IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33517/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 February 2016	**On 24 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

RASHID MINHAS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S. Nasim, Whitefields Solicitors
For the Respondent: Ms A. Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Behan promulgated on 21 August 2015 in which she dismissed the Appellant's appeal against the Respondent's decision to refuse to grant an EEA residence card as confirmation of his right to reside in the United Kingdom under the Immigration (EEA) Regulations 2006.

2. Permission to appeal was granted as follows:

"It is arguable that the Judge has failed to apply the approach set out in **Papajorgji** and that this has materially affected the Judge's analysis and the outcome of the case. The Judge has clearly referred to the stance adopted by the respondent at paragraph 2 of the decision. It is arguable that the weight attached to the evidence of Mr Khalid and Mr Seha would have differed."

3. The Appellant and Sponsor attended the hearing. I heard submissions from both representatives, following which I reserved my decision which I set out below with reasons.

Submissions

4. Ms Nasim referred me to the cases of Rosa [2016] EWCA Civ 14 and Agho [2015] EWCA Civ 1198. She submitted that the judge had failed to take into account the principles in Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC).

5. In response Ms Fijiwala submitted that the judge was not considering a marriage of convenience but was considering whether or not the Appellant and Sponsor were in a durable relationship. I was referred to paragraphs [2] and [3] of the decision. I was referred to paragraphs (b) and (e) of the headnote to Kareem (Proxy marriages – EU law) [2014] UKUT 24 (IAC). There was no evidence that the marriage was recognised. The test in Papajorgji and Rosa related to whether or not the marriage had been entered into for immigration purposes. I was referred to paragraph [30] of the decision where the judge set out the burden of proof. I was referred to paragraphs [24] and [41] of Rosa which referred to the burden being on the Respondent, but this was not when the durability of relationship was the issue. Whether a relationship was genuine and subsisting was not relevant to a marriage of convenience case, but it was relevant to the durability of a relationship.

6. I was referred to paragraphs [31] to [33], and [37]. Ms Fijiwala submitted that the judge had been looking at different kinds of relationships in the round, as was shown by paragraph [33]. She submitted that the judge had not been applying her own expectations but was aware that relationships took all sorts of forms. I was referred to paragraphs [38] and [43].

7. She submitted that the marriage interview record had not been challenged by the Appellant. Reduced weight was attached to the visit. In considering the evidence before her the judge had been entitled to take the visit into account but she had given it reduced weight. At paragraph [35] she had considered the discrepancies at the marriage interviews. She had made findings relating to additional discrepancies, which she found to be significant. She did not accept how the Appellant had met the Sponsor, paragraph [36]. In summary she submitted that the judge had fully considered all of the evidence and there was no error of law.

8. In response Ms Nasim submitted that the refusal letter referred to a marriage of convenience which is where the misunderstanding had originated. She accepted that it was about the durability of the relationship but submitted that there was an overlap with the case law relating to marriages of convenience. She submitted that the judge had dealt more with the issue of marriage of convenience than durability. She had failed to take into account that the Appellant and Sponsor had been together since 2010, a period of over five years, as opposed to the two year period relevant for durable relationships. The Sponsor had been present with the Appellant throughout the course of the immigration process from the application, through to the interviews, and now to this hearing.

9. It was only after the visit that the issue of marriage of convenience had been raised and the judge had placed too great an emphasis on it. She had referred to the cases relating to marriages of convenience because the Respondent had started off along these lines, and the judge had reiterated the Respondent's stance in relation to marriage of convenience.

10. The hearing had taken place over two days. The evidence of the landlord had been given at the adjourned hearing. At paragraph [39] the judge found the landlord to be credible but attached no weight to his evidence. At paragraph [37] the judge had made her own comments about "whirlwind romances" and had used her own mindset to judge when people should move in together, failing to take into account the evidence given by Mr. Khalid and Mr. Seha. This failure to take the evidence into account was a material error of law. Had she placed weight on the evidence of the witnesses, the decision would have been different.

11. Too much emphasis been placed on the visit by the immigration officers. From pages 1 to 273 of the Appellant's bundle there was evidence of correspondence in both of their names. The judge placed no emphasis on the relevance of their cohabitation. I was referred to paragraph [34] where the judge found that they had a supportive relationship. She submitted these were all traits of a durable relationship. If the judge had taken the evidence as a whole and not placed so much evidence on the Respondent's case, she would have found that they were in a durable relationship.

12. Ms Fijiwala submitted that it was a balanced decision by reference to paragraph [34]. She submitted that the judge had not conflated marriage of convenience with durable relationship.

Error of law

13. Paragraph [2] of the decision states:

"The Respondent refused the application because she did not accept the credibility of the appellant's claim. The reasons for refusal referred to the appellant having entered a marriage of convenience. In fact the appellant had not claimed to be legally recognised marriage rather, he claims he and the sponsor have entered an Islamic marriage in the UK. At the hearing on 11th May Mr Singh said that the Respondent's position was that the evidence the Respondent says shows the appellant is in a marriage of convenience equally shows they are not in a genuine relationship and could not be said to be in a durable relationship."

