



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/16415/2014

THE IMMIGRATION ACTS

Heard at Field House
On 28 November 2014

Determination Promulgated
On 11 December 2014

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Limberg Hugo Rojas Guzman
[No anonymity direction made]

Claimant

Representation:

For the claimant: Mr S Subramaniam

For the appellant: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The claimant, Limberg Hugo Rojas Guzman, date of birth 18.2.82, is a citizen of Bolivia.
2. The Secretary of State appealed against the determination of First-tier Tribunal Judge Bircher, who allowed the claimant's appeal against the decision of the respondent, dated 19.3.14, to refuse his application made on 12.10.13 for an EEA residence card as confirmation of a right to reside in the

UK as the spouse of an EEA national exercising Treaty rights. The Judge heard the appeal on the papers on 30.5.14.

3. First-tier Tribunal Judge Peart granted permission to appeal on 10.7.14.
4. Thus the matter came before me on 27.8.14 as an appeal in the Upper Tribunal. I found that there was an error of law and set the decision aside, adjourning the remaking of the appellant to a further hearing before me in the Upper Tribunal, which resulted in the hearing being listed before me on 28.11.14.
5. In summary in relation to error of law, I found that Judge Bircher failed to address the crucial issue in the appeal as to whether this was a marriage of convenience and failed to make a finding as to whether the Secretary of State had discharged the burden to demonstrate reasonable suspicion that it was a marriage of convenience so as to place the burden on the claimant to show that it was not such a marriage of convenience, as established in the relevant case law of Papajorgji [2012] UKUT 38 (IAC), where the Upper Tribunal held that (i) There is no burden at the outset of an application on a claimant to demonstrate that a marriage to an EEA national is not one of convenience; (ii) IS (marriages of convenience) Serbia [2008] UKAIT 31 establishes only that there is an evidential burden on the claimant to address evidence justifying reasonable suspicion that the marriage is entered into for the predominant purpose of securing residence rights.
6. Further, the judge failed to make any findings in relation to the claims of inconsistency between the appellant and his EEA sponsor.
7. The judge also erred in finding that she could not accept that the interview was properly and fairly conducted without a full transcript of that interview, which had not been provided. There was no reason why the judge should have doubted the interview summary submitted by the Secretary of State. It was a matter for the claimant as to whether he wished to adduce evidence that the interview was somehow unfair. No such evidence had been produced and the claimant asked for the appeal to be decided on the papers without an oral hearing.
8. I had intended to proceed immediately to remake the appeal at the hearing on 27.8.14, but Mr Guzman had asked for a Spanish interpreter, which was not provided, and it was clear from that and earlier hearings that his command of English was less than fluent. In the circumstances I adjourned the remaking of the decision in the appeal, reserved to myself, inviting the claimant to consider whether he would be better advised to obtain legal representation, which he has done.
9. I should add for clarity that there was a CMR hearing on 29.9.14 and an earlier listing of the continuation hearing on 30.10.14 had to be adjourned as Mr Subramanian had an accident on the way to the hearing.

10. At the outset of the hearing before me, Mr Subramanian said that he had not seen a copy of the interview summary, which was rather surprising. However, a copy was provided for him.
11. At the end of the hearing on 28.11.14 I reserved my decision on the remaking of the appeal, which I now give.
12. Of some relevance to the issues in the appeal, and in particular to the interview summary, is the case of Miah (interview's comments: disclosure: fairness) [2014] UKUT 00515 (IAC) in which the President held, inter alia, that Form ICV.4605 must be disclosed as a matter of course. That is the interview summary which was present in the papers before Judge Bircher and which at some stage the claimant must have seen, but Mr Subramanian now has had the opportunity to consider. In that case, reliance was placed on comments in the interview which were adverse to the subject's case and conveyed to the decision maker but withheld from the subject. The president held that it would be unfair not to disclose it. There were no comments on the record that are relevant to the present case; but the content of the interview disclosed discrepancies between the accounts of the claimant and the EEA sponsor.
13. Without setting them out in detail, the interview summary highlights a number of inconsistencies. Some of these are insignificant but others are not. For example, the sponsor said that she and her husband attended church quite a number of times, but he said that neither she nor he attended church. They gave differing accounts about each other's interest in football and the teams they support. He said he used to have a Manchester United scarf but lost it a long time ago. She said she saw it that day hanging on the back of the wardrobe door. Although she worked 3 jobs whilst he worked intermittently as a gardener, he was adamant that they struggled financially. He said they didn't receive any type of financial assistance or support, but she disclosed that her mother gave her money which she saved up and put into the bank, some £3,600. Other answers were no so much inconsistent as designed to be deliberately vague in an apparent effort to avoid contradicting each other. For example, asked when he first told his wife he loved her, he said he had told her so on many occasions from the day after their first date. She said she didn't think he had ever said it at all since they met, as he was shy. Other examples are cited in the refusal decision of 19.3.14.
14. In the circumstances, I find that there is ample material to discharge the burden on the Secretary of State to raise a reasonable suspicion that the marriage is one of convenience, placing the burden on the claimant to demonstrate that it is not a marriage of convenience for the predominant purpose of securing residence rights.

