



Upper Tribunal
Immigration and Asylum Chamber

Appeal Number: EA/06615/2017

THE IMMIGRATION ACTS

Heard at Field House
On 30 August 2018

Decision & Reasons Promulgated
On 7 September 2018

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

RASHID QASER
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

Representation

For the Appellant: Mr S K Abbas, Solicitor, Imperium Group Immigration Specialists
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

Background

1. The appellant is a Pakistani national born on 3 June 1983. He seeks a residence card as the spouse of an EEA national. The respondent refused his application because he was not satisfied that the marriage was genuine and subsisting and because there was no evidence to show that the sponsor was exercising treaty rights. The appellant did not seek an oral hearing and his appeal was determined on the papers by First-tier Tribunal Judge Mensah who dismissed the appeal by way of a determination promulgated on 25 September 2017.
2. Permission to appeal was granted by Judge Mailer on 5 March 2018 on the basis that the judge had arguably applied the wrong burden of proof in stating that

the burden was on the appellant to show that his marriage was not one of convenience.

3. In his rule 24 response, the Secretary of State conceded that the judge had erred in that respect. Upper Tribunal Judge McWilliams then issued directions for the materiality of the error to be assessed at a hearing and so the matter came before me.

The hearing

4. I heard submissions from both parties at the hearing before me on 30 August 2018.
5. Mr Abbas referred to an application made on 27 June 2018 to the Tribunal under Rule 15 to adduce fresh evidence of the sponsor's employment/self-employment. As this was not on the Tribunal file and had not been received by the respondent, copies were made.
6. Mr Abbas acknowledged the respondent's concession as to the error made by the judge as to the burden of proof and submitted that it was material to the outcome. He submitted there had been no evidence from the respondent in the form of the interview transcript relied upon and as the respondent had not therefore put forward any evidence to support the allegation that the marriage between the appellant and the sponsor was one of convenience there had been no shift in the burden. He submitted that the appellant now wished to provide current evidence of the sponsor's employment so that the matter could be justly disposed of.
7. Ms Everett accepted in her submissions that the judge had misdirected himself as to the burden of proof but submitted that the error was not material as there had been no evidence before him that the sponsor was exercising treaty rights. The appellant had chosen to have his appeal determined on the papers and it had therefore been his duty to ensure that the evidence was properly presented. His evidence had been deficient; he was at liberty to reapply with his new evidence.
8. Mr Abbas submitted that he had current evidence of employment. He accepted that the judge had not made any errors in respect of his findings on the sponsor's position as a qualified person and admitted that the evidence before the Tribunal had been sparse but he submitted that the Upper Tribunal could take account of the fresh evidence and he relied on the judgment in Boodhoo (EEA Regs : relevant evidence) [2013] UKUT 346 in support of his submissions.

9. Ms Everett argued that notwithstanding the error that had been conceded, there was no materiality in it as there had been no evidence that the sponsor had been exercising treaty rights. The appellant's remedy was a fresh application. It could only be the inconvenience of making such an application that the appellant objected to.
10. Mr Abbas conceded that the judge had not erred but still urged me to consider the new evidence and allow the appeal. He referred me to Rule 2 of the Upper Tribunal procedure rules of 2008.
11. That completed submissions. I then reserved my determination which I now give with reasons.

Findings and conclusions

12. I have carefully considered all the evidence before me and the submissions that have been made by both parties.
13. It is plain that the judge was wrong in the application of the burden of proof applied to the issue of the marriage. Where it is alleged the marriage is one of convenience, it is established law that the burden lies on the respondent to prove the allegation (Sadovska [2017] UKSC 54) and the judge therefore erred at paragraph 9 in saying that it was for the appellant to prove the marriage was not one of convenience. I do not know why the interview transcript was not produced to the appellant or the First-tier Tribunal by the respondent but in its absence, the respondent's allegations were not made out and the burden had not shifted to the appellant.
14. That, however, is not the end of the matter as there was another limb to the refusal: whether the sponsor was a qualified person.
15. Mr Abbas quite rightly conceded that there had been little, if any, evidence before the judge with respect to the sponsor's employment/self-employment and he conceded that the judge had not fallen into any errors in finding that this limb of the appeal had not been made out. Thus, notwithstanding the error over the marriage issue, the appeal could not have succeeded on the extremely sparse material submitted. That being the case, it is difficult to see how I can admit the further evidence and re-make the decision as Mr Abbas urged me to. I have considered the judgment of Boodhoo but in that case the Tribunal admitted further evidence having found that the judge had made a material

error of law. Even if I were to take the evidence into account it does not assist the appellant because the payment into the sponsor's bank account for April does not accord with the salary recorded on the payslip for that month and it is not clear why the payslips state that she is paid in cash if payment is by BACS.

16. The remedy for the appellant is to make a fresh application and provide original and reliable evidence. As I find that the judge did not make a material error of law, I am unable to admit further evidence at this stage or re-make the decision. In reaching that conclusion, I have had full regard to Rule 2 of the Upper Tribunal Procedure Rules. It was the appellant's duty to assist the Tribunal by properly presenting all relevant evidence for in support of his appeal particularly as he had requested a paper determination. As both the appellant and his sponsor are now said to be working, there is no issue of costs and resources and indeed the fee for an EEA application is modest.

Decision

17. There are no material errors of law in the determination of the First-tier Tribunal Judge. The decision to dismiss the appeal stands.

Anonymity order

18. There has been no request for an anonymity order at any stage and I see no reason to make one.

Signed:



**Dr R Kekić
Judge of the Upper Tribunal**

3 September 2018