



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/29926 /2014**

THE IMMIGRATION ACTS

**Heard at Field House
on 17 March 2015 and 14 May
2015**

**Decision & reasons Promulgated
On 3 September 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

**MR MUHAMMAD AQEEL
(Anonymity direction not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr S Mahmud/ Mr A Janjua, Solicitor

For the respondent: Ms A Brockles-Weller/Ms A Fijiwala, Senior Presenting
Officers

DECISION AND REASONS

1. The appellant, a national of Pakistan born on 10 October 1987, appealed against the decision of the respondent to refuse to issue him with a residence card as confirmation of his right to reside in the United Kingdom pursuant to the EEA 2006 Regulations. First-tier Tribunal Judge Khan dismissed the appellant's appeal in a determination promulgated on 8 December 2014. First-tier Tribunal Judge VA Osborne gave the appellant permission to appeal stating that the Judge arguably erred in law by failing

to weigh the competing areas of evidence sufficiently to reach a sustainable decision.

The First-Tier Tribunal Judges Findings

2. The Judge in his determination found the following which I summarise. The three witnesses who gave oral evidence were contradictory and inconsistent. The mother-in-law gave evidence who said that during her visits she sleeps downstairs in the living room. The appellant's wife said that her mother slept with her in the bedroom while the appellant slept downstairs on the sofa. The appellant said that his mother-in-law shared the smaller room with his wife's son. The Judge found that had the appellant and his EEA national wife been living together these inconsistencies about the sleeping arrangements would not arise.
3. There were further contradictions in the respondent's reasons for refusal letter, relating to questions about the appellant's wife's child's uniform, schoolteachers name, the appellant's medical visit to the hospital, religious celebrations, employment issues and previous address. The appellant's wife said she did not know why the appellant has given different answers in his interview with the respondent. The appellant said that he could not pronounce the name of the teacher because the child had moved up a year in March /April 2014. The judge noted that it is a known fact that children only move up a year at the start of the school year which is September of every year.
4. The appellant's wife said that last Saturday they stayed home all day, the appellant said that all went out shopping at Tesco in the High Street. The appellant's wife said that stayed at home on Sunday and the appellant said that they went to Prime Mark. The appellant's wife said that she was given a dress as a present at Ramadan Idd and the appellant said that it was on the sacrifice Idd that he gave his wife the dress. These contradictions and inconsistencies in the evidence show that the appellant and his wife are not living together as a married couple as claimed.
5. The appellant and his wife both gave contradictory evidence about the appellant's visit to hospital. They were both vague and evasive about when the appellant told his wife about his visit to the hospital. The appellant and his wife's evidence shows that they have entered into a marriage of convenience so that the appellant can claim benefits under the EEA Regulations.
6. On the evidence and a balance of probabilities the Judge found that he is not satisfied that the appellant has entered into a genuine marriage with an EEA national or that they have lived together in a relationship as a married couple. The appellant therefore does not meet the requirements of regulation 2 of the 2006 Regulations and is not entitled to a residence card as confirmation of his right to live in this country as the spouse of an EEA national.

Grounds of Appeal

7. The appellants' grounds of appeal state the following which I summarise. The question for the Judge, when an issue is raised in respect of marriage of convenience, is set out at paragraph 39 in the case of **Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC)** which stated that, "in the light of the totality of the information before me, including the assessment of the claimant's answers and any information provided, I satisfied that it is more probable than not that this is a marriage of convenience?". The Judge erred in failing to adequately consider the totality of the information in evidence before him as required.
8. The Judge's reasoning in reaching his conclusion that the marriage is one of convenience is limited to 6 findings which insists of the inconsistencies in the evidence between the witnesses. The veracity of these findings are challenged. The appellant's wife's inability to explain why her husband incorrectly detail the colour of her son's uniform does not amount to a contradictory statement. The Judge's findings at paragraph 37 that it is a known fact that children only move up a year at the start of the school which is in September 2014, without information as to the circumstances of the move, is speculative and unsustainable.
9. The remaining four adverse findings which were clearly relevant to the assessment are insufficient to warrant the finding that the appellant's marriage is one of convenience when viewed in the round with the evidence and information provided as a whole.
10. The appellant provided evidence of cohabitation, the appellant provided evidence that the couple had a failed pregnancy in 2012 and that that the appellant is known at his son's stepson school. He also provided evidence of the appellant's wife having converted to Islam.
11. From the 81 questions asked at the interview, the appellant and his wife provided inconsistent answers to only five questions. Importantly, the appellant and his wife were entirely consistent about their respective personal details, about the circumstances of their first meeting, about their wedding and about each other's wider families.
12. Considering the guidance of the EU Commission and the criteria said to indicate possible triggers for investigation of suspected marriages of convenience, the couple were largely consistent at the interview. They speak the language and is understood by both, there was no evidence of a sum of money or gifts handed over in order for the marriage to be contracted. The past history of the spouses contained no evidence of previous marriages of convenience or other forms of abuse and fraud to acquire a right of residence and that the evidence of cohabitation dates back to 2012.

