



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/07181/2016

THE IMMIGRATION ACTS

Heard at Field House
On 12 September 2018

Decision & Reasons Promulgated
On 24 September 2018

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MUMRAIZ ASGHAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J P Dean, instructed by Ebrahim & Co Solicitors
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is a citizen of Pakistan who was born on 15 February 1970. On 20 October 2015, the appellant applied for a residence card as confirmation of his right of residence as the spouse of an EEA national exercising treaty rights in the United Kingdom under the Immigration (EEA) Regs 2006 (SI 2006/1003 as amended) (the

“EEA Regulations 2006”). On 2 June 2016, the Secretary of State refused the appellant’s application on the basis that his marriage to a Bulgarian national, Gyulezar Shefketeva Brahimbasheva contracted on 11 July 2011 was a “marriage of convenience”. Consequently, he did not fall within the definition of a “spouse” for the purposes of the EEA Regulations 2006 by virtue of reg 2(1).

2. The appellant appealed to the First-tier Tribunal.
3. In a decision promulgated on 9 January 2018, Judge Andrew dismissed the appellant’s appeal. She found that the appellant’s marriage was, indeed, a “marriage of convenience” and consequently he had failed to establish his right of residence under the EEA Regulations 2006 as the “spouse” of an EEA national.
4. The appellant sought permission to appeal to the Upper Tribunal. Permission to appeal was initially refused by the First-tier Tribunal (DJ Shaerf) on 9 May 2018. The appellant renewed her application to the Upper Tribunal and, on 12 July 2018, UTJ Pitt granted the appellant permission to appeal.
5. On 3 August 2018, the respondent filed a rule 24 response seeking to uphold the judge’s decision.

The Appellant’s Challenge

6. Mr Dean, who represented the appellant, relied upon the grounds of appeal which he developed in his oral submissions. He raised, in essence two points.
7. First, Mr Dean submitted that the judge had failed to consider all the evidence submitted on behalf of the appellant. At the hearing, Mr Dean submitted, the judge had returned to the appellant’s (then) representative a bundle of documents. Those documents, arising from earlier applications and proceedings, related to the lives of the appellant and her spouse in the past. They were, nevertheless, irrelevant and the judge did not take them into account in reaching her adverse decision.
8. Further, and Mr Dean placed more emphasis upon this, he submitted that a bundle of documents dealing with the lives of the appellant and sponsor currently was faxed to the First-tier Tribunal on 5 January (three days after the hearing), and sent by recorded delivery on 5 January 2018 and was received on 8 January 2018. The judge clearly did not take these documents into account. Although the judge’s decision was signed on 4 January 2018 (before the documents were received by the FtT), Mr Dean pointed out that the decision was not promulgated until a later date (namely 9 January 2018) and it was a procedural irregularity that the documents were not considered by the judge.
9. Secondly, Mr Dean submitted that the judge had failed adequately to deal with the evidence that was actually before her at the hearing. He pointed out that the appellant, her spouse and her brother-in-law had given oral evidence at the hearing. The judge had wrongly, Mr Dean submitted, discounted the evidence of the appellant’s brother-in-law solely on the basis that he was not “an independent witness”. His evidence was not set out. Further, the judge had failed to make any finding in relation to the

evidence of the appellant and sponsor, other than by reference to what she considered to be an inconsistency in their evidence (at para 17 of her determination) as to when the appellant had left for work on the Sunday before the hearing. Mr Dean submitted that this was an inadequate treatment of the evidence of both the appellant and sponsor. Mr Dean submitted that the judge had, instead of focusing upon the credibility of the witnesses, based her decision upon the absence of any joint bills (para 15); that her brother-in-law was not an “independent witness” (para 12) and, despite there being a tenancy agreement in their joint names, that there was no supporting evidence from the appellant’s landlord (paras 13 and 14). That was not an adequate consideration of all the evidence.

