Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00453/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
on 21 January 2014	**On 29 January 2014**
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Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

NAVEED ANJUM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr Kennedy, Advocate, instructed by Abbott, Solicitors, Luton
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

No anonymity order requested or made.

DETERMINATION AND REASONS

1) The appellant appeals against a determination by First-tier Tribunal Judge Burns, dismissing "on the papers" (as requested by the appellant) his appeal against refusal of a residence card.

2) These are the grounds of appeal to the Upper Tribunal:

Ground No 1

Failure to consider Regulation 6 properly:

Regulation 6
"Qualified Person"

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6 –(1) In these Regulations "qualified person" means a person who is an EEA national and in the United Kingdom as –
(a) a jobseeker;
(b) a worker;
(c) a self-employed person;
(d) a self-sufficient person; or
(e) a student.

Immigration Directorates' Instructions Chapter 7 Section 73, EEA Nationals & Their Family Members explain self employed as
"A "self-employed person" is someone who established him/herself in the UK in order to pursue activity as a self-employed person."

In paragraph 16 the Immigration Judge states

"I did not accept the evidence tendered of the appellant's claimed employment."

It is pertinent to mention that Immigration Judge did not consider the grounds as it clearly indicates that the appellant is a qualified person which include self-employed along with other categories. (Please see grounds). In support of self-employment the Appellant did provide Invoices. Bank statement, Accountant letters which clearly shows that the Appellant is self-employed.

The Appellant believes that the Immigration Judge has not properly followed the Regulations. Should the Immigration Judge apply the Regulation 6 properly; he would have reached a different conclusion.

Ground 2

Failure to consider Papajorgji (EEA Spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC).

It is further argued that the appellant was not under duty to prove at the outset that the marriage of the Appellant was not one of convenience and burden of proving the allegation of genuineness of marriage was on the Respondent who have failed to do so in line with the case of "Papajorgji (EEA Spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC)" wherein it is held that:

"i) There is no burden at the outset of an application on a claimant to demonstrate that a marriage to an EEA national is not one of convenience.

ii) IS (marriages of convenience) Serbia [2008] UKAIT 31 establishes only that there is an evidential burden on the claimant to address evidence justifying reasonable suspicion that the marriage is entered into for the predominant purpose of securing residence rights."

In the presence of above mentioned evidence appellant has proved that the marriage between him and his wife is genuine and burden of proof that it is not genuine on the Respondent and the Immigration Judge cannot simply conclude from the facts that all the personnel (accountant and solicitors) acting for the appellant are from not the same vicinity where the appellant resides.

Should the Immigration Judge apply Papajorgji (EEA Spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC) properly; he would have reached a different conclusion.

Ground 3

Failure to apply properly Tanveer Ahmed v Secretary of State for the Home Department (Pakistan) [2002] UKIAT 00439 (19 February 2002)

Although Tanveer Ahmed v Secretary of State confirms that the claimant to show that a document on which he seeks to rely can be relied on and the decision maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round, however the Immigration Judge never consider the documents properly as the Immigration Judge states at Paragraph 16: "Why the appellant's claimed wife should be working in a modest capacity in Glasgow, but having account prepared for her by an accountant in Mile End Road London was unclear and unconvincing. The appellant present solicitors are a firm called Abbott Solicitors who appear to practise in Luton."

It is worth mentioning that there is no bar in statue or case law that all the personnel acting for the appellant should be in the same vicinity where the appellant resides.

Should the Immigration Judge applied Tanveer Ahmed case in totality, she would have reached different conclusion.

Ground 4

Failure to apply Law of evidence:

The burden of proof is on the appellant and standard is the balance of probabilities. Although the same is explained in the Paragraph 15 of the determination however the Immigration Judge was not satisfied despite the fact that appellant had submitted Letter from the Accountant Mac & Co, an independent qualified chartered certified accountant, along with Invoices, letter from the landlord and bank statements.

The standard of proof is the balance of probabilities and not beyond reasonable doubt as in criminal cases.

The Immigration Judge was not satisfied from the law firm and accountant's office location however it is not requirement of the EEA Regulations that the law firm and account must have specific vicinity. It is submitted that the accountant is qualified Chartered Certified Accountant and member of recognised body with registration number as 1176259. But the same is totally ignored by the learned Immigration Judge. Apart from this the Appellant has provided Accounts, Accountant letter, invoices and Bank statement in support of self-employment which are totally ignored by the Immigration Judge, hence there is serious error of law which need to be rectified.

Should the Immigration Judge have considered the case on balance of probabilities he would have reached a different conclusion.

Ground No 5

There was a failure to take into account Article 8, in the light of recent judgment of Mr Abdullah Munawar and Secretary of State for the Home Department Appeal No IA/26534/2010 promulgated on 20 October 2011.

The appellant is here in the UK and in addition to his studies; he has formed friendships with fellow students and work colleagues. He has been living with his wife. In short he has developed his private and family life in the UK.

The Immigration Judge failed to consider the impact of Article 8 ECHR on appellant's case. The impact of Article 8 ECHR on an appellant's private and family life and this was of sufficient gravity to engage his right to respect for private life under Article 8 of the ECHR hence the consequences of the decision are of sufficient gravity and this decision constitute a disproportionate breach of the appellant's rights as protected by Article 8 ECHR.

Should the Immigration Judge have taken into consideration the Article 8 properly the Immigration Judge would not have reached the same decision.

Conclusion

Taking all of the above factors into account the appellant requests that the decision to refuse his application amounts to disproportionate interference with his right to respect for private and family life and also against the spirit of the Regulation 6 of the Immigration (European Economic Area) Regulations 2006.