Respondents Rule 24 response

13. The respondent stated in her Rule 24 response dated 6 February 2015 that the Judge considered all the evidence including the evidence which emerged as a result of oral evidence given at the hearing. There are inconsistencies arising from the interview and the further inconsistencies from the oral evidence of the witnesses. It is trite law that it is a matter for the Judge as to how much weight to place on the evidence presented. The Judge analysed the evidence and dismissed the appeal by giving adequate reasons. There is no material error of law in the determination.

The hearing

14. At the hearing I heard submissions from both parties in the full record of the hearing are in my Record of Proceedings.

Findings on Error of Law

15. I find that the Judge fell into material error as he did not give sufficient reasons for why he found that the appellant and his spouse have entered into a marriage of convenience. The Judge did not specifically consider evidence which was consistent with the marriage being genuine. The Judge primarily focused on the inconsistent evidence at the interviews and what was stated in the reasons for refusal letter. It is trite law that the Judge must give consideration to all the evidence before reaching his conclusions.
16. The Judge also made a material error of law in his self-instruction on the burden of proof in marriages of convenience. This is that at first instance the burden falls on the respondent to prove that there is sufficient indicia for the respondent to consider that the appellant's marriage is one of convenience. After the respondent has discharged that burden, the burden shifts back to the appellant to prove that his marriage is not one of convenience.
17. In the case of **Papajorgi (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC)**, it was made clear that there is now burden at the outset of an application on the claimant to demonstrate that marriage to an EEA national is not one of convenience. In the case of **IS (marriage of convenience) Serbia [2008] UKAIT 31**, establishes only that there is an evidential burden on the claimant to address evidence justifying reasonable suspicion that the marriage is entered into for the predominant purposes of securing residence rights.
18. The Senior Presenting Officer in the submissions argued that the Judge implicitly understood that the burden of proof was on the respondent which had been proved by providing the interview record of the appellant and his spouse in which there were many discrepancies as listed in the refusal letter. At paragraph 9 however, the Judge stated that the appellant has the burden of proof and it is on a balance of probabilities that he meets the requirements of Regulation 2 of the 2006 Regulations. There

was no self-direction of the correct burden of proof in cases where marriage of convenience is alleged by the respondent.

19. I am of the view that in the absence of proper analysis and reasoning, it cannot be said that the Judge paid all due scrutiny to all the evidence as he was required to do or that he applied the correct burden of proof.
20. I find that the first-tier Tribunal Judge materially erred in reaching conclusions without considering all the evidence in the appeal.
21. I therefore set aside the determination in its entirety and directed that it be heard afresh at the Upper Tribunal. If possible, I reserve it to myself.

