



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/30288/2015

THE IMMIGRATION ACTS

Heard at Field House
On 22nd May 2017

Decision & Reasons Promulgated
On 13th June 2017

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

ABDUL KADER SADDIK
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Nicholson, instructed by BMAP
For the Respondent: Ms Z Ahmad, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Lebanon born on 21st February 1984. He appeals against the decision of First-tier Tribunal Judge Abebrese, promulgated on 26th September 2016, dismissing his appeal against the refusal of a residence card, as confirmation of a right of residence, under the Immigration (EEA) Regulations 2006.

2. The Appellant appealed on four grounds:
 - (i) The refusal to adjourn the hearing was unfair;
 - (ii) The Respondent had failed to discharge the burden of proof in showing that the marriage was one of convenience;
 - (iii) There were errors in assessing the Appellant's credibility; and
 - (iv) The judge had incorrectly stated the standard of proof.
3. Permission to appeal was granted by First-tier Tribunal Judge P J M Hollingworth on 7th April 2017 for the following reasons:

"The judge was arguably wrong to refuse the application for an adjournment in the overall circumstances. It is arguable that the Appellant was denied a fair hearing. It is arguable that the judge took into account evidence in relation to Ms Zampirolo, in circumstances which prevented the Appellant, since the hearing was proceeding, from dealing with matters raised in relation to that evidence. It is arguable therefore that leaving aside the arguably wrong decision to refuse the adjournment application that an arguably wrong approach has been adopted in relation to the reception and consideration of the evidence in relation to Ms Zampirolo. It is arguable in these circumstances that the judge's reasoning has been vitiated. It is arguable that the necessary conditions for the reception into evidence of the material in relation to Ms Zampirolo were not met. It is arguable that the judge has applied the standard of proof incorrectly. At paragraph 22 of the decision the judge has referred to it being likely that the Appellant and the Sponsor did enter into a sham marriage on the evidence before the judge."

Submissions

4. Mr Nicholson submitted that the Appellant was expecting his wife to come to the appeal hearing to give evidence. However, on the day of the hearing the Respondent served a Home Office minute sheet which showed that the Appellant's wife, Ms Zampirolo, had been interviewed at Stansted Airport and had been prevented from entering the UK on 31st August 2016.
5. The minute sheet stated: "She confirmed that she had previously been involved in a sham marriage in the UK for financial gain of £2,500. She confirmed that she was served on 23/06/16 with IS151A as an abuse of treaty rights (Sham marriage related). She said that she was a victim of a gang in becoming hooked on crack cocaine whilst she was in London between 2012 and 2015. She stated that since she left the UK in 2015 to Italy, she managed to stay clean from taking any drugs. She added that she was now settled in Italy with her boyfriend. They both work, live together and share everything as a couple. She stated that her only intention was to visit a close ITA friend for four days and return back to Italy."
6. The Respondent submitted the minute sheet and intended to rely on it at the appeal hearing. Mr Nicholson applied for an adjournment on the basis that the Appellant's

wife was unable to come and give evidence and she was also unable to comment on what was set out in the minute sheet.

7. The judge refused the adjournment for the following reasons:
 - “7. *There was an application for an adjournment by the Appellant’s representative Mr Nicholson on the basis that the information which had thus far been provided to them had not been properly contested by the Appellant and they had not had the opportunity to take a statement from the Sponsor as she had been out of the country. It was submitted by Mr Nicholson that the Appellant gave his statement to those instructing him on 22nd August 2016 and that he was aware that the Sponsor was due to arrive back into the United Kingdom on 31st August 2016. The basis of the adjournment is that she ought to be given the opportunity to re-enter the country in order for a statement to be taken in preparation and defence of what had been alleged by the Respondents. He submitted that it was in the interests of justice for the Appellant to be allowed the opportunity to properly prepare his appeal and that his wife and Sponsor was keen and anxious to support him. Mr Alagh for the Respondent opposed the application on the basis that the information that was before the Tribunal was sufficient for the hearing to proceed as the Appellant himself was present and that in the case of his Sponsor she had provided information to the Respondents to indicate that the transaction was a sham marriage and therefore she ought not be to permitted the opportunity to re-enter the United Kingdom in order to prepare a witness statement for the Appellant’s appeal.*
 8. *I was also mindful in refusing the adjournment that I did not see any correspondence from the Appellant’s representatives supporting the submissions which had been made by Mr Nicholson in relation to the position of the Sponsor in supporting the appeal even though she had been out of the country it ought to have been possible to have made some kind of contact with her formally asking her to take part in the preparation of the appeal. There was nothing to support what was being said by Mr Nicholson in relation to the Sponsor’s eagerness to be proactive in this appeal.”*
8. The judge then went on to admit the summary of the interview conducted with the Sponsor when she sought to re-enter the UK on 31st August 2016 and the judge relied on the Home Office minute sheet in his findings.
9. Mr Nicholson submitted that the minute sheet was not a record of a comprehensive interview. The Respondent in her refusal letter had relied on an interview in August 2015 conducted by Leanne Evenson when she visited Flat 3, 54 Sinclair Road, West London. There was no record of that interview served on the Appellant or on the Tribunal. The allegation had been made that the Appellant’s wife had admitted that she had entered into a sham marriage on payment of £2,500.
10. The evidence before the Tribunal was the Home Office minute sheet of 31st August 2016 and the notes of interviews with IO Pooranaswaminathan, IO Symss [sic] and IO Muir, which the judge referred to at paragraph 9. Mr Nicholson submitted that

the Appellant did not know what his wife had said in these interviews and he had been denied the opportunity of getting a statement from her. The hearing could not be a fair one.

