



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/06601/2013

THE IMMIGRATION ACTS

Heard at Bradford
On 9th August 2013

Determination Promulgated
On 19th August 2013
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Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

ELIZABETH YIRENKYI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss L Appiah, Counsel, instructed by JF Law Solicitors
For the Respondent: Mrs R Pettersen, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Grimshaw made following a hearing at Bradford on 4th June 2013.

Background

2. The Appellant is a citizen of Ghana born on 2nd December 1952.
3. On 7th August 2012 she sought a residence card. On 11th February 2013 a decision was made to refuse to issue her with one as confirmation of a right of residence under European Community Law as the spouse of an EEA national exercising treaty rights in the UK.
4. In the reasons for refusal letter the Respondent said that it was noticed that the Appellant had entered the UK on 23rd December 2009 using a visit visa and had overstayed. She had remained here without authority since 15th June 2010. She married the Sponsor, a national of Italy exercising treaty rights in the UK as a worker, by proxy in Ghana on 10th December 2011.
5. The Respondent recorded that in order to ensure that this was a genuine and subsisting marriage an unannounced home visit was conducted at the claimed matrimonial home. The refusal letter states that the Sponsor was present and he said that the Appellant was away visiting a friend named Grace Adai. The friend lived outside Leeds but he was unable to give the address or the town or the city. The Appellant was said to be away for a few days and would be back at the weekend. The Sponsor was happy for officers to have a brief look around the property and accompanied officers into the hall. He showed them a pair of flowered pyjamas on a rack drying. He then went with officers into the bedroom and brought a carrier bag out of the bottom of the wardrobe. In the carrier bag was a patterned African style woman's dress. However there were no women's clothes hung in the wardrobe, no shoes, bags or makeup on view in the property and the bathroom contained no women's toiletries. In the view of the officers there was no evidence that a female resided there at all.
6. On that basis the Respondent decided that the relationship was not as claimed. The application to issue a residence card was refused on the grounds that the marriage was one of convenience.

The Judge's Determination

7. The judge recorded the standard of proof in the appeal to be as follows:

"The Appellant must show on the balance of probabilities that she is the spouse of an EEA national who is a qualified person. The effective date for my consideration is the date of the Respondent's decision although I may consider any relevant matters arises after the date of decision.

This is an appeal where the Respondent argues that there is reasonable ground for suspicion that the Appellant's marriage is one of convenience. There is no burden at the outset of an application for the applicant to show that a marriage to an EEA national is not one of convenience. However where evidence is produced by the Respondent which justifies reasonable suspicion that the

marriage is entered into for the predominant purpose of securing residence rights it is for the applicant namely the Appellant to address those suspicions.”

8. Later in the determination she said:

“I turn now to my assessment of the evidence and my conclusions.

As I have already stated where evidence is produced by the Respondent which justifies a reasonable suspicion that the marriage is entered into for the predominant purpose of securing residence rights it is for the Appellant to address those suspicions. I have seen the report prepared by the Immigration Officer that forms the basis of the Respondent's decision. The Immigration Officers found no female belongings at the address given by the Appellant at her home other than a pair of pyjamas and one dress which was in a carrier bag at the bottom of the wardrobe. The report goes on to state ‘There were no women’s clothes hung in the wardrobe, no shoes, bag or makeup on view in the property. The bathroom contained no women’s toiletries. There was no evidence that a female resided there at all.’ In these circumstances there is no doubt in my mind that the Respondent's suspicions about the purpose of the Appellant's marriage to Mr Owusu were well-founded.

It follows that I find that the Appellant's general duty to prove her case includes a duty to prove that she is not party to a marriage of convenience.”

9. The judge then recorded the Appellant's evidence and that of the Sponsor, made adverse findings and dismissed the appeal.

