IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/44657/2014

THE IMMIGRATION ACTS

Heard at Field House
On 21 January 2016

Decision & Reasons Promulgated
On 11 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

PASCHAL CHIBUIKE OKORO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. P. Hayward of Counsel, instructed by Jemek Solicitors
For the Respondent: Ms A. Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Moore promulgated on 16 July 2015 in which he refused the Appellant's appeal against the Respondent's decision to refuse to issue an EEA residence card as confirmation of his right to reside in the UK.

2. Permission to appeal was granted as follows:

> "While the judge dealt with the evidence in detail and made detailed findings on the facts, he appears to have overlooked the fact that this was an appeal governed by the 2006 Regulations. It is not clear from the

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> decision whether the Judge considered the Regulations at all, far less that he considered the relevant jurisprudence pertaining to EEA applications."

3. At the hearing I heard submissions from both representatives. I reserved my decision which I now set out with reasons.

Submissions

4. Mr. Hayward relied on his skeleton argument. He submitted that the judge had failed to apply the correct framework when approaching the issue of a marriage of convenience. He accepted that the judge had acknowledged the EEA context, but he had approached the law without any direction. It was necessary for the judge to direct himself to the relevant questions, which he had not done, and it was not clear that he knew what law he was addressing.

5. In relation to the interview records, the Appellant had asked for the tapes of the interviews, but these had not been provided, despite the direction made by the Tribunal. It was possible that there had been transcription errors. The status of the document with which they had been provided was not clear. It was not a transcript, but was a document listing the interview questions with the answers of the Appellant and his wife set out in table form. Further, the notes taken by the immigration officers who raided the marriage ceremony had not been produced.

6. Of the 196 questions put to the Appellant and his wife, the judge had taken a selection which were the most adverse. In their witness statements the Appellant and his wife had addressed these in detail. Some of the answers to the 196 questions asked were capable of supporting the relationship, but the judge had seized on the adverse answers. Set against this, the evidence of the witnesses was bound to be important, but there had been a failure properly to consider the evidence of the witnesses, namely the Appellant's brother-in-law, his step-daughter, his relative, and the letter from the Appellant's wife's mother. No findings had been made regarding the content of the evidence of the Appellant's friend, nor the mother-in-law's statement. It was not fair of the judge to state that the evidence of the brother-in-law did not assist much, nor that the step-daughter's evidence was limited.

7. In addition to the failure to deal with the evidence of the witnesses fairly, the documentary evidence which showed that they had been living together since 2010 had not been taken into account.

8. I was referred to the cases of Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC), Agho [2015] EWCA Civ 1198, and Rosa [2016] EWCA Civ 14. The judge had not considered whether there was evidence of cohabitation. He had not considered what the primary purpose of the marriage was. Rosa did not call into question the correctness of Papajorgji. Instead of looking at the totality of the evidence, the judge had looked at what was adverse to the Appellant.

9. In summary the evidence had been unfairly treated, and the evidence of the witnesses and the documentary evidence had been overlooked.

10. Ms Fijiwala submitted that there were no errors in the decision. It was clear that the Respondent had discharged the burden of proof. There had not been an interpreter present for the immigration officers' visit, but there had been an interpreter present for the interviews. The judge was entitled to place weight on the transcript. The judge accepted that a full transcript had been provided. The weight to be given to the report of the immigration officers' visit was a matter for the judge. He stated in [33] that the weight to be attached to it was diminished. The judge did not accept the submission that the interview had been "forceful". This was an attempt to reargue the same points as were before the judge.

11. In relation to the legal question of the marriage of convenience, I was referred to paragraph [40] of Rosa. The judge was aware of this throughout. The case fell on all fours with Rosa. At paragraph [41] the judge did not accept the explanation of the Appellant's wife's poor memory. He was entitled to give weight to the inconsistencies in the oral evidence. Even though there was evidence of cohabitation, they could have been in separate rooms. There were inconsistencies regarding salary and the loan set out in [36]. There were significant discrepancies which were sufficient to discharge the burden of proof and shift it to the Appellant. On the body of evidence before him, the judge was entitled to find that it was a marriage of convenience. There were no errors, despite the lack of the tapes.

12. In response Mr. Hayward submitted that at paragraph [7] the judge had clearly misdirected himself. The constant re-iteration of "genuine and subsisting" was not synonymous with what he had to decide. There was no accurate analysis of the evidence, and there had been a clear misdirection regarding the burden. Ms Fijiwala had not addressed the failure to take into account the evidence of the witnesses and the documentary evidence. It was not possible to say that the same conclusion would have been reached if the judge had considered all of the evidence. There was no full transcript of the interview. The tapes were necessary to see whether the document provided by the Respondent was accurate or not.

Error of law

13. The judge states in paragraph [2] that the appeal is against the decision to refuse to issue a residence card, by reference to the EEA Regulations 2006. In paragraph [8] he sets out the relevant part of Regulation 2. However in paragraph [7] he states "The burden of proof is on the Appellant to satisfy me that the decision of the Respondent was on the balance of probabilities against the weight of evidence". I find that this is a material misdirection, as this is not the correct burden of proof in marriage of convenience cases.

