



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/32181/2015

THE IMMIGRATION ACTS

Heard at Field House
On 24th April 2017

Decision & Reasons Promulgated
On 14th June 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR BHUPINDER SINGH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Secretary of State: Ms J Isherwood, Senior Home Office Presenting Officer

For Mr Bhupinder Singh: Mr Neil Garrod, Counsel instructed by N Sharma and Co,

DECISION AND REASONS

1. This is an appeal by the Secretary of State from the decision of First-tier Tribunal Judge Callow sitting at Hatton Cross on 6th September 2016. In that decision, which was promulgated on 10th October 2016, he allowed the appeal against refusal to grant Mr Singh's application for an EEA residence card in recognition of his right to reside in the United Kingdom as the spouse of Gabriella Maria Vass. Ms Vass is a citizen of Hungary and Mr Singh is a citizen of India.

2. The Secretary of State refused the application because she concluded that the marriage was one of convenience and thus did not qualify to be recognised under the Immigration (European Economic Area) Regulations 2006. This was the sole issue before the judge.
3. The evidence upon which the Secretary of State relied was by way of the records of interviews that had been conducted with the parties separately. The Secretary of State concluded that there were discrepancies in the replies that they had given to questions upon the same topics. Quoting from the reasons for refusal letter, the judge set out those discrepancies as follows:

“You stated that your wife last travelled outside the United Kingdom on 20th July 2014 and returned on 11th August yet your spouse stated she last travelled outside the United Kingdom for two weeks at the end of September. You stated you came to the UK to study and confirmed you did not finish your college course (college was blacklisted). You stated you had completed a university degree in physical education in India and your trade in India was as a welder on the railways. You also stated that you have been looked after “cousin’s sister” (your cousin) Artiseda since coming to the United Kingdom. You stated your wife calls your cousin Arti however your spouse stated she did not know anything about your studies and believed that you had completed your studies. Your spouse also stated that you may have been a PE sports instructor in India and had been supported by your niece (with help from your family) throughout your stay. Your spouse stated that she could not pronounce your niece’s name and called her “Povi”.

You stated you would like a job on the railways, welding again yet your spouse stated that you would like to work in a construction/building industry.

You stated you put the engagement ring in your wife’s bag before she left for work and called her. You state she was wearing the ring when she came home and said yes. Yet your spouse states she was not wearing the ring when she got home and asked if you were serious and you stated you were.

You stated you are not sure if your wife’s mother got you a wedding gift or not, yet your wife stated her mother gave you between £200 and £300 as a wedding gift. You stated that your wife last travelled outside the United Kingdom on 20th July 2014 and returned on 11th August yet your spouse stated she last travelled outside the United Kingdom for two weeks at the end of September. You stated you came to the UK to study and confirmed you did not finish your college course (college was blacklisted). You stated you had completed a university degree in physical education in India and your trade in India was as a welder on the railways. You also stated that you have been looked after “cousins sister” (your cousin) Artiseda since coming to the United Kingdom. You stated your wife calls your cousin Arti however your spouse stated she did not know anything about your studies and believed that you had completed your studies. Your spouse also stated that you may have been a PE sports instructor in India and had been supported by your niece (with help from your family) throughout your stay. Your spouse stated that she could not pronounce your niece’s name and called her “Povi”. You stated you would like a job on the railways, welding again yet your spouse stated that you would like to work in a construction/building industry. You stated you put the engagement ring in your wife’s bag before she left for work and

called her. You state she was wearing the ring when she came home and said yes. Yet your spouse states she was not wearing the ring when she got home and asked if you were serious and you stated you were. You stated you are not sure if your wife's mother got you a wedding gift or not, yet your wife stated her mother gave you between £200 and £300 as a wedding gift."

4. Mr Singh and Ms Vass each gave oral testimony at the hearing in the First-tier Tribunal and, as one might expect, were cross examined by the Presenting Officer in order to afford them the opportunity to provide an explanation for the above discrepancies. The judge faithfully recorded the explanations given by Mr Singh at paragraph 6 of his decision:

"In his evidence the Appellant accepted the discrepancy as to the dates when the Sponsor travelled to Hungary but explained the error on the basis that he mixed up the dates by a few weeks and that he had never been good at recalling dates. As to his work ambition, he was of the opinion that the difference between construction, railways and building was not material. As to the engagement ring, he acknowledged that there was a difference between whether the Sponsor was wearing the ring when she returned home from work and a version given by the Sponsor. However, given the unusual circumstances of the proposal and secret placement of the ring in her handbag, the discrepancy relied upon was in no way material. As to the wedding gift from the Appellant's mother-in-law, he was simply unaware of the fact in all, the interview lasted for about four hours wherein it was reasonable to expect that in some areas there would be differences in precise detail."

