IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05314/2019 (V)

THE IMMIGRATION ACTS

Heard remotely at Field House	**Decision & Reasons Promulgated**
On 17th August 2020	**On 26th August 2020**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

ERMAL HASANDOCAJ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Pipe, instructed by TRP Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in the Appellant's bundle of 58 pages and the Respondent's bundle of 157 pages, the contents of which I have recorded. The order made is described at the end of these reasons.

DECISION AND REASONS

1. The Appellant is a citizen of Albania born in 1986. He appeals against the decision of First-tier Tribunal Judge Browne promulgated on 21 February 2020 dismissing his appeal against the refusal of a residence card as confirmation of a right of residence under the Immigration (EEA) Regulations 2016 [the Regulations]. The judge decided the appeal on the papers at the Appellant's request.

2. Permission to appeal was sought on the grounds that the judge:

   i) applied the wrong burden of proof;

   ii) erred in law in her approach to the evidence and in making irrational findings; and

   iii) made a material mistake of fact.

3. Permission was granted by First-tier Tribunal Judge Haria on 6 May 2020 for the following reasons:

> "The grounds assert inter alia that in determining whether the marriage between the Appellant and his EEA Sponsor was one of convenience the judge erred in requiring the Appellant to show that the marriage was genuine and not one of convenience rather than the legal burden being on the Respondent.
>
> In an otherwise well-reasoned Decision it is arguable, that the judge erred as asserted. The Judge states the burden of proof is on the Appellant [11], however as clarified in Rosa v SSHD [2016] EWCA Civ 14 "… *the legal burden lies on the Secretary of State to prove that an otherwise valid marriage is a marriage of convenience* … ." I do not consider it appropriate to limit the grant of permission. Permission is granted on all grounds."

Submissions

4. Mr Pipe submitted the judge misdirected herself at [11] on the burden of proof stating: "The standard of proof is the balance of probabilities (i.e. it is more likely than not) and the burden of proving this case is on the Appellant. The relevant date for my consideration of this appeal is at the date of determination." Mr Pipe submitted that there was no further self-direction and no reference to any of the case law on marriages of convenience. At [44] the judge stated "The Appellant does not qualify as a family member under Regulation 2 and 7, as a spouse, as he is a party to a marriage of convenience. He does not satisfy the Regulations so he is not entitled to issue of confirmation under the Regulations and has not established an entitlement to a residence card under the Regulations. The Sponsor cannot exercise her treaty rights as an EEA national and worker in the UK in relation to the Appellant, as the Appellant and Sponsor are parties to a marriage of convenience."

5. Mr Pipe submitted the Sponsor was a qualified person and there was a legal marriage between the Appellant and the Sponsor. Therefore, he had established an entitlement under the Regulations and it was for the Respondent to show that the marriage was one of convenience. There was nothing in the decision to indicate that the judge had applied the correct burden of proof in her findings.

6. Mr Pipe then made submissions on ground 3 and referred me to the marriage certificate in which the Appellant's occupation was blank and the Appellant's father's occupation was stated as a lorry driver. There was a clear mistake of fact at [17] of the decision where the judge stated:

> "The application states that the Appellant is a lorry driver (marriage certificate) and she is a food factory worker. The claim that he is a lorry driver is inconsistent with his evidence in interview, he said he had been a casual waiter in Albania. The fact that he is a lorry driver goes against him in relation to his overall credibility as he travelled illegally into the UK first by car and then by lorry. This is his stated profession on a legal document and the documentary evidence is at odds with the evidence he provided in the Home Office interview. He has gained illegal entry by planning along the lines of his work and he is evasive about his purpose in the UK."

7. Mr Pipe submitted that this mistake of fact was taken as a significant point of credibility against the Appellant and therefore it was sufficiently weighty to give rise to an error of law. Mr Pipe submitted that, taking grounds 1 and 3 together, the decision was fundamentally flawed and should be set aside.

