



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/02420/2016

THE IMMIGRATION ACTS

Heard at Field House UT
On 13th June 2018

Decision & Reasons Promulgated
On 26 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD FAHAD
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Duffy, Senior Home Office Presenting Officer

For the Respondent: Ms Bassiri-Dezfouli, Counsel

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of a First-tier Tribunal (Judge M R Oliver) allowing the appeal of Muhammad Fahad against the Secretary of State's decision to refuse to issue him with a residence card, as confirmation of a right of residence as the spouse of an EEA national exercising treaty rights in the UK.

2. For the purposes of this decision I shall refer to the Secretary of State as “the Respondent” and to Muhammad Fahad as “the Appellant”, reflecting their respective positions before the First-tier Tribunal.

Background

3. The following summary is relevant to the Appellant’s case. The Appellant is a citizen of Pakistan (born 25th December 1984). He arrived in the United Kingdom on 26th May 2011 with a valid student visa, which was extended to 9th July 2014. His application for further leave was refused because he had not supplied his biometrics.
4. On 6th April 2015 he applied for the issue of a residence card under the EEA Regulations 2006, as the family member of Hermina Kanalas “the Sponsor”, a Hungarian national who was exercising treaty rights. The Appellant and Sponsor were married on 20th August 2015 in a ceremony at Hackney Town Hall. A valid marriage certificate has been produced.
5. Following procedure the Respondent called the Appellant and the Sponsor for a marriage interview in Liverpool on 6th January 2016. They did not attend, reporting that the Sponsor was unwell with a temperature. However, both attended for interview on 20th January 2016. During the course of her interview the Sponsor appeared confused about dates and according to the interviewer became agitated.
6. She informed the interviewer that she had a headache, and was feeling dizzy and sick. By this time she had been asked around 90 questions some of which were simply the usual formal introductory ones. The interview was terminated. The Appellant was not interviewed. Both the Appellant and Sponsor were informed that a decision would be made whether to recall the Sponsor for a further interview.
7. Suffice to say there was no further interview offered and on 10th February 2016 the Respondent refused the Appellant’s application as she was not satisfied that the relationship was a genuine and subsisting one. She found therefore that the marriage was one of convenience.
8. The Appellant appealed that decision and the appeal came before the First-tier Tribunal. Following consideration of the evidence, the FtTJ allowed the appeal.

Onward Appeal

9. The Respondent sought and was granted permission to appeal. The grounds raise two issues:
 - (i) Failure to take into account apparent discrepant evidence when comparing answers given by the Sponsor in interview with those given by the Appellant in his application letter.
 - (ii) The FtTJ adopted an incorrect approach to the evidence. It was asserted that he failed to consider whether the discrepant evidence outlined in (i) above was sufficient, when added to other factors set out in the Respondent’s decision letter,

to raise a reasonable suspicion in respect of the marriage being one of convenience. In cases of this nature, a reasonable suspicion raised by the Respondent is sufficient to shift the evidential burden to the Appellant to show that the marriage is in fact genuine.

10. Permission was granted in the following terms:

“It is arguable that the Judge has set out an insufficient analysis of the evidence in relation to the question of genuineness. It is arguable that the judge has not dealt with the question of whether the evidential burden has shifted.”

11. Thus, the matter comes before me to determine whether the decision of the FtT contains such material error that it must be set aside and remade.

Error of Law Hearing

12. Mr Duffy appeared for the Respondent and Ms Bassiri-Dezfouli for the Appellant. Mr Duffy’s submissions relied upon the grounds seeking permission. Partway through his submissions he asked whether a copy of the record of interview of the Sponsor had been served. Neither I nor Ms Bassiri-Dezfouli had been served with a copy of the interview, although I located a copy in the court bundle served by the Appellant for the hearing before the First-tier Tribunal. Mr Duffy helpfully gave Ms Bassiri-Dezfouli sight of the copy record of interview on his file.
13. Having had sight of the record of interview, Ms Bassiri-Dezfouli made short submissions. Those submissions encompassed both issues raised by the Respondent in the grounds seeking permission.
14. Firstly she said, the FtTJ had dealt with all the evidence placed before him. She invited me to look at [11] of the judge’s decision. That paragraph had to be read in conjunction with the Respondent’s refusal decision. The reasons for refusal letter highlighted only one discrepancy concerning the answers given by the Sponsor in her interview when compared to the information given by the Appellant in his application letter.
15. The Respondent asserted that the discrepant evidence amounted to the Appellant saying that he and his Sponsor first met in January 2015 whereas she had said they met ten months earlier in March 2014. She contended that this assertion was incorrect. A perusal of the Sponsor’s interview record showed that nowhere did she say that she and the Appellant first met in March 2014. What she said was that she came to the United Kingdom in March 2014 [question 82].
16. Referring back to the FtTJ’s findings at [11], this is precisely the point which the judge covers. It is clear that reasonable suspicion cannot be raised on a misapprehension of the evidence. The judge also noted that the interview process itself was unfair. It was clear that the Sponsor became unwell during the process. The interview was terminated but no further interview was offered. Therefore the other two factors which the Respondent raised as evidence of reasonable suspicion, namely the speed at

which the parties moved in together and at which they married after their first meeting, had never properly been put to either the Appellant or the Sponsor.

17. In these circumstances, the criticism made of the judge for failing to consider whether the information produced by the Respondent was sufficient to raise a reasonable suspicion in respect of the marriage being one of convenience is not made out. A reading of the decision shows that it is clear that the judge considered that the Respondent's decision was based on a misapprehension of the facts. Therefore the evidential burden did not shift to the Appellant to show that the marriage was genuine. The burden remained with the Respondent to show that the marriage was one of convenience.

Consideration

18. I find force in Ms Bassiri-Dezfouli's submissions. I find I am satisfied that the Respondent's decision was based on a misapprehension of the facts regarding the date when the Appellant and Sponsor first met. A reading of the Sponsor's interview notes shows that the judge was correct to find as he did at [11].
19. I also find that it was open to the judge to find that it was unfair to characterise the Sponsor's conduct at the interview as agitated, when there was evidence that she had visited the doctor a week earlier for a discharge and was due to return the following week.
20. I find that the FtTJ was correct in his assessment that the evidential burden in this case remained with the Respondent.
21. Having assessed the evidence on this basis, the FtTJ found that the Respondent had not shown that the marriage between the Appellant and Sponsor was a marriage of convenience. Accordingly, the FtTJ's decision to allow the Appellant's appeal against the Respondent's refusal to issue a residence card under the EEA Regulations was a decision open to him. It follows therefore that the Secretary of State's appeal to the Upper Tribunal is dismissed.

Notice of Decision

22. The Secretary of State's appeal against the decision of the First-tier Tribunal promulgated on 4th December 2017 is hereby dismissed. The decision of the First-tier Tribunal stands.
23. No anonymity direction is made.

Signed

C E Roberts

Date

22 June 2018

Deputy Upper Tribunal Judge Roberts

TO THE RESPONDENT
FEE AWARD

The First-tier Tribunal made a full fee award. I see no reason to interfere with that decision.

Signed C E Roberts

Date 22 June 2018

Deputy Upper Tribunal Judge Roberts