



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/07653/2017

THE IMMIGRATION ACTS

Heard at Field House
On 26th November 2018

Decision & Reasons Promulgated
On 21st December 2018

Before

UPPER TRIBUNAL JUDGE KING TD

Between

ZAHEER AHMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Shrestha of Counsel, instructed by Direct Access

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a Pakistani national seeking a residence card as a spouse of a Polish national. The respondent refused the application on 30th August 2017 on the basis that it was not accepted that the marriage was a genuine one in all the circumstances.
2. The appellant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Iqbal on 20th June 2018. The appellant did not attend on that occasion and the matter proceeded in his absence.

3. The Judge paid particular regard to a previous determination of First-tier Tribunal Judge Davies relating to a hearing on 10th October 2016 on a similar issue. Applying the guidance in Devaseelan the Judge concluded that nothing had been advanced to change the situation such that the appeal fell to be dismissed.
4. There are essentially two grounds of challenge to that decision and leave to mount those challenges was granted to the Upper Tribunal. Thus the matter comes before me to determine the issue.
5. The first challenge is that it was fundamentally unfair of the Judge not to have granted an adjournment. On 13th June 2018 shortly before the hearing the appellant submitted an application to adjourn the matter on the basis he was suffering from chronic backpain and was unable to move. He said that both he and his wife's attendance were necessary to the hearing. He attached a doctor's letter which simply indicated that he was unfit for work and that "backpain - being investigated".
6. The application was refused on the basis that there was no evidence that the appellant was not fit to attend the hearing and had failed to provide any medical evidence on that issue.
7. On the date of the hearing a letter dated 19th June 2018 was faxed to the court by the appellant that he still had backpain and could not travel and also had no funds to hire a lawyer.
8. The Judge noted that the appellant had been put on notice as to the importance of obtaining medical evidence which he had not done. It was not considered therefore that it was in the interests of justice to further adjourn the matter.
9. The second challenge relates to the evidence that was submitted by the appellant for that particular hearing which was received on 15th June 2018. It is a voluminous bundle containing a number of statements and also evidence that for a number of years the EEA sponsor was working, including wage slips.
10. Perhaps more relevant are copies of Lloyds Bank statements for the period 2016 to 2018 showing a joint account as between the appellant and the sponsor at the same address. There are also photographs of family gatherings showing the appellant with the sponsor. There are also a number of other utility bills.
11. It is said that the Judge did not pay adequate regard to those matters as being evidence capable of showing that the marriage was indeed not one of convenience but a genuine marriage.
12. The respondent in the notice under Rule 24 contends that the fact that the appellant may have acquired more evidence or continued cohabiting with the EEA national did not take away from the fact that a marriage of convenience is such as from the

outset. It is submitted that it is the attention of the parties entering the marriage that is crucial.

13. It seems to me, however, that the evidence as presented has the potential to show, if accepted, that the appellant and EEA sponsor have lived together over a number of years thereby indicating that the marriage was in fact a genuine one and not one entered into for convenience.
14. There is little mention specifically of the nature of this evidence, other than that there were HMRC records and pay slips relating to the sponsor. The Judge at paragraph 26 said this "however there is no new evidence before me which addresses the concerns raised by the previous Judge and on balance I cannot be satisfied that there is anything before that demonstrates they have not entered into a marriage of convenience".
15. When one looks at the findings of the previous Judge set out in paragraph 22 of the determination it is noted the Judge was not satisfied that there was evidence of the sponsor working in the United Kingdom. That is dealt with to some extent in the bundle of new evidence.
16. As Ms Isherwood indicated that the difficulty which the appellant faces is, indeed, the nature of the interview which was conducted with him and with the sponsor. It is the nature of that interview which featured largely in the original determination as showing the lack of knowledge of each other and of the number of contradictions in the account. As Ms Isherwood indicated that interview has not been challenged and clearly provides cogent evidence undermining the genuineness of the relationship.
17. Although the Judge makes some reference in paragraphs 24 and 25 to the issue of cohabitation, very little reference is made to the documents as submitted. As I have indicated potentially they have a relevance to the issue of the genuineness of marriage and as such, in fairness, should have been considered in greater detail and proper findings made upon them. It is to be recognised of course that the fact that there may be joint bank accounts at the same address does not necessarily mean that the parties actually live together, particularly if the marriage was a sham then there would clearly be motivation to create a false impression as to cohabitation. However that is a matter that does deserve some consideration and findings made upon it.
18. Were the matter simply to turn on the issue of an adjournment I would consider that it was fair for the Judge to have taken the approach that was taken. It seems to me that the lack of full consideration of the material that was submitted, particularly when the appellant was absent from the hearing was such as to undermine the safety or fairness of the conclusions.
19. With some reluctance I consider that the failure to consider that additional evidence is an error of law such that the decision should be set aside to be remade.

20. A further bundle of documentation was presented, received on 26th November 2018, namely the morning of the hearing. Ms Isherwood had had no opportunity of seeing that bundle. It is quite unsatisfactory for papers to be lodged at the last moment in appeals of this nature.
21. In terms of a rehearing of the matter it is incumbent upon the appellant to produce a comprehensive bundle of documents properly paginated that can serve to assist the Tribunal in its task.
22. Given the extensive examination of documents and of the appellant and presumably of the sponsor, it is appropriate in accordance with the senior president's Practice Direction for the matter to be remitted to the First-tier Tribunal for a de novo hearing. No doubt the First-tier Tribunal will issue such directions as are appropriate in the circumstances.

Notice of Decision

23. The decision of the First-tier Tribunal is set aside to be remade.

No anonymity direction is made.



Signed

Date 13 Dec 2018

Upper Tribunal Judge King TD