



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/04662/2018

THE IMMIGRATION ACTS

Heard at Field House
On 14 June 2019

Decision & Reasons Promulgated
On 20 June 2019

Before

UPPER TRIBUNAL JUDGE KAMARA
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

MUHAMMAD UMAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:

Ms. K. Joshi, legal representative, Joshi Advocates Ltd

For the Respondent:

Mr. T. Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Iqbal ('the Judge'), issued on 11 March 2019, by which an appeal against the respondent's decision not to issue the appellant with a residence card confirming that he enjoyed a retained right of residence was dismissed.

Anonymity

2. No direction has been previously made, and there is no reason for one to be now issued.

Background

3. The appellant is a national of Pakistan. He married a national of Lithuania, Ms. Naringa Jankauskaite, on 11 October 2012 and was issued with an EEA residence card valid from 28 August 2014 to 28 August 2019. The appellant initiated divorce proceedings and a decree absolute was issued on 27 April 2017. On 15 February 2018, the appellant applied for a residence card confirming his retained rights of residence. The respondent refused the application by way of a decision dated 18 June 2018 in which it was detailed:

'We have determined that you do not have a retained right of residence in the UK following divorce from your EEA ... sponsor. In March 2014, an investigation was launched into a money laundering operation being carried out by a Lithuanian national. This money laundering investigation ran alongside a criminal investigation and was given the name Operation Jotaru. The investigation was conducted by an Immigration Officer and a Metropolitan Police Detective attached to the Home Office.

The Lithuanian national, who will be referred to as LTU female 1, was suspected of arranging sham marriages between females from Lithuania and non-EEA national males living in the United Kingdom.

This investigation uncovered an organised crime network, with links to Albanian drug traffickers and corrupt solicitors. The members of the crime group sourced females in Lithuania, who were often convinced to come to the United Kingdom with the promise of obtaining a job in London. Some of the females were only made aware they would be expected to marry a male once they had arrived in the United Kingdom.

The modus operandi of the gang was for a member of the criminal group to source males who were either present illegally in the United Kingdom or whose visas were due shortly to expire. These males would be given bank account details for various members of the crime group. Payment would then be made to the gang

with LTU female 1 sourcing a flight for the female to come to the United Kingdom, using a Hungarian based budget airline.

The female would travel to Luton airport where she would be met by members of the crime group. The female would then apply for a National Insurance number and in some cases, open a UK bank account, in order to give the impression that they were present in the United Kingdom, exercising their Treaty rights as an EEA national.

The female would return to Lithuania on a flight booked by the crime group. They would then return to the United Kingdom again on a flight booked and paid for by the crime group and a registry office wedding would take place. The male would then, with the assistance of the crime group, make an application for leave to remain in the United Kingdom as the spouse of an EEA national.

... The male who had married the EEA national would be expected to pay around £4,000 to £7,000 for this sham marriage service.

...

Five members of the gang were arrested in August and September 2014 and given police bail. This was a lengthy investigation with international enquiries carried out and large amounts of electronical material and media devices requiring forensic analysis.

All members of the crime group were charged in September 2015 with 'Conspiracy to assist unlawful immigration' contrary to section 25(1) of the Immigration Act 1971 and 'Money laundering' contrary to sections 327 – 329 of the Proceeds of Crime Act 2002.

... Due to the scale of the investigation, it was decided with the Crown Prosecution Service to select a number of marriages to evidence and use these marriages to highlight to the jury the criminality the gang were involved with.

Twenty-six marriages were chosen, and they were chosen due to the flows of money between the non-EU national male and members of the crime group and evidenced flight booking from the airline's database.

There is evidence of bank transactions between yourself and the aforementioned crime group on the following dates: 17/08/2012, 03/09/2012, 11/09/2012.

There is evidence of Neringa Jankauskaite flying to the UK on flights paid for by LTU female 1 on the following dates: 24/8/2012, 12/09/2012, 10/10/2012.

The marriage of yourself, Muhammad Umar ... and Neringa Jankauskaite ... was one identified by the investigation team as being a sham marriage arranged purely to assist you to obtain leave to remain in the United Kingdom.'

