



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/00322/2017

THE IMMIGRATION ACTS

Heard at Field House
On 6 June 2018

Decision & Reasons Promulgated
On 21st June 2018

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

AYODELE OLUWASEGUN OGUNYEMI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Nnamani of Augustus Chambers
For the Respondent: Ms Z Ahmad, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed to the First-tier Tribunal against a decision of the Secretary of State of 22 December 2016 refusing his application for a residence card and

confirmation of a right to reside in the United Kingdom with his claimed spouse Agnes Orsos, a Hungarian national.

2. The refusal letter referred to a large number of inconsistent and conflicting answers arising from a marriage interview that took place in December 2013 with the appellant and with the sponsor.
3. The sponsor did not attend the hearing. The appellant said that she had had to go to Hungary because her mother was unwell and produced documents which the court interpreter interpreted which contained references to a Ms Orsos Mihalyne, referring to various illnesses. Three of the letters were dated 20 June 2017. The hearing took place on 28 June 2017. The appellant did not wish to seek an adjournment. He had been at work on the Sunday when his sponsor telephoned him to say she had to go urgently to be with her mother. She had left on Monday and was travelling overland. He was not sure when she would return: it depended on her mother's condition. As to why he did not seek an adjournment he said he had all the necessary information with him.
4. He was asked about the discrepancies recorded at the interview and said he forgot things and as regards the exchange of rings he said the sponsor was confused between engagement and wedding rings and as to whether he bought the ring or they bought the rings together. He said he meant he saw an engagement ring when he was going through a shopping centre.
5. His brother gave evidence saying that he first met the sponsor in 2012 and was present at their wedding, in fact he was the best man, and the marriage was genuine and subsisting.
6. There is a reference at paragraph 12 in the summary of the appellant's representative's submissions to the onus being on the appellant to show this was a marriage of convenience. That is a matter to which I shall need to return subsequently.
7. The judge in his consideration referred to the case law of Papajorgji [2012] UKUT 00038 (IAC), where he said it was held that there was no burden at the outset of an application on a claimant to demonstrate that a marriage to an EEA national is not one of convenience. It had been established in IS [2008] UKAIT 31 that there was an evidential burden on the claimant to address evidence justifying reasonable suspicion that the marriage was entered into for the predominant purpose of securing residence rights. The judge went on thereafter to refer to what had been said in Agho [2015] EWCA Civ 1198 and Rosa [2016] EWCA Civ 14.
8. Thereafter the judge referred to such matters as the appellant's immigration history, the fact that he had made a series of applications based upon marriage to a European national, concerns that he had about the inability of the couple to communicate noting that interpreters had been used at various stages, and the fact that at the interview in

2013 there had to be an interpreter for the sponsor who said she only spoke a little English and her husband only spoke a few words of Hungarian.

9. The judge referred to the interviews on 13 December 2013 and noted that the various discrepancies were recorded. He referred to inconsistencies in the evidence. He also referred to the sponsor's statement. He had said she was brought up a catholic but said she did not know the difference between the Catholic church and the church (Pentecostal Church) they attend together. This the judge found difficult to understand.
10. As regards the brother's evidence, the judge considered that he was not an independent witness and that although he had said the appellant was visited regularly by the sponsor while he was in custody no records had been produced to confirm this.
11. The judge went on to say that most significantly the sponsor had not attended the appeal and the appellant declined the possibility of an adjournment to secure her attendance. He found it very telling that the appellant could not describe the route she was taking to Hungary except that it was overland. He thought a flight would have been quicker, and he failed to see how as a couple they would not have discussed travel plans.
12. As regards the documentation produced in the appellant's bundle he did not consider that that demonstrated married life together. The documents showed a common address but there was nothing to indicate an ongoing relationship and no intermingling of finances. What appeared to have been the appellant's earnings were paid into the sponsor's bank account and withdrawn in a matter of days.
13. As regards the interviews, he appreciated that the appellant's representative requested a transcript. It was not known if the interview was recorded. The judge did not consider any unfairness arose as the appellant knew the case he had to meet having sought to address the discrepancy raised by the respondent in his statement. The appeal was dismissed.
14. The appellant sought permission to appeal on various grounds, in respect of which permission was granted and which were developed by Ms Nnamani in her submissions.
15. The first point she raised was that the judge had erred with regard to the burden of proof. This was a reference to paragraph 12 of the decision which I have referred to above. She argued that it was clear that the judge had misdirected himself on the law and had considered that the appellant bore the burden of proving the case.
16. She also argued that the judge had erred in placing reliance on the discrepancies identified in the summary in the decision letter but this was procedurally unfair since the appellant had not been provided with a copy of the transcript of the interview. The Presenting Officer had confirmed at the hearing that the full transcript was not

