



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/52529/2013

THE IMMIGRATION ACTS

Heard at Field House
On 23rd December 2015

Decision & Reasons Promulgated
On 14th April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR. YASIR AMIN KOKAB
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Whitwell, Home Office Presenting Officer
For the Respondent: Mr A Chohan, Instructed by Immigration Chambers

DECISION AND REASONS

1. This is an appeal against a decision and reasons by First-tier Tribunal Judge Cooper promulgated on 28th May 2015 in which he allowed an appeal against a decision made by the Secretary of State on 20th November 2013, to refuse to issue

the appellant with a residence card as the family member of an EEA national exercising treaty rights in the UK.

2. The appellant is the Secretary of State for the Home Department and the respondent to this appeal, is Mr. Yasir Amin Kokab. However for ease of reference, in the course of this determination I shall adopt the parties' status as it was before the First-tier Tribunal. I shall in this determination, refer to Mr. Kokab as the appellant, and the Secretary of State as the respondent.

BACKGROUND

3. The appellant is a Pakistani national who entered the UK on 9th September 2010 with a Tier 4 Student visa valid until 15th October 2012. On 10th October 2012 he married Mioara Capraru, a Romanian national at the Wandsworth Register Officer. Ms Capraru had arrived in the UK in February 2012.
4. On 12th October 2012, Ms Capraru made an application for a registration certificate as confirmation of a right of residence in the UK as a self employed individual under the Immigration (European Economic Areas) Regulations 2006 ("the 2006 EEA Regulations"). The appellant was included on that application as a family member of a Romanian national exercising a treaty right in the UK. On 21st November 2013, the respondent refused the application made by Ms Capraru. The application was refused on the basis that she had said in a marriage interview that had been conducted on 20 September 2013, that she had stopped working and no longer intended to continue with her cleaning business. Ms Capraru appealed, and in his decision of 28th May 2015, First-tier Tribunal Judge Cooper found that as at the date of the hearing, Ms Capraru was working as a self employed cleaner and consequently, was a qualified person. The Judge found that she is entitled to the issue of the Registration Card that she had applied for, and allowed her appeal. The respondent does not challenge that decision.
5. The respondent issued a separate decision dated 20th November 2013 refusing the application made by Mr Korab for a residence card as confirmation of a right of

residence in the United Kingdom as the family member of Ms Capraru. In her decision, the respondent stated:

“....On the basis of the evidence submitted by you in support of your application, and to further assess your application it was decided to invite you and your wife Mioara Capraru to attend a Marriage Interview. The purpose of this interview was to establish further facts about the nature of your relationship with Mioara Capraru and the validity of your marriage.

....”

6. The respondent set out in her decision letter the questions asked during the interview that took place on 20th September 2013 and the answers provided by the appellant and Ms Capraru. The respondent considered the answers provided and concluded:

“In view of the fact that inconsistent and conflicting information was provided by you and your Wife at Marriage Interview in Liverpool on 20 September 2013 it has been decided that you have not provided satisfactory evidence to show that your marriage is not one of convenience.

Therefore you do not satisfy the requirements for this category and it has been decided to refuse your application for a residence card with, reference to Regulation 2(1) and Regulation 17 of the Immigration (European Economic Area) Regulations 2006.”

7. In reaching her decision, the respondent also referred to the fact that she was not satisfied that the appellant’s wife was exercising a treaty right in the UK as a Self employed person, and the fact that the appellant’s wife’s application for a Registration Certificate, had consequently been refused.

The decision of First-tier Tribunal Judge Cooper

8. First-tier Tribunal Judge Cooper heard the appeals of the appellant and Ms Capraru together. At paragraphs [17] and [18] of his decision he refers briefly to the respondent’s decision and the reasons for it. At paragraphs [27] and [28] he notes that both appellant’s gave evidence and the evidence and submissions are

noted in his record of proceedings. The Judge's findings and conclusions upon the appeal by the appellant, are set out at paragraphs [35] to [38] of the decision;

"35. Marriage of convenience: The Respondent analysed the answers given by the parties during the Marriage Interview at considerable length in the decision letter for Mr Kokab, and it has to be said that some of the discrepancies between each of their answers were surprising for a couple who had said that they were in a genuine subsisting relationship; for example the fact that Ms Capraru appeared to be unaware that Mr Korab had engaged the services of a solicitor to prepare the application.

