IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05864/2015

THE IMMIGRATION ACTS

Heard at Stoke	**Decision & Reasons Promulgated**
On 12 April 2016	**On 11 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

ARSLAN AHMAD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. M. Schwenk of Counsel instructed by Whitestone Solicitors
For the Respondent: Mr. A. McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Pickup, promulgated on 3 June 2015, in which he dismissed the Appellant's appeal against the Respondent's decision to refuse his application for an EEA residence card as confirmation of his right to reside in the United Kingdom.

2. Permission to appeal was granted as follows:

"However, it is arguable that the judge has not given adequate weight to the evidence that the parties are expecting a child together (paragraph 18 of the decision) or the documentary evidence suggesting cohabitation. It is also arguable that the judge has failed to make findings on those matters."

3. The Appellant and EEA Sponsor attended the hearing. I heard oral submissions from both representatives.

Submissions

4. Mr. Schwenk submitted that there was a fundamental flaw in the decision in that the judge had applied the burden of proof incorrectly. In paragraph [10] the judge referred to the burden of proof the shifting to the Appellant. He had failed to distinguish between the legal and the evidential burden. I was referred to the cases of Agho [2015] EWCA Civ 1198 and Rosa [2016] EWCA Civ 14, in particular paragraph [13] of Agho. He submitted that the burden of proof did not shift to the Appellant to show that it was not a marriage of convenience. It appeared that the judge had followed the case of IS (marriages of convenience) Serbia [2008] UKAIT 00031. Agho was clear that this case should not be followed. Neither Agho nor Rosa changed the principles set down in Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC). He submitted that the Respondent's decision was wrong as it had quoted IS (marriages of convenience) Serbia. I was referred to paragraph [7] of the decision.

5. Mr. Schwenk submitted that the Respondent had failed to provide the interview record but at paragraph [15] to [17] of the decision the judge gave weight to the interview. I was referred to the case of Miah (interviewer's comments: disclosure: fairness) [2014] UKUT 00515 (IAC). The interview had featured prominently in the reasons for refusal letter and in the decision.

6. I was referred to paragraph [6] of Agho and the fact that it was two limbed test. First of all the marriage must have been entered into for the purposes of gaining admission, and secondly it must have been entered into without the intention of matrimonial cohabitation. The Respondent's case must be that the Appellant and Sponsor were not cohabiting, yet the judge had failed to consider a huge amount of evidence of cohabitation. I was referred to pages 130 to 259 of the bundle which were documentary evidence of cohabitation.

7. At pages 72 to pages 85 was evidence that the Sponsor had been pregnant at the time of the hearing. The judge had referred to this at paragraph [18]. It was a very short decision and there was no explanation of on what basis the judge could reasonably conclude that the Appellant and Sponsor were not matrimonially cohabiting.

8. There was an evidential burden on the Appellant to produce evidence to counter the suspicion of the Respondent. No reasonable judge could say that the Appellant had

not done this. The Appellant had provided a huge bundle of documents to demonstrate cohabitation and his relationship with the Sponsor. However, the judge had addressed all of this in just one paragraph, [18]. This was inadequate given the complexity and depth of the evidence.

9. With reference to paragraph [19] of the decision, all of these applications had been granted, and all of them pre-dated the marriage. This was an irrelevant consideration. In summary, he submitted that the error regarding the burden of proof was so fundamental that the whole decision was flawed.

10. Mr. McVeety submitted that permission had not been granted on the basis that the judge had applied the burden of proof incorrectly. There had been no application to amend the grounds of appeal which submitted that the judge had applied too high a burden of proof, not that he had incorrectly shifted the burden of proof.

11. Even if the amendment to the ground was accepted, paragraph [19] of Rosa provided that the evidential burden shifted to the Appellant and this is what the judge had done in paragraph [10]. The judge had not said whether it was the legal or evidential burden, and it was not possible to read into paragraph [10] that the judge had shifted the legal burden of proof to the Appellant. He submitted that the judge had followed Papajorgji.

12. In relation to the interview record, the Appellant had not asked for this document to be produced. The case of Miah had not been referred to in the grounds of appeal. It had not been argued in the First-tier Tribunal that the interview record had not been provided. It had not been submitted that evidence of the interview could not be relied on. Even if the reasons for refusal letter had been wrong, that was not under appeal now. There was no material error in the judge's decision in respect of the interview record. It could not be an error for the judge to rely on a document which had been unchallenged.

13. In relation to the requirements of cohabitation, I was referred to paragraph 10 of Rosa. There was no cohabitation consideration in EEA cases. Cohabitation did not equal marriage.

14. Mr. McVeety accepted that the decision had not considered the documentation methodically. However, nobody had ever heard of the Marriage Investigation Bureau and the judge had rejected the evidence in relation to this. He accepted that the decision was brief but submitted that it did not need to be lengthier. The relevant time for consideration of whether a marriage was a marriage of convenience was the intent at the beginning. He submitted that paragraphs [11] to [16] contained findings which were open to the judge. Paragraph [18] should not be considered in isolation.

