Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05234/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decisions and Reasons Promulgated**
On Thursday 13 June 2019	**On Thursday 27th June 2019**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ROMAN [O]

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr M Sowerby, Counsel instructed by Shanthi & Co

DECISION, REASONS AND DIRECTION

BACKGROUND

1. This is an appeal by the Secretary of State for the Home Department. For ease of reference, I refer below to the parties as they were in the First-tier Tribunal albeit that the Secretary of State for the Home Department is technically the Appellant in this particular appeal. The Respondent appeals against a decision of First-tier Tribunal Judge Ian Howard promulgated on 30 July 2018 ("the Decision") allowing the

Appellant's appeal against the Respondent's decision dated 16 May 2017 refusing the Appellant's application for a residence card under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") as the spouse of an EEA national, Ms [YR] (referred to by the Judge as "Ms [Y]" which is the name I therefore use hereafter). The Respondent contends that the marriage is one of convenience. The Judge concluded that it was a genuine marriage.

2. Permission to appeal was refused by First-tier Tribunal Judge Paul Chambers on 18 September 2018 but granted by Upper Tribunal Judge McWilliam on 7 May 2019 in the following terms so far as relevant:

> "…It is arguable that the judge did not take into account the interview transcripts and resolve issues of conflict in the evidence relied upon by the respondent."

3. The appeal comes before me to consider whether the Decision contains an error of law and, if so, either to re-make the decision in this Tribunal or remit the appeal to the First-tier Tribunal for re-making.

4. At the outset of the hearing, Mr Melvin explained that he was in some difficulties in presenting the Respondent's case as he had been sent the file relating to the Appellant's wife and did not therefore have the documents on which the Respondent's grounds relied. He did have a copy of some documents but not those referred to in the grounds. He would have some difficulty in arguing the appeal without sight of the relevant documents. Mr Sowerby expressed some sympathy with the position in which Mr Melvin found himself but objected to any adjournment of the hearing as the Appellant was ready to proceed.

5. Having ascertained that the documents which Mr Melvin did not have were relatively few and short, I refused the adjournment and arranged for copies to be provided to Mr Melvin. The case was put back in the list whilst copies were organised, and I gave Mr Melvin a short break before the re-start of the hearing to consider the copy documents.

GROUNDS, RULE 24 STATEMENT AND SUBMISSIONS

6. Mr Melvin relied in his submissions on the renewed grounds as pleaded. Those are that the Judge failed to consider the content of the marriage interview which had been produced at an earlier hearing which was adjourned to allow the Appellant to consider its content. The Respondent also took issue with the Judge's acceptance at [20] of the Decision of the evidence of Ms [Y]. In the course of that paragraph, the Judge referred to the evidence provided by an Immigration Officer during a visit to the address said to be shared by Ms [Y] and the Appellant and to the discovery there of the Appellant's ex-partner, Ms [R]. The Respondent contends that the Judge failed to consider whether this evidence pointed to the Appellant living at that

address with Ms [R] rather than with Ms [Y]. The Judge is also said to have ignored the evidence that the Appellant had been working in the UK using a false identity (said to be relevant to his credibility). Finally, the Appellant had, by the time of the hearing, returned voluntarily to Mexico. It is said that the Judge failed to consider that factor when assessing the genuineness of the marriage.

7. Mr Melvin relied in submissions on two matters in particular. First, he reiterated the point that the Judge failed to reference the marriage interview and the discrepancies therein. Second, he pointed out that the evidence might suggest that the Appellant, his ex-partner, the child and Ms [Y] were all living at the same address. The Appellant and his ex-partner have a child together. The Judge had failed to take that evidence into account.

8. Mr Sowerby relied on the Rule 24 response. That submits that "the First-tier Tribunal Judge .. addressed himself properly to the evidence before him and reached adequately-reasoned findings". It refers to the Judge's finding that the witnesses were compelling. It is said that reasons were provided for the finding that the marriage was genuine at [14] to [26] of the Decision. The Judge had referred to the marriage interview and minute sheet at [18] of the Decision and took into account the circumstances surrounding the visit to the address at [20] of the Decision. He also took into account the Appellant's voluntary return to Mexico ([22] of the Decision).

9. Mr Sowerby pointed out, in addition, that the current decision under appeal followed two previous refusals which relied on the marriage interview and property visit. The Respondent's decision under appeal on this occasion reads as follows so far as relevant:

> "It is also noted that you have previously been refused a residence card on 2 previous occasions on the basis of your marriage to your EEA sponsor following a home visit and a marriage interview respectively.
>
> On this occasion you have not submitted sufficient evidence to convince the secretary of state that this marriage is genuine. You have only submitted some photographs, one council tax bill dated March 2016 that your EEA sponsor is not listed on, 5 general letters and 1 joint bank statement.
>
> It is also noted that in 2003 you were refused asylum as the dependent of your then spouse [CSR], also that a divorce certificate from this first marriage has never been seen by this department to accept it as dissolved and that on your current marriage certificate you are stated as single.
>
> Therefore, this relationship is still deemed one of convenience in order to benefit your immigration status."