14. I find that, while the judge refers to the EEA Regulations at the outset, and quotes the relevant regulation, this is not enough. He must show that he has approached the question of marriage of convenience in the correct way, and I find that he has not done so. He has incorrectly stated that the

burden lies on the Appellant, rather than the correct position which is that only when the Respondent has shown that there are sufficient grounds to justify a suspicion that the marriage is one of convenience does the burden shift to the Appellant. I was referred to paragraph [13] of Agho which confirms this position.

15. It was also submitted that his references to "genuine and subsisting" indicated that, despite citing the Regulations, he had applied the incorrect test. Paragraph [40] of Rosa is clear in relation to the phrase "genuine and subsisting".

> "It has no place in relation to the issue of marriage of convenience on an application under regulation 17 of the EEA Regulations, where the relevant question is whether the marriage was "concluded … with the sole aim of circumventing the rules on entry and residence of third-country nationals and obtaining for the third-country national a residence permit or authority to reside in a Member State" (see paragraph 10 above)."

16. I find that the re-iteration of "genuine and subsisting" indicates that the judge was not clear as to the relevant law to be applied, especially given his misdirection as to the burden of proof.

17. In relation to whether this error is material, it is necessary to consider the judge's treatment of the evidence, and I find that there are errors of law in his treatment of the evidence.

18. In relation to the issue of the interview tapes, directions were given at a previous hearing that the tapes of the interviews be provided to the Appellant's solicitors. In paragraph [30] the judge states that the failure of the Respondent to comply with these directions "is strictly related to the tapes, since a full extract (typed) had been provided". However I find that this is not the case. The Appellant requested a copy of the tapes in order to ascertain whether the transcript of the replies as set out in the reasons for refusal letter was accurate. The document provided by the Respondent is not a transcript, or a "full extract", but is in fact a table of questions and answers, part of which is set out in the reasons for refusal letter. The judge was not provided with a transcript of the interviews carried out with the Appellant and his wife.

19. The same issue arises with the table of answers provided for the appeal hearing as arises with the extract produced in the reasons for refusal letter. I find that when the judge states that the failure is "strictly related to the tapes", this is not the case. The document that he had in front of him was not a full transcript of the contents of the tapes. By stating that a full extract of the tapes has been provided, the judge has failed to acknowledge the concerns of the Appellant that the extract in the reasons for refusal letter was not an accurate reflection of the answers given at interview. He has failed fully to realise why the tapes were requested.

20. I find that the judge then placed significant reliance on the answers given at interview while failing to acknowledge that the Appellant had concerns with the translation of the interview as set out in the form provided by the Respondent.

21. Further the judge has placed weight on the report of the immigration officers who raided the marriage ceremony. In paragraph [31] he acknowledges that no Russian interpreter was present, but states that the report "adds some small further weight" to his findings. Given that he finds that it adds weight to his findings that the marriage is one of convenience, it is relevant that the immigration officers did not prevent the wedding from going ahead. However, he makes no reference to the fact that these immigration officers allowed the wedding to proceed.

22. In relation to documentary evidence provided as evidence of cohabitation, the judge sets out in paragraph [28] the evidence he has taken into account in reaching his decision. He does not mention any documentary evidence. In paragraph [34] of his findings he addresses the issue of where the Appellant and his wife have lived, but again he does not refer to any documentary evidence. The documentary evidence which was provided included bank statements, hospital documents and HMRC documents covering the period from 2010 to 2014. There is no analysis of this evidence in the context of cohabitation.

23. In relation to the evidence of the witnesses, the judge states in paragraph [28] that he has "borne in mind" the evidence of the witnesses. In paragraph [31] he states that the evidence of Mr. Rusianas Dolgosciolvas, the brother-in-law of the Appellant, was of "limited value", but he does not give any reasons. The letter provided by Mr. Dolgosciolvas is not referred to at all. He refers to the evidence of the step-daughter of the Appellant as "limited", but again gives no reasons. He does not set out in any detail the evidence of the Appellant's step-daughter or why he considers this to be "limited". In paragraph [24] the judge refers to the evidence of Mr. Chukwuyere Amaechi, but he does not mention it at all in his findings. The letter from the Appellant's mother-in-law is not referred to either.

24. In considering whether or not a marriage is one of convenience, it is necessary to look at the totality of the evidence. The judge has failed to give reasons as to why he considered the evidence of the witnesses to be of limited value, and/or he has failed to address this evidence at all.

25. I find that the judge has compounded his error of incorrectly placing the burden of proof on the Appellant by failing to take account of all of the evidence provided. I find that he has failed to take into account the evidence of the witnesses, and/or failed to give reasons for why he considers their evidence to be limited. I find he has failed to take into account the documentary evidence of cohabitation provided by the Appellant. He has placed weight on the document provided which contains the answers given at interview, but he has wrongly found this to be a full transcript of the interviews. I find that these are material errors of law.

<u>Notice of decision</u>

The decision involves the making of an error on a point of law and I set it aside.

The appeal is remitted to the First-tier Tribunal for rehearing.

Signed Date 8 February 2016

Deputy Upper Tribunal Judge Chamberlain