14. I find this paragraph indicates that the judge was aware that she was considering the issue of durable relationship rather than marriage of convenience. However, I find that the judge has approached the evidence from the standpoint of a marriage of convenience rather than from the standpoint of a durable relationship.

15. The reasons for refusal letter refers to marriage of convenience. It does not set out which parts of the interview records the Respondent relied on when coming to the conclusion that the marriage was one of convenience (albeit that this was not the relevant question). There is no reference in this refusal letter to any visit by immigration officers. In relation to other evidence, the Respondent states only that the discrepancies at interview led her to doubt the "validity of some of your documentation", without any reference to the documentation itself.

16. In paragraph [35] the judge states that the Respondent's representative relied on the result of the visit by the immigration authorities. The judge states that the weight she can give to the assertion that the Sponsor did not live with the Appellant, which was asserted by the Respondent, could be given less weight because the Respondent did not produce any evidence from the officers involved. However she said that she could give it some weight "because what is not disputed is that two of the appellant's co tenants said something to the effect that a female did not live in the house which is an odd thing to say if the sponsor lived there". She then addressed the explanations given by the Appellant and also by the co-tenants, but did not accept these explanations. She went on to find that the Appellant and Sponsor "gave some consistent answers to questions about their living arrangements at Clarence Street but they also gave several inconsistent answers". She finds at the end of paragraph [35] that she was not satisfied that they had cohabited there.

17. However, while saying that she attaches little weight to the evidence of the visit, the judge has focused on this visit and taken it as her starting point. She rejected the explanations given by both the Appellant and the co-tenants, accepted that there were some consistent answers given by the Appellant and Sponsor and failed to take into account the documentary evidence. Given that no evidence was provided by the Respondent of this visit, it is unclear why she has attached any weight to it at all.

18. In paragraph [15] the judge states that she asked the Appellant to tell her about how he first met the Sponsor. In paragraph [36] the judge sets out her findings relating to this issue. This issue was not raised in the reasons for refusal letter. The judge states that she finds the claim that they met in the street by chance "implausible". She finds that there was one person who could have supported the account of how they met but that he was not a witness. However it does not appear that this issue had been raised prior to the hearing. Further, she states that "the evidence points firmly to the appellant and sponsor meeting by arrangement". However she does not state what evidence this is, but makes a finding that they met by arrangement, which does not appear to have been put to the Appellant and Sponsor.

19. Further, I find that the judge's approach to the evidence has been infected by her own expectations of and attitudes towards relationships. For example in paragraph [33] she states:

    "I am required to make and (sic) assessment of someone else's relationship and this is no easy task because relationships take all sorts of forms, some are founded on romance and someone practicalities and most a combination of both."

20. In paragraph [37] she states:

    ""Whirlwind romances" are not unknown but nonetheless 12 weeks is a notably short period of time for a relationship to progress to the stage where both parties wish to live together and there was no evidence about what it was that caused them to decide to take such a significant step so early in their relationship."

21. I find that the judge has come to her findings based on her own expectations of why relationships are formed, and her own expectations of the time that couples wait before they move in together. It does not appear that the Appellant and Sponsor were asked about this issue, or that it was put to them that they had taken this "significant step so early in their relationship". I find that this has affected her approach to the other evidence, including that of the witnesses and the documentary evidence.

22. When assessing the evidence of the witnesses she states [39]:

    "They have gained the impression the appellant and sponsor are in love with each other but were not able to give specific examples of what had caused them to reach this conclusion. In my judgment they described two people who appeared to get on with each other."

23. The judge found the witnesses "to be truthful because they were straightforward and, in oral evidence, they did not appear to exaggerate the knowledge" [39]. However, having found that they were truthful, the

judge then finds that they were unable to give specific examples of how they had come to the conclusion that the Appellant and Sponsor were in love. It is difficult to know what kind of examples the judge had in mind, and having found that they were truthful witnesses who did not exaggerate, she has failed to give clear and cogent reasons for why she did not accept their evidence. She finds that they "described two people who appeared to get on with each other", but this could be used to describe people who are in a durable relationship. She does not give reasons for why this detracts from the witnesses' evidence that the Appellent and Sponsor were in love.

24. There is no detailed assessment of the documentary evidence. In paragraph [9] the judge refers to the documents which were considered. In paragraph [34] the judge refers to the fact that "there are matters capable of supporting the support (sic) the appellant's claim". She referred to a joint bank account and evidence that they share and have shared a room in two houses. Further she states "They do know something of each other's backgrounds. They have been consistent with each other about many things and the number of applications that have been made is indicative of some kind of commitment between the parties". Despite this positive finding, there is no weight attached to it, and no assessment of the documents which corroborate it.

25. I find that the judge erred in failing to consider the totality of the evidence. I find that her approach to the visit, and her expectations of how a relationship is formed and developed, have affected her approach to the rest of the evidence before her. I find that she has failed to give adequate reasons for why she did not attach weight to the evidence of the witnesses or to the documentary evidence before her. I find that this is a material error of law.

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 10 March 2016

Deputy Upper Tribunal Judge Chamberlain