36. In their statements the parties only explained the discrepancies by stating that Ms Capraru was still not very well after the operation she had undergone in Romania, and was very tired. At the hearing both parties were cross-examined at considerable length by Ms Butt. Whilst not all the discrepancies identified in the decision letter were resolved, I am satisfied that several the apparent discrepancies did in fact arise from misunderstandings. For example Ms Capraru said that they had gone to the wedding ceremony by train, whereas Mr Kokab had said it was by taxi; in his oral evidence Mr Kokab made clear that what actually happened was that that they had set off by taxi, but because of the traffic they had abandoned it and taken the train.

37. The Respondent believed that Mr Kokab would have known more about the details of his wife's operation in Romania had the couple been in a genuine relationship, but I was satisfied on the basis of their evidence that, even though Ms Capraru may have explained the contents of the medical records to her husband, he simply had not fully taken in the details – perhaps a common "male trait".

38. Reading the Marriage Interview as a whole, and taking that together with the written and oral evidence of the parties, I am satisfied that the parties demonstrated genuine and substantial knowledge about each other and their respective families, even though there remained certain discrepancies in their accounts. On the balance of probabilities I am satisfied that this is indeed a genuine and subsisting relationship, and consequently not a marriage of convenience. In reaching the decision I also take account of the fact that the parties have continued to pursue this claim, despite previous setbacks, and in so doing have attended court a number of times, the last hearing before me being some 2½ years after the date of the original applications."

The Grounds of Appeal

9. The respondent appeals on three grounds. First, the Judge failed to take into account the numerous inconsistencies in the marriage interview that indicate the appellant's marriage is one of convenience. It is said that the Judge failed to deal with the numerous important inconsistencies highlighted in the Reasons for Refusal letter and to explain why the inconsistencies do not undermine the appellant's credibility. The respondent accepts that the Judge does not have to deal with every inconstancy highlighted, but submits that the Judge is required to highlight and resolve the key issues in the case, and resolve them with adequate reasons; **Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC)**
10. Second the respondent claims that the Judge's reasons for finding the appellant's marriage to be genuine are not adequately reasoned. The Judge noted at paragraph [36] that "... Several of the apparent discrepancies did in fact arise from misunderstandings.", but the Judge fails to provide reasons for his view that the apparent discrepancies arose from misunderstandings, rather than being simple inconsistencies that affect the credibility of the appellant.
11. Finally, the respondent claims that the Judge's reference to the appellant's lack of knowledge of his wife's medical problems as being a "male trait" has no evidential foundation, but is based upon a stereotype of male behaviour. The respondent submits that the finding is irrational and perverse, and was one that was not properly open to the Judge.
12. Permission to appeal was granted on 7th August 2015 by First-tier Tribunal Judge Lever. The matter comes before me to consider whether or not the decision of the Tribunal involved the making of a material error of law, and if the decision is set aside, to re-make the decision if appropriate.
13. At the hearing before me, Mr Whitwell adopted the grounds of appeal. He submits that the appellant and his partner married on 10th October 2012, five days before the appellant's leave to remain expired. He submits that there can be no dispute that there are a number of material inconsistencies between what was

said by the appellant and Ms Capraru during the marriage interview on 20th September 2013. The material inconsistencies are carefully considered and highlighted in the respondent's decision. He submits that there is no proper or adequate consideration of those discrepancies by the Judge, and on any proper reading of the decision one is non-the wiser in knowing why the Judge has allowed the appeal. He submits that the Judge has come to findings that are irrational, unreasonable and perverse. In particular he submits that the finding at paragraph [37] that the appellant had simply not taken in the details of Ms Capraru's operation in Romania, and the contents of the medical records, because that is perhaps a common "male trait", is perverse and has no evidential foundation.

14. In reply, Mr Chohan accepts that the decision of the Judge is not perhaps as detailed as one might expect, but he reminds me that the case is one with a long history. He submits that at paragraph [35], the Judge demonstrates that he was aware that there were a number of discrepancies, and that it was open to the Judge, who had heard the evidence, to find that he was "...satisfied that several of the apparent discrepancies did in fact arise from misunderstandings.". Mr Chohan submits that at paragraph [38], the Judge refers to the marriage interview and it was open to the Judge to conclude that he was satisfied that the parties have demonstrated genuine and substantial knowledge about each other and their respective families, notwithstanding the discrepancies in their accounts.

Discussion

15. The respondent's decision of the 20th November 2013 is detailed and spans to some 14 pages. As I have said, it sets out the questions that the appellant and Ms Capraru were asked during the marriage interview, and the answers that each of them gave. The decision letter refers to a number of material discrepancies that had caused the respondent to question the credibility of the relationship and reach the ultimate conclusion that the marriage was one of convenience. I do not recite in this decision all of the discrepancies referred to by the respondent, but suffice it to say that there are many, identified at pages 3 to 13 of the decision.

