



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/00037/2020 (V)

THE IMMIGRATION ACTS

**Heard remotely by Skype for Decision & Reasons Promulgated
Business at On 28 September 2020
Cardiff Civil Justice Centre
On 17 September 2020**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

PELLUMB [M]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Ahmed of Evolent Law

For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Albania who was born on 23 June 1994.
2. On 27 July 2019, the appellant applied for a residence card under reg 18 of the Immigration (EEA) Regulations 2016 (SI 2016/1052 as amended) (the “EEA Regulations 2016”) on the basis of a ‘durable relationship’ with Melanie [U], a French citizen.

3. On 3 August 2019, the appellant married Ms [U] at the Haringey Register Office. Following the marriage, the appellant's application was considered as an application for a residence card as the "spouse" of an EEA national exercising treaty rights in the UK.
4. On 10 December 2019, the Secretary of State refused the appellant's application under reg 18 of the EEA Regulations 2016 on the basis that she was satisfied that the appellant's marriage was "a marriage of convenience" and so the appellant did not qualify as a "spouse" under reg 2 of the EEA Regulations 2016.

The Appeal

5. The appellant appealed to the First-tier Tribunal. The appeal was listed for an oral hearing. On 14 January 2020, the appellant's legal representatives (Evolut Law) wrote to the First-tier Tribunal requesting that the appeal be converted to a "paper hearing". Consequently, on 27 January 2020, Judge I Howard determined the appellant's appeal without a hearing.
6. In a determination sent on 19 February 2020, Judge Howard dismissed the appellant's appeal under the EEA Regulations 2016. He did so on the basis that the appellant's marriage was a "marriage of convenience".
7. The appellant appealed to the Upper Tribunal. On 8 June 2020, the First-tier Tribunal (Judge Scott-Baker) granted the appellant permission to appeal.
8. In the light of the COVID-19 crisis, the Upper Tribunal listed the appellant's appeal for a remote hearing by Skype for Business. No objection to that was made by either party. As a result, the appeal was listed on 17 September 2020 for a remote hearing by Skype for Business. I was based in the Cardiff Civil Justice Centre and Mr Ahmed, who represented the appellant, and Mr Howells, who represented the Secretary of State, took part in the hearing remotely by Skype for Business.

The Submissions

9. On behalf of the appellant, Mr Ahmed adopted the grounds of appeal which he developed in his oral submissions.
10. First, Mr Ahmed submitted that the judge, having found that there were reasonable grounds to suspect that the appellant's marriage was one of convenience, failed properly to deal with the issue of whether the appellant had discharged the evidential burden of raising an innocent explanation. He submitted that, in para 13 of the determination, the judge accepted that the statements of both the appellant and his wife were "capable of providing an explanation for the differences in their accounts". However, having found that the explanations were in effect plausible, Mr Ahmed submitted that the judge nevertheless wrongly went on to reach an adverse conclusion.