5. The judge thereafter considered the definition of a spouse in Regulation 2, noting that it did not include a person who was party to a marriage of convenience. He also quoted from the judgement in one of the leading authorities on the subject of marriages of convenience (**Rosa [2016] EWCA Civ 14**) before setting out his conclusions at paragraph 14:

"In this appeal, the uncontested fact of a marriage having been established, an onus rests with the Respondent to prove that the marriage initially is one of convenience and that the burden is not discharged by showing a reasonable suspicion. The discrepancies highlighted by the Respondent in the refusal and those advanced by Mr Bassi in his closing submissions create no more than a reasonable suspicion. In the event of being in error in reaching the conclusion wherein the evidential burden shifts to the Appellant I make the finding in the round and attaching weight to the parties' personal circumstances that the marriage is subsisting and genuine. They cohabited in rented accommodation. Companionship and mutual support between the parties exists. The failure to call the supporting witnesses does not undermine my findings. Their inability to attend the hearing unsupported by any documentation has been adequately explained. Accordingly the appeal is allowed."

Ms Isherwood made a number of complaints about the above passage.

6. Firstly, it fails to explain why the evidence relied upon by the Home Office amounted to nothing more than a reasonable suspicion that the marriage was one of convenience as opposed to establishing the matter on a balance of probabilities. Mr Garrod argued that the judge did not need to give reasons for so finding; all that was

required of him was to recite the evidence, identify the issues, recite the law, and conclude by saying that he did not find the respondent's case proved. I disagree. It was incumbent upon the judge to examine and engage with the individual discrepancies relied upon by the Secretary of State, to state (with reasons) whether he placed more or less weight upon them, to consider the explanations given by the Appellant for those discrepancies, and to say whether he accepted or rejected those explanations. Simply to state the Secretary of State had failed to discharge the burden of proof was an abnegation of the responsibility to make clear findings of fact.

7. Secondly, the judge's reference to the evidential burden shifting to the appellant seems to me to be based upon a misreading of paragraph 13 of Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 38 (IAC). It is clear from that decision that the *legal* burden of proof remains upon the Secretary of State from first to last. It does not "shift". Moreover, whilst the *evidential* burden "may" shift from one party to another during the course an investigation into the issue of whether a marriage is one of convenience, the ultimate question of whether the Secretary of State has discharged the legal burden of proof will always be dependent upon a detailed consideration of the evidence as a whole. References to shifting evidential burdens of proof are thus unlikely to assist in undertaking a rounded assessment of the evidence.
8. Thirdly, in finding that the appellant had established that his marriage "is" genuine and subsisting, the judge was addressing the wrong question. The relevant question was whether the marriage had been genuine at its inception. This is an important distinction given that it is perfectly possible for parties to enter into a marriage of convenience but nevertheless subsequently develop genuine feelings of mutual love and affection over time. I stress that I am not suggesting that this is what occurred in the instant appeal. I merely highlight the possibility in order to illustrate the nature of the flaw in the judge's reasoning
9. I therefore hold that the judge made errors of law in the determination of this appeal such that it is appropriate to set it aside.
10. I canvassed with the representatives the question of whether the appeal should be re-made in the Upper Tribunal or remitted to the First-tier Tribunal for a complete rehearing. Ms Isherwood argued that I should remit the case because I had in effect found that the First-tier Tribunal had yet to make any findings of fact in this appeal. Mr Garrod refused to say which course I should adopt because, as he put it, "it is not as simple as that" given the issue that I have identified at paragraph 8 (above). I find the argument of Ms Isherwood more persuasive than the somewhat Delphic position that was adopted by Mr Garrod. I therefore remit this appeal for complete rehearing at Hatton Cross before any judge save Judge Callow.

Notice of Decision

11. The appeal of the Secretary of State is allowed and the decision of Judge Callow is set aside.
12. The case is remitted to the First-tier Tribunal for complete rehearing at Hatton Cross before any judge save Judge Callow.
13. Any further directions concerning the conduct of this appeal are to be made by the Acting Resident Judge at Hatton Cross.

No anonymity direction is made.

Signed

Date: 25th May 2017

Deputy Upper Tribunal Judge Kelly