Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04047/2018

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 27 September 2019	**On 15 October 2019**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

MUHAMMAD RIZWAN FAZAL
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Khan, instructed by Parkview Soilicitors
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

This is the appellant's appeal against a decision of First-tier Tribunal Judge Gurung-Thapa promulgated on 3 April 2019 dismissing his appeal against the decision of the Secretary of State dated 16 May 2018 to refuse the application made on 18 April 2018 for an EEA residence card as a family member of an EEA national exercising treaty rights in the UK pursuant to the Immigration (EEA) Regulations of 2016 (the Regulations).

In essence, the application was refused because the respondent concluded that the marriage was one of convenience and therefore not protected by the

Regulations. First-tier Tribunal Judge O'Keeffe refused permission to appeal on 8 May 2019, however, when the application was renewed to the Upper Tribunal Upper Tribunal Judge Keith granted permission on 3 July 2019.

At the outset of the hearing before me Mr Khan sought to adduce further evidence under Rule 15(2A). However, as I am only concerned at this stage with whether there was an error of law in the decision of the First-tier Tribunal the evidence relied on is not directly relevant. As I understand it, the evidence purports to show that the sponsor in this case has now been granted indefinite leave to remain on the basis of residence and Mr Khan wanted to submit that this undermined the respondent's position that this case was a marriage of convenience. As I said, I am not prepared to consider that evidence at this stage and I refused the application to adduce it.

I have to decide whether or not there was an error of law in the decision of the First-tier Tribunal that was sufficient to require it to be set aside. For the reasons set out in summary form, I find there was no material error of law in the decision of the First-tier Tribunal. I make an observation that most of the grounds and most of the submissions of Mr Khan before me are little more than a disagreement with the decision and an attempt at length to reargue the appeal.

The grounds assert the First-tier Tribunal erred in part in relying on the alleged answers given by the sponsor in telephone interview on 18 June 2017 when the Tribunal had previously ordered a transcript of that conversation and had indeed adjourned for that purpose for it to be produced but no transcript was provided and no explanation given.

In granting permission, Judge Keith considered that the First-tier Tribunal arguably erred in relying at paragraph 58 of the judge's decision on the respondent's assertion as to what had been said in that conversation of 18 June, the contents of which, it is clear, the applicant then disputed. It is said that no explanation was provided for the absence of a transcript. Judge Keith considered the other grounds, a failure to adequate address evidence of cohabitation, and placing inappropriate weight on a failure to notify HMRC of the appellant working for the sponsor, were somewhat weaker but nonetheless granted permission on all grounds. After due consideration, I am not satisfied that any of the other grounds had in fact any merit.

The relevant factual background can be summarised as follow. In 2013 the appellant was issued with an EEA residence card on the basis of being a family member of his partner, a Norwegian national exercising treaty rights in the UK. It is said that in 2017 they both left the UK. Whether that is true or not may be in some doubt. The appellant's case is that the sponsor travelled to Norway and the appellant to Pakistan. On his return to the UK on 18 June 2017, he was stopped and questioned by an Immigration Officer, who had sufficient concerns to grant only temporary admission and gave him the opportunity to attend with his wife at a further interview on 27 June 2017 at which he was also to provide certain documents. Following that interview, later in June he was refused admission to the UK and his residence card was revoked. His appeal against that decision was dismissed and in January 2018 he was served with notice of

liability to be removed. He apparently failed to attend an appointment and made no contact until making the application that this appeal is concerned with on 18 April 2018.

During the course of the subsequent First-tier Tribunal appeal hearing before Judge Gurung-Thapa an issue arose as to what the sponsor had said when telephoned by the Immigration Officer on 18 June 2017. The respondent's case set out in the refusal decision and in some other documents was that she had said that apart from fourteen days in the UK in May 2017 she had been living in Norway since 2015 and in receipt of disability benefit there. For that reason, the hearing was adjourned part-heard from 15 November 2018 to 19 February 2019 in order for the transcript of that telephone conversation to be produced. At the resumed hearing no transcript of the 18 June conversation was available. However, there was a document called refusal cancellation of leave to enter or remain report dated 5 August 2017, so some weeks later, and there was also a statement from Caroline Poyser dated 6 January 2019 detailing a further telephone call from the sponsor on 27 June 2017.

Much has been made by Mr Khan and in the grounds of the absence of a transcript of the conversation. As no transcript was available, the judge had to deal with the matter on the basis of the documents she had and the evidence that she heard, including the dispute by the sponsor asserting, I did not say that. It is specifically denied that she had been in Norway since 2015. However, as Mr McVeety has pointed out, it is not essential for documents to be contemporaneous. The judge has to decide the weight to be given to the evidence including the documentation. It is not the case that the judge simply ignored the submissions that the absence of a transcript was relevant. It may be that another judge would have given limited weight to an assertion that was not supported by a contemporaneous document, but it is not the case that the judge was prohibited from considering that information and reaching a conclusion at the hearing on the evidence and after hearing submissions. After all, the judge was careful to give the opportunity for a transcript to be produced by adjourning the matter, delaying the conclusion of the appeal, and the judge is not to be criticised for doing so.

