



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/01402/2020

THE IMMIGRATION ACTS

Heard at Field House
On 22 October 2021

Decision & Reasons Promulgated
On 19 November 2021

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

CAM TU LAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Solomon, Counsel instructed by Acculegal Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Vietnam born on 21 September 1995. She is appealing against a decision of Judge of the First-tier Tribunal Hoffman (“the judge”) promulgated on 16 November 2020.
2. The sole issue before the judge was whether the appellant’s marriage to Mr Makos (“the sponsor”) in June 2019 was a marriage of convenience under regulation 2 of the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”).

Decision of the First-tier Tribunal

3. The judge found that the marriage between the appellant and sponsor was one of convenience. Broadly, he gave two reasons. First, there were a considerable number of discrepancies between answers given by the appellant and sponsor during an interview that took place on 20 January 2020 (“the marriage interview”). Second, the appellant and sponsor both confessed that the marriage was one of convenience immediately following the marriage interview.
4. In paragraph 18 the judge stated that:

“the discrepancies between the two interviews are so numerous and wide-ranging that it is impossible to comprehensively set them out in this determination and deal with each one individually.”
5. The judge went on to summarise what he described as “some key discrepancies” in the marriage interview. These were:
 - (a) The appellant and sponsor gave an entirely different accounts of the circumstances in which the sponsor proposed to the appellant.
 - (b) The appellant stated that she was employed by, and very close to, a woman called Julie, whom she described as her “guardian”. However, the sponsor did not know what Julie did for a living or who she was married to, despite the appellant stating that the sponsor worked for Julie’s husband in 2016/2017.
 - (c) The appellant and sponsor gave different answers concerning their living arrangements. The sponsor said that they had lived together since April 2019 but the appellant stated that she and the sponsor did not live together.
 - (d) They gave discrepant answers about recent events. The sponsor stated that on the previous Saturday, two days prior, he arrived home from work at 6.30pm and when he arrived home the appellant was already in the house. However, the appellant stated that the sponsor was already at home when she returned. In answer to a question about exchange of Christmas gifts the sponsor stated that he gave the appellant £100 and she gave him a bottle of Jack Daniel’s whereas the appellant said that she did not want to exchange gifts.
 - (e) The appellant stated that they used their joint account to pay for the registry office fee for the marriage whereas the sponsor claimed that it was Julie who paid and that he did not know how much it cost.
6. The judge noted that both the appellant and sponsor confessed to being dishonest at the interview and signed a confession. The appellant argued before the First-tier Tribunal that she was intimidated by Home Office officials. The judge rejected this, finding that there was nothing in the interview transcripts to indicate that officials acted in any way inappropriately.
7. The sponsor did not attend the hearing to give evidence. A psychiatric report from a consultant psychiatrist Dr Dhumad was submitted. Mr Dhumad expressed the opinion that the sponsor was unfit to attend the hearing or to give oral evidence. He

also stated that it was his opinion that the “mistakes “the sponsor made during the interview are very likely to be explained by his poor mental health and anxiety disorder. In addition, Dr Dhumad stated that he did not consider it likely that the sponsor was feigning or exaggerating his mental illness.

8. The judge considered the psychiatric report in considerable detail. The judge found that the report did little to explain the roots of the sponsor’s depression and anxiety and that it does not explain how or why the sponsor’s condition would drive him to falsely confess to the respondent that he had entered into a marriage of convenience.
9. The judge noted that there was no evidence of the sponsor ever seeking or obtaining treatment for depression and anxiety, and no GP records were submitted. The judge stated in paragraph 38:

“In the absence of supporting medical evidence, I find I can attach only limited weight to the psychiatric report. It is clear that Dr Dhumad was relying solely on what he was being told by [the sponsor] and the appellant, which in my view could arguably be said to be self-serving given the unusual position they have found themselves in, i.e. having to explain why each of them signed a confession admitting to entering into a marriage of convenience. In any event, the fact that [the sponsor] did not give oral evidence at his wife’s appeal hearing detracts from the weight that I can attach to his written statement in a case where discrepancies between their evidence is key.”

Grounds of Appeal and Submissions

10. The appellant has advanced four grounds of appeal. The first ground argues that the judge misstated, and misapplied, the burden of proof. Reference is made to paragraphs 9 and 16 of the decision. In paragraph 9 the judge stated:

“I remind myself that there is no burden on an applicant to establish that they are not a party to a marriage of convenience unless the respondent provides reasonable grounds for suspecting that that is the case. Where the respondent does provide reasonable grounds, the burden is then on the appellant to prove the facts of their case, applying the civil standard of balance of probabilities, see *Papajorgji (EEA spouse - marriage of convenience) Greece* [2012] UKUT 38 (IAC).”

11. In paragraph 16 the judge stated:

“In the light of the discrepancies given in interview, and the signed confessions in particular, I find that the respondent has met the threshold of providing reasonable grounds for suspecting that the marriage is one of convenience. The burden is, therefore, on the appellant to demonstrate that the marriage is not one of convenience.”

12. Mr Solomon, during his submissions, argued that the error is material because it means that the assessment of the credibility of the appellant and sponsor was “fatally flawed”.
13. The second ground of appeal concerns the report by Dr Dhumad. The grounds argue that it was erroneous in law to attach only limited weight to the report solely because it was based on an account given by the person concerned. Mr Solomon argued that this approach is inconsistent with *JL (medical reports-credibility) China*

[2013] UKUT 145 (IAC) and *MN v Secretary of State* [2020] EWCA Civ 1946, 36. He argued that the error is material because if the report of Dr Dhumad had been given weight then the judge would not have reduced the weight given to the sponsor's evidence on the basis of the sponsor not attending the hearing.

14. The third ground of appeal argues that the judge failed to take account of factors that should have weighed in the appellant's favour. The grounds refer to Appendix A of *Papajorgji (EEA spouse – marriage of convenience) Greece* [2012] UKUT 00038(IAC) where relevant factors are set out. Specifically, Mr Solomon argued that the judge should have taken into account that:
 - (a) The appellant and sponsor have been in a relationship for a long time.
 - (b) They met before the marriage and speak the same language.
 - (c) No money or gifts were handed over in order for the marriage to be contracted.
 - (d) There is no past history of marriages of convenience.
 - (e) The appellant has a good immigration history and had alternative routes to a lawful basis to remain in the UK.
15. The fourth ground of appeal submits that the judge erred by failing to take into account the evidence of the appellant's father, which supports the contention that this is a happily married couple.
16. Ms Everett's submissions can be summarised briefly. She stated that even if the judge misdirected himself as to where the burden of proof lies, this would be an immaterial error of law because there were overwhelmingly strong reasons to find that the appellant and sponsor entered into a marriage of convenience.

Analysis

Ground 1: Error in relation to burden of proof

17. It is well-established that the legal burden lies on the respondent to prove that an otherwise valid marriage is a marriage of convenience. See *Sadovska v Secretary of State for the Home Department* [2017] UKSC 54.
18. The judge plainly fell into error in paragraphs 9 and 16 by failing to state that the burden fell on the respondent. Moreover, a reading of the decision as a whole leads inescapably to the conclusion that the judge approached the case without recognising that the burden fell on the respondent.
19. However, the error was not material. This is because the answer to the question of whether the marriage between the appellant and sponsor was a marriage of convenience was clear-cut and, on any view, this was not a case which could have turned on where the legal burden of proof lies. Not only did the appellant and sponsor admit to the respondent that the marriage was one of convenience, there were stark – and numerous – inconsistencies between the answers they gave at the marriage interview. I am fortified in my view by considering what was said by

Richards LJ in *Rosa v Secretary of State for the Home Department* [2016] EWCA Civ 14 at [39] about cases of this type not necessarily turning on where the legal burden lies.

Ground 2: Approach to psychiatric evidence is flawed

20. There is no error in the judge's approach to Dr Dhumad's report. First, the judge considered the report carefully, as is evident from paragraphs 34 – 38 of the decision. Second, it was open to the judge to take into account the brevity and lack of detail in the report. Third, the judge was entitled to have regard to the fact that the appellant did not submit evidence to show he has had any treatment, or even seen his GP, in respect of mental health issues. Taken together, these factors adequately support the judge's finding that only little weight should be attached to the report.

Ground 3: Failure to take account of other considerations

21. The grounds identify a number of factors (as set out in appendix A of *Papajorgji*) which, generally, are relevant to the question of whether a marriage is one of convenience. It is argued that the judge erred by not addressing these. This submission has no merit because these factors, considered either individually or cumulatively, could not, on any view, justify a different conclusion to the one reached, given the overwhelmingly strong evidence supporting the conclusion that this was a marriage of convenience.

Ground 4: Failure to take into account the letter from the appellant's father

22. This ground cannot succeed for the same reasons as ground 3. There was overwhelmingly strong evidence to support the conclusion that this was a marriage of convenience and there is no rational basis upon which it could be said that a letter from the appellant's father could have changed the outcome. The failure to refer to this letter is immaterial and does not amount to an error of law.

Conclusion

23. Although an error was made in respect of the burden of proof, for the reasons explained above, this was not material. The other grounds have no merit.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of a material error of law and the decision stands.

No anonymity direction is made.

Signed

D. Sheridan

Upper Tribunal Judge Sheridan

Date: 11 November 2021