The Respondent’s Submissions

10. On behalf of the respondent, Ms Fijiwala relied upon the rule 24 response. That drew attention to the fact that there had been two previous decisions on appeal in which the appellant’s marriage had been found to be one of “convenience”. Those decisions were in 2011 and 2014 but, Ms Fijiwala accepted, that the judge had not had the more recent appeal decision before her.
11. Ms Fijiwala submitted that there was no procedural irregularity, even though it was clear that the evidence submitted post-decision had not made its way to the judge. There was, Ms Fijiwala submitted, no evidence that the judge had rejected the earlier bundle. At para 7 of her determination, the judge simply said that it had not been left with her but had been taken back by the representative. There was a lack of documentation before the judge and so the judge was left, in effect, with the oral evidence. She was entitled to give no weight to the evidence of the brother-in-law as he was not “independent”. Further, the point made by the judge at para 17 in relation to the inconsistency between the appellant and sponsor’s evidence was a point that “stuck out”, one saying she left for work “at 7.30 p.m.” and the other saying “you went after 6.00 p.m. It could have been 8.00 or 9.00 p.m.”. Ms Fijiwala submitted that the judge was entitled for the reasons she gave to find that the respondent had established that the appellant’s marriage was a “marriage of convenience”.

Discussion

12. The principal issue before the judge was whether the appellant was a “spouse” for the purposes of the EEA Regulations 2006 and so could establish a right of residence as a family member of an EEA national exercising Treaty rights by virtue of reg 14(2).
13. As a practical matter, that turned upon whether the respondent could establish that the appellant’s marriage was a “marriage of convenience” (see Sadovska and Another v SSHD [2017] UKSC 54 at [28]). As the Supreme Court acknowledged in Sadovska, that requires proof that both parties contracted the marriage with the predominant purpose to gain rights of entry to and residence in the European Union (see [29]). As I pointed out at the hearing, the issue relates to the “contracting” of the marriage, rather than with its continued “subsistence”. The focus, therefore, in time is upon the parties’ motivation when they entered into the marriage. Of course, evidence relating to the genuineness and subsistence of the marriage subsequently may reflect back

upon their motivations when they married. But, it is always the latter which is the issue when the respondent alleges that the marriage is a “marriage of convenience”.

14. In reaching a finding on that issue, bearing in mind that the burden of proof is upon the respondent, a judge must take into account all relevant evidence which, as I have pointed out, may include evidence concerning the genuineness and subsistence of the marriage over time. On that basis, the bundle of documents which were not “left” with the judge contained relevant documentation. That was the case even if there had been two previous adverse decisions finding that the marriage was, in fact, a “marriage of convenience”. As Ms Fijiwala acknowledged, the most recent determination in 2014 was not even put before the judge. She did have the earlier decision in 2011 but, on a Deveseelan basis, either or both of those decisions were only a “starting point”. Even if the earlier evidence had been fully considered by those judges, and in the absence of the 2014 decision it is difficult to know what evidence was actually before the judge and the basis of that decision, past evidence might well be cast in a different light by further evidence which is relied upon.
15. It is difficult, if not impossible, to know precisely why the earlier bundle was not retained by the judge. There was no evidence before me from those present at the hearing to elucidate that issue. What the judge said about it is at para 7 of her determination as follows
 - “7. What I do have before me is the Appellant’s Bundle and also that of the Respondent. I enquired why there was no other Bundle giving me copies of the evidence apparently produced to the Respondent and I was shown a Bundle of documents which had not been filed and which related, it seemed to 2012. I was also shown a further Bundle of documents, which again had not been filed and in which the latest relevant document referred to November 2016. Neither of these two Bundles was left with me by the Appellant’s representative. I enquired why I had no more up to date evidence before me given I must consider the matter as at the date of hearing and I was told this was not available as most documentation was on line. I was however, handed a copy of a Tenancy Agreement.”
16. It is unclear why the bundles were not “left” with the judge. One interpretation is that the appellant’s (then) representative did not wish those documents to be considered. Another interpretation, and one asserted before me, was that the judge did not wish to consider those documents and so returned them. In the absence of any clear evidence that the latter was the case, I am unable to conclude that there was, as a consequence, a procedural irregularity. It is, however, curious that the judge did not retain the bundle, even if asked to return it, as it was clearly relevant.
17. However, I am satisfied that there was a procedural irregularity – albeit one for which the judge was not personally responsible – as a result of the post-hearing bundle of documents not being passed to the judge in order for her to take them into account. Ms Fijiwala is undoubtedly correct that this was not a case where the appellant’s representative asked the judge to ‘hold off’ making a determination immediately after the hearing in order that other documents could be sent in. Had that been the case, there would be little doubt, if the judge went on and reached a decision without allowing the appellant to submit the documents, that there would be a procedural