15. In response Mr. Schwenk submitted that the burden of proof had been raised as an issue in the grounds of appeal but, if I was not with him on that, it was Robinson obvious. Agho and Rosa were not out at the time that the grounds been drafted. The

decision letter had got the law wrong, and the judge appeared to have adopted the same approach as the reasons for refusal letter. He accepted that there was a different definition of marriage of convenience in paragraph [10] of Rosa which did not set out a two stage test, and he accepted that there was a tension there. He submitted that Papajorgji and Agho should be preferred for the definition of a marriage of convenience.

16. He submitted that the evidence of the pregnancy was important as it went to the matrimonial cohabitation. They cohabited before the marriage and she was pregnant after marriage. The situation after the marriage could cast light on the intention of the parties at the date of the decision and this was significant evidence of matrimonial cohabitation. The nature of the relationship had not changed and the pregnancy was proof of that.

Error of law

17. It is fair to say that many of the issues argued before me at the hearing were not raised in the grounds of appeal, and some of the issues raised had not been raised at the hearing in the First-tier Tribunal.

18. The grounds of appeal did not submit that the judge had shifted the burden of proof from the Respondent to the Appellant when he should not have done, but instead submitted that the judge had applied a higher burden of proof than he should have done. Paragraph [10] of the decision states as follows:

"I am satisfied that the Secretary of State has discharged the initial burden of proof to show reasonable suspicion that this is a marriage of convenience and that therefore the burden shifts to the Appellant to demonstrate on the balance of probabilities that it is not a marriage of convenience."

19. While the judge might have been clearer, I find that he is aware that the initial burden of proof rests on the Respondent to demonstrate a reasonable suspicion that the marriage is a marriage of convenience. It is also clear that he finds that the Respondent has discharged this burden. He has then stated that the burden shifts to the Appellant to demonstrate that the marriage is not a marriage of convenience. It is true that the burden does shift to the Appellant at this point, but it is an evidential burden rather than a legal burden. The grounds of appeal did not argue that the judge had shifted the legal burden of proof, and this point was raised for the first time at the hearing.

20. I find that it cannot be read from this paragraph that the judge has shifted the legal burden to the Appellant rather than the evidential burden. However, be it legal or evidential, I find that his treatment of the evidence provided by the Appellant to address the Respondent's concerns is inadequate.

21. I find that, in order to address the evidential burden, the Appellant provided extensive corroborative documentary evidence to the First-tier Tribunal. As accepted by Mr. McVeety, this was not methodically considered. Paragraph [18] of the decision states:

"I take into account the documentation suggesting cohabitation, and the photographs and other evidence, but that does not mean the marriage is not one of convenience entered into for the sole purpose of remaining in the UK."

22. This one sentence is the extent of the judge's consideration of the documentary evidence which the Appellant provided. The Appellant provided in excess of 100 pages of documentation showing cohabitation. The judge states that the documentation provided "suggests" cohabitation, but he does not make a finding as to whether or not the Appellant and Sponsor were cohabiting. Neither does he make any findings regarding the length of time for which the Appellant and Sponsor cohabited. I find that this failure adequately to consider the evidence, and the failure to make a finding as to whether or not the Appellant and Sponsor were living together, given the volume of evidence provided by them, is an error of law. I find that the judge has failed to consider the extent to which the documents provided meet the evidential burden placed on the Appellant to address the reasonable suspicion of the Respondent, and he has failed to consider the evidence in the round.

23. It is also in paragraph [18] that the issue of the Sponsor's pregnancy and her earlier miscarriage in 2014 is mentioned. However the judge merely states that he has taken these matters into account without making any finding as to whether or not they are evidence of matrimonial cohabitation. He has failed to explain why he has given them no weight. This failure to give reasons for why he has attributed no weight to them is an error of law.

24. I have taken into account the judge's findings in paragraphs [11] to [16], and it is of course correct that paragraph [18] should not be considered in isolation. However, the judge has failed to take into account the totality of the evidence. He has failed to consider his findings in relation to the oral evidence in the round with the documentary evidence, and the evidence of the pregnancy. He has failed to explain why he has attributed no weight to the evidence briefly referred to in paragraph [18]. I find that these errors are material given the nature of the Appellant's appeal.

25. In relation to paragraph [19], I accept Mr. Schwenk's submission that this is an irrelevant consideration given that the Appellant's previous applications for leave to remain were granted and that they related to his position in the United Kingdom as a student.

26. Paragraph 7.2 of the Practice Statement dated 10 February 2010 contemplates that an appeal may be remitted to the First-tier Tribunal where the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for the party's case to be put to and considered by the First-tier Tribunal.

Given the nature and extent of the fact-finding necessary to enable this appeal to be remade, having regard to the overriding objective, I find that it is appropriate to remit this case to the First-tier Tribunal.

Notice of Decision

27. The decision involves the making of a material error of law and I set it aside.

28. The appeal is remitted to the First-tier Tribunal for rehearing.

No anonymity direction is made.

Signed Date 6 May 2016

Deputy Upper Tribunal Judge Chamberlain