3) Mr Kennedy submitted as follows. The business of the appellant's sponsor as a self-employed cleaner was not of a complex nature, did not require registration for VAT, was carried on largely in cash and involved limited outlays. In those circumstances, bank statements might not be corroborative. The sponsor's first tax return would be for the year to 5 April 2013, due to be filed only on 31 January 2014, so to found on the absence of such evidence was premature. The judge had shown unwarranted cynicism towards the evidence. It was irrelevant that the appellant and the sponsor employed professional advisors who are not local. They were entitled to employ advisors anywhere in the UK. Logically, the judge's position would represent an unlawful restraint of trade. The judge failed to take proper account of the appellant's Article 8 rights and failed to note that the burden of showing the marriage to be one of convenience was on the respondent. Even if the burden had been on the appellant to show the marriage was not one of convenience, he arguably supplied sufficient evidence to discharge that burden. The judge failed to take account of documentation showing that the sponsor was self-employed and showing the Glasgow residence of both the appellant and his spouse. If the judge had been right that this was a marriage of convenience, it would follow that no weight would attach to the appellant's Article 8 rights, but if the judge's reasoning were otherwise flawed, then he had not applied his mind properly to Article 8 either. If so, Ground 5 disclosed that a fresh decision was required. The appellant and sponsor married on 4 May 2012, and have cohabited since. The adverse decision represented a disproportionate interference with their Article 8 rights. The determination of the First-tier Tribunal should be set aside and the decision remade in the appellant's favour under the Regulations, or alternatively under Article 8.

4) Mrs O'Brien accepted that the respondent's decision had not put in issue whether this is a marriage of convenience. She argued further as follows. Although the judge went astray with regard to that issue, the point was not material. The appellant chose to have his case decided without an oral hearing on the evidence he put forward in the clear knowledge that the adverse decision was based on inadequacy of documentary evidence produced, and of the further evidence sought by the respondent. In short, the decision was reached because there was no evidence of any meaningful self-employment of the appellant's sponsor. The judge's points on that, although briefly stated, were properly reasoned. The appellant did not produce satisfactory evidence to establish his case. The judge was entitled to observe that the invoices were all in similar form for even (i.e. suspiciously rounded) sums of money and with bold (undetailed) narratives.

The judge was entitled to observe that the appellant and sponsor both resided in Glasgow and there was no adequate explanation for their non-attendance to give evidence, and to give that some weight. While there was of course no prohibition on which professional advisers the appellant and sponsor might instruct, and where they might be located, the judge was entitled to find it curious that an appellant and a sponsor with a very modest cleaning business in Glasgow chose to instruct a solicitor and accountants in London. From the lack of evidence, the non-appearance of witnesses, and other curious features, the judge was entitled to conclude that the appellant had not proved his case. The appellant had simply been refused a residence card. There was nothing to stop him applying again if and when he had the adequate evidence to support an application. In those circumstances, there was no Article 8 case to consider. Finally, Mrs O'Brien observed that although the adverse decision by the respondent was based on inadequate evidence, the appellant appeared to have proceeded in the First-tier Tribunal on the same evidence without adding anything further.

5) I reserved my determination.

6) The Grounds of appeal are not very well expressed.

7) The point raised at Ground 2 goes to burden of proof, not to the judge taking an unforeseeable point. However, the judge went further than he should have in finding that the marriage was nothing but a device. That issue was not raised by the respondent. A conclusion ought not to have been reached without giving parties the opportunity to deal with it. The finding should not be held as adverse to any further application the appellant may make.

8) Grounds 1, 3 and 4 are not well taken. The judge was not under the misapprehension that this application was based on anything other than the sponsor's alleged self-employment. He made no error of legal approach to the documents or to the standard of proof. Professional advisors may be instructed wherever the appellant and the sponsor choose, but the judge was entitled to note that their choice appeared rather odd, particularly in context of an appellant and sponsor who explain non-attendance at the hearing by reasons of cost, while living only a short bus trip from the hearing centre.

9) On the best possible view for the appellant, the decision under appeal could not constitute a disproportionate interference with Article 8 rights. There was no evidence before the Tribunal by which that might have been established, and if the circumstances are as the appellant claims, he should be in a position to make a further, properly supported application.

10) The judge was entitled to hold that the evidence fell short of proving the appellant's case, and those reasons which survive scrutiny justify that conclusion. I find that the determination discloses no error such as to require it to be set aside.

11) After reaching the above conclusion but while dictating the draft of this determination, a faxed letter was received from the appellant's solicitors, dated 22 January 2014, enclosing a copy of the sponsor's tax return to 5 April 2013 "… for a proper decision in this case." The letter is not accompanied by any application for further evidence to be admitted, either for purposes of showing error of law or for reaching a fresh decision. The document is not said to have been copied to the respondent. There is no explanation of why it might become admissible at such a very late stage, after the hearing in the Upper Tribunal. In any event, the document can have no bearing on whether the First-tier Tribunal made an error of law on the evidence before it.

12) After dictating the above, but before revising the draft, a further faxed letter, dated 27 January 2014, has arrived from the appellant's solicitors. This encloses a copy letter from the sponsor's accountants, and says it has been copied to the respondent. This betrays the same misconceptions referred to in the preceding paragraph. The time to produce the relevant evidence was with the application to the respondent, or at latest by the time of the First-tier Tribunal hearing. The items now tendered are irrelevant and inadmissible for present purposes. The appellant's remedy is as mentioned at paragraph 9 above.

13) The determination of the First-tier Tribunal shall stand.

28 January 2014
Judge of the Upper Tribunal