



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/01821/2015

THE IMMIGRATION ACTS

Heard at Field House
On 27 October 2017

Decision and Reasons Promulgated
On 31 October 2017

Before

UPPER TRIBUNAL JUDGE FINCH

Between

JENN ROSSLEY CECILIO ROVILLOS
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. S. Karim of counsel, instructed by MA Consultants
For the Respondent: Ms P. Hastings, Home Office Presenting Officer

DECISION AND REASONS

History of Appeal

1. The Appellant, who was born on 11 October 1988, is a citizen of The Philippines. She had married her husband, who is a national of Slovakia, on 6 August 2013. On 8 August 2014 she applied for a residence card as the dependent of an EEA national for a third time.

2. On 20 October 2015 she was refused a residence card on the basis that the Respondent believed that her marriage was one of convenience and that she had not established that her husband was exercising a Treaty right in the United Kingdom.
3. She appealed and First-tier Tribunal Judge Majid dismissed her appeal in a decision promulgated on 17 February 2017. The Appellant appealed against this decision and on 31 August 2017 First-tier Tribunal Judge Baker granted her permission to appeal.

Error of Law Hearing

4. At the start of the hearing, counsel for the Appellant handed up a copy of *MM v Secretary of State for the Home Department & Others* which dealt with a number of cases in which First-tier Tribunal Judge Majid had made errors of law. The Home Office Presenting Officer handed up a copy of a decision to dismiss an earlier appeal by the Appellant made by First-tier Tribunal Judge Gillespie.
5. Counsel for the Appellant and the Home Office Presenting Officer made brief oral submissions and I have referred to these submissions, where relevant in my findings below.

Findings

6. The Appellant did not attend the appeal before First-tier Tribunal Judge Majid which took place on 14 December 2016. The Judge correctly referred himself to the provisions contained in rule 28 of the Tribunal Procedure (First-tier Tribunal) Immigration and Asylum Rules 2014 and found that on the evidence before him the Appellant had been notified of the date of the hearing. There is a letter in the file which confirms that a letter was sent to her home address on 21 July 2016.
7. The Appellant had submitted that there was a postal strike at that time and that this was why she did not receive the notice. However, she had not provided any evidence that this was the case or, in the alternative, explained why she would not have received a notice sent to what was said to be her matrimonial home. Counsel for the Appellant suggested that the First-tier Tribunal Judge should have asked his clerk to telephone the Appellant when she did not arrive but was not able to point to there being a relevant telephone number in the papers before the Judge. .
8. The First-tier Tribunal Judge also considered whether it was in the interests of justice to proceed with the hearing. In particular, in paragraph 5 of his decision he found that “fairness required by the overriding objective does not demand that this case should be left unresolved. Therefore, in the interest of expeditious and just disposal of cases that the appeal was dealt without any further delay”. As a consequence, I do not find that the First-tier Tribunal Judge made any procedural errors when proceeding with the appeal.
9. However, in both paragraphs 3 and 7 of his decision, First-tier Tribunal Judge Majid referred to the need to take into account the provisions of the Immigration Rules and did not refer to the Immigration (European Economic Area) Regulations, which were relevant to the appeal before him.

10. Furthermore, he did not address either of the two issues which had led to her application being refused, which were that it was asserted that her marriage was one of convenience and that she had not been able to establish that her husband was exercising a Treaty right in the United Kingdom.
11. In my view, it was not sufficient to rely on the Respondent's reasons for refusing the application without particularising them.
12. The First-tier Tribunal Judge also erred in law by drawing an adverse inference in paragraph 6 of his decision from the fact that the Appellant had not arranged for a legal representative to attend the hearing. As counsel for the Appellant noted, such an inference would have serious implications for anyone appearing in person before the Tribunal.
13. In addition, the First-tier Tribunal Judge erred in law in paragraph 8 of his decision when he said that he had born in mind that the burden of proof was on the Appellant. This is not the case, when it was alleged that a marriage was one of convenience. The Respondent bore the initial evidential burden, as confirmed by *Sadovska v Secretary of State for the Home Department (Scotland)* [2017] UKSC 54 and *Rosa v Secretary of State for the Home Department* [2016] EWCA Civ 14.
14. The Home Office Presenting Officer submitted that the Respondent had met the initial burden of proof in the decision letter but the Judge did not explicitly refer to this in his decision or indicate that he was aware of the test to be applied when it was asserted that there had been a marriage of convenience.
15. As a consequence, I find that there were arguable errors of law in First-tier Tribunal Judge Majid's decision.

Decision

16. The appeal is allowed.
17. The appeal is remitted to the First-tier Tribunal to be heard *de novo* by a First-tier Tribunal Judge other than First-tier Tribunal Judge Majid and First-tier Tribunal Judge Gillespie.

Date: 27 October 2016

Nadine Finch

Upper Tribunal Judge Finch