10. Mr Sowerby accepted that the answers given at the marriage interview were not referred to in the Decision but pointed out that the Judge had heard evidence from Ms [Y]. The Judge also had a witness statement from the Appellant although, as Mr Melvin pointed out in reply, that was largely concerned with his departure from the UK. As Mr Sowerby also pointed out, many of the answers in the marriage interview were not discrepant as the earlier reasons for refusal letter had accepted. For that reason, even if there were an error in failure to deal with the content of that record, it was not material.

DISCUSSION AND CONCLUSIONS

11. The Respondent does not suggest that the Judge has misapplied the case-law in relation to marriages of convenience. He sets out the relevant passages from Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC) and Rosa v Secretary of State for the Home Department [2016] EWCA Civ 14 at [12] of the Decision. As there recorded, therefore, the position is that the legal burden of proof throughout remains with the Respondent to the balance of probabilities but that, once the Secretary of State has discharged his evidential burden, that burden then shifts to an appellant to rebut that evidence.

12. The Decision has to be read against that background. The Judge recorded at [14] of the Decision the Respondent's reasons for refusal on this occasion and that this depended on information gathered during the Respondent's previous interactions with the Appellant. Although he does not expressly find at that point that the evidence was sufficient to discharge the evidential burden, it must be assumed that he accepted this because he then moved on to consider the Appellant's case countering the evidence of the Respondent.

13. The Judge dealt first with the reasons based on the Appellant's continuing marriage to Ms [R]. The Judge accepted that the Appellant's assertion that he was never married to Ms [R] was inconsistent with an earlier asylum interview where the Appellant said he was married to her. He also accepted that there was inconsistency between a "UKBA minute sheet dated the 21st November 2012" when the Appellant apparently stated that he lived with his two children and their mother but then changed his account and said that the children were in Mexico which is at odds with what he said in the marriage interview. In relation to those aspects, the Judge said that "[u]ltimately the evidence on this point is unsatisfactory, but I am not satisfied the evidence is such to support the respondent's contention Ms [R] and the appellant are married". I note that the Judge did not say either there or later whether the inconsistencies there noted had any impact and if so what impact on his later findings that the marriage to Ms [Y] was genuine. However, those are not directly relevant to that issue because the Appellant's case is that the

relationship between him and Ms [Y] did not commence until February 2013.

14. The crux of the Judge's finding that the marriage is genuine is based on the evidence of Ms [Y] and what he says about that evidence therefore bears setting out in full:

> "20. Ms [Y] was a convincing witness. She told me about the circumstances of her relationship with the appellant from beginning to date. Their relationship is easy to understand, it is their circumstances as they have been from time to time that are curious. They met when the appellant and Ms [R] were her tenants. She describes how she started living at 63A with her daughter in 2010, [M]. She told me the appellant moved in with his partner and stepson in September 2012. She described her relationship with the appellant at that time as landlord and tenant. It was in February 2013 she describes the relationship changing when he kissed her for the first time. By April 2013 she describes the relationship as more solid. Ms [R] was still living at the address with her son until the appellant told her about the relationship. This is consistent with what Ms [R] said to immigration officials when they visited the 63A address on the 6th December 2014. It is recorded that she claimed the appellant "is dating a woman by the name of [MY] and has been for approximately 2 years". She went on to say the couple was on holiday at an hotel in London and she was staying at the house to look after their child while they were away. Given the potential for Ms [R] to be hostile to the appellant this evidence is particularly probative.
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> 21. She then gave detailed evidence about her previous marriage and why she did not tell the appellant about this. She also explained the need to find a tenant when her daughter moved out. She told me that prior to 2012 she did not know the appellant.
>
> 22. She then described the nature of their relationship up to the date he returned to Mexico and showed me the evidence of their daily contact since that time. She has also been to visit him there since he left the UK. I have a copy of her flight details and boarding passes."

15. Based on that evidence and the Judge's finding that Ms [Y] was a compelling witness, he expressed himself satisfied that the marriage between her and the Appellant was a genuine one.

16. Turning back to the Respondent's grounds of challenge to the Decision, I reject the last two of those grounds concerning the relevance of the Appellant's voluntary departure to Mexico and the content of the UKBA Minute Sheet. I have already noted why the UKBA Minute Sheet does not assist and the Judge was relying on the credibility of Ms [Y] and not the Appellant and so it was not relevant in that regard. If anything, the Appellant's voluntary departure to Mexico helped rather than hindered the Appellant's case as there was

evidence of continuing contact between him and Ms [Y] thereafter to the extent that she had travelled to Mexico to see him. The Respondent can scarcely complain of the Appellant doing the right thing and leaving the UK when he is told he should do so.

