



**Upper Tribunal
Immigration and Asylum Chamber**

Appeal Number: IA/27075/2014

THE IMMIGRATION ACTS

Heard at Field House

**Decision and Reasons
Promulgated**

On: 18 September 2015

On: 21 September 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

BETWEEN

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR SOHAIL SARWAR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Home Office Presenting Officer

For the Respondent: Mr R Spurling, counsel instructed by Goodfellows Solicitors

DETERMINATION AND REASONS

1. This is an appeal against the decision, promulgated on 16 March 2015, of First-tier Tribunal Judge Samimi (hereinafter referred to as the FTTJ).
2. Permission to appeal was granted by FTTJ Lambert on 13 May 2015.

Background

3. The respondent to this appeal sought a residence card as

confirmation of a right to reside in the United Kingdom on the basis of his marriage to Sanna Butt (a Danish national), which was said to have taken place, by proxy, on 18 May 2013. The respondent and Ms Butt were interviewed by the Secretary of State on 19 May 2014, following which the residence card application was refused on the basis that the respondent was a party to a marriage of convenience.

4. At the hearing before the FTTJ, the respondent's counsel, Mr Spurling, conceded that owing to the conclusions in Kareem (proxy marriages - EU law) [2014] UKUT 24), the respondent was not able to discharge the burden of proving that the marriage was legitimate in Denmark. It was common ground that the issue was whether the parties were in a durable relationship. The FTTJ remarked that there had been no challenge to the "*formal validity of the Nikah marriage ceremony;*" notwithstanding the discrepancies in the interview records and oral evidence the parties had been in a "*genuine and durable*" relationship and she allowed the appeal "under the EEA Regulations 2006."
5. The grounds of application raise three grounds. The first ground argued was that the FTTJ materially misdirected herself in twice referring to the issue before her being one of dependency and in addition, it was said that she erred in finding that the marriage was valid, despite counsel's concession to the contrary. Secondly, it was argued that the FTTJ failed to provide adequate reasons for her finding that the parties were in a genuine and durable relationship given the "*considerable*" inconsistencies noted in the reasons for refusal letter and those which emerged during the course of the appeal hearing. Thirdly, it was argued that the FTTJ erred in allowing the appeal of an extended family member outright rather than remitting the matter to the Secretary of State.
6. FTTJ Lambert granted permission specifically on the first and third grounds, commenting that the reasoning of the FTTJ in [13-14] was not "*obviously inadequate*" but nonetheless not excluding the second ground.
7. Those representing the respondent did not lodge a Rule 24 response.
8. At the hearing before me, Mr Clarke accepted that the FTTJ had made distinct findings regarding the durability of the relationship. He did not seek to expand upon the FTTJ's erroneous reference to the issue of dependency at [2] and [3] of the decision. With regard to the Nikah marriage, Mr Clarke stated that there was no evidence that this marriage would be recognised in Denmark and he argued that the FTTJ ought to have put the Home Office on notice if she was intending to find that it would be, given the concession made by counsel on this issue.
9. With regard to the second ground, Mr Clarke drew my attention to the areas of concern as set out in the reasons for refusal letter; arguing

that not all these points were fully addressed by the FTTJ in her decision. He accepted that the FTTJ had dealt with the “contraception issue” which emerged during oral evidence, but that this was only one of a number of credibility issues of concern.

10. Finally, Mr Clarke argued that the FTTJ had exercised discretion when not in a position to do so.
11. Mr Spurling urged me to read the decision as a whole and reach conclusions in the round. He submitted that the FTTJ was not required to note every point made and she set out enough of her findings to make it clear what those findings were. He accepted that some elements of her findings could have been more clearly expressed. The mention of dependency was no more than a cut and paste error.
12. With regard to the FTTJ’s view of the Nikah marriage, Mr Spurling argued that there were no wider repercussions on the respondent as a result of this comment and the respondent had not raised a point with regard to the formal validity of the marriage in the reasons for refusal letter. However, the representatives at the hearing had taken a pragmatic view, given the changes to the legal landscape and the only issue before the FTTJ was that of whether the respondent was in a durable relationship.
13. Mr Spurling argued that the FTTJ had provided adequate reasons for her findings. He took me through [10-17] of the decision and asked me to note the lack of specific examples in the grounds of matters, which the Secretary of State was of the view the FTTJ was bound to consider. He argued that the parties were consistent and credible on core issues.
14. In relation to ground 3, Mr Spurling asked me to note that the FTTJ had not directed the Secretary of State to issue a residence card. He was also of the view that there was no difficulty with the FTTJ allowing the appeal under the Regulations, as the Secretary of State would consider the exercise of her discretion in any event.
15. In reply, Mr Clarke argued that the FTTJ regarded the marriage as being substantive, she had referred to Regulation 2 in her decision and the Secretary of State had not been given an opportunity to argue that the marriage was not legitimate. Those findings could be relied upon subsequently owing to Devaseelan and could not be allowed to stand. Mr Clarke also stressed that the FTTJ did not have jurisdiction to exercise discretion in the respondent’s favour.
16. Mr Spurling sought leave to make a further submission; that being that the Secretary of State had had the opportunity to consider the validity of the marriage but had refused the application on the basis that it was a marriage of convenience. Mr Clarke did not wish to reply to this point.