Rehearing on 14 May 2015

22. Mr Janjua represented the appellant. Before the hearing, The Senior Presenting Officer, Ms Fujiwala provided the appellant's asylum interview record dated 19 September 2011. The appellant withdrew his asylum claim after he married an EEA national.
23. The asylum interview record provided was adverse for the appellant. The basis of the appellant's claim for asylum was that he fears persecution in Pakistan because he is a homosexual. He also stated that he has a wife and children in Pakistan. He also stated that a female friend of his, a Czechoslovakian national, (not his current spouse) had volunteered to enter into a marriage of convenience with him so that he could obtain the paperwork for his application to remain in this country as a spouse of an EEA national.
24. The appellant's solicitor, Mr Janjua, asked for a short adjournment to view the papers and seek instructions from his client. The appellant solicitor, after the short recess, said that he has called the Law Society to consider whether he was professionally embarrassed and he was of the view that he is no longer able to represent the appellant and excused himself.
25. The appellant represented himself and gave oral evidence in English. He gave the following evidence which I summarise.
26. He came to the United Kingdom in 2007 on a visitor's visa. When he came, he did not intend to return to the United Kingdom. He did not want to return because he feared for his life because he is a homosexual. Asked whether he is a bisexual or a homosexual, the appellant did not understand the question and it was explained to him the difference between the two. The appellant said he is a bisexual because he has a wife and kids in Pakistan.
27. It was put to the appellant that at his asylum interview he stated that he had a Czechoslovakian national friend who had volunteered to marry him for him to secure documents to remain in this country. The appellant stated "she asked me what is wrong and I told her and I agreed and made a mistake". It was put to him that he had made a false application to the

Home Office for a certificate of approval to marry this Czechoslovakian national. The appellant said "yes". He was asked why the court should now believe him when he claims that he has not married his current wife to gain immigration status. The appellant said that they have been together now for three years.

28. His wife does not know about his past and he has now "properly changed" asked what he means by "properly changed", he said "I am no longer a homosexual but a heterosexual and I only like women." He lived with the Czechoslovakian woman for 3 to 5 months but he lived in his own room in the same accommodation.
29. He has married his wife Islamically. Asked why he withdrew his asylum claim, he said because "I married her in March and withdrew my asylum claim in August or July". Asked how was it that within a matter of months he changed his sexuality, the appellant said "someone a friend told me that homosexuality is not good for Islamic people". Asked how was it that a friend in the United Kingdom persuaded him not to be a homosexual when his brother in Pakistan could not. The appellant answered "my brother did not try and convince me to leave homosexuality because I ran away". He said that his friend "taught him to like women and told him that to read the Koran. His friend said that if he continues down this path, he will go to hell. His wife does not know about his past homosexuality because it is a shame for him and "what will she think of me, so I did not tell her". His wife does not know that he was intending to enter into a false marriage with another Czechoslovakian national.
30. Mrs Helena Damovosa gave oral evidence and said the following which I summarise. Her date of birth is 30 June 1983 and she is 32 years of age and the appellant is 26 years of age. The appellant came to the United Kingdom "may be in 2008-2009" on a visit visa. Asked why the appellant did not return to Pakistan, she said "he has a wife and some problem with his family he told me". Asked whether she is aware that the appellant made an asylum claim which he later withdrew, she said "I don't know what asylum claim is." It was put to her had the appellant ever told her that he was in fear of returning to Pakistan for any reason, to which she replied "no".
31. It was put to Mrs Damovosa that the appellant made an asylum claim based on his homosexuality and she said "he only told me about his wife and child" and said "I am in shock to discover this". She was asked whether she trusts the appellant about his motives in marrying her and she said "he has lied to me". It was further put to her that the appellant had made a false application to marry a Czechoslovakian national called Ivana, only to regularise his immigration status. She replied "no I don't know about it". She has lived with the appellant for three years and they are a normal couple. The appellant likes my son and we live as a family.
32. I heard submissions from both parties the full record of which is in my Record of Proceedings.

Findings of Fact

33. A residence card is a card issued in accordance with Regulation 17 of the 2006 Regulations to a person who is not a national of the European Economic Area (EEA) but who is a 'family member' or an 'extended family member' of an EEA national, subject to the criteria of that Regulation being satisfied.
34. 'Family member' is defined for the purposes of the Regulations in Regulation 7 which states:
 7. — (1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person—
 - (a) his spouse or his civil partner;
35. Paragraph 2 of the Regulations states that "spouse" does not include a party to a marriage of convenience.
36. In the case of **Papajorgi (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC)**, it was made clear that there is now burden at the outset of an application on the claimant to demonstrate that marriage to an EEA national is not one of convenience. In the case of **IS (marriage of convenience) Serbia [2008] UKAIT 31**, establishes only that there is an evidential burden on the claimant to address evidence justifying reasonable suspicion that the marriage is entered into for the predominant purposes of securing residence rights.
37. There is no issue between the parties that the appellants sponsor, Mrs Damovosa is a Czechoslovakian national, and therefore an EEA national for the purposes of the 2006 Regulations, as defined in Regulation 2. There is also no dispute between the parties that she is in this country exercising her EEA treaty rights and the respondent has not taken issue with this.
38. The respondent has alleged that the appellant who purports to be the spouse of Mrs is not a 'family member' of Mrs Damovosa for the purposes of paragraph 7 of the Regulations, as the appellant's marriage to Mrs is one of convenience. Paragraph 2 of the Regulations states that 'spouse' 'does not include a party to a marriage of convenience.
39. The respondent provided an asylum interview record when the appellant made an asylum claim which he later withdrew. This and other matters seriously compromise the appellant's claim that his marriage to Mrs Damovosa is not one of convenience.
40. The appellant came to this country on a visitor's visa and overstayed. At the hearing he said that when he came to the United Kingdom he had no intention to return. He also accepted that when he said he had an intention to return it is application form that was not true. I find that the appellant's credibility is damaged by his misrepresentation to the

