Upper Tribunal
(Immigration and Asylum Chamber) Appeal number: EA/08937/2016

THE IMMIGRATION ACTS

Heard at:	Field House	Decision & Reasons Promulgated
On	12 April 2018	On 17 April 2018

Before

Upper Tribunal Judge Gill

Between

Laddawan Ninsinghkhon — Appellant
(ANONYMITY ORDER NOT MADE)

And

Entry Clearance Officer, Bangkok — Respondent

Representation:
For the appellant: Mr M West, of Counsel, instructed by City Heights Solicitors.
For the respondent: Mr S Kotas, Senior Presenting Officer.

Decision and Directions

1. The appellant, a national of Thailand born on 11 February 1981, has been granted permission to appeal the decision of Judge of the First-tier Tribunal Beg (hereafter the "judge" unless otherwise indicated) who, in a decision promulgated on 17 August 2017 following a hearing on 7 August 2017, dismissed her against a decision of the respondent of 20 June 2016 to refuse her an EEA family permit in order to join her husband, a Mr Catalin Paraschiv (hereafter the "sponsor") in the United Kingdom.

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The sponsor is a Romanian national said to be exercising Treaty rights in the United Kingdom.

2. The respondent refused to issue an EEA family permit because he concluded that the marriage entered into between the appellant and the sponsor on 18 March 2016 in Thailand was a marriage of convenience.

3. The judge found that the marriage was a marriage of convenience, for reasons that she gave in her decision.

The issues and the grounds

4. The issues/grounds may be summarised as follows:

   (i) Whether the judge materially erred in law in her self-direction as to the burden of proof. At para 18, she referred to the decision of the Asylum and Immigration Tribunal in IS (marriages of convenience) Serbia p2008] UKAIT 00031 where the Tribunal held that the burden of proving that a marriage was not a marriage of convenience rests on the appellant.

   (ii) Whether her assessment of the evidence was unreasonable, irrational and/or insufficient to sustain her conclusion.

5. I heard detailed submissions from Mr West and Mr Kotas. It is only necessary for me to summarise their submissions very briefly, for reasons which will become apparent.

6. Mr Kotas accepted that the judge erred in law in her self-direction as to the burden of proof. However, he submitted that this error was not material. In his submission, she did not materially err in law in her assessment of the evidence at paras 18-26 where she considered whether the appellant had addressed the concerns raised by a report by immigration officers following a visit to the sponsor's address on 14 January 2016. He submitted that, if the judge had not materially erred in law in her assessment of the evidence, it is impossible to see how she could have reached a different decision if she had not erred in her self-direction concerning the burden of proof.

7. Mr West submitted that the judge's error in self-direction as to the burden of proof was fatal. In any event, he submitted that her reasoning at paras 18-26 failed to take account of relevant evidence, placed too much weight on third-hand hearsay evidence of the lodger who was spoken to by the immigration officers on the day of the visit and failed to reconcile contradictions which materially undermined the reliability of his hearsay evidence.

Assessment

8. In relation to her self-direction on the burden of proof and as stated above, the judge referred to IS at para 14 and the fact that the Tribunal held in IS that the burden of proving that a marriage was not a marriage of convenience rests on the appellant. Having found, at para 17, that the visit of immigration officers to the sponsor's residence on 12 January 2016 provided "*prima facie evidence that the marriage between the appellant and the sponsor raises a reasonable suspicion that the marriage had been entered into for the predominant purpose of securing residence rights*", she said, in the first sentence of para 18, that the "*burden of proof*" shifted to

the appellant "*to demonstrate that her marriage to the sponsor [was] not a marriage of convenience*".

9. The judge appeared to be unaware of the judgments of the Court of Appeal in Agho v SSHD [2015] EWCA Civ 1198 and Rosa v SSHD [2016] EWCA Civ 14 and the judgment of the Supreme Court in Sadovska v SSHD [2017] UKSC 54. There was no recognition by the judge that the overall legal burden of proof rested on the respondent to establish that the marriage was a marriage of convenience. Indeed, this would have been contrary to the judge's self-direction at para 14. Importantly, in my judgment, the first sentence of para 18 set the context in which the judge considered the evidence at paras 18-26.

10. In my view, it is impossible and, indeed wrong in law, to attempt to separate the judge's reasoning from her self-direction. A judge's assessment of evidence does not take place in a vacuum but against his or her self-direction concerning the applicable burden and standard of proof. An incorrect self-direction as to the burden of proof is fatal, in my view. It would be wrong in law to decide that, if the judge did not materially err in law in her reasoning at paras 18-26, any error in relation to her self-direction concerning the burden of proof was not material. In this particular case, the first sentence of para 18 shows that the judge's reasoning at paras 18-26 was inextricably linked to her incorrect self-direction on the burden of proof.

11. Accordingly, I have concluded that Mr West is correct in his submission that the judge's error in her self-direction as to the applicable standard of proof is fatal to her decision.

12. It is therefore unnecessary for me to deal with the detailed reasons Mr Kotas gave in submitting that the judge had not materially erred in law in her reasoning at paras 18-26 or the detailed reasons Mr West gave in submitting that the judge materially err in law in her reasoning.

13. Accordingly, I set aside the decision of the judge in its entirety.

14. In the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal ("FtT") and the Upper Tribunal (the "Practice Statements") recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

   "(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

   (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

15. In my judgment this case falls within para 7.2 (b). I therefore remit the appellant's appeal against the respondent's decision to the FtT.

<u>Notice of Decision</u>

The decision of Judge of the First-tier Tribunal involved the making of a material error of law. The decision is set aside in its entirety. This case is remitted to the First-tier Tribunal for a fresh hearing on all issues on the merits by a judge other than Judge of the First-tier Tribunal Beg.

Signed Date: 16 April 2018
Upper Tribunal Judge Gill