11. Secondly, Mr Ahmed submitted the judge had been wrong to reject the evidence of the appellant and sponsor just because they had not attended court and given oral evidence.
12. Thirdly, Mr Ahmed referred to para 17 of the judge's determination where he appeared to place the burden of proof on the appellant which was incorrect. The burden of proof was upon the respondent.
13. On behalf of the Secretary of State, Mr Howells submitted that the judge had not made an error of law.
14. First, Mr Howells submitted that the judge had correctly set out the relevant case law, in particular Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 0038 (IAC) and Sadovska & Anor v SSHD [2017] UKSC 54. The judge recognised that the respondent had the burden of proving whether the appellant's marriage was one of "convenience" and, where there was evidence justifying a reasonable suspicion that the marriage had been entered into for the purpose of securing residence rights and circumventing immigration rules, the evidential burden passed to the individual. Mr Howells submitted that the judge had found, on the basis of differences in the accounts of the appellant and his wife, at para 11, that there was a "reasonable suspicion" that their marriage was one of convenience. Mr Howells submitted that the judge was entitled to find, in the absence of the appellant and sponsor giving oral evidence, that the appellant had not discharged the evidential burden and the respondent had proved that the marriage was one of "convenience".
15. Secondly, whilst Mr Howells accepted that para 17 of the judge's determination was loosely drafted, all that the judge was doing was stating that the respondent had discharged the burden of proof and that he had not accepted the appellant's "innocent explanation". Reading the decision in its entirety, the judge had not materially erred in law.
16. In his reply, Mr Ahmed submitted that the judge had specifically found that the explanations of the appellant and sponsor were plausible given his view that they were capable of providing an explanation for the differences in their accounts which had given rise to the reasonable suspicion.
17. Further, it was wrong to simply rely upon the absence of cross-examination without considering the detailed evidence of both the appellant and sponsor in their witness statements which contained their explanations. By way of example, Mr Ahmed drew my attention to para 25 of the appellant's witness statement (at page 3 of the bundle) where the fact that the appellant's wife had given a mistaken date for their marriage (stating it to be 4 October 2019 rather than 3 October 2019) was simply an error, and it was objectively established that she was present at that ceremony. The explanation was not a matter which lacked weight simply because of the absence of cross-examination.

Discussion

18. In reaching his decision, Judge Howard set out the correct approach following the decisions of Papajorgji and Sadovska at paras 8–9. He correctly recognised that the legal burden of proof, on a balance of probabilities, was upon the Secretary of State to establish that the appellant’s marriage was one of “convenience”. Further, the judge correctly recognised that if the evidence justified a “reasonable suspicion” that the marriage was entered into for the purpose of evading immigration control, then an evidential burden passed to the individual to establish an innocent explanation.
19. In his determination, at paras 11 and 12 the judge concluded that the evidence did establish a “reasonable suspicion” based upon differences in answers given by the appellant and his wife at their interviews. That conclusion is not challenged.
20. Then, at paras 13–16, the judge dealt with the shift in the evidential burden to the appellant as follows:
 - “13. So it is the evidential burden shifts to the appellant to show that this is not the case. I have the materials set out above. In their respective statements they have sought to address the issues raised by the respondent directly. The answers they give are certainly capable of providing an explanation for the differences in their accounts.
 14. In addition to the statements I have a wealth of material that establishes that they are known to each other, socialise together and with others, share the same accommodation and underwent a formal marriage. These are all objectively proven facts. What this material cannot do is answer the question what is the *nature* of the relationship.
 15. Answering questions as a paper exercise and doing so when being forensically challenged in cross-examination are however two quite different things, as the interview showed. When the appellant instructed Evolent Law to ask that the appeal be dealt with on the papers the explanation given was lack of funds. This explanation in no way prevents the appellant and his wife from attending the hearing in person and without a representative as many do in this jurisdiction.
 16. Choosing not to at all is not a decision for which I criticise the appellant, however it has deprived me of the opportunity of seeing them answer my questions and those of the respondent’s representative and how they interact more generally”.
21. Having said that, the judge reached his conclusion in para 17 of his determination in the following terms:
 - “17. The burden of proof is on the appellant and in the absence of live evidence on these intensely personal matters I am not satisfied he has discharged that burden in respect of Regulation 2”.
22. Despite Mr Howells’ invitation, it is impossible, in my judgment, to read para 17 as anything other than a misdirection by the judge. There, the judge clearly placed the burden of proof upon the appellant. Despite, therefore, his careful citation of the relevant case law at paras 8–9 of his determination, and stating that it is for the respondent to establish that the appellant’s marriage is a marriage of convenience, the judge reached

a finding on the application of reg 2 on the erroneous basis that he is not satisfied that the appellant has discharged the burden of proof required – when there is no such burden of proof. I see no proper basis upon which it can be concluded that the judge has simply made a ‘slip’ in para 17. It is a fundamental and material error of law to have placed the legal burden of proof upon the appellant.