17. I find that the FTTJ erred solely in relation to her decision to allow the appeal under the EEA Regulations, which I will address below.
18. In terms of ground 1, I find that the FTTJ did not go behind counsel's concession that there was no evidence that the Nikah proxy marriage was in accordance with Danish law. There are two references to the marriage. The first at [14] refers to there being "*no challenge to the formal validity of the Nikah marriage ceremony*" and the second at [17] includes the remark that "*I find that the Appellant and Sponsor have provided a consistent and truthful account of events and issues regarding the genuineness of their Nikah marriage.*" The FTTJ was correct on the first point, given that the respondent had not formally challenged the validity of the marriage in the reasons for refusal letter. The issue at the hearing was whether the marriage would be valid in relation to the sponsor, as a Danish national. Those issues are separate. The second mention of the marriage refers to the genuineness of the Nikah marriage ceremony. In this, I find that the FTTJ was doing no more than indicating that the parties had undergone this ceremony for genuine reasons rather than to engage in a marriage of convenience. It is obvious from reading the decision as a whole, that the FTTJ was in no doubt as to the issue before her, that of whether the parties had a durable relationship. As Mr Spurling stated, the FTTJ could have expressed matters more clearly, however I find that her findings in relation to the Nikah marriage do not amount to a material error of law.
19. The second ground relied upon related to the adequacy of the reasons provided by the FTTJ for finding that the parties were truthful and that the discrepancies did not undermine their accounts. As noted by Mr Spurling, the application for permission did not descend to detail of the considerable discrepancies referred to. Mr Clarke asked me to consider seven out of eight matters listed in the reasons for refusal letter. He accepted that the issue with regard to the bank account had been addressed in the FTTJ's decision.
20. The FTTJ said as follows regarding the matters referred to in the reasons for refusal letter, at [10], "*Although there are a number of discrepancies between the answers given by the Appellant and Sponsor at the marriage interview, I find that they have sought to address those issues in their statements as well as in the course of the oral evidence before me.*" The FTTJ goes on to set out the parties' explanation for the discrepancy in relation to the health conditions suffered by each party, which is one of the more serious issues set out in the refusal letter.
21. I have considered the witness statement of the respondent to this appeal and consider that very detailed explanations were put forward to address the issues identified as inconsistencies in the reasons for refusal letter. It is said by the respondent to this appeal that the parties were asked "hundreds" of questions. In this context, seven or

eight inconsistencies do not appear to me to be a considerable number. In view of the detail in the respondent's statement, I find that the FTTJ cannot be said to have erred in referring to that document as part of her findings on credibility.

22. The FTTJ also acknowledged apparent inconsistencies, which emerged during the oral evidence and these she addressed in some detail at [11] to [13] of her decision, in particular. The FTTJ's decision does not suffer from a dearth of adequate reasons in relation to the issues at large before her. Quite the reverse. I accordingly conclude that her reasoning was entirely adequate in relation to her finding that the parties were in a genuine and durable relationship. Her findings stand.
23. In Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340 (IAC) it was found that Regulation 17(4) made the issue of a residence card to an extended family member a matter of discretion. As in this case, where the Secretary of State has yet to exercise that discretion, a judge allowing the appeal can do no more than find that the decision was not in accordance with the law.
24. I accept that the FTTJ, at [18], found that the "*decision is not in accordance with the EEA Regulations 2006,*" However, she went further in proceeding to allow the appeal under the Regulations and in this she materially erred. I therefore allow the Secretary of State's appeal on this basis alone.
25. I therefore remake the FTTJ's decision by substituting a decision to allow Mr Sarwar's appeal on the basis that the Secretary of State's decision was not in accordance with the law. All the findings of the FTTJ as to the durability of the relationship are preserved. Therefore it is now a matter for the Secretary of State to exercise her discretion as to whether or not to issue him with a residence card.

Conclusions

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

I set aside the decision to be re-made.

I substitute a decision allowing the appeal on the basis that the Secretary of State's decision was not in accordance with the law.

No application for anonymity was made and I saw no reason to make such a direction.

Signed:

Date: 19 September 2015

Deputy Upper Tribunal Judge Kamara