16. In R (Iran) & Ors -v- SSHD [2005] EWCA Civ 982, the Court of Appeal drew together the threads of the approach to be adopted in cases where it is claimed that there is an error of law in the Tribunal's approach to the evidence. Lord Justice Brooke stated:

90. *It may now be convenient to draw together the main threads of this long judgment in this way. During the period before its demise when the IAT's powers were restricted to appeals on points of law:*

1. *Before the IAT could set aside a decision of an adjudicator on the grounds of error of law, it had to be satisfied that the correction of the error would have made a material difference to the outcome, or to the fairness of the proceedings. This principle applied equally to decisions of adjudicators on proportionality in connection with human rights issues;*
2. *A finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the Wednesbury sense, or one that was wholly unsupported by the evidence.*
3. *A decision should not be set aside for inadequacy of reasons unless the adjudicator failed to identify and record the matters that were critical to his decision on material issues, in such a way that the IAT was unable to understand why he reached that decision.*
4. *A failure without good reason to apply a relevant country guidance decision might constitute an error of law.*
5. *At the hearing of an appeal the IAT had to identify an error of law in relation to one or more of the issues raised on the notice of appeal before it could lawfully exercise any of its powers set out in s102(1) of the 2002 Act (other than affirming the adjudicator's decision).*
6. *Once it had identified an error of law, such that the adjudicator's decision could not stand, the IAT might, if it saw fit, exercise its power to admit up-to-date evidence or it might remit the appeal to the adjudicator with such directions as it thought fit.*

7. If the IAT failed to consider an obvious point of Convention jurisprudence which would have availed an applicant, the Court of Appeal might intervene to set aside the IAT's decision on the grounds of error of law even though the point was not raised in the grounds of appeal to the IAT.

17. I have carefully read through the decision of First-tier Tribunal Judge Cooper. The Judge deals with the discrepancies in the four short paragraphs at [35] to [38] of his decision. In my judgment, the Judge has given inadequate reasons for reaching his conclusion that the several apparent discrepancies arose from misunderstandings. That is particularly so in light of the Judge's comment at paragraph [35] that "...it has to be said that some of the discrepancies between each of their answers were surprising for a couple who had said that they were in a genuine subsisting relationship;". I set out below the head note in **Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC)**;

"It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they won or lost."

18. In reaching her conclusion that this was a sham marriage, the respondent had referred to substantial discrepancies within the interview record. The judge did not adequately engage with the reasons given by the respondent for refusing the appellant's application, and did not adequately analyse the evidence, taking into account that the respondent had specifically concluded that the marriage was one of convenience because of a number of discrepancies upon material matters.
19. This amounts to an error of law. The judge has not adequately explained his reasons, so that the respondent can understand why no weight has been given to the points raised in the refusal letter.
20. In my judgement, the Judge's conclusion at paragraph [37] that even though Ms Capraru may have explained the contents of the medical records to her husband, he simply had not fully taken in the details – perhaps a common "male trait", is a

finding that is irrational and was wholly unsupported by the evidence. Ms Capraru's account of events was that she had gone on an ordinary visit to see her parents and family when she became ill and was taken to A&E requiring an emergency intervention. She had undergone an operation to remove a tumour from her ovaries. She claimed that she had explained that to the appellant over the telephone, whilst she was in Romania and again once she had returned to the UK. She had also shown him the discharge documents. Beyond claiming that his wife had a urine infection and had undergone an operation, the appellant did not know much about Ms Capraru's medical condition or treatment. There were also discrepancies as to the date and time of the surgery, and the length of her stay in hospital. These were all matters that could not simply be dismissed on the basis that the appellant simply had not fully taken in the details – perhaps a common “male trait”.

21. In those circumstances in my view there is a material error of law and the decision is set aside with no findings preserved.
22. The decision needs to be re-made and I have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having taken into account paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012 which states;

‘7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that;

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.’

23. In my view the requirements of paragraph 7.2(b) apply, in that the nature and extent of any judicial fact-finding necessary, will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

24. The decision of the First-tier Tribunal involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the First-tier Tribunal.

25. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

The fee award made by the First-tier Tribunal is set aside. No fee award is made by the Upper Tribunal. This is to be considered by the First-tier Tribunal.

Signed

Deputy Upper Tribunal Judge Mandalia