respondent that he would return to Pakistan when he clearly had no intention to do so.

41. The appellant did not leave the country after his visit visa expired and then made an asylum claim based on his fear of persecution in Pakistan because he is a homosexual. He subsequently withdrew this asylum claim because he claims that he married an EEA national and therefore no longer needed to pursue it.
42. At the hearing, the appellant said that he was a homosexual but when a friend of his told him that homosexuality is not Islamic, he saw the light and became a heterosexual. He said that his friend told him to read the Koran and he will discover that it is not Islamic to be a homosexual. His friend also told him, that he will go to hell if he continues being a homosexual. The appellant said that he changed after his friend taught him how to like women.
43. I do not find it at all credible that the appellant would immediately become heterosexual because he was told by a friend that homosexuality is not Islamic or that he could be taught to be a heterosexual. I find that the appellant's claim that he is a homosexual at his asylum interview was not genuine and an attempt to continue to live in this country by making false asylum claim. This also goes to his credibility.
44. Furthermore, the appellant said at the hearing that he is a bisexual after it was explained to him the difference between a homosexual and a bisexual. However at his Asylum interview, the appellant said that he is a homosexual. At the hearing he said that he is a bisexual because he has a wife and children in Pakistan. This inconsistency in his evidence goes to his credibility into the credibility of this claim.
45. The appellant made a false application to the Home Office for permission to marry a Czechoslovakian national with whom the appellant claims he was living. He accepted at his asylum interview that this was a false application and he was attempting to regularise his status to continue to live in this country. He also confirmed that the hearing that this was a false application and there's was a marriage of convenience in order to regularise his stay in the United Kingdom.
46. This evidence demonstrates to me that the appellant resorts to deception to achieve his objectives.
47. I have taken into account the other evidence in this appeal including the inconsistencies in the interviews of the appellant and Mrs Damovosa. I have also taken into account Mrs Damovosa's medical records that she has had a miscarriage. This evidence in itself does not demonstrate that the pregnancy was from the appellant.
48. Mrs Damovosa in her evidence at the hearing said that she was not aware of the appellant's past or that he had claimed to be a homosexual. She

said she did not know he had made an application to marry a Czechoslovakian national in order to regularise his immigration status. Mrs Damovosa claims that she has lived with the appellant for three years. I do not find it credible she would know so little about the appellant in the time that she has lived with him. Even if she did not know, it does not affect my decision because this also demonstrates that the appellant has not been truthful with Mrs Damovosa which further demonstrates his propensity to deceive.

49. I find that both the appellant and Mrs Damovosa have attempted to deceive the Home Office by entering into a marriage of convenience, in order to regularise the appellant's immigration status in this country.
50. I find that the respondent has discharged her burden of proof that the appellant's marriage is one of convenience. The appellant has not given a credible reason for why it is not a marriage of convenience.
51. I find that the appellant's application for a residence card is a cynical manoeuvre on his part to regularise his immigration status and he has not entered into a genuine marriage but his marriage is one of convenience.
52. I therefore find that the Appellant is not a 'family member' of Mrs Damovosa under the relevant provisions of Regulation 12 of the 2006 Regulations.

Decision

Appeal dismissed

Signed by,

Dated this 16th day of May 2015

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Mrs S Chana
A Deputy Judge of the Upper Tribunal