



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

Appeal Numbers: EA/00107/2019

THE IMMIGRATION ACTS

**Field House
On 15th October 2019**

**Decision & Reasons Promulgated
On 17th October 2019**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

**WEI DIDI WANG
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Lam, of Counsel, instructed by David Tang & Co Solicitors

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of China born on 7th July 1968. He applied for an EEA residence card based on his marriage to a Belgian citizen, Ms Xiao Wei Fei, in March 2014 but was refused by the respondent in August 2014 on the basis the marriage was one of convenience, and the appeal was dismissed in April 2015 by Judge of the First-tier

Tribunal Barker. The appellant then overstayed and applied to remain on human rights grounds in October 2018. The application was refused although the respondent accepted in the refusal decision that the relationship between the appellant and Ms Fei was genuine. In November 2018 the appellant made a new application for a residence card, which was refused in a decision dated 18th December 2018. His appeal against the decision to refuse the residence card was dismissed by First-tier Tribunal Judge Turner in a determination promulgated on the 10th July 2019.

2. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 2nd September 2019 on the basis that it was arguable that the First-tier judge had erred in law in failing to consider whether the evidence concerning the relationship between the appellant and sponsor was capable of casting light on their intention at the time of the marriage, applying Rosa v SSHD [2016] EWCA Civ 14.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

4. At the beginning of the hearing Mr Lam applied to amend his grounds to include a challenge to the decision of the First-tier Tribunal on the basis that there was a failure to consider whether the appellant was entitled to succeed in his appeal on the basis of a durable relationship under Regulation 8(5) of the Immigration (EEA) Regulations 2016 given the findings with respect to the current state of the relationship between the appellant and Ms Xiao Wei Fei. Mr Walker agreed that it was appropriate to allow this amendment to the grounds. Mr Lam relied upon this ground if I was not with him in his challenge to the decision dismissing the appeal on the basis of the marriage.
5. The grounds of appeal, in short summary, argue that the respondent had a suspicion that the marriage was one of convenience. The appellant relied upon two matters as rebutting that suspicion: firstly that there was evidence of cohabitation such as council tax payments which came into being after the decision of First-tier Tribunal Judge Barker; and secondly the concession of the respondent made in the letter of 11th October 2018 that the relationship was genuine. In the decision of the First-tier Tribunal Judge Turner it is said at paragraphs 19 and 20 that she is not bound by the respondent's concession and in any case the relationship may have developed from one of convenience at the start to a genuine one in 2018. However, there is no evidence to support this proposition of a development in the relationship, which is therefore unlawful as it is based on pure speculation.
6. Mr Lam argued further in oral submissions that the decision of the previous judge, Judge of the First-tier Barker, was clearly legally incorrect as it was decided on the basis that the burden of proof to

show that the marriage was genuine was on the appellant when in fact the burden to show that it was one of convenience lies with the respondent: this misstatement is set out at paragraph 3 and again at paragraph 30. As such it should not have been the starting point for Judge Turner that the marriage was one of convenience; and when the evidence of cohabitation and the finding that the respondent had made a concession that the relationship was genuine and subsisting in 2018 was put in the balance the only rational outcome was that the respondent had not shown the marriage to be one of convenience.

7. I informed Mr Walker that I did not find that there was an error of law in the decision dismissing the appeal on the basis of the marriage but asked that he make submissions on remaking with respect to the durable relationship as I found that it had been an error of law by the First-tier Tribunal not to go on to consider Regulation 8(5) of the Immigration (EEA) Regulations 2016. Mr Walker said that the respondent conceded that there was a genuine and subsisting partner relationship akin to marriage in the decision of January 2018. He therefore accepted that the appellant and Ms Xiao Wei Fei had a durable relationship, and there should be consideration by the respondent as to whether to issue a residence permit.
8. I informed the parties that in the circumstances the appeal would be allowed on the basis that I find that the appellant and Mr Fei are in a durable relationship, but only to the extent that the matter would be remitted to the respondent for a decision as to whether a residence permit should be granted which would require an extensive examination of all of his personal circumstances.

