



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/25241/2013

THE IMMIGRATION ACTS

Heard at Field House
On 23 June 2014

Determination Promulgated
On 28 July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR JAVED ANWAR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Ahmed, Counsel, instructed by 12 Bridge Solicitors
For the Respondent: Mr T Wilding, Specialist Appeals Team

DETERMINATION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing his appeal against the decision by the Secretary of State to refuse to issue him with a permanent residence card as confirmation of his right to reside on a permanent basis in the United Kingdom as the spouse of an EEA national. The

First-tier Tribunal did not make an anonymity order, and I do not consider that such an order is warranted for these proceedings in the Upper Tribunal.

2. The appellant is a national of Pakistan, whose date of birth is 11 February 1976. He first entered the United Kingdom on 7 June 2003 on a 24 hour transit visa. On 2 December 2003 he married his EEA national sponsor, and on 22 December 2003 the appellant applied for a residence document. On 25 March 2004 he was served with an ISI15A notice for using a false identity in order to work. The appellant posed as Tariq Malik, a Belgian national born on 25 October 1975. On 2 April 2004 his application for a residence document was refused, in the light of the IS15A notice and “concerns over the genuineness” of his relationship with his EEA national sponsor.
3. On 5 January 2006 the appellant applied for a residence card as a spouse of an EEA national exercising treaty rights in the United Kingdom, but the application was withdrawn on 6 July 2006. On 5 September 2007 he applied again for a residence card as a spouse of an EEA national exercising treaty rights in the United Kingdom, and a card was issued to him on 15 December 2007. The residence card was valid for five years until 15 December 2012.
4. On 16 November 2012 the appellant applied for a permanent residence card. On 6 June 2013 the Secretary of State gave her reasons for refusing the application. She advanced two reasons. The first was that he had not shown that his EEA sponsor had been exercising treaty rights in the United Kingdom for a continuous period of five years. In his application he said that his EEA national sponsor took a gap year to reconsider her career and study options. This was between August 2008 and August 2009. During this time he said that she was supported by him. He also stated that his EEA national sponsor was studying from 7 September 2009 to 11 June 2010. In order for the sponsor to be exercising treaty rights as a self-sufficient person, she had to have had comprehensive sickness insurance cover in the United Kingdom. This was also a requirement to be exercising treaty rights as a student. He did not provide any evidence that his EEA national sponsor had obtained comprehensive medical insurance during these periods.
5. The second reason was that the Secretary of State had sufficient evidence to believe that the marriage undertaken on 2 December 2003 to Andeia Paris Goncalves, a Portuguese national, was one of convenience for the sole purpose of him remaining here in the United Kingdom. So it had also been decided to refuse the issue the confirmation which he sought with reference to Regulation 2 of the Immigration (EEA) Regulations 2006.
6. In support of the marriage of convenience allegation the respondent relied on an immigration offender’s report dated 25 March 2004 and an Immigration Officer report dated 14 May 2013.
7. The March 2004 report recorded that the appellant, who had two aliases, had been encountered working at an establishment in Aldershot using a counterfeit Belgian

passport. He had made an application to remain as the spouse of Ms Goncalves. However he could not tell the officer her nationality, or what language she spoke, her full name or where they were married. He also could not tell the officer the address they had shared since December 2003. At the time of arrest he advised the officer that Ms Goncalves was on holiday. But he could not tell the officer where she was, nor how to get hold of her. The report continued:

Checks revealed someone using this identity had married before, a man named Joga Singh. They subsequently divorced following the grant of his leave to remain for five years on the basis of that marriage. Mr Joga Singh has since applied to register his new marriage four months after the decree absolute. The Home Office will be withdrawing Mr Joga Singh's leave to remain on the basis of his marriage to Ms Goncalves. Ms Goncalves failed to record on her marriage certificate that she was divorced. She advised the registrar that she was a spinster.

I obviously have grave doubts that the marriage is genuine.

8. The May 2013 report related to a visit on 14 May 2013 by the UKBA west London arrest team to the address given by the appellant in his EEA application. This is an address in Greenford. On arrival at the address at 6:45 in the morning, the officer knocked on the front door which was answered by a male who gave his name as Zahid Khan. The officer knew him to be Zahid Anwar, an Afghan male who had lived there with his wife and child, but who changed his name by deed poll to Zahid Khan. He asked if he could speak to the appellant, and Mr Khan said that he had gone out earlier. He asked Mr Khan if he could show him the appellant's room. Mr Khan brought him into the hall, and showed him the room which he said was locked. He asked if Ms Goncalves lived at this address. He said that she had just gone out. It was clear to the officer that there was no evidence of either the appellant or his spouse living at the address. When he asked Mr Khan details as to when they moved in and how long they had been at the address, he became agitated and then angry. He asked Mr Khan if he could make a formal statement stating that both the appellant and Ms Goncalves lived at the address. He refused and said he did not want to answer any more questions. The bathroom had only enough products and toothbrushes for the family. Mr Khan became increasingly animated when the officer asked him again to make a declaration stating that both the appellant and Ms Goncalves lived at the address. It was therefore decided to leave the premises.
9. The officer was certain that the applicants did not live at the address and that Mr Khan was attempting to give the impression they did. His explanations were contradictory. He first stated they had left that morning. But when he informed him that they had been outside for some time, he changed it to a few days ago. The officer observed that Mr Khan's original name was the same as the appellant's, and he conjectured that Mr Khan might be a family member of the appellant.
10. He knocked on the door of another address in the street, the house directly below that of Mr Khan's. He asked the occupant, a middle aged British male, whether he had ever seen the appellant at the address or Ms Goncalves. He said he knew that Mr Khan lived at the address with his wife and children, and there was another female

who was also Pakistani. He showed him the photograph of the appellant, and asked him to look and to be sure. He looked for some time and said he had never seen the appellant at the address. He said the other female was a sister of Mr Khan's wife, and she was an Urdu speaker.