Merely because a matter is denied or not accepted does not mean that it is not true or that the judge cannot rely upon the assertion. As I said, much of the grounds point to the evidence going the other way, but those are all matters for the judge. It is not an arguable error of law for the judge to give too little or too much weight to a relevant factor unless the exercise amounts to being irrational. Nor is it an error of law for the judge for the judge to fail to deal with every factual issue of argument. Nor is it a material error if there were minor inaccuracies in some of the findings made or if the judge does not set out every single piece of evidence. The evaluation and the weight to be given to the evidence is a matter for the judge.

Properly read, one can see that the refusal decision relies on two telephone conversations with the sponsor, the first on 18 June and the second on 27 June. Whatever was said in the 18 June conversation, it appears that when she was spoken to on 27 June, the sponsor was saying that she had been in Norway

since 18 May as she had a hospital appointment but would come back to the UK. It was not recorded there when she said she went to Norway, so to some extent that might be regarded as inconsistent with the earlier record from the conversation between the Immigration Officer and the sponsor on 18 June. However, of course, the sponsor and the appellant would have had time to talk about that matter beforehand, before the second conversation.

After hearing all the evidence including that for the sponsor denying that she had told the Immigration Officer that she was living in Norway since 2015 and notwithstanding the absence of a transcript, the judge rejected the account of the appellant and the sponsor and reached a conclusion at 58, applying the correct standard of a balance of probabilities, that she had no reason to doubt the respondent would wrongly record, or no reason to believe, as I think she should have said, the respondent would wrongly record what the sponsor had said or simply invented the assertions. Nevertheless, the judge found against the appellant and the sponsor on that factual issue. Despite the absence of a transcript the finding was open to the judge; there was sufficient reliable evidence before the Tribunal for the judge to be satisfied on the balance of probabilities that that is what was said. Obviously, that was highly relevant to the issue of the marriage of convenience as it went to the credibility of the parties, which the judge then went on to consider further.

I have been referred to the fact that there had been considerable evidence of cohabitation, but that in and of itself is not determinative of whether the marriage when entered into was one of convenience, in other words, for the purpose of obtaining an immigration advantage or being able to obtain the right to reside in the UK.

The judge was also entitled to consider the previous decision of Judge Howard from December of 2017 and in particular it was noted in that decision, which, as Mr Khan pointed out, was not considering the issue of a marriage of convenience. But at paragraph 14 of that decision that judge considered the same alleged conversation from 18 June and at paragraph 15 the judge recorded that the appellant and his wife did not at that appeal hearing seek to argue that the interview had been incorrectly recorded. Of course, they could have done so but they did not. That judge then went on to consider the evidence and was not satisfied that what he had been told was correct. It does not specifically say, as Mr Khan also pointed out, that the judge found them to be liars or not credible, but it is obvious on reading the decision that the judge did not accept the claim and the facts as asserted about when and where the employment of the sponsor took place.

I am satisfied that the judge in this case was entitled to conclude that there were indeed contradictions in the evidence. Mr Khan has taken me to various pieces of evidence and suggested that the contradictions were not as serious or as important. For example, he relies on an alleged misunderstanding about the law about reporting a cessation of work. However, I am satisfied, for example, that at paragraph 65 the judge was entitled to reach the conclusion that the appellant and the sponsor fabricated the claim that the sponsor started working for the appellant at Mama’s Grill in January 2017. That may be

hotly disputed but on the evidence, it was a finding open to the judge and for which cogent reasoning open to the judge has been given. Thus, at paragraph 67 the judge dealt with the issue that there had been no notification to the respondent that the sponsor had ceased to work and therefore the appellant ceased to be a family member of a qualifying EEA national. It was in respect of that issue that Mr Khan urges me to consider that the sponsor was ignorant of the intricacies of the Regulations. The fact remains that the information was not provided to the respondent and the judge was on those facts entitled to find that that further detracted from the appellant's and the sponsor's credibility.

It is in those circumstances that after a careful and detailed assessment of the evidence the judge reached the conclusion, assessing the evidence in the round, that it was more probable than not that the marriage was one of convenience, the burden on the respondent having been discharged. In other words, she accepted, in due course, the assertion of the respondent. I find no material error in the decision or the way in which the decision was reached. A disagreement with the outcome is not an error of law. It follows that this appeal to the Upper Tribunal cannot succeed.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such as to require the decision to be set aside.

I do not set aside the decision.

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

Signed 

Upper Tribunal Judge Pickup

Dated 27 September 2019

Anonymity

I have considered whether any parties require protection of their anonymity direction. No submissions were made on the issue and the First-tier Tribunal did not make such an order. Given the circumstances, I make no such order and I make no fee award.

Signed 

Upper Tribunal Judge Pickup

Dated 27 September 2019