



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/27817/2015

THE IMMIGRATION ACTS

Heard at Field House
On 15 June 2018

Decision & Reasons Promulgated
On 29 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

MUHAMMAD NASIR JAVED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Muquit, Counsel instructed by Farani Taylor Solicitors
For the Respondent: Ms Z Kiss, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born on 13 January 1981. He is married to a citizen of Portugal, whom he married on 22 July 2013.
2. The appellant is appealing against the decision of First-tier Tribunal Judge Fowell promulgated on 17 October 2017 whereby his appeal against the decision of the Secretary of State to refuse him a residence card as the spouse of an EEA citizen was refused.
3. The background to this appeal is that the Secretary of State in a decision made on 2 July 2015 found that the appellant was not a family member of an EEA national because his marriage in 2013 to a Portuguese national was a "marriage of convenience". The appellant appealed to the First-tier tribunal where his appeal was

dismissed by First-tier Tribunal Judge Miller. He appealed to the Upper Tribunal, which set aside Judge Miller's decision and remitted the case to the First-tier Tribunal, where it came before Judge Fowell, whose decision is now being appealed.

Decision of the First-tier tribunal

4. In a lengthy and detailed decision Judge Fowell concluded that the respondent had satisfied him on the balance of probability that the marriage between the appellant and his spouse ("the sponsor") was a marriage of convenience. The judge reached this conclusion after finding that the appellant and the sponsor were not credible witnesses and there were a number of inconsistencies and incongruities in their evidence. The reasons that the judge gave for finding that the appellant lacked credibility and that the marriage was one of convenience included the following:
 - (a) When, on 6 October 2014, the appellant was visited by Immigration Officers and not present the officers spoke to an occupant of the property who said that she had been living at the property since March 2014 and she could account for all the occupants but did not know the appellant or the sponsor and she did not recognise his photograph. The occupant subsequently wrote a letter of retraction. The judge noted at paragraph 61 that the letter of retraction provided the full names and details of the couple which must have come from the appellant since they were previously unknown to her and it is headed "To whom it may concern" which the judge thought indicated it was provided to the appellant rather than direct to the respondent. The judge stated, "on any view it was not a spontaneous retraction. If anything I find that the terms of this letter and the fact that it has come via Mr Javed add to the concerns raised by the Immigration Officer rather than dispel them."
 - (b) The appellant contacted the Home Office on the day of the visit on 6 October 2014 to say he had moved. The judge found that this suggests he was prompted into action by the visit. The judge also noted that the appellant sent a letter to the Home Office dated 1 October 2014 apparently telling them in advance that he had moved house but in fact, as he acknowledged, only posted the letter after the visit. The judge found that there was no real reason to explain the delay. The judge concluded that the letter "was drafted after the visit with a view to pretending that he had notified them earlier".
 - (c) When a further visit occurred on 26 November 2014 the appellant was again not home. He claimed that he and the sponsor were in Scotland but the judge, based on an analysis of the evidence, thought it likely the sponsor was in Portugal at this time. The judge said that "the evidence they both gave at this hearing on this aspect cannot be accepted which naturally lessens the confidence that can be placed in their evidence on other matters".
 - (d) There was a lack of family in attendance at the wedding, confusion about whether one of the sponsor's friends attended, and it was an "unusual fact" that the appellant was living with his uncle for a month or two for reasons that "he was not able to explain sensibly". The judge stated at paragraph 65 in respect of these points that "the net result does overall deepen the suspicions around this match".

5. The judge stated at paragraph 66:

“Summarising the position, there were initial circumstances surrounding the wedding which cumulatively gave rise to suspicion about it being genuine. There was then a string of incidents in which the Home Office scrutinised their living arrangements with visits on 6 October and 26 November 2014 which found no trace of them, and then invitations to attend interviews the following January and February which were declined on the basis that Ms Ribeiro was in Portugal and unwell. Some deception is apparent in the attempts to persuade the Home Office that previous notice had been given of a change of address, and then later that they were away together in Scotland.

6. The judge then at paragraph 67 concluded that the appellant and sponsor were not credible witnesses.

7. In addition to making the above-described findings which were said to be undermining of the appellant’s credibility, the judge made a number of findings which could be construed as supportive of the claim. This included:

- (a) The sponsor had been in employment exercising treaty rights in the UK despite travelling frequently to Portugal, such that the fact that she was regularly in Portugal did not necessarily undermine the case.
- (b) The evidence concerning where the appellant was living was not strong either way.
- (c) The sponsor was pregnant. At paragraph 53 the judge stated, “the fact of this pregnancy is strong support for the appellant’s claim”.
- (d) At paragraph 44 the judge indicated that he was unable to form a clear idea of what in fact the Secretary of State was alleging. He stated:

“However the ultimate burden is on the Home Office and I formed no very clear idea at the end of the evidence and submissions as to what in practice is alleged: whether they are supposed to be living in the same house and pretending to be in a relationship; whether Mr Ribeiro is living in Kimberley Avenue and Mr Javed is living elsewhere or whether Ms Ribeiro is in reality mainly living in Portugal and Mr Javed is at Kimberley Avenue or elsewhere. The position alleged should be set out and put to the witnesses, even if there are alternative cases, rather than for different hypotheses to be left open.”

Grounds of appeal and submissions

8. The grounds of appeal argue that the judge erred because he had no clear idea of what was being alleged by the respondent and it was unclear how the judge was rationally able to determine that the respondent had discharged the burden of establishing that the marriage was one of convenience. The grounds also submit that the judge erred by failing to make findings on the evidence of witnesses who gave evidence in respect of the addresses at which the appellant lived and corroborated his account. The grounds further argue that it was an error to regard the sponsor’s presence in Portugal as indicating her marriage was one of convenience given that,

amongst other things, it was accepted (and employment records established) that she was working in the UK.

9. At the error of law hearing Mr Muquit argued that the decision of the First-tier Tribunal was undermined by contradictory findings. In particular, he noted that at paragraph 53 the judge stated that the pregnancy was strong support for the appellant's claim but at paragraph 70 stated that it was at least probable that she remained in Portugal and that the pregnancy was by someone else. Likewise, Mr Muquit argued that there was a contradiction between, on the one hand, it being accepted that the sponsor was working in the UK and, on the other hand, the judge's comments at paragraph 69 which indicate that he was of the view that the employment records could have been fabricated and his finding at paragraph 70 that it was likely that the sponsor spent much of her time in Portugal.
10. Ms Kiss's response was that the judge was being criticised for undertaking the task which he was required to undertake which is to conduct a careful balancing exercise. She submitted that the judge did this properly by looking at factors that point in both directions before reaching a conclusion having regard to all of the evidence on the issue before him, which was whether the marriage was a marriage of convenience. She highlighted that it was not suggested by either party and it is not raised in the grounds that the judge misstated the applicable standard or burden of proof.

Analysis

11. I am satisfied that the decision does not contain a material error of law. The judge has delivered an extremely detailed decision where he has explored the evidence thoroughly. Between paragraphs 40 and 70 the judge has considered the material events including in particular the visits by Immigration Officers and the appellant's explanations for his absence and the fact that he was not recognised by an occupant.
12. The judge made the following findings, all of which were consistent with the evidence before him:
 - (i) The appellant wrote a letter to the Home Office dating it substantially earlier than when it was in fact sent in order to create the impression that it was sent prior to an immigration visit.
 - (ii) Two visits by the Home Office were undertaken where no trace of the appellant or sponsor was found.
 - (iii) Two invitations to attend interview were declined.
 - (iv) It was unclear where the appellant or sponsor were actually living.
 - (v) The appellant and sponsor claimed to be in one location (Scotland) when the evidence indicated the sponsor was elsewhere (Portugal).
13. Having made these findings, it was open to the judge to not believe the appellant and reject his credibility even though the appellant was able to provide witnesses who stated that they could corroborate his claims about where he lived. I accept the point made by Mr Muquit that it is not clear from the decision what weight the judge

gave to the sponsor's pregnancy and whether or not the evidence showing that the sponsor was living in the UK was accepted. However, given the findings summarised above in paragraph 12 which undermine the appellant's credibility, I am satisfied that it was open to the judge to find the appellant not credible irrespective of the significance of the pregnancy and the sponsor's residency the UK.

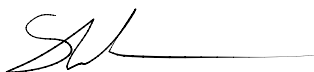
14. The judge observed at paragraph 44 that the Secretary of State did not put forward a positive case setting out his view on whether the appellant and sponsor were living in the same house and pretending to be in a relationship, living in different locations in the UK, or the sponsor was mainly living in Portugal. Mr Muquit submitted that because a positive case has not been put forward the burden of proof, which lies with the Secretary of State, has not been discharged. I disagree. The burden on the Secretary of State is to show that on the balance of probabilities the marriage was "a marriage of convenience". It may, in some cases, assist in establishing that there is a marriage of convenience if the Secretary of State is able to put forward a view on how the parties to the marriage are in practice conducting themselves. However, it is not necessary, in order to find that there is a marriage of convenience, for the Secretary of State to put forward a hypothesis or theory (or for the judge to make a finding) about the appellant's living arrangements following the marriage. The relevant question is whether the sole aim of the marriage was to circumvent the rules on entry and residence of third-country nationals and obtain for the third-country national a residence permit or authority to reside in a Member State (see para 10 of *Rosa v Secretary of State for the Home Department* [2016] EWCA Civ 14). It was not necessary to reach a conclusion on the appellant's living arrangements to reach a conclusion on the intention behind the marriage, which is the relevant question where a marriage of convenience is alleged.
15. In this case, the judge, for clearly articulated reasons – as summarised at paragraph 12 above- did not find the appellant or sponsor to be credible and rejected their evidence. Having done so, he was entitled to find that the burden had been discharged by the Secretary of State and I am satisfied that the conclusion he reached, which is that the marriage between the appellant and sponsor was "a marriage of convenience," was open to him. Accordingly, the appeal is dismissed and the decision of the First-tier Tribunal stands.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 28 June 2018