15. The claimant's witness statement of 28.11.14, as well as the letter of complaint of 1.4.14, claim that he felt harassed at the date of the interview and under a lot of pressure. He said he felt uneasy and did not feel confident to be able to answer clearly and had to answer quickly. Whilst this, together with the difficulty of understanding English might well explain some of the differences between the couple that might be regarded as vague or trivial, but it provides no satisfactory explanation as to why directly inconsistent answers were given of two mutually exclusive versions of certain facts or events; they cannot live in the same world and cannot be attributed to nervousness or the like. In the circumstances, there remains serious doubt as to whether this is a genuine marriage.
16. Before the application was made, the claimant was in the UK illegally for some 9 years. He told me that he did not leave because he liked the country and got used to it. He worked illegally. He was unable to tell me when he told his wife that he did not have status in the UK. Asked why the application was made in 2013, he said that they wanted to travel outside the UK, so that they could meet each other's families.
17. The claimant's spouse gave evidence, relying on her undated witness statement, which mainly deals with the interview and the stress and depression resulting from the unresolved immigration status. Asked what her plans for Christmas were, she said she was going to go to Spain with her sister. When he gave evidence he said they would be spending Christmas at home. I find it difficult to understand why he would not know that if their relationship were genuine.
18. Mr Jonathan Bull gave evidence relying on his undated witness statement. He has known the claimant a long time, some 10 years, and is in fact his landlord. Significantly, he was able to tell me that he had known the sponsor over the past two years and to his knowledge they live together in the flat he rents to them. He wasn't aware of the claimant's immigration status and never thought to ask about it. He not only sees the couple as their landlord, but sees them on occasional weekends. Asked in cross-examination whether he could say if the marriage was genuine, he pointed out that he was at the wedding, as is clear from the photographs in the claimant's bundle. He continues to see them on an irregular basis, irregular because of his night time work as a driver.
19. A less impressive witness was Mr Osman Balderrama, a fellow countryman of the claimant. He has known him for some 6 years and is also friends with the sponsor. They have been at parties and dinners together and he said that he had seen them in a romantic relationship during those times. Mr Balderrama was in the UK 8 years illegally until he obtained an EEA residence card last year. Given that, I take Mr Balderrama's evidence with caution, he, like the claimant, had a vested interest in trying to show EEA residence card entitlement.

20. Unlike Judge Bircher, I have had the opportunity to see and speak with the claimant and his wife during a number of hearings, in most of which he was not represented. At each hearing I have seen him with his wife and watched their interaction. At the latest hearing I also had the advantage of hearing oral evidence from not only the claimant and his spouse, but other witnesses who have known the couple for some time now. My observations tend to suggest to me that their's is a genuine relationship and adds to the credibility of the claimant's case.
21. I remind myself that the burden is on the claimant to demonstrate on the balance of probabilities that their marriage is not one of convenience. Whilst I have significant concerns about their interview and some further discrepancies in oral evidence, I find the other witness evidence, in particular that of Mr Bull, compelling. He has seen the two of them over a lengthy period of time not only living at the same address, but on social occasions. He was even present at the wedding.
22. The net result of these considerations, which is in reality a balancing exercise between the evidence for and against the claimant, I have concluded that he has demonstrated on the balance of probabilities that whatever it may have started out as, this is now, at the time I must assess it, a genuine and subsisting marriage which is not a marriage of convenience. It follows, there being no issue as to whether the sponsor is qualified as exercising Treaty rights in line with regulation 6 of the Immigration (EEA) Regulations 2006, as amended, I find that the claimant is entitled to the residence card requested.

Conclusion & Decision:

23. For the reasons set out above, I find that the claimant meets the requirements of the Immigration (EEA) Regulations 2006, as amended, for the issue of an EEA Residence Card on the basis that he is the family member of an EEA national exercising Treaty rights in the UK.
24. The appeal of the claimant is allowed.



Signed:
Deputy Upper Tribunal Judge Pickup

Date: 10 December 2014

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: Whilst the appeal has been allowed, the responsibility for the refusal of the application was that of the claimant by failing to provide adequate evidence to address the issues in the refusal decision.



Signed:
Deputy Upper Tribunal Judge Pickup

Date: 10 December 2014