The Grounds of Application

10. The Appellant sought permission to appeal on the grounds that the Respondent’s allegation in the Immigration Officer’s report was not supported by any written evidence in the form of interview records or witness statement. The judge had applied different and uneven standards without justification and did not make it clear as to whether she was relying upon the legality of the marriage or the primary reasons for it. It was not clear from the determination what evidence the judge had accepted. The suggestion that bills could have been in joint names even though they were paid by the Sponsor was far from reality. The duration of the marriage and the timing of the application was not an issue. The Appellant’s husband was able to tell the Immigration Officer where the Appellant had gone and who she was visiting in London.
11. Permission to appeal was granted by Judge Keene on 2nd July 2013. The judge said that arguably the judge had made a material misdirection in law in recording that the burden rested on the Appellant to prove that she was not a party to a marriage of convenience.
12. On 24th July 20123 the Respondent served a reply opposing the application.

Submissions

13. Miss Appiah made a number of submissions. Firstly, since the Respondent was alleging that the Appellant was making a false claim, the standard of proof which should be applied should be higher than the balance of probabilities, possibly as high as the criminal standard.
14. Secondly, the judge was not entitled to take the Immigration Officer's report as a document capable of discharging that burden i.e it was not open to her to find that the report created the reasonable suspicion necessary for the burden of proof to pass to the Appellant. The report was not signed and was not in the form of a witness statement but was preferred to the evidence of the sponsor whose clear statement was properly made. Each party should consider whether it was appropriate to call live witness evidence and if the Respondent decided not to call the Immigration Officer it was incumbent on the Tribunal to consider what weight ought to be attached to the documentary evidence particularly when it is not in the proper format. The remaining findings stem from the judge's mistreatment of the report which then infected the determination as a whole, for example, the witness statement from the Appellant's friend was given short shrift in comparison with the treatment of the Immigration Officer's report.
15. Mrs Pettersen submitted that there was no error in the determination. The judge was clear in her own mind as to what the proper burden and standard of proof was. The Secretary of State had put the Appellant on notice of all of the issues in the refusal letter. The fact that report itself was served on the day should not have caused her any difficulty but in any event she could have asked for an adjournment to consider the report, or to ask for the Immigration Officer to be present but did not do so. The judge made clear findings which were open to her on the evidence and had provided ample reasoning for her conclusions.

Findings and Conclusions

16. There is no error in this determination.
17. The judge's setting out of the burden and standard of proof to be applied at paragraphs 7 and 8 of the determination is unimpeachable. As she said, there is no burden on the Appellant to show that a marriage to an EEA national is not one of convenience until evidence produced by the Respondent justifies reasonable suspicion that the marriage is one of convenience.
18. There is no basis for finding that anything other than the normal civil standard i.e. the balance of probabilities should be applied in this case. There is no such thing as more than a balance of probabilities but less than the criminal standard. The balance of probabilities is what it says it is.
19. Secondly, it is unarguable that an Immigration Officer's report, whether or not it is signed or in the format of a witness statement, which concluded that there was no evidence of female occupation is capable of discharging the burden on the

Respondent to show that there is a reasonable suspicion that the marriage was entered into for the purpose of securing residence rights. The weight which the judge put on the Immigration Officer's report was entirely a matter for her.

20. This is a full and careful determination of all of the relevant issues in the appeal. The judge noted the Appellant's immigration history and was entitled not to accept her explanation that she did not know what course of action to take after her visit visa expired. The treatment of the witness statement from the Appellant's friend is again unimpeachable. The judge noted that the witness statement conspicuously omitted to make any mention of the Appellant's marriage and whilst it confirms that she was staying with her at the time of the Immigration Officer's visit, it cannot answer the Respondent's point that the real issue was that the Sponsor did not know where she was. The fact that no friends of the couple have come forward to vouch for the marriage was considered by her, reasonably, to be significant. The absence of such evidence clearly made it more difficult for the Appellant to show that she was entitled to the residence card which she sought.
21. In summary the judge weighed up the oral evidence of the Appellant and her husband but was entitled to find it not credible and to place weight on the evidence in the Immigration Officer's report for the reasons which she gave.
22. The grounds disclose no errors in this determination which shall stand.

Decision

23. The Appellant's appeal is dismissed.

Signed

Date

Upper Tribunal Judge Taylor