available and there was no indication that the interview had been recorded. The appellant had had no choice but to try and address the alleged discrepancies to the best of his recollection. An adjournment had not been sought in light of what the Presenting Officer had said and the argument was that no weight should be attached to the decision letter with regard to the discrepancies, given that the interview record had not been provided.

17. Ms Nnamani also referred to paragraph 27 of the judge's decision which she said was wholly unclear and demonstrated an absence of anxious scrutiny.
18. Ground 3 was concerned with a flawed examination of evidence as it was contended. It was argued that the judge had not properly considered the evidential value of the appellant's brother's evidence, but simply concluded that he was not an independent witness, and had clearly ignored the documentary evidence confirming that the sponsor acted as a surety for her husband when he was detained. It was also argued that the judge had ignored the documentary evidence which did not only demonstrate that the parties had a common address but also showed that they had shared responsibilities such as council tax bills, and noting also evidence confirming that the appellant's salary was paid into his bank account for a period of time when he could not have his own bank account. The judge had been wrong to conclude that there was not an "intermingling of finances".
19. As regards the appellant's wife's absence, medical evidence had been submitted confirming the serious nature of the sponsor's mother's health and therefore a reasonable explanation for her absence had been provided. It was the case that there had been no application to adjourn with regard to the transcripts, but that had to be seen light of what the Presenting Office had said and also the cost of another hearing and the uncertainty as to whether an adjournment would actually bear any fruit.
20. With regard to the medical evidence the judge had on the one hand accepted that he had received medical evidence concerning the sponsor's mother's condition but on the other hand placed unduly significant weight on the sponsor's absence.
21. It was further argued that the judge had erred in attaching weight to previous applications made by the appellant and the fact that he was an overstayer. The couple had wanted to get married, hence their attendance before the registrar on 15 April 2013. It was immaterial whether the appellant was an overstayer or not. He had clearly been allowed to work because of the nature of the application he made. As regards multiple applications, they were all with respect to his relationship with the same woman.
22. In her submissions Ms Ahmad argued that at paragraphs 6 and 7 where the judge set out the evidence concerning the sponsor's mother, this was no more than a recording of the evidence and did not amount to findings. There was therefore no inconsistency between that and the concerns set out at paragraph 24 as to the absence of the sponsor from the appeal hearing and the lack of an adjournment application. The judge's

concerns about the appellant's lack of clarity as to the route and the mode of travel were also of relevance. As regards the issue of living together, there was nothing to show an ongoing relationship in the judge's conclusions and that was a fair observation.