8. In relation to ground 2, Mr Pipe submitted that the judge had erred in law in her approach to the evidence. Applying Sadovska v SSHD [2017] UKSC 54 the judge had to balance the totality of the evidence. The judge had failed in the decision to refer to any of the questions in interview where the Appellant and Sponsor gave consistent answers. The judge only referred to discrepant evidence and not consistent evidence. She failed to demonstrate that she had balanced all of the evidence before her and she erred in law in not looking at the totality of the evidence.

9. In relation to paragraph 12(vi) of the grounds Mr Pipe submitted that the judge was in danger of importing irrelevant considerations into her assessment of the witnesses' evidence at [31] and [33] of the decision. He referred me to paragraph 12(i) to 12(iii) of the grounds and submitted the judge's approach was flawed. The judge irrationally rejected the evidence of witnesses and the documentary evidence was not inconsistent. The photographic evidence was clear evidence of a relationship. Mr Pipe accepted there were credibility issues but, looking at the totality of the evidence, the judge had erred in law and the decision should be set aside.

10. Ms Everett submitted that on the face of the decision the judge had misdirected herself on the burden of proof. However, this was not a material error of law because when the judge's findings were considered that error did not affect the judge's approach to the evidence. It was not clear on reading the decision as a whole that the judge's findings were infected by a misapplication of the burden of proof because the judge did not take the assertion from the Respondent, that this was a marriage of convenience, and stop there. The judge went on to consider the Appellant's evidence and her findings were intermingled with what the Respondent had said in the refusal decision. Although there was a profound and acknowledged legal error, unusually it was not material to the decision to dismiss the appeal.

11. In relation to ground 3, Ms Everett submitted that the judge's findings at [17] could be 'ringfenced' because, notwithstanding the significant weight attached to this mistake, there were so many other findings which adversely affected the Appellant's credibility. This mistake of fact was not material so as to amount to an error of law.

12. In relation to ground 2, Ms Everett submitted that, although there were questions in interview where the Appellant and Sponsor gave consistent answers, the judge had looked at the interview as a whole. The judge decided the appeal on the papers with the Appellant's consent. It was difficult to deal with credibility when there was no opportunity to clarify the Appellant's and the Sponsor's evidence and no cross-examination. When the decision is looked at as a whole, the judge's inferences were open to her on the evidence before her.

13. The witnesses who submitted letters in support of the application were foreign nationals and all had dealings with immigration. The judge's inference that they had knowledge of immigration issues may not be correct but it was one that was open to the judge on the evidence and one that was not challenged because the appeal was decided on the papers. Whilst an appeal on the papers should not be held against the Appellant, the judge cannot step into this evidential void and must decide the issues on the evidence before her. On the evidence in this appeal, it is hard to suggest that the judge would not have found that the Respondent had satisfied the burden of proof.

14. Before Mr Pipe responded to Ms Everett's submissions, I pointed out the evidence at pages 147 and 148 of the Respondent's bundle which is a statement dated 11 June 2019 from the Home Office in relation to the interview. It stated:

> "The couple were initially spoken to in the waiting room where (S) claimed she spoke Romanian and some Albanian. (A) was unable to understand what was being asked of him as he only appeared to speak Albanian. There did not appear to be any common language and as such a communications test was authorise (sic) by the duty CIO. The test was then conducted with an EO colleague in attendance. A number of questions were given to an Albanian interpreter prior to the couple entering the room. The interpreter was asked to read the question to the applicant so he could relate the same question to the sponsor. What was found (sic) that there was no clear evidence that they could actually hold a normal conversation but by using short words in broken English and by using hand actions and signals, they could attempt some idea of what was being asked although the answers provided were far from fluid. As such a full interview was then conducted.
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> From the very start it was noticed numerous discrepancies including the fact (A) stated that (S) had the same year of birth (1986) as his own, adding that this was something they had in common. He was asked again to confirm her date of birth and again stated 19/07/1986 when in fact it was 19/07/1996! This was confirmed still further at Q.20 where (S) confirmed she had no problems with (A) being ten years older!