11. Ms Ahmad submitted that the judge's reasons for refusing the adjournment were reasonable given that the Appellant's wife had admitted on two occasions that she had entered into a sham marriage. It was unlikely that she was going to return to the UK to give evidence at the appeal. There was no documentation in the Appellant's bundle to show that she was going to be called as a witness, no statement had been prepared and there was no evidence before me today to indicate that the Appellant was able to obtain her evidence and that it would assist him in proceeding with his appeal. Therefore, the refusal of the adjournment was not unfair because the position would not have been any different had the Appellant been granted the adjournment. The judge would have had to make the decision on the same evidence which was before him.

Discussion and conclusions

12. Having heard submissions by the parties, I find that the judge's decision to refuse the adjournment was unfair for the following reasons. The Home Office minute sheet was served on the morning of the hearing. The Appellant was given no opportunity to respond to this document and he was unable to contact his wife in order to ascertain what had happened when she sought to re-enter the country a few days before the hearing. The Appellant was also prevented from calling her as a witness at the hearing.
13. Further, the Respondent has made a very serious allegation and there is no evidence in the form of interview transcripts to support that allegation. The Home Office minute sheet dated 31st August 2016 did not actually refer to the name of the person who conducted the interview at 16.15. It would appear from the Home Office minute sheet timed at 13.35 that BFAO S McCabe was on duty and attended the interview room at Stansted Airport with the BFO D Joel. She carried out a short interview and searched the Sponsor's bag. She fingerprinted the Sponsor at 13.03 and she returned the passenger to the interview room at 13.20. Given the serious nature of the allegation it was incumbent on the judge to give the Appellant an opportunity to respond. The judge failed to do so. He then admitted the Respondent's evidence, submitted on the day of the hearing, and in relied on it in his findings. The refusal of the adjournment was unfair.
14. The burden is on the Respondent to provide sufficient evidence to show that the marriage was one of convenience. The Respondent has failed to submit a record of interview or indeed any notes from those interviewing the Appellant's wife on two

occasions. The minute sheet was not a contemporaneous note and was insufficient in the circumstances to discharge the burden of proof.

15. Accordingly, I find that the judge's decision to refuse the adjournment was unfair. His decision to admit and rely on the evidence submitted on the day of the hearing was also unfair. The judge erred in law in relying on assertions made by the Respondent when there was insufficient evidence to support them.
16. I set aside the judge's decision promulgated on 26th September 2016 and I remit the matter to the First-tier Tribunal in accordance with paragraph 7.2 of the Practice Statements of 25th September 2012. None of the judge's findings are preserved.

DIRECTIONS

- (i) The Tribunal is directed pursuant to section 12(3) of the Tribunals, Courts and Enforcement Act 2007 to reconsider the appeal at a hearing before a First-tier Tribunal Judge other than First-tier Tribunal Judge Abebrese.
- (ii) The Respondent to file with the Tribunal and serve on the Appellant the following documents by 21st July 2017:
 - (a) A transcript of the interviews with the Appellant's wife conducted by Leanne Evenson on August 2015
 - (b) A transcript of the interview which took place on 31st August 2016 at 16.15.
 - (c) Any notes made by the interviewing officers to which any reference is made in the documents relied on by the Respondent, including IO Pooranaswaminathan, IO Symss (or Symes) and IO Muir.
 - (d) Notes made by BFAO S McCabe on 31st August 2016 and any other notes relating to interviews with the Appellant's wife on that day.
 - (e) The Respondent's bundle
- (iii) The Appellant to file and serve a bundle of all documents upon which he intends to rely, including a witness statement from the Appellant's wife, by 21st August 2017.
- (iv) Should the Appellant or the Respondent be unable to comply with these directions then written reasons to be received by the Tribunal by 4th September 2017.
- (v) The appeal to be adjourned to the first open date before the First-tier Tribunal and listed for two hours.
- (vi) An Arabic interpreter is required.

Notice of decision

The Appellant's appeal is allowed and remitted to the First-tier Tribunal.

No anonymity direction is made.

J Frances

Signed

Date: 9th June 2017

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have remitted the appeal. I make no fee award at this stage.

J Frances

Signed

Date: 9th June 2017

Upper Tribunal Judge Frances