



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal number: EA/03209/2019 (V)

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC

Decision & Reasons Promulgated

On 23 March 2021

On 31 March 2021

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

BABATUNDE LAWAL

(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (V)

For the appellant: Mr N Khan, IIAS Solicitors

For the Respondent: Mr A McVeety, Senior Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote

hearing. At the conclusion of the hearing, I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a Nigerian national with date of birth given as 18.4.74, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 20.2.20 (Judge Knowles), dismissing his appeal against the decision of the Secretary of State, dated 18.6.19, to refuse his application made on 20.3.19 for an EEA Residence Card on the basis of a retained right of residence following the termination of his 2011 marriage to an EEA national, namely Edith Pinas.
2. The application was refused as the respondent considered the marriage as one of convenience and never genuine, not recognised under Regulation 2 of the Immigration (EEA) Regulations 2016.
3. A previous refusal based on the same relationship was successfully appealed in 2013, with the result that the appellant was issued an EEA Residence Card in 2014. However, immigration officials visited the appellant's residence in April 2016 to find no evidence that Edith Pinas lived at the address. In consequence, the Residence Card was revoked on the basis that the marriage was one of convenience. His appeal against that decision was dismissed in 2017 on the basis that the marriage was one of convenience.
4. In the meantime, the appellant had applied for a retained right of residence on the basis that the marriage to Edith Pinas had been terminated by decree absolute in January 2017. The respondent also refused this application and the appellant's appeal against that decision was dismissed in December 2018.
5. The February 2020 dismissal of his appeal against his subsequent retained rights application from March 2019 is the subject matter of the present appeal.
6. Permission to appeal to the Upper Tribunal was refused by the First-tier Tribunal on 7.5.20. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Sheridan granted permission, considering it arguable that "although the judge at paragraph [27] correctly identified that the legal burden lies on the respondent to prove that an otherwise valid marriage is a marriage of convenience, it is arguable that the judge in fact placed the burden on the appellant as at paragraph [47] he found that: *'the appellant has not established that he is a credible witness or that it is more probable than not that this was not a marriage of convenience.'*" It is worth noting that Judge Sheridan also observed that whilst he did not restrict the grounds of appeal, he considered the other points raised in the grounds to be weak.
7. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal.

8. I agree with Judge Sheridan and find that, in the main, the grounds are little more than a disagreement with the findings of the First-tier Tribunal and the weight accorded to the evidence. In Herrera v SSHD [2018] EWCA Civ 412, the Court of Appeal said that it is necessary to guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors, particularly if the judge who decided the appeal had the advantage of hearing oral evidence. It is well-established law that the weight to be given to any particular factor in an appeal is a matter for the judge and will rarely give rise to an error of law, see Green (Article 8 -new rules) [2013] UKUT 254.
9. Similarly, there is no merit in the argument that the judge was in error to rely on the Devaseelan principle to take the findings from previous appeals as his starting point. The submission that Devaseelan was not applicable because credibility was in issue is misguided. As the First-tier Tribunal pointed out in refusing permission, the judge carefully considered the evidence before him and reached findings properly open, providing adequate reasoning.
10. At the hearing before me, Mr Khan introduced a new ground not contained within the grounds of application for permission to appeal, arguing that the First-tier Tribunal Judge failed to address any of the requirements of Regulation 10(5) for a retained right of residence. However, as Mr McVeety pointed out this unpleaded point is entirely subject to the issue of a marriage of convenience. If it is suggested that there is a retained right of residence arising from what has been found to be a marriage of convenience, that submission is misguided. No error of law is disclosed by this ground, even if it had been pleaded in the grounds.
11. In relation to the the burden and standard of proof applied by the First-tier Tribunal, it is clear from [27] that the judge was fully aware that the legal burden of proof remained on the respondent throughout, citing the Court of Appeal decision of Rosa [2016]. As Mr McVeety pointed out, the decision has to be read as a whole, including at [44] where the judge stated “The respondent has previously established facts that justified the inference that the marriage was not genuine and the previous determinations on this are my starting point.” Clearly, the judge considered that the respondent had discharged the evidential burden. The judge then went on to consider the evidence relied on by the appellant which had not been previously considered, as referred to at [45] of the decision.
12. At [31] the judge found that, “considering the totality of the evidence”, the appellant was not a credible witness, pointing to “many contradictions” in the overall account in evidence, as well as in previous appeals, noting that he was found not credible in two of those earlier appeals. At [45] the judge noted that it was open to the appellant to adduce new evidence not previously available in those earlier appeals, indicating that the judge’s mind was not closed to further

consideration of the evidence. In effect, the judge found that the appellant failed to discharge the evidential burden of proof.

13. The passage which the appellant criticises, and which prompted the grant of permission, is at [47] of the decision. There the judge stated, "*In the round my conclusion is that the appellant has not established that he is a credible witness or that it is more probable than not that this was not a marriage of convenience.*" Properly read, this was not a reversal of the burden of proof but a finding that the appellant failed to discharge the evidential burden which had switched to him, because of the prima facie case established by the respondent, so that the obvious conclusion is that the legal burden had been discharged by the respondent. Whilst the judge could have set this out more clearly, I am satisfied that at [47] the judge was reflecting the authority of the Court of Appeal's decision in Agho [2015], set out at [27] that "a Tribunal should consider the totality of the evidence and determine whether or not it is more probable than not that this is a marriage of convenience.
14. In VW (Sri Lanka) [2013] EWCA Civ 522 at [12], LJ McCombe stated, "Regrettably, there is an increasing tendency in immigration cases, when a First-tier Tribunal Judge has given a judgment explaining why he has reached a particular decision, of seeking to burrow out industriously areas of evidence that have been less fully dealt with than others and then to use this as a basis for saying the judge's decision is legally flawed because it did not deal with a particular matter more fully. In my judgment, with respect, that is no basis on which to sustain a proper challenge to a judge's finding of fact." In effect, this is what has happened in the present appeal. The appellant has scoured the decision in an attempt to burrow out areas to support a challenge to the adverse decision.
15. In the circumstances and for the reasons set out above, I find no material error of law in the decision of the First-tier Tribunal.

Decision

The appeal of the appellant to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 23 March 2021