Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05247/2016

THE IMMIGRATION ACTS

Heard at Field House, London
On 6 March 2018

Decision & Reasons Promulgated
On 16 March 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

KWAME OPOKU ANSAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs S Bassiri-Dezfouli, instructed by BWF Solicitors, London
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. As I announced at the end of the hearing, I find there is no legal error in the decision and reasons statement of FtT Judge O'Rourke that was issued on 6 June 2017. It was open to Judge O'Rourke to find that the appellant's marriage was one of convenience and therefore that he was not the family member of a qualified person for the purposes of EU free movement law. Although I gave brief reasons for my decision at the end of the hearing, I reserved my full reasons, which I now give.

2. I begin by recording the opposing arguments.

3. The appellant's principle argument is that Judge O'Rourke impermissibly placed the whole or part of the burden of proof on the appellant when assessing whether the marriage was one of convenience, which was contrary to the Court of Appeal's judgment in *Rosa v Secretary of State for the Home Department* [2016] EWCA Civ 14. The appellant also alleged the judge had erred by relying entirely on the report of an Immigration Officer who visited his place of residence but who did so when the appellant and his wife were absent and therefore were not given the opportunity to answer questions about their relationship. The final allegation is that Judge O'Rourke erred in placing significant weight on the absence of evidence from Miss Janet Afriyie, who spoke to the Immigration Officer during the home visit. The allegation focuses on the fact the judge drew negative inferences from her absence, which was not permissible.

4. Mrs Bassiri-Dezfouli expanded on these arguments. She pointed out that the respondent had failed to provide the documentary evidence described by the Immigration Officer in his report. Without being able to examine the underpinning evidence, Judge O'Rourke was in error to give the report the great weight he did.

5. In addition to these omissions, Mrs Bassiri-Dezfouli argued the report included obscurities and inconsistencies. Extracts of the interview record mentioned at the end of the report appear in the reasons for refusal letter. They are not examined by the judge even though they provide an insight as to whether Ms Afriyie had access to her husband's phone number on a different mobile she owned. It was unclear whether the author of the report had looked at the screen saver on Ms Afriyie's phone or whether he was looking at the profile picture in FaceBook. The report also omitted the fact Ms Afriyie had called the appellant during the Immigration Officer's visit and the appellant had offered to return to the house to speak to the officer.

6. The failure of Judge O'Rourke to analyse all these problems with the report, according to Mrs Bassiri-Dezfouli, meant his decision to give it significant weight was legally flawed.

7. Mr Kotas responded, first relying on the rule 24 response of 10 January 2018, before arguing the following. Because the First-tier Tribunal is an informal tribunal, Judge O'Rourke was able not only to admit the Immigration Officer's report but to decide what weight to give it.

8. Mr Kotas pointed out that the appellant had provided no evidence to rebut the observations and conclusions of the Immigration Officer. The failure to call any evidence from Ms Afriyie was telling because she was the only person who could rebut the Immigration Officer's account. The guidance in *Rosa* required an appellant to rebut evidence provided by the respondent. That was not to shift the legal burden but the evidential burden. It was open to Judge O'Rourke to draw the negative inferences he did.

9. I begin my assessment by citing the last sentence of paragraph 29 of *Rosa*.

> "The result that I think the tribunal must have intended is achieved if the legal burden of proof lies on the Secretary of State throughout but the evidential burden can shift, as explained in *Papajorgji*. In my judgment, that is the correct analysis."

This confirms one of the key points of Mr Kotas's submissions and sets the context in which I must consider the competing arguments.

10. The Immigration Officer's report is sufficient to show that it is more likely than not that the appellant's marriage was one of convenience. It is clear from the detail in the report that the Immigration Officer spent sufficient time at the property to investigate the situation. His report is objective and detailed, as would be expected from an immigration professional. I mention at this juncture that there is no reason to believe the Immigration Officer acted improperly. He must abide by a code of conduct when visiting people, and not only is there no allegation that he acted improperly, it is clear that if such an allegation were made, that he would be able to call on others who attended the property with him to corroborate his behaviour. This is not a case where there is any allegation or any reason to believe the Immigration Officer sought to misrepresent what he observed.

11. What the Immigration Officer observed and recorded goes well beyond mere reasonable doubt as to the nature of the marital relationship. What the Immigration Officer observed and recorded identifies that it is more likely than not that there is a relationship akin to marriage (if not marriage) between the appellant and Ms Afriyie. That is why the claimed relationship between the appellant and his EEA national sponsor in disputed and why concerns it is a marriage of convenience have been raised.

12. Because the report discharges the initial evidential burden on the respondent, it was for the appellant to rebut it. He provided no evidence to rebut the Immigration Officer's report. There was no statement from Ms Afriyie. Her unexplained absence from the hearing had to be considered by Judge O'Rourke in that context and it was open to him to draw the inferences he did.

13. Mrs Bassiri-Dezfouli's submissions that the report should not have been given the weight it was given are arguments that should have been pursued before Judge O'Rourke. There is no evidence they were, given the submissions of Ms Glass recorded by the judge at paragraph 16(iv).

> "Ms Afriyie has very poor English and was not forewarned of the officer's visit. The Appellant saw her potential evidence as ancillary, considering that he and the Sponsor's evidence would be sufficient, a misunderstanding on his part. However, both their evidence today compensates for the absence."

14. It is evident from the appeal file that the appellant has had legal representation throughout and it can be inferred that he would have been properly advised about the failure to rebut the Immigration Officer's report. It is unsurprising, therefore, that Judge O'Rourke drew the negative inference he did despite Ms Glass's best efforts.

15. Additionally, I recognise that the directions of the First-tier Tribunal were to the extent that the respondent was required to disclose those documents relied upon. The respondent relied upon the account provided by the Immigration Officer and did not rely on the documents described therein. Judge O'Rourke does not rely on the documents; he relies on the observations and comments of the Immigration Officer for the reasons given at paragraph 17. It was open to him so to do.

16. The final issue is whether the appellant was entitled to be interviewed in person. This was not raised before Judge O'Rourke so is a new argument. I cannot fault Judge O'Rourke for not dealing with the issue. Nor can I see that it was a relevant issue. The appellant had an opportunity to rebut the Immigration Officer's report but did not take it. As indicated in the submissions of Ms Glass, he sought to rely on the evidence given by him and his EEA national sponsor during the hearing.

17. It is evident from paragraph 18 that Judge O'Rourke took that evidence into consideration and examined the case in the round, as he was required to do. He gave good reasons for rejecting the evidence provided and why he decided the evidence of the Immigration Officer was of greater weight.

18. Having explained the reasons for my decision, I confirm I have found there is no legal error in Judge O'Rourke's decision and reasons statement and his conclusion that the appellant is not the family member of an EEA national because his marriage is one of convenience is upheld.

Notice of Decision

The appellant's appeal to the Upper Tribunal is dismissed.

There is no legal error in the decision and reasons statement of Judge O'Rourke and his decision is upheld.

Signed Date 14 March 2018

Judge McCarthy
Deputy Judge of the Upper Tribunal