irregularity such that proceedings would be unfair and flawed. Nevertheless, here there were documents received by the First-tier Tribunal by fax on 5 January 2018 – three days after the hearing. Whilst the judge had already prepared and signed her determination on 4 January 2018, that determination was not promulgated until 9 January 2018 – five days after the determination was signed and four days after the bundle of documents was submitted by the appellant by fax. Whilst difficulties of linking the documents with the file and the judge no doubt existed, it remains the fact that the Tribunal had within its possession documents relevant to the appellant’s claim. Had they been received by the judge, she would have been required to take them into account, perhaps after giving the respondent an opportunity to make any further submissions upon them. Had she not already signed her decision, there would be no doubt, in my judgment, that the failure to take into account these documents – although not the judge’s personal fault – nevertheless amounted to a procedural impropriety that would undermine and flaw the judge’s adverse decision. That she had signed the decision is not, in my judgment, crucial as the decision had not yet been promulgated. Until the latter occurred, the appeal was still pending before the First-tier Tribunal and the fact that the documents were not drawn to the judge’s attention so that she could decide how to proceed – including whether to seek further submissions or not – was a procedural irregularity nonetheless. It was not suggested before me that the documents as a whole were irrelevant to the appellant’s claim. In these circumstances, and on this basis, the judge’s decision cannot stand.

18. In addition, the judge’s treatment of the evidence that was actually before her, in particular the oral evidence, was not adequate. I accept Mr Dean’s submission that the judge failed to make clear findings upon the credibility of the evidence from the appellant and her spouse.
19. On reading the relatively short determination, the reader is left entirely in the dark as to the content of that evidence, apart from the one inconsistency, to which I have already referred, in para 17 relating to the difference in their evidence as to the time the appellant went to work on the Sunday prior to the hearing. As I commented at the hearing, although there is an inconsistency it is difficult to see how it could support a finding of disbelief simply because one said she went to work at “7:30 p.m.” and the other said it was “after 6.00 p.m. It could have been 8.00 or 9.00 p.m.”.
20. Whilst I accept, as Ms Fijiwala submitted, it is not necessary for a judge to set out each and every piece of evidence, it is incumbent upon a judge to set out the relevant and salient evidence and reach reasoned findings whether or not it is accepted. Here, in my judgment, the reader is left unclear as to what was the evidence of the appellant and sponsor (or indeed of the appellant’s brother-in-law), whether the judge accepted that evidence (though perhaps it is implicit she did not) but, if she did not accept the evidence, the reasons for not accepting what was said by the appellant and spouse. Their credibility was a central feature of their case (see para 8 of the determination).
21. In my judgment, for these reasons also the judge’s factual findings are flawed and cannot stand.

Decision

22. For the above reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal involved the making of an error of law. That decision cannot stand and is set aside.
23. Given the nature and extent of the fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the appropriate disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Andrew.

Signed



A Grubb
Judge of the Upper Tribunal

20 September 2018

TO THE RESPONDENT
FEE AWARD

There is no fee award.

Signed



A Grubb
Judge of the Upper Tribunal

20 September 2018