> What was also apparent was that (S) had only been in the UK for a matter of days before the couple allegedly met and within a further 3 days were living together. Both were asked how they could have had an actual conversation together given there was no common language. (A) admitted it was so hard, in fact unbelievable. (S) said they used Google Translate to hold a conversation. At question 134, (A) was asked about the language barrier between a Romanian and an Albanian. He replied, 'If someone speaks to me in perfect English I don't understand a word but if someone speaks in broken English I understand perfectly.'
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> A full transcript of the marriage interview with both parties conducted in their respective languages is recorded on ICD5257
>
> Findings
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> Following lengthy interviews with both parties and examination of all evidence provided the investigating officer concludes that this is clearly a relationship of convenience and not one that is akin to marriage. It is likely that this relationship has been arranged solely to assist (A) to remain in the UK."

15. I asked Mr Pipe that, given this evidence, the Respondent had clearly discharged the evidential burden of raising a reasonable suspicion that the marriage was one of convenience. Therefore, it was for the Appellant to raise sufficient evidence to show otherwise and there was no material error of law in the judge's approach.

16. Mr Pipe submitted that it was accepted the judge had misdirected herself in law. This misdirection was material because the judge had also made a material mistake of fact, in finding the Appellant had lied in legal documents, and the judge had failed to balance the positive answers in interview with the negative ones. Further, the judge took into account irrelevant considerations. The misdirection coupled with the other errors of law meant that the decision was fundamentally flawed. Mr Pipe accepted that stating the wrong burden at [11] might not have been material if there had been a proper assessment of the evidence. However, the judge had made other errors of law and her findings were not properly balanced. It was not possible to isolate the errors as submitted by Ms Everett and therefore the errors were material.

17. I indicated that I was going to reserve my decision and Mr Pipe submitted that, if I found there was a material error of law, I should remit the appeal to the First-tier Tribunal for rehearing. The Sponsor had lodged an appeal against the decision to deport her. A remittal should be on the basis that this appeal is linked to the deportation appeal DA/00174/2020 in the First-tier Tribunal in Birmingham. Mr Pipe also submitted that the Sponsor was in the early stages of pregnancy and this may affect any listing of a future oral hearing.

Conclusion and Reasons

18. The Appellant entered the UK illegally in August 2017 and the Sponsor arrived in the UK in September 2018. The Appellant and Sponsor met in a bar/club on 3/4 October 2018. They spent that first night together and the Sponsor asked the Appellant to

move in a few days later. At that stage they communicated by a combination of hand gestures, body signals and using google translate.

19. In the application form the Appellant stated they started living together in November 2018 and they decided to get married in December 2018. The council tax bills in both names are dated April and July 2019. The water bill dated March 2019 was in the Sponsor's name. The Appellant's neighbour stated (in his statement dated 8 January 2019) that they moved in together in October 2018 and he was introduced to the Appellant in November 2018.

20. The Appellant applied for a residence card as an extended family member on 14 May 2019 which was refused and he was served with notice of removal on 4 June 2019. The Appellant and Sponsor were interviewed on 5 June 2019 and were married on 19 July 2019. There was an affidavit dated 29 June 2019 from the Sponsor's mother agreeing to the marriage. The Appellant applied for a residence card as a family member on 5 August 2019. The Respondent refused the application on 19 September 2019 on the basis the marriage was one of convenience.

21. The judge made the following findings:

    (a) The Appellant's occupation of lorry driver in his marriage certificate was inconsistent with his interview in which he stated he was a casual waiter in Albania. This fact went against him in relation to his overall credibility [17];

    (b) The Appellant and Sponsor were not credible witnesses and the marriage was contrived [18] and [19]. The reasons for these conclusions were set out in the subsequent paragraphs;

    (c) It was improbable that a woman new to the UK would ask a stranger from another country to move in so quickly and to do so whilst relying on hand gestures, body signals and google translate [20] and [21];

    (d) There were no text messages or other evidence of messages between the Appellant and Sponsor to show that the relationship began in October 2018 [22];

