



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/04124/2015
IA/31044/2015

THE IMMIGRATION ACTS

Heard at Field House
On 31 May 2017

Decision & Reasons Promulgated
On 27 July 2017

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

MR MD NURUL ISLAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Karim
For the Respondent: Mr Tarlow

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh born in 1987. He appeals against a decision of the Respondent made on 2 September 2015 under paragraph 322(2) of the Immigration Rules it being alleged that in a previous application for leave on 30 October 2012 he submitted a false TOEIC certificate.

2. He also appeals against a decision made on 15 December 2015 refusing his application for a residence card. It was refused because it was concluded that his marriage to a Spanish national was one of convenience.
3. Following a hearing at Taylor House on 9 September 2016 Judge of the First-tier I Ross dismissed both appeals.
4. He dealt first with the residence card case. Having heard evidence from the Appellant and his EEA national spouse his findings are at paragraphs 12 to 14. In summary, he found their evidence to be *'inconsistent, vague and lacking in credibility'*. He found it to be unlikely that the Appellant happened to be living away from home at an address which was raided by immigration officers on 3 December 2015. Also that his wife was staying with a friend.
5. The judge did not believe their evidence that they had moved out of the marital house because of a pest infestation. Inadequate documentary evidence had been provided in that regard.
6. The judge gave *'no weight'* to a letter purporting to be from a flatmate of the Appellant and to letters from the parents of his wife because their letters *'comprise wholly of self serving statements created by the appellant'*.
7. The judge also noted inconsistencies between the Appellant and his wife in relation to the date of their engagement, and whether he bought her a ring.
8. Turning to the TOEIC case his findings are at paragraphs 23 to 26. He concluded that the Respondent had discharged the evidential burden of establishing that the Appellant procured his TOEIC certificate by deception. Having noted and found persuasive the generic evidence submitted by the Respondent he went on to find the Appellant's evidence *'unsatisfactory in several respects'*: he dealt with the taking of the test in September 2012 *'in a vague and perfunctory way unable to name the college or give any meaningful description of it or of the taking of the test'*. The judge did not believe the claim that it was not the Appellant who was named in the invalid test analysis document.
9. He also found that the fact that the Appellant may be proficient in English did not assist in determining whether he or a proxy took the test. Nor did he have to determine what the Appellant's motive (or lack of) may have been.
10. He sought permission to appeal which was granted on 25 April 2017.

Error of law hearing

11. At the error of law hearing Mr Karim made the following submissions in respect of the EEA case: the evidential burden to justify reasonable suspicion was back to front, this being with the Respondent not the Appellant as stated; it was unfair to comment on an unlikely coincidence for the Appellant to be absent and the Sponsor to be staying with a friend when the house was raided, when the raid was directed at a

different person; it was unfair to comment on vagueness and inconsistency without identifying why and given that on the one hand there was no interview and on the other corroboration was provided including pest control evidence and letters from housemates and his wife's parents. Also, he failed to consider photographic and bank evidence which supported the claim that the relationship was genuine.

12. On the second case Mr Karim submitted that the judge erred when he criticised the Appellant for not knowing the name of the test centre when he specified this precisely in his witness statement; the judge erroneously relied upon an October 2012 CAS referred to by the Respondent when there was no such document, the only CAS produced being dated May 2013; he was also wrong to give a lack of credit for evidence of good English which would have made cheating at ETS otiose.
13. In reply Mr Tarlow's position was that the decisions were sustainable. The judge had approached the issues correctly and reached conclusions that were open to him on the evidence.

Conclusions

14. In considering this I look first at the EEA case. I see no merit in the claim that the judge reversed the burden of proof. The judge referred to **Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038** at paragraph 6. He states '*The burden of proving that the marriage is one of convenience is on the respondent...There is an evidential burden on the Appellant to address evidence justifying reasonable suspicion that the matter has been entered into for the predominant purpose of securing residence rights*'. That approach was approved in **Agho v SSHD [2016] EWCA Civ 1198** where it was noted (at [14]):

'The UT in Papajorgji concluded at para 39

"In summary, our understanding is that, where the issue is raised in an appeal, the question for the judge will therefore be in the light of the totality of the information before me including the assessment of the claimant's answers and any information provided, am I am satisfied that it is more probable than not that this is a marriage of convenience"

Consistently with the prior discussion, that clearly places the burden of proof on the Secretary of State (or ECO).'

15. In my judgment the judge properly applied the burden.
16. The problem with the judge's brief findings can be briefly stated. Whilst it is not necessary for a judge to comment on every piece of evidence before him, in this case the judge failed to have regard to significant amounts of evidence which appeared to support the Appellant's case. In itself he was entitled to conclude that an undated and uninformative note by a pest control company did not advance the case, that little weight should be given to letters and that there were several inconsistencies between the Appellant and his wife in respect of the date of engagement, the length

of engagement and whether he bought her a ring. However, he made no reference to photographs bearing to show the couple together, to claims in his statement that he was required by the officers to show them intimate photographs of his wife which he did, reluctantly, from his phone. Also, several bank documents which individually showed them at the same address (92 The Sandlings London) and at least one (Lloyds Bank, Appellant's bundle (p92)) which is in joint names at that address.

17. In failing to pay heed to and give adequate reasons on material matters the judge erred.
18. As for the ETS case, which like the EEA case was dealt with briefly by the judge I find error for the same reason. It suffices to note the following. The judge found the Appellant's oral evidence about the taking of the test to be '*vague & perfunctory*' he was '*unable to name the college or give any meaningful description of it or of the taking of the test*'. He appears not to have been aware of the Appellant's statement which was before him and where it stated, inter alia:

'I attended the test in September 2012. The test centre was about 15 minutes walking distance from my house where I used to live at the time and the centre used to be a college before, the name of the college being Advance College. Before taking the exam I took a 3 day course and two mock tests from the college. I paid £300 which included the test fee and the 3 day course fee.'

19. Also, in his witness statement the Appellant referred to his past and post qualifications including IELTS and ACCA parts 1, 2, 3 which it is claimed demonstrates his English language ability and lack of motive. He gave evidence in English. The judge found that he '*may be proficient in English...*' [25]. In my judgement he was wrong to find that such apparent proficiency necessarily did not assist in determining whether he or a proxy took the test.
20. The judge should have had regard to **SM and Qadir (ETS-Evidence-Burden of Proof) [2016] UKUT 229** during the course of which the Tribunal states: '*every case belonging to the ETS/TOEIC stable will invariably be fact sensitive. To this we add that every appeal will be determined on the basis of the evidence adduced by the parties*'. Also, in **Qadir [2016] EWCA Civ 1167** the court said that the UT was entitled to reach its conclusion on the English language ability of the claimant based on the evidence before them.
21. The decisions of the First-tier Tribunal show material error of law such that they are set aside. None of its findings are to stand. The nature of the cases is such that it is appropriate in terms of section 12(2)(b)(i) of the 2007 Act and of Practice Statement 7.2 to remit the case to the FtT for an entirely fresh hearing, not before Judge I Ross.
22. No anonymity direction has been requested or made.

Upper Tribunal Judge Conway

Date