23. The point with regard to the proper legal test based on paragraph 12 was no more than a typographical error. That was a summary of the submissions, and the judge had gone on in his consideration of the claim at paragraphs 13 to 15 to set out the relevant case law and summarise the relevant legal principles accurately.
24. No adjournment had been sought with respect to the lack of the interview record and the matter could not be challenged now. It is true there was a burden on the Secretary of State to provide the interview record, but it was not there and at the time the appellant was happy to proceed and could not now rely on the lack of a transcript. There were only brief references by the judge at paragraphs 20 and 21 to discrepancies, in any event.
25. With regard to the immigration history, the Tribunal in Papajorgji had referred to the helpful guidance which is annexed to that decision and there were relevant pointers there which made it relevant for a judge to take into account such matters. The finding with respect to the brother was reasonably open to the judge. There was a lack of independent documentary evidence.
26. With regard to the lack of clarity of paragraph 27, the judge seemed to observe the previous applications by the appellant and hence the reasons why it was so dated as he kept making multiple applications and it was a matter again open to the judge. Paragraph 25 dealt adequately with the intermingling of finances point. The findings were all open to the judge.
27. By way of reply Ms Nnamani argued that the judge had clearly directed himself on the burden of proof and the legal principles underpinning the case. It should not be found to be adverse that there was no adjournment application for the reasons argued earlier. It was wholly unfair to rely on the summary of the interview. As regards the intermingling point, it could not be seen as surprising that the appellant's wages, having been paid into his wife's account, were subsequently drawn out by him. The witness statement set out matters in detail and these were not addressed by the judge.
28. I reserved my determination.
29. As regards ground 1, I see the superficial force of the point made, but in the end I have concluded that it lacks substance. Clearly, ideally the full transcript would have been provided to the appellant, but there was a detailed summary of the matters that caused concern to the Secretary of State set out in the decision letter, and these matters were addressed by the appellant in a witness statement. He did not seek an adjournment in light of what was said by the Presenting Officer about unavailability of the full transcript, and that is perhaps not surprising, but if there had been a real concern about

procedural fairness at the time, then surely despite that, the matter would have been pursued and an application would have been made. In my view the respondent, although failing to provide all that should have been provided, nevertheless provided sufficient to enable the appellant to respond and the judge properly took into account the discrepancies identified as part of the overall process of evaluation of the claim.

30. As regards the issue of the burden of proof, the matter was clearly misstated at paragraph 12 in the judge's summary of the submissions, but there is no indication that that coloured his reasoning thereafter. Indeed immediately after that paragraph he identified and summarised the relevant principles in the leading cases, and there is no indication that in his evaluation of the evidence he did anything other than adhere to the proper standard of proof.
31. The next issue is that of paragraph 27 which as Ms Nnamani accepted, was not her strongest point. This states as follows:

“27. There is a linked file ref IA/11826/2015 which contains a statement from the appellant dated 13 August 2015 in relation to a late notice of appeal. He states in September or October 2014 he applied for a family permit whilst in detention. He then applied for bail on 14 November 2014. The reason why the interviewer (sic) appears dated is because the appellant has been making multiple applications.”

32. I agree with Ms Nnamani that there is a degree of obscurity to this paragraph, though it may be explained on the basis as Ms Ahmad did that the judge was simply recording part of the history of the claim. In any event it appears to have no materiality to the judge's decision and cannot go to show an error of law in that decision.
33. As regards the matters raised at ground 3, I consider it was open to the judge to decide not to attach weight to the brother's evidence bearing in mind the absence of any records produced to confirm the claimed regular visits by the sponsor to the appellant while he was in custody. It was also open to the judge to consider that the documentary evidence did not demonstrate married life together. As he noted, the documents show a common address but there was nothing to indicate an ongoing relationship and though perhaps it went a little far to say there was no intermingling of finances, earnings paid in and then withdrawn go but only a short way to demonstrate such intermingling.
34. With regard to the issue of the appellant's wife's absence, I consider it was properly open to the judge to express concern about this. There was no statement from her as to the reasons for her absence or why she was travelling by car rather than by air if the matter was urgent, and also the judge noting that the appellant did not know what route was taken. I agree with Ms Ahmad that all that was done at paragraphs 6 and 7 was to set out the evidence, and that in no sense indicates that the judge accepted that the situation was as claimed. I note the points made by Ms Nnamani as to the reasons why an adjournment was not sought, but the evidence of the appellant's wife was

clearly going to be an important issue in the appeal, and her absence with the lack of a satisfactory explanation for that absence was something to which the judge was entitled to attach weight.

35. Nor do I see any material weight to ground 4. It was open to the judge to refer to the appellant's immigration history, bearing in mind such matters as the guidance annexed to Papajorgji. As part of the overall evaluation by the judge, he was entitled to take it into account.
36. Bringing these matters together, I do not consider it has been shown that the judge erred in law in any of the matters in which this is contended in the grounds. As a consequence his decision dismissing the appeal stands.
37. No anonymity direction is made.



Signed

Date 11 June 2018

Upper Tribunal Judge Allen