



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA 02113 2017

THE IMMIGRATION ACTS

Heard at Field House
On 3 September 2018

Decision & Reasons Promulgated
On 14 September 2018

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ASRAR AHMAD

(anonymity direction not made)

Respondent

Representation:

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer

For the Respondent: Mr Z Raza, Counsel instructed by Maher & Co, Slough

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant", against the decision of the Secretary of State refusing him a residence card as the former husband of an EEA national exercising treaty rights.
2. There is a mistake on the face of the decision where the claimant is described as a national of India. He is not. He is a national of Pakistan. This is annoying and suggests carelessness but it is not a material error of law.
3. The core point in the grounds is that the decision is not explained adequately.
4. Before considering the First-tier Tribunal's decision and reasons I look at the Reasons for Refusal Letter dated 10 February 2017.

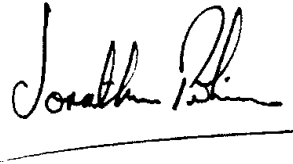
5. The Secretary of State gave two reasons for refusing the application. The first was that the marriage relied on was a marriage of convenience and therefore did not give rise to treaty rights. Further, or in the alternative, it was the Secretary of State's case that even if there had been a genuine marriage the claimant did not satisfy the requirements of Regulation 10(5) of the Immigration (EEA) Regulations 2016. Although the exact terms of the Rules are not repeated a paraphrase is set out in the decision. The Secretary of State maintains that the claimant had to show that the EEA national and former spouse was exercising free movement rights in the United Kingdom at the time of the divorce, that the marriage had lasted for three years and that the claimant and his former spouse had resided in the United Kingdom for at least one year during that marriage and that the claimant himself was employed, self-employed or economically self-sufficient as if he were an EEA national.
6. The Secretary of State then gave reasons for not being satisfied on either of these points.
7. The First-tier Tribunal's decision is in rather withering terms. It is very critical of the Secretary of State not doing more to justify the allegations that had been made. The First-tier Tribunal then concluded that the claimant had proved his case and allowed the appeal.
8. I can deal easily with the complaint that the First-tier Tribunal allowed the appeal on the basis that the Secretary of State had not established that the marriage was a marriage of convenience. This was something for the Secretary of State to prove and there is very little evidence to justify a conclusion that the marriage was one of convenience and certainly not sufficient evidence to show that the First-tier Tribunal was in any way perverse in being unpersuaded by it. The Secretary of State relied in part on answers given by the claimant and his partner in an interview about their circumstances. The First-tier Tribunal Judge found nothing in the answers that was inconsistent with a genuine marriage, still less proof that the marriage was one of convenience, and I see no basis whatsoever for criticising that part of the reasoning.
9. It is also the Secretary of State's case that the claimant and his wife had spent very little time together. According to the Reasons for Refusal Letter the Secretary of State had records showing that the claimant's partner left Heathrow Airport to travel to Lisbon on 16 August 2012 having married the claimant the previous day. The Secretary of State's records then show that the wife returned to the United Kingdom on 18 January 2014 but returned to Lisbon two days later. She was next in the United Kingdom on 19 January 2017 when she landed at Edinburgh Airport. The Secretary of State concluded that the sponsor's wife had been in the United Kingdom "for no more than three days throughout the time when she was married to you which raises questions about the genuineness of your relationship and marriage". This is a potentially powerful strand of evidence and points in favour of disbelieving the claimant. The problem with this evidence is that it was inconsistent with tax records produced by the Secretary of State that indicate that the claimant's wife was working in the United Kingdom when the Secretary of State thought that she was elsewhere, and the Secretary of State did not explain why his arrival and departure records should have been preferred to the tax records.
10. The Secretary of State then noted that there were two home visits which found no evidence to show cohabitation. The first was on the morning of 20 January 2017 and the next on 7 February 2017.