11. Ms Goncalves was previously married to Mr Joga Singh. This was considered to be a marriage of convenience at the time, and she divorced Mr Joga Singh in 2002. It was strongly believed that there was not a genuine relationship between the appellant and Ms Goncalves.

The Hearing Before, and the Decision of, the First-tier Tribunal

12. The appellant's appeal came before Judge Fox sitting in the First-tier Tribunal at Hatton Cross on 19 December 2013. Mr Ahmed of Counsel appeared on behalf of the appellant, and Mr Singh, Home Office Presenting Officer, appeared on behalf of the respondent. The appellant relied on a bundle of documents running to 288 pages which was only served on the day of the hearing. The judge adjourned so as to give Mr Singh time to consider the contents of the bundle. When the hearing resumed, Mr Singh confirmed that the Immigration Officer who had made the recent report was absent from duties due to sickness.
13. The judge received oral evidence from the appellant, the sponsor, and three supporting witnesses. The supporting witnesses were Mr Khan (the landlord), Mr Jamal and Mr Latif. In his subsequent determination, the judge records that during the cross-examination of Mr Latif, the appellant was observed to gesture with his hands and head, nodding and shaking his head subtly and raising his fingers whilst maintaining his hands' position on his lap. As a result of this, the appellant was asked to leave the room.
14. The appellant adopted as his evidence-in-chief a short witness statement in the appellant's bundle. From October 2008 to September 2009, his wife was looking for work. He had submitted evidence of this with the witness statement. From September 2009 to June 2010, his wife was studying at West Thames College. From June 2010 onwards his wife had been working for Supreme Staff Limited.
15. With regard to their marriage, he had submitted supporting statements from friends confirming that they had a genuine and subsisting marriage. He knew that his wife was married before, but it did not last and they divorced.
16. With regard to his arrest in 2004, he had never used the name and false identity of Tariq Malik. In any event, he had returned to Pakistan and applied for a family permit, and no issue had been taken regarding the bona fides of his marriage. He had also successfully applied for a five year residence permit, and again no issue had been taken then with the bona fides of his marriage.
17. When the Immigration Officers visited his home on 14 May 2013 he was at work. He had submitted his duty summary to confirm that he was working from 10 p.m. on 13 May to 7:30 a.m. on 14 May. He occasionally had to work at night, and his wife

preferred to stay with her mother in Chiswick when he was working at night. He confirmed that his wife was at her mother's house on 14 May 2013. He had provided evidence (in the bundle) they had been living together since November/December 2007. The evidence was in the form of utility bills and bank statements.

18. In his subsequent determination, the judge set out at some length the evidence which he had received from the witnesses in paragraphs 10 to 53. He set out the submissions of the representatives at paragraphs 54 to 61. Mr Singh for the respondent submitted there were numerous discrepancies in the evidence of the appellant and the sponsor. The consistent evidence was the result of coaching and rehearsal. The evidence of the Immigration Officer was reliable when considered in the round. Mr Khan did not initially refute the Immigration Officer's account of the events relating to the appellant's departure from the home address. Mr Khan was an unreliable witness. The other witnesses had provided self-serving evidence. Mr Latif had no knowledge of the sponsor's religious beliefs.
19. In reply, Mr Ahmed for the appellant submitted that the factual dispute in respect of the matters reported by the Immigration Officer fell in favour of the appellant as there was no opportunity to cross-examine the Immigration Officer. There was no evidence that Mr Khan had used an alias. The allegation was speculative, and designed to insinuate that Mr Khan had permitted the appellant to use his home address for the purpose of a marriage of convenience.
20. The evidence at page 229 of the appellant's bundle (the appellant's shift pattern for 1 to 31 May 2013) corroborated the appellant's account. The neighbour was unidentified, and no weight could be placed on the report.
21. Inconsistencies in evidence could be plausible. If the evidence was rehearsed, it would have focused on the engagement. Consistent evidence had been provided on the topic of religion and there was no motive for the witnesses to lie. Mr Latif did not interact with the sponsor, and the issue of religion was a private matter.
22. The appellant had returned to Pakistan in 2004 to apply for the EEA family permit. The appellant had satisfied the respondent on several occasions. When the inconsistencies and consistencies were considered in the round, the conclusion fell in favour of the appellant.
23. The judge set out his findings in paragraphs 62 to 80. At paragraph 79 he held:

The evidence of Mr Khan, Mr Jamal and Mr Latif ('witnesses') is of no probative value. When the evidence is considered in the round it is more likely than not that the witnesses have agreed to provide supporting evidence exclusively to assist the appellant when no merit exists. I do not accept Mr Latif's inconsistent evidence that the sponsor celebrated Eid with the appellant and others, but in ten years Mr Latif and the appellant have never discussed the sponsor's religