



IAC-PE-SW-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/25840/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 15<sup>th</sup> October 2015**

**Decision & Reasons Promulgated  
On 3<sup>rd</sup> November 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE LEVER**

**Between**

**MR JORGE LOMBANA JIMENEZ  
(ANONYMITY NOT RETAINED)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Miss Norman of Counsel

For the Respondent: Miss Fijiwala

**DECISION AND REASONS**

**Introduction**

1. The Appellant born on 9<sup>th</sup> February 1989 is a citizen of Colombia. The Appellant who was present was represented by Miss Norman of Counsel. The Respondent was represented by Miss Fijiwala, a Presenting Officer.

**Substantive Issues under Appeal**

2. The Appellant had made application for a residence card as confirmation of his right to reside in the United Kingdom as the spouse of an EEA national under the 2006 Regulations. The Respondent had refused that application. The Appellant had appealed that decision and his appeal was heard by First-tier Tribunal Judge Chana sitting at Hatton Cross on 18<sup>th</sup> February 2015. The judge had dismissed the appeal.
3. Permission to appeal was sought by the Appellant and permission was firstly refused by Designated Judge McClure on 19<sup>th</sup> May 2015. The judge had noted that the Grounds of Appeal seeking permission were that the judge had made factual errors as to how long the Appellant had been in the United Kingdom, the assessment under Article 8 was flawed and the judge had given weight to irrelevant information and failed to give weight to relevant information. The decision to refuse noted the Grounds of Appeal did not challenge the substance of the judge's findings namely that this was a marriage of convenience and accordingly the appeal must by necessity have failed under the 2006 Regulations. It was further noted that the judge was entirely right not to have considered Article 8. Permission to appeal was renewed and granted by Upper Tribunal Judge Storey on 31<sup>st</sup> July 2015. The judge made the somewhat curious comment:

"Whilst I doubt the Appellant can succeed on the merits it is at least arguable that the First-tier Tribunal Judge erred in the reasons she gave for finding certain documents unreliable and that this impacted on her findings as to the credibility of the couple's claim to have entered into a genuine marriage."

The matter comes before me firstly to decide whether an error of law had been made by the First-tier Tribunal.

### **Submissions on behalf of the Appellant**

4. It was conceded by Miss Norman that the judge was correct not to have considered the case under Article 8 of the ECHR given the recent case law in such respect. It was submitted however that the judge had made findings that were not open to him concerning the solicitor's letter within the Appellant's bundle and failed to have taken into account other documents appearing at pages 53 to 56 of the Appellant's bundle. It was submitted the finding on forgery affected the whole decision regarding credibility. It was further submitted that the marriage interview record whilst it may have contained one or two inconsistencies noted by the judge contained a substantial number of consistencies that the judge had simply failed to take into account.

### **Submissions on behalf of the Respondent**

5. It was submitted that the question of the consistencies or inconsistencies within the marriage interview record were not matters that had been raised before within the Grounds of Appeal. It was submitted that the

judge was entitled to make the findings that she had made regarding the documents presented and indeed lack of documentation.

6. At the conclusion of the hearing I reserved my decision to consider the submissions and documents in this case. I now provide a decision with my reasons.

### **Decision and Reasons**

7. I have concerns in this case. The Respondent had refused the Appellant's application to be granted a residence card on the basis that the Respondent viewed this as being a marriage of convenience between the Appellant and Sponsor. As clear from page 1 of the refusal letter that was based exclusively upon the marriage interview conducted by the Respondent on 14<sup>th</sup> May 2014.
8. The judge had acknowledged that fact at paragraph 30 of the decision. Furthermore the judge had correctly identified at paragraph 29, in accordance with **IS Serbia [2008] UKAIT 603**, the fact that whilst the burden of proving a marriage is not one of convenience lies with the Appellant, there must be initially some evidence supporting such suspicion and therefore there is an initial burden upon the Respondent.
9. The judge at paragraphs 31 to 32 had highlighted inconsistencies within the marriage interview. In reality those inconsistencies amounted to two separate matters relating to dates and location. The judge noted the Appellant and Sponsor conceded in the interview they had lied concerning when the Sponsor had been in the UK or Spain and the reason for that. The judge was entitled to highlight those inconsistencies as a means of demonstrating that the Respondent had discharged that initial burden of proof i.e. there was some evidence that gave rise to suspicion that this may be a marriage of convenience. However, thereafter the judge does not appear to have looked further at the interview record to establish whether when examining that record as a whole the Appellant had then discharged the burden of proof that the marriage was not one of convenience. That interview record was lengthy. It was not of assistance perhaps to the Appellant and Sponsor that they were not always asked the same questions or questions covering the same topics so that a comparison was not necessarily available across the board. However it is clear that there were a range of topics and questions where the Appellant and Sponsor provided consistent evidence and consistency in details. It does not necessarily follow that the judge would have found that the Appellant had discharged the burden of proving that this was not a marriage of convenience but it was a material error for the judge not to have examined that document carefully in order to reach that conclusion as the document formed the totality of the Respondent's case and the core of the evidence before the First-tier Tribunal.
10. Rather the judge appears to have dwelt at some length on the issue of whether or not the solicitor's letter was genuine or not (paragraphs 35 to

39). The judge's findings that the letter was essentially a forgery is in my view speculative. I accept the enclosures referred to in the letter were not before the First-tier Tribunal, whereas I have now seen those enclosures that support the Appellant's case. Those documents were not before the judge and therefore there is and can be no criticism of the judge but it tends to underscore the somewhat speculative approach to the solicitor's letter which in itself was not really a central feature of this case.

11. The Grounds of Appeal do not properly engage with where the difficulties lie in this decision namely the failure to examine properly the interview record to decide whether having accepted the Respondent discharged the initial burden of proof, thereafter did the Appellant on balance show that this was not a marriage of convenience. That failure together with an over emphasis on a speculative matter has led in my view to a material error of law. A close examination of the interview record may have led the judge to reach a different conclusion particularly if that had been coupled with only looking at what could be properly inferred from the solicitor's letter rather than speculating upon that letter.

**Notice of Decision**

12. I find that the judge made a material error of law such that I set aside the decision of the First-tier Tribunal.

13. Anonymity not retained.

Signed

Date

Deputy Upper Tribunal Judge Lever