4. A 'section 9 statement' authored by an Immigration Officer, dated 21 May 2018, details the information above and confirms that after a 9-week trial held in 2017, five members of the crime group were convicted of assisting unlawful

immigration and one member of money laundering. Four members received custodial sentences.

The hearing before the First-tier Tribunal

5. The appeal was heard on 11 May 2019. The appellant was represented by Mr. Balroop, counsel, who observed that no exhibits accompanied the section 9 statement. Mr. Grennan, for the respondent, informed the Judge that no further evidence would be forthcoming, and it was sufficient to rely upon a section 9 statement made for the purposes of criminal proceedings. Mr. Balroop confirmed to the Judge that his instructing solicitors had made no request for copies for the exhibits referred to within the section 9 statement prior to the hearing. No adjournment request was made by either party resulting in the hearing proceeding.
6. The Judge found that the evidence relied upon by the respondent discharged the burden placed upon him of demonstrating a reasonable suspicion that the marriage was one of convenience. She then proceeded to consider the totality of the evidence and in addition to the evidence contained within the section 9 statement she observed at [27], *'Although it may be considered a whirlwind romance, I find that the dates from his entry to the United Kingdom in March 2011, his college closing down and then being unable to find another college, to meeting his ex-spouse in 2012 and then subsequent marriage, is a time line that is highly convenient and further detracts from the credibility of the claimed relationship.'* At [29] the Judge found the marriage to have been one of convenience and dismissed the appeal.

Grounds of appeal

7. Grounds of appeal were drafted by Mr. Balroop. Three grounds of challenge were identified:
 - i) The Judge erred in law in her approach to the section 9 evidence relied upon by the respondent, as the failure to produce the purportedly exhibited evidence meant that the respondent had not discharged the evidential burden initially placed upon him;
 - ii) The Judge made adverse findings on issues that were not expressly put to the appellant; and
 - iii) The Judge acted unfairly in requiring the appellant to provide evidence as to the illness of the former wife's mother and by giving inadequate weight to the written evidence of the former wife and their former landlord.

8. Permission to appeal was expressly granted on Ground 2 alone by First-tier Tribunal Judge Birrell on 23 May 2019 in accordance with the procedure identified by the President in Safi and Others (permission to appeal decisions) [2018] UKUT 00388 (IAC); [2019] Imm AR 437. Judge Birrell observed, *inter alia*:

‘There is arguable merit in ground 2: it is arguable that if the Judge has concerns about aspects of the appellant’s account of his marriage then he should have given the appellant the opportunity to address those concerns.

There is no merit in the other two grounds. The Judge was entitled to find that the respondent met the legal burden of establishing the marriage was a sham given that there is no dispute that the defendants in the criminal case – in which it was asserted that the appellant’s marriage was a sham – were convicted of the offences in question and therefore it is difficult to see how it would be argued that failure to produce the exhibits (which appeared to relate to facts that were not in any event disputed) was material to the outcome. In relation to Ground 3 the Judge was entitled to give very little weight to evidence contained in witness statements where the witnesses did not attend court and there was no evidence to support the reason given for non-attendance.’

The hearing

1. Preliminary issue

9. At the outset of the hearing, Ms. Joshi sought to amend grounds by means of a skeleton argument dated 13 June 2019, which reached us on the morning of the hearing. She asserted that the amendment was nuanced in relation to Ground 1, though we find that it constitutes an effort to raise several issues which were not expressly raised in the earlier grounds of appeal. We observe that Joshi Advocates Ltd came on record on 5 June 2019 and no adequate reason was given for the late filing and service of the skeleton argument. Mr. Lindsay had no notice of the request to amend grounds until the morning of the hearing.
10. The request was for the Tribunal to exercise its case management powers: rule 5 of The Tribunal Procedure (Upper Tribunal) Rules 2008 (‘the Procedure Rules’) and permit the appellant to amend Ground 1 so as to incorporate a wide-ranging challenge to the Judge’s decision. Several grounds of challenge are identified within ‘amended Ground 1’, including a ground that the respondent had provided no evidence to connect ‘LTU female 1’ with any of the five persons convicted following trial; no evidence was filed detailing to whom the money was transferred and whether this was a gang member subsequently convicted; no evidence as to the number of charges was provided to the Judge and no confirmation was provided as to whether the charges related to the three

transactions made by the appellant to Ms. Jankauskaite's friend; and further that the Judge could not have lawfully determined that the burden of proof transferred from the respondent to the appellant.

11. The skeleton argument further details as to the amended ground:

'The only connection between the appellant/EEA sponsor and this criminal matter is that the EEA sponsor travelled via Whizz Air and that the appellant paid for her ticket via a third party (EEA sponsor's friend's boyfriend) who may or may not be the associated member of the gang involved in criminal activities with the said crime gang, but given the absence of evidence it is remote to connect the appellant's marriage to the criminal matters particularly as it is unclear whether the charges against the gang members related to the appellant's transactions, whether the associated person was charged/convicted.'

12. By way of rule 5(3)(c) of the Procedural Rules the Tribunal may permit an appellant to amend the notice of appeal. Rule 2 establishes that the overriding objective is that this Tribunal deals with cases fairly and justly, which includes dealing with a case in a way that is, *inter alia*, proportionate to the importance of the case, avoiding delay and being aware of anticipated costs. Rule 2(4) provides that parties to an appeal are obliged to help the Tribunal to further the overriding objective.
13. We observe that the appellant was aware that the First-tier Tribunal had refused him permission to appeal on Grounds 1 and 3 by way of its decision of 23 May 2019. The appellant enjoyed a right to apply to the Upper Tribunal to seek permission to appeal the refused grounds within 14 days after the date on which the First-tier Tribunal's notice was sent to him: rule 21(3)(a)(i) of the Procedure Rules. Such time expired on 6 June 2019, after Joshi Advocates Ltd came on record. No such paper application was made. We further note that in NA (UT rule 45; Singh v Belgium) Iran [2014] UKUT 00205 (IAC), at [4], a former President of this Tribunal refused to accede to a request to consider all grounds in circumstances where permission to appeal was granted on a narrow ground, the application was inexplicably made without notice and if the request had been granted it would have inevitably resulted in an adjournment with delay and resulting costs.
14. We refused the application to amend the appellant's grounds at the hearing. We were mindful of the overriding objective but observed the failure to exercise a right of appeal to the Upper Tribunal by way of a paper application. Ms. Joshi sought to rely upon her late entry into these proceedings, but we noted at the hearing that the appellant had enjoyed legal representation at the date of Judge Birrell's decision and that time in which to bring an appeal was still running when she came on record. Ms. Joshi could provide no adequate reason as to why such step was not taken, in circumstances where the Upper Tribunal would not proceed

with consideration of the substantive appeal where an in-time application for permission to appeal remained outstanding: see Safi, at [16]. The application amounted to a very late, without notice, effort to significantly amend the underlying nature of the appeal in circumstances that were unfair to the respondent. We found it was just and fair for the hearing to proceed on Ground 2 alone.

II. Submissions

15. As to Ground 2, Ms. Joshi criticised the Judge for not adjourning the matter of her own volition if she were concerned as to the inadequacy of Ms. Jankauskaite's evidence as to her inability to attend the hearing due to her mother's illness. Given the gravity of the respondent's evidence, there was a burden upon the Judge to permit the appellant to address all elements of concern as to the marriage.
16. Mr. Lindsay resisted the appeal. In simple terms, the appellant was on notice as to the case against him and there was no error in the Judge deciding that the appellant had failed to properly address such issues. The appellant was aware that if the burden were to shift to him, he would have to establish the circumstances of his marriage and its subsequent breakdown to the Tribunal's satisfaction. The findings at [23] to [26] simply confirm that the appellant failed as a matter of law to meet the burden placed upon him.
17. In reply, Ms. Joshi accepted that the former representatives could have explored matters in more detail, but the appellant was penalised because of their failure. Though his former wife has sought to support him by way of emailed evidence, the Judge should have been mindful that the appellant could not meet the burden placed upon him if Ms. Jankauskaite was unable to provide more detailed evidence.

Decision on error of law

18. Ground 2 details at [8] - [10] of the appellant's grounds:

'The FtT then proceeded to assess the appellant's explanation, however the FtT made adverse findings without putting the issue to the appellant.'

At paragraph 23 the FtT states, '... I find that the appellant has failed to explain why he would have taken such an active role in attempting to find her employments in the UK ...' the FtT continued at paragraph 26 '... I have no information before me as to the breakdown of the marriage.'

The appellant gave evidence however these issues were not put to the appellant at any stage. It is trite law that the appellant should be given the opportunity to respond before an adverse finding is made. The FtT failed to give him that opportunity.'

19. The paragraphs of the Judge's decision complained of, [23] and [26], detail in full:

'I find the appellant has failed to explain why he would have taken such an active role in attempting to find her employment in the UK, when he barely knew her, or indeed pay for her ticket to return, such that I am satisfied on balance that these matters detracts from the credibility of his claim. The appellant's explanation for his ex-spouse returning to Lithuania on several occasions was that her mother was a cancer patient. As I have already highlighted, there are two emails from his ex-spouse in which, I note, she confirms the appellant's account of how they met and in relation to the tickets that were bought. Further, she was unable to attend as she was looking after her mother.'

...

In addition, I have considered the fact that I have no information before me as to the reasons for the breakdown of the marriage save for the mention that there were some marriage difficulties. Further, I have noted that the appellant's immigration history demonstrates that soon after arrival in 2011, his college closed down and whilst he complained to the Home Office and searched for another college, it was at this time he met and married his ex-spouse.'

20. The respondent's refusal decision dated 18 June 2018 clearly placed the appellant on notice that the marriage was considered to be one of convenience and that Ms. Jankauskaite had sought to give an impression that she was present in the United Kingdom exercising relevant Treaty rights when she continued to reside in Lithuania. The appellant sought to explain at [7] of his witness statement dated 5 February 2019:

'I can confirm that after meeting each other for the first time we always stayed in touch with each other and even after my ex-spouse left the UK on temporary basis to see her mother. It was also during this period that I found a nail technician job for her and informed her about the same. My ex-spouse was very happy to hear that I found a job for her. However, she informed me that she has first to arrange the money for ticket and only then she can come. I really wanted to help my ex-spouse as I really liked her and also due to her mother's medical condition. It was therefore in this context that I offered to buy her ticket for coming to the UK. However, due to my poor knowledge of airports I was unable to book her ticket. It was therefore in this premise that my ex-spouse requested me to transfer the money to her friend's boyfriend who would be able to book the ticket for her. As a result of the same, I transferred the money into given bank account with the particular reference namely 'ticket'. I can confirm that I never knew or had met my ex-spouse's friend's boyfriend who booked her tickets. I can further confirm neither my ex-spouse nor myself were

involved in any of the activities performed by this group at all. My ex-spouse's flight booking were made entirely unintentionally for all the above-mentioned reasons.'

21. Contrary to the allegation made within Ground 2, the appellant was not only on notice that the respondent did not accept that Ms. Jankauskaite was working in this country, but he sought to address the issue by way of his witness statement. Upon applying the correct burden and standard of proof, the Judge did not accept his evidence. We find that there is no substance in the assertion that the appellant was not made aware of this issue during the course of the hearing.
22. We further find that there is no merit to Ms. Joshi's submission that the Judge should have adjourned the hearing so that the appellant could file and serve further evidence as to the reasons for the breakdown of his marriage. The appellant was aware that the respondent did not accept the genuineness of the marriage and he enjoyed some seven months from receipt of the respondent's decision to his appeal hearing in which to prepare for his appeal. His witness statement runs to over 3 pages and the breakdown is simply detailed at [12] as, '*In 2016, I started to encounter marital problems with my ex-spouse as a result of which my marriage broke down conclusively on 27 April 2017 by way of divorce.*' The burden rests upon the appellant to establish his case and the Judge cannot be criticised for not adjourning the appeal on her own motion so as to permit the remedying of failings in the presentation of evidence, particularly in circumstances where the appellant and his representatives have not sought such adjournment.
23. The Judge considered the evidence presented to her in the round, undertook a careful assessment and gave clear and lawful reasons that are unimpeachable in the circumstances. The hearing was conducted in a fair manner and the appellant cannot meritoriously assert that he was not put on notice of issues that were adverse to him.

Notice of Decision

24. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
25. The decision of the First-tier Tribunal is upheld.

Signed: *D. O'Callaghan*

Upper Tribunal Judge O'Callaghan

Date: 17 June 2019