Conclusions – Error of Law

9. The First-tier Tribunal clearly understood that it was argued that there was further documentation showing cohabitation and that it was argued that there was a concession by the respondent about the relationship being genuine in the human rights decision of the respondent in October 2018, see paragraphs 5 and 6 of the decision.
10. The First-tier Tribunal correctly then took the previous decision of Judge of the First-tier Tribunal Barker as the starting point for the decision-making on the question as to whether the marriage was one of convenience, see paragraphs 10 and 12 of the decision. Judge Barker found the appellant and his wife gave evidence which was confused, considerably different, conflicting, inconsistent with each other, significantly in conflict with each other and which was poor in quality, see paragraphs 23, 24, 25, 27 and 30 of that decision. I find that the characterisation by this First-tier Tribunal that the appellant and his wife were found not to be credible witnesses was one that was accurate and rationally open to the First-tier Tribunal. Whilst there is an error in the burden of proof in the decision of Judge Barker this was not adopted by this First-tier Tribunal, and there has not been shown to be any reasons

why it was not correct for this First-tier Tribunal to start from the position that the evidence of the appellant and his wife was not credible.

11. The First-tier Tribunal directed itself properly that following Rosa the question is the intentions of the parties at the time the marriage was entered into, and that evidence post the marriage is only relevant in so far as it demonstrates whether it was genuine at the time it was entered into by the parties, see paragraph 11 of the decision. Rational reasons are given for finding that the new documentary evidence simply shows cohabitation and a joint business venture, and not that appellant and Ms Fei were in a marital relationship, see paragraphs 12 to 16 of the decision.
12. The First-tier Tribunal then goes on to consider the evidence in the respondent's letter of 11th October 2018 and finds that the respondent had found that the relationship was genuine and subsisting at that time from the way the decision was made, see paragraphs 18 and 19 of the decision, but finds that given the starting point of the evidence of the appellant and his wife not being credible, and the inconclusive other new evidence that the concession meant that there was an acceptance of a relationship in 2018, but not that there was a genuine marriage when it was contracted, and thus concludes for rational reasons that the predominate purpose of the marriage at the time it was contracted had been shown by the respondent as being to gain an immigration advantage. I find therefore that the First-tier Tribunal did not err in law in dismissing the appeal under Regulation 7 of the Immigration (EEA) Regulations 2016 on the basis that the appellant was not a spouse of his Belgian wife because the marriage was one of convenience at the time it was contracted.
13. However, I find that the First-tier Tribunal did err in law as it ought then to have gone on to consider whether the relationship was one which qualified as a durable relationship under Regulation 8(5) of the Immigration (EEA) Regulations 2016 considering that it was found that the respondent had found that the relationship was genuine and subsisting in the decision of 11th October 2018 refusing the human rights claim, see paragraph 19 of the decision. At paragraph 20 of the decision the First-tier Tribunal found that this was "some form of relationship" but did not consider whether it was a durable relationship, but simply concluded that the original marriage had been shown to have been contracted for reasons of convenience.

Conclusions - Remaking

14. Mr Walker conceded for the respondent that the relationship was a durable one based on the concession in 2018, the evidence of cohabitation, and accepted that the appellant's partner was a citizen of Belgium who was exercising Treaty rights in the UK as a worker.

15. In these circumstances I remake the appeal so as to allow it to the extent that it is remitted to the respondent to consider by way of an extensive examination of the appellant's personal circumstances whether to exercise discretion to issue a residence permit under Regulation 17(5) of the Immigration (EEA) Regulations 2016 given that the relationship between the appellant has been found to have developed into a durable, genuine and subsisting one akin to marriage.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal
3. I re-make the decision in the appeal by allowing it under the Immigration (EEA) Regulations 2016 to the extent that it is found that the appellant and Ms Xiao Wei Fei are now in a durable relationship akin to marriage and that the Secretary of State must now decide whether to issue a registration certificate to the appellant as an extended family member of a qualifying EEA national.

Signed: Fiona Lindsley
Upper Tribunal Judge Lindsley

Date: 15th October 2019