IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/47865/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 February 2016	**On 16 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

ELIZABETH TEMITOPE OLAYIWOLA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. A. Adeolu, Counsel instructed by Lonsdale & Mayall Solicitors
For the Respondent: Mr. C. Avery, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Keith promulgated on 3 June 2015 in which he dismissed the Appellant's appeal against the Respondent's decision to refuse to grant an EEA residence card as confirmation of her right to reside in the United Kingdom under the Immigration (EEA) Regulations 2006.

2. Permission to appeal was granted as follows:

> "The grounds seeking permission are wide-ranging and make various allegations, with which I need deal. However, they may be read as including a complaint about the lack of adequate reasoning and the approach taken about the issue of whether the appellant's marriage was one of convenience. The self-direction (see paragraphs 6 and 7) as to the law does not follow Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC) and thus the judge's decision may be vitiated by an arguable error of law and I grant permission."

3. At the hearing I heard submissions from both representatives, following which I reserved my decision which I set out below with reasons.

Error of law

4. In paragraph [6] the judge states:

> "The burden of proof rests with the Appellant to demonstrate that she meets the requirements of a 'spouse' for the purpose of Regulation 7 of the EEA Regulations, and in particular , that her marriage to the Sponsor is not one of convenience."

5. In paragraph [24] he states:

> "Having assessed that evidence, I do not find, in the context of the extremely limited evidence provided by the Appellant, that those limited documents were of sufficient corroborative weight such that the Appellant had discharged the burden of proving that she is the Sponsor's spouse, within the meaning of the EEA Regulations."

6. It was accepted by Mr. Avery at the hearing that it was not apparent from paragraph [6] that the judge had appreciated that the burden of proof lay on the Respondent in the first instance. He accepted that the judge had not appreciated the Papajorgji point. However he submitted that although this may be an error, it was the extent to which it was material which was relevant.

7. I find that it is clear from paragraph [6] that the judge has misdirected himself as to the law. Papajorgji provides that in cases of marriage of convenience the burden of proof initially lies on the Respondent to raise a suspicion that the marriage is one of convenience. Only once the Respondent has satisfied the burden of proof to show that there is a suspicion of such a marriage does the burden of proof pass to the Appellant. Paragraph [24] where the judge states that the Appellant had not discharged the burden of proof indicates that the misstatement of the law in paragraph [6] has fed through the whole decision.

8. In order to ascertain whether this error is material I have considered whether the judge placed weight on the evidence of the Respondent, given the fact that the burden of proof rested with the Respondent in the first place.

9. In paragraph [20] the judge states:

> "I was conscious that I had not seen the notes of the Appellant's and Sponsor's interviews and while the Appellant did not seek an adjournment on this basis, I attach less weight to the Respondent's summary of the interviews (and the alleged inconsistencies) accordingly."

10. Given that the burden of proof lay on the Respondent, it was not for the Appellant to seek an adjournment on the basis that the notes of the interviews had not been provided. Rather it was for the Respondent to seek an adjournment if she wished to rely on those documents. I find that the misdirection as to the law has infected the judge's approach as shown by this implicit criticism of the Appellant for failing to seek an adjournment.

11. The judge states that he attaches less weight to the Respondent's summary of the interviews. The Respondent decided that the relationship was is not genuine by reference to the marriage interview records. She considered that there were a significant number of discrepancies, inconsistencies, irregularities and issues in the interview records. On page 2 of the reasons for refusal letter the Respondent lists these discrepancies. At the end of page 2 the Respondent concludes that "based on the information detailed in the interviewer's reports the Secretary of State has sufficient evidence to believe that the marriage undertaken is one of convenience". Therefore in the reasons for refusal letter the only evidence on which the Respondent relies are these discrepancies. However, the judge states in paragraph [20] that he had not seen the notes of the interviews and accordingly attached less weight to the Respondent's summary.

12. Given that this was the basis on which the application was refused, if the judge does not have the interview records themselves and is placing less weight on the summary of this evidence, it is difficult to see how he could have found in any event that the Respondent had discharged the burden of proof to show that the marriage was one of convenience.

13. Mr. Avery submitted that additionally the reasons for refusal letter detailed failures to attend interviews. However, I find that it is clear from the letter that the reason that the Respondent gives for deciding that the marriage was one of convenience is based on the information detailed in the interviewer's reports. The only reference to any failure to attend interviews is in the second paragraph and relates to previous applications. The Respondent then turns to consider the current application and notes that the Appellant and Sponsor attended interviews. The judge refers to

the failure to attend marriage interviews in paragraph [3] when detailing the immigration history of the Appellant. He does not mention it either when recording the submissions made by the Respondent's representative, nor in the findings of fact. The only evidence from the Respondent to which the judge refers when making his findings is the evidence of the discrepancies in the summary of the interviews.

14. The judge also refers to the lack of documentation provided by the Appellant to corroborate his claim to be in a relationship. However, in the reasons for refusal letter there is no issue taken with the Appellant's claim to be cohabiting, and no suggestion that the Appellant and Sponsor were not living together. The documents considered by the judge are listed in paragraph [24]. I have considered these documents which contain evidence in these documents of cohabitation. However, the judge has not paid any regard to this evidence but has instead relied on the answers given at interview.

15. The judge's findings relating to credibility are set out in only three paragraphs. The judge did not find the Appellant and Sponsor to be credible witnesses but this finding must be set against his error in placing the burden of proof on them and not on the Respondent, and in failing to assess whether or not the Respondent had discharged her burden by reference to the evidence she provided. He has failed to take into account the corroborative evidence.

16. Following the case of Papajorgji a child can be evidence of a relationship. Given that the Appellant was pregnant at the time and documents had been provided detailing this pregnancy, it was incumbent on the judge to consider this. However he failed to mention this until the last sentence of paragraph [24].

17. I find that the error of law in placing the burden of proof on the Appellant has infected the judge's entire approach such that the error is material. No account was taken of the evidence of cohabitation or of the pregnancy.

18. Paragraph 7.2 of the Practice Statement dated 10 February 2010 contemplates that an appeal may be remitted to the First-tier Tribunal where the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for the party's case to be put to and considered by the First-tier Tribunal. Given the nature and extent of the fact-finding necessary to enable this appeal to be remade, having regard to the overriding objective, I find that it is appropriate to remit this case to the First-tier Tribunal.

Notice of Decision

19. The decision involves the making an error of law and I set it aside.

20. The appeal is remitted to the First-tier Tribunal for rehearing.

No anonymity direction is made.

Signed Date 4 March 2016

Deputy Upper Tribunal Judge Chamberlain