11. However in each case the evidence relied on was of the Immigration Officers not being able to find the claimant or his wife. On the first occasion an unidentified person led the officers to a box room and the officers knocked on the door for about five minutes and left when they got no response. On 7 February 2017 they claimed to have arrived at the address and to have seen a light on the first-floor bedroom and a light in the passageway on the ground floor. The officers knocked several times but there was no answer although they did see an unidentified figure through the frosted glazing on the front door. They called through the door to explain the purpose of their visit but there was no answer. The officers were satisfied that somebody was in the house.
12. The Secretary of State also considered documents produced and found little sign of cohabitation in the documents disclosed.
13. These are not telling points. In his statement the claimant explained that he worked long shifts and left for work early. Although the recording of the evidence in the refusal letter verges on the theatrical and is rich in intrigue it amounts to nothing more than visiting the address where the claimant was supposed to live after he says that his wife had left him and finding him not there. They are not proof of anything other than apparent absence on the time of the visits.
14. The Secretary of State did make enquiries of HMRC and did produce evidence of the claimant's wife's tax records and these show declarations of tax on a modest income, not sufficient to attract an obligation to pay tax in the tax years ending in April 2013, 2014, 2015 and incurring Pay As You Earn tax in the tax years ending 2015, 2016, 2017 and that is all.
15. The evidence of cohabitation is skimpy. In his statement the claimant said that he applied for a residence card in August 2016. He said that he and his wife gave notice of intention to marry in August 2012 and that his wife started to live "at the home address" in January 2012 and continued to live there until August 2012 when they gave notice of intention to marry. The claimant then moved to the house and cohabitation began. Clearly there is a marked inconsistency between the tax records produced by the Secretary of State and the very short period of time in which the claimant's wife lived in the United Kingdom according to the airport records which were not produced. The claimant's statement included a claim that they had chosen to marry and commence cohabitation but the marriage did not work.
16. The judge's notes of evidence are typed and are clear. These show that the claimant gave evidence and adopted his statement. He said that his ex-wife moved out of the house they shared together in 2016 in January before the divorce. Some documents were sent to her after that time but they were redirected. He was quizzed about the documents that had been provided. He said that they had lived together at 129 Trinity Road from sometime in 2012 to March 2014. He could not explain why pay slips in February and March showed that she still lived at the Trinity Road address [that is January, February, March 2016].
17. The grounds and Mr Tarlow were particularly critical of the First-tier Tribunal Judge for not engaging with the requirement in the Rules that there be twelve months' cohabitation after the marriage. Certainly there is no detailed consideration of that requirement of the Rule or the evidence that shows that it was satisfied. However the note of the oral evidence shows that the claimant did marry on 15 August 2012 and separated in January 2016 and in answers to questions in cross-examination the claimant clearly claimed to have lived with his wife throughout 2013. It was not put to the witness that he had not lived with his wife

throughout 2013 and the fact is the judge was presented with oral evidence of cohabitation that was not challenged. It would have been better if he had made this point himself in the decision and reasons but the evidence was there and was clearly accepted and against this background the Secretary of State's complaints start to look less impressive. Both the Secretary of State in the refusal letter and the judge were, to some extent, critical of the quality of documents provided by the claimant but they were disclosed and the Secretary of State could have checked and appears not to have done.

18. This is not an entirely satisfactory decision and reasons. Having criticised the Secretary of State the judge expressed the view that he was "left in the position that there is no option but to find for the [claimant]". That is not right. However it is clear that the judge had unchallenged evidence which made out the claimant's case. In the circumstances I am not able to say that the First-tier Tribunal has reached the decision that was not open to it or has given unlawful reasons for reaching the decision.
19. Read carefully this is a case of the judge believing the evidence given orally by the claimant and that is not an error of law. It follows therefore that I dismiss the Secretary of State's appeal against the First-tier Tribunal's decision.

Signed
Jonathan Perkins
Judge of the Upper Tribunal

A handwritten signature in black ink, appearing to read 'Jonathan Perkins', written over a horizontal line.

Dated 12 September 2018