23. In any event, in reaching that finding, I am satisfied that the judge erred in law in his approach to the evidence even if he correctly had in mind that the burden of proof was upon the respondent.
24. Having found that a “reasonable suspicion” arose from the discrepancies or differences in the evidence of the appellant and sponsor about their personal circumstances, the judge was required to consider whether the appellant had shown an explanation which refuted a conclusion that would otherwise follow from the “reasonable suspicion” having arisen. In para 13 of his determination, the judge stated that the explanations given by the appellant and his wife – which he does not set out in his determination – are “certainly capable of providing an explanation for the differences in their accounts”. Then, in para 14 he went on to cite a number of matters, including the conduct of the appellant and his wife which, at least in some instances, offered some support for their marriage being a genuine one which was not contracted for the purpose of circumventing immigration control.
25. Having found the explanations to be “certainly capable” of refuting the reasonable suspicion, given the judge’s ultimate decision, he must have concluded that those explanations were not to be accepted. Mr Howells submitted that he had implicitly done so. That, in my view, must be correct since the judge did not explicitly reject the explanations and, if he had accepted them, he would have reached a different ultimate conclusion about the nature of the appellant’s marriage.
26. Consequently, in order to discern the judge’s reasons for his ultimate finding in para 17, it is necessary to look at paras 15 and 16. Those paragraphs refer to the fact that the evidence of the appellant and sponsor has not been subject to cross-examination because the appeal was determined without a hearing. At no point does the judge say that because of that, he rejects their explanations. However, as I have already said and Mr Howells submitted, he must have implicitly done so on that basis. He offered no other reason for his ultimate adverse finding that the appellant’s marriage is one of convenience.
27. While, of course, the weight that should be given to evidence can be affected by whether or not that evidence has been given orally and, therefore, if disputed has been the subject of cross-examination. Testing evidence by cross-examination is a key feature of civil litigation where evidence is in dispute. In its absence, a judge *may* be entitled to give less weight to evidence which the opposing party has been unable to test forensically. That, however, does not mean that the judge is not required to analyse the evidence given, for example, in witness statements. It may

be that that evidence is intrinsically worthy of credit even if the witness has not been subject to cross-examination. It is unlikely that it can be simply rejected out of hand because the evidence has not been tested in cross-examination. All will depend upon the content of the evidence.

28. In this case, the judge did not analyse the evidence of the appellant and his wife given in their respective statements. Indeed, without reading those statements, the reader of the determination is wholly unaware of what their evidence (and explanations) were.
29. However, without providing any detail at all, the judge himself accepted in para 13 that the evidence was “certainly capable of providing an explanation for the differences in their accounts”. One can ask the question: if their evidence was capable of having that effect (which would mean that the respondent had not established that the marriage was one of convenience) why was it in fact *incapable* of doing so? It can only be because the judge determined that it should be given so little (or no) weight because the evidence had not been tested in cross-examination.
30. The error that the judge fell into in this appeal was not to analyse the written evidence of the appellant and his wife before concluding, albeit implicitly, that he considered that evidence should have so little weight placed upon it that it could not discharge the evidential burden upon the appellant of establishing innocent explanations for the differences in their evidence. The absence of cross-examination did not, in itself, justify an otherwise unreasoned blanket rejection of the evidence of both the appellant and his wife. That was an inadequate reason for reaching such a conclusion without analysing the content of the evidence and determining, despite the absence of cross-examination, whether or not it was worthy of credit.
31. For these reasons, therefore, the judge erred in law in dismissing the appellant’s appeal under the EEA Regulations 2016.

Decision

32. The decision of the First-tier Tribunal to dismiss the appellant’s appeal under the EEA Regulations 2016 involved the making of an error of law. That decision cannot stand and is set aside.
33. Both representatives invited me, if I was satisfied that the judge had erred in law, to remit the appeal to the First-tier Tribunal for a *de novo* rehearing. I agree that is the proper disposal of the appeal. Having regard to the extent and nature of fact-finding required and para 7.2 of the Senior President’s Practice Statement, the appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge I Howard.

Signed

Andrew Grubb

Judge of the Upper Tribunal
22 September 2020