Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43885/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision and Reasons Promulgated**
On 24th June 2015	**On 30th June 2015**

Before

DEPUTY UPPER JUDGE KELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR UMAIR ATEEQ
(ANONYMITY NOT DIRECTED)

Respondent

Representation:
For the Appellant: Mr L Din
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Myers to allow the appeal of Mr Umair Ateeq against refusal of his application for a European Economic Community Residence Card in recognition of his status as the extended family member of a citizen of the European Union who is exercising her Community Treaty rights in the United Kingdom.

2. For ease of reference, I shall hereafter refer to the parties in accordance with their status in the First-tier Tribunal: that is to say, I shall refer to Mr Ateeq as "the appellant" and to the Secretary of State as "the respondent".

3. It was not disputed in the First-tier Tribunal that the appellant's claimed partner, Udiko Tunde Torok, was an EU citizen who is (and was at all material times) exercising her Community Treaty rights within the United Kingdom. The sole factual issue, therefore, was whether the appellant and Ms Torok were in a "durable relationship" thus qualifying the appellant as an 'extended family member' within the scope of Regulation 8 of the Immigration (European Economic Area) Regulations 2006. In view of the respondent's first ground of appeal, it should be stated from the outset that the burden of proving the existence of this claimed relationship was from first to last upon the appellant.

4. The respondent's second ground of appeal is that even if the judge had correctly applied the burden of proof to the evidence (the issue at the heart of the first ground) she was wrong to have allowed the appeal outright. Mr Din did not contest the merits of this ground. He was right not to do so. This is because, although 'family membership' entitles an applicant to an EU Residence Card, the granting of such a card to an 'extended' family member is one that falls entirely within the discretion of the respondent [compare and contrast the wording of Regulation 17(1) with Regulation 17(4)]. It follows from this that (at most) the First-tier Tribunal ought only to have allowed the appeal on the limited ground that the respondent's decision was "not in accordance with the law", thus affording the respondent the opportunity to exercise her discretion as to whether this was an appropriate case in which to issue a Residence Card.

5. By contrast, the first ground of appeal strikes at the very heart of the basis upon which the Tribunal allowed the appeal. If the Tribunal misapplied the burden of proof to the evidence, then this will vitiate the entirety of the decision. I therefore now turn to consider the first ground.

6. As the respondent correctly notes at paragraph 1 of her grounds, the judge failed to make any discrete reference to the burden and standard of proof in her decision. However, whilst it is doubtless good practice to make such a reference, its absence is not of itself be fatal to the decision. Conversely, its inclusion would not necessarily have demonstrated that the correct burden of proof had been applied to the evidence. The ultimate question, therefore, is whether the Tribunal has demonstrated that it applied the correct burden of proof when making its findings of fact. Regrettably, I have come to the conclusion that the reverse is true.

7. At paragraph 15 of her determination, the judge noted that "although this appeal concerns a durable relationship and not a marriage of convenience … it is useful to examine the rules concerning sham marriages". The judge thereafter quoted from what she described as "UKBA advice to caseworkers concerning marriages of convenience". This

included advice that "where there is a child of the relationship", such a case should be "discarded from consideration as [a] marriage[s] of convenience". Although the judge did not specifically highlight this passage, it may be that she considered it to be of some relevance to the instant appeal. Unfortunately, the passage that she quoted also included (indeed began with) the phrase, "the burden of proof is on the Secretary of State". Immediately after quoting this advice, the judge proceeded to quote extensively from the reported decision of **Papjorgji (EEA spouse – marriage of convenience) Greece** [2012] UKUT 00038 (IAC) in which it was held that "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", and that "there is an evidential burden on the claimant to address evidence justifying reasonable suspicion that marriage is entered into for the predominant purpose of securing residence rights".

8. However, these legal materials did not have any bearing upon the issue that arose for determination in this appeal. They related to an entirely different category of applicant; namely, that of a 'family member' rather than of an 'extended family member' of an EU citizen. Specifically, they relate to cases in which the parties are legally married, whereas the parties to the relationship in this appeal (as the judge herself noted) are not. This distinction is crucial to the burden of proof. Where parties have entered into the lifetime commitment of a legally recognised marriage, then the law assumes that the relationship is of a durable nature unless the Secretary of State adduces some evidence that is capable of giving rise to the suspicion that it is a 'sham'. The position is otherwise where the relationship is not legally recognised. In such a case, the burden of proving durability remains upon the applicant/appellant throughout. The decision in **Papjorgji** thus cast no light at all upon the legal issues that had to be decided in this appeal. On the contrary, it merely served to add to the existing confusion as to whether the judge was applying the correct burden of proof. Moreover, and in any event, the proposition that a relationship in which a child has been conceived is more likely to be of a "durable" nature than otherwise is one of plain common sense for which no legal authority is required.

9. Furthermore, although the judge was right to focus upon the existence of a child of the relationship as evidence of its durability, her reference to a birth certificate providing "prima facie" evidence of the appellant's paternity [paragraph 19] raises doubts about whether she was applying the correct standard of proof. Evidence that on the face of it (*prima facie*) establishes the existence of a particular state of affairs will usually suffice to discharge an evidential burden. It will however rarely suffice (of itself) to discharge the legal burden of proofing a case on a balance of probabilities. By way of example, had this been a marriage case, it may have been appropriate to note that the Secretary of State was required to adduce evidence that on the face of it (*prima facie*) gave rise to the suspicion that the marriage was one of convenience, as a pre-condition to the appellant being required to prove that it was not.

10. This is not to say that the judge was in any event right to characterise the birth certificate as mere ‘prima facie’ evidence of paternity. Given the penal consequences under criminal law for those who knowingly make false declarations in support of registration, together with the long-term legal and fiscal consequences for a person who is falsely registered as the father of a child, it is at least arguable that a birth certificate constitutes very much more than ‘prima facie’ evidence of the facts that are stated therein. The central point, however, is that the judge’s use of the expression “prima facie” evidence was not only inappropriate in its use of Latin, but it also added further confusion to the question of whether she was applying the correct burden and standard of proof.

11. The above are not matters of mere semantics. They are fundamental errors of law concerning the burden and standard of proof. They could have been avoided by simple reference to the burden of proving the existence of a durable relationship being upon the appellant, to the standard of a balance of probabilities, followed by findings of fact that were couched in language that clearly demonstrated that this principle was being applied to the evidence. As it is, the errors of law mean that none of the factual findings in this appeal can safely be preserved. The Tribunal’s decision must therefore be set aside in its entirety. The representatives agreed that in these circumstances it was appropriate for the appeal to be remitted to a different judge of the First-tier Tribunal in order for the appeal to be determined afresh.

Notice of Decision

12. The Secretary of State’s appeal is allowed, the decision of the First-tier Tribunal is set aside, and the appeal is remitted for redetermination by a First-tier Tribunal judge other than Judge Myers.

Anonymity is not directed

Signed Date

Deputy Judge of the Upper Tribunal