    (e) The photographs sent with the application were undated. The photographs had handwritten dates added at a later date [22] and [30];

    (f) There was no correspondence or bills to indicate that the Appellant and Sponsor had been living together since October/November 2018 [22];

    (g) The Appellant and Sponsor were unable to speak a common language and agreed to marry without knowing very much about each other [23] and [36];

    (h) The Sponsor stated in response to the one stop notice that her family in Romania were coming to the wedding. They did not attend the wedding. The Sponsor's aunt from Germany attended the wedding [24];

    (i) There was no evidence from the Appellant's relatives in the UK or his brother in Albania [27];

(j) The letters from friends had been obtained post refusal and testified to seeing the Appellant and Sponsor together on limited occasions. They attracted little weight [26], [31] to [34];

(k) The council tax and water bills did not support the Appellant's claim that he moved in with the Sponsor in November 2018 [28] and [29];

(l) The Appellant and Sponsor married and friends attended the ceremony and reception [31];

(m) The conflicting evidence and circumstances of the Appellant did not lend weight to the impression that this was a genuine relationship, notwithstanding the letters of support [34];

(n) The answers in interview were inconsistent and did not support the Appellant's claim that the relationship was genuine [37] to [39].

22. The mistake of fact at [17] was not material to the judge's conclusion that the Appellant was not a credible witness (Ground 3). It was one of a number of factors taken into account. The judge's adverse credibility finding was not infected by this error because the judge gave numerous other reasons at [20] onwards for why he concluded at [19]:

> "He has provided proof of marriage by way of a marriage certificate and hence the evidence required but I find it is more likely than not and hence probable that the marriage is contrived in order to avoid deportation on account of the following further facts."

23. The appeal was decided on the papers at the Appellant's request and the judge considered the documentary evidence, including witness statements and letters of support from friends and neighbours. The judge did not find the Appellant and Sponsor to be credible and gave cogent reasons for coming to that conclusion at [19] to [42].

24. It was apparent from [37] and [38] that the judge considered the interview as a whole. The judge's conclusion that the Appellant and Sponsor had only basic knowledge of each other and little knowledge about each other's family background was open to her on the evidence before her. The judge was not obliged to set out the consistent answers given in interview. Those consistent answers would not have led to a different conclusion in any event. The judge gave adequate reasons for why the answers given in interview did not support the Appellant's claim that his marriage was genuine.

25. The judge considered the interview in the context of the other evidence and gave adequate reasons for why he attached little weight to the evidence of the Appellant's witnesses. The letters were very brief and lacking in detail. In general, they are dated November 2019 and either state that the writer has been to dinner with the Appellant and Sponsor or that the writer attended the wedding. There was no error of law in the judge's consideration of the Appellant's case (Ground 2).

26. I am satisfied that the judge's misdirection at [11] was not material to the decision to dismiss the appeal under the Regulations on the basis that the marriage was one of convenience for the following reasons (Ground 1).

27. The evidence at pages 147 and 148 of the Respondent's bundle (set out above) was sufficient to show that there was a reasonable suspicion the marriage was one of convenience. The Respondent had discharged the evidential burden. The judge's failure to state this in the decision was not material because there was clear evidence before her to enable her to come to such a conclusion. The evidential burden shifted to the Appellant. There was no error of law in the judge's assessment of the Appellant's evidence for the reasons given above.

28. The consistent evidence when balanced against the inconsistent evidence and the lack of other documentary evidence to support the Appellant's and the Sponsor's account could lead to only one conclusion in this case: The marriage was one of convenience. Therefore, had the judge correctly stated the burden of proof she would have come to the conclusion that the Respondent had discharged the legal burden in showing that this was a marriage of convenience.

29. Accordingly, I find that there is no material error of law in the decision promulgated on 21 February 2020 and I dismiss the Appellant's appeal.

Notice of Decision

The appeal is dismissed

No anonymity direction is made.

J Frances

Signed Date: 21 August 2020
Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed Date: 21 August 2020
Upper Tribunal Judge Frances