement from Lily supporting his claim that the marriage was not one of convenience but it was not clear why she would not also attend the hearing. The FtJ was entitled to conclude that in her absence, her witness statement should be afforded very limited value. The appellant's evidence was that Lily had not attended court because their marriage had broken down and he had not asked her to attend. She had moved on with her life, according to the appellant. As to the suggestion that her non-appearance was inconsistent with her giving a supporting statement, the appellant said that it was not said that he should have asked her to attend. All that evidence puts into context the FtJ's assessment of her witness statement and her absence from the hearing. He was entitled to conclude as he did in relation to that evidence.

37. At [28] the FtJ said that it seemed to him that the appellant had invented the fathering of a child named N with another woman called B simply to show that he is someone who has multiple relationships. I accept that that conclusion by the FtJ fails to have regard to the fact that there is indeed a child named N whose mother is the person identified. The FtJ's decision does suggest that the appellant had simply made up the existence of a child that did not exist. In this, I am satisfied that the FtJ apparently failed to have regard to the documentary evidence that was before him.
38. However, I am not satisfied that this is a basis from which to conclude that the FtJ's overall assessment of the evidence is flawed. It was but one part of his examination of the evidence.
39. Insofar as it is suggested that overall the FtJ was not entitled to take into account the information provided in the immigration officer's report, I do not accept that contention. It was evidence that was before the FtJ which he was bound to take into account. That evidence was indicative of the appellant being in a relationship with someone called S, and indeed living with her, contrary to the appellant's contention that he was married and in a relationship with Lily.
40. In conclusion, I am not satisfied that there is any error of law in the FtJ's assessment of the evidence, notwithstanding the lack of supporting evidence in relation to the immigration officer's report. The FtJ considered the evidence in the round and the weight to be attached to the evidence was a matter for him.

Decision

41. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal therefore stands.