17. I am however more concerned about the Judge's failure to refer in any detail to the record of the visits to the Appellant's address and the marriage interview. There is an express reference to the visit which took place on 6 December 2014 at [20] of the Decision and I accept that the Judge was entitled to take that supportive evidence into account. However, there is other evidence in that and the record of the other visit which may have a bearing on whether the relationship between the Appellant and Ms [Y] is genuine. Following the evidence from the visit on which the Judge relies, the record of the visit on 6 December 2014 continues as follows:

> "Ms [R] allowed us to have a look at the room that Mr [O] and Ms [Y] share. Andrew (Mr [O] and Ms [R] child) was in the room at the time. The room contained a bunk bed. Ms [R] claimed that Andrew sleeps on the top bed whilst Mr [O] and Ms [Y] sleep on the bottom bed.
>
> The other bedroom in the property's door was shut and Ms [R] would not allow us to have a look in this room, claiming that her other son was in there with his friends."

Whilst there may be that innocent explanation for why the Appellant's ex-partner would not allow the Immigration Officers into the other room, the Judge ought to have considered whether this gave rise to any suspicion that the living arrangements were not as claimed. Moreover, the sleeping arrangements as explained by the Appellant's ex-partner whilst possibly not unique were at least unusual and the Judge ought to have considered what should be derived from this evidence as a whole and not simply that part which supported the Appellant's case.

18. The record of the visit on 15 February 2015 contains less by way of evidence either supporting or undermining the Appellant's case. As appears from that record, the Immigration Officers sought to gain entry with "two adolescents" who were entering the property at the time. The Officers concluded that these were the children of the Appellant and his ex-partner. There is no evidence from either about what occurred during that visit. They are said to have asked the Officers if they had a warrant and when they said they did not, the children told them to wait whilst they went inside. They did not re-emerge, and the Officers left. There is obviously no reason why an individual, particularly a teenager should not ask if an official has a warrant before admitting that official to the premises but, coupled with the other report, the Judge should at least have explained why that evidence had no bearing on the question he had to answer.

19. Turning then to the marriage interview, it can be inferred from what is said at [20] to [21] of the Decision that Ms [Y] was giving evidence about the details of the relationship in order to answer the inconsistencies relied upon by the Respondent emerging from the marriage interview (for example, the reason why she had not told the Appellant about her previous marriage arises from the discrepancy in that regard between the answers at interview). However, the Judge ought to have had regard to the evidence from that interview about the answers there given.

20. I have carefully read the earlier reasons for refusal letter, in particular that dated 27 January 2016 which is detailed in relation to the discrepant answers relied upon. That earlier letter is relied upon as part of the Respondent's case now. None of that material is considered by the Judge. Some of the discrepancies may be minor but they required to be explained. There are what are referred to as "statements" from the Appellant and Ms [Y] on the Tribunal file which are not statements as such but rather point by point responses to the discrepancies relied upon by the Respondent. It may be that when those are considered alongside the interview record, the same result may be reached. However, those should have been considered with the evidence which the Judge considered to be in the Appellant's favour. They were not.

21. Whether a marriage is one of convenience depends on the Respondent establishing to a balance of probabilities that the marriage is not genuine. However, I am unable to be satisfied as to the lawfulness of the Judge's conclusion when he has considered only the evidence pointing in one direction. There is no balancing of the evidence relied upon by both parties. For that reason, I am satisfied that the grounds disclose an error of law in the Decision. As I have already indicated, whilst an analysis of all the evidence might lead to the same outcome, that is not necessarily the case. Accordingly, I am satisfied that the Decision should be set aside, and the decision re-made.

NEXT STEPS

22. For the above reasons, I set aside the Decision. I have carefully considered whether to retain this appeal in the Upper Tribunal for re-making or to remit to the First-tier Tribunal.

23. I am mindful of the fact that the Appellant remains in Mexico and may still be unable to give evidence at the hearing. He is apparently living in Acapulco and it may be possible for him to give evidence by video-link if he wishes to do so. There is no indication that he wished to do so at the previous hearing. However, I have decided that it is appropriate to remit this appeal to Taylor House in case he wishes to take that course as arrangements are likely to be easier to put in place there.

24. The reason I have set aside the Decision is a failure to consider the Respondent's evidence. As such, although the issue is a narrow one, the fact finding required may be more extensive, particularly if the Appellant does wish to give evidence himself. I am therefore satisfied that it is appropriate to remit the appeal to the First-tier Tribunal. I do not preserve any of the previous findings as it will be necessary for a second Judge to consider Ms [Y]'s evidence which lay at the heart of the Decision as a whole and he/she should not be constrained by earlier findings when so doing.

25. Both parties were agreed that, if I found an error of law as I have done, it was more appropriate to remit the appeal for re-hearing than to retain it in this Tribunal.

DECISION

I am satisfied that the Decision contains a material error of law. I set aside the decision of First-tier Tribunal Judge Ian Howard promulgated on 30 July 2018. I remit the appeal to Taylor House for re-hearing before a Judge other than Judge Howard.

DIRECTION

The Appellant is directed to notify the First-tier Tribunal within 28 days from the date when this decision is promulgated whether he wishes to give evidence by video-link from Mexico at the remitted hearing so that arrangements can be made if necessary.

Signed Dated: 25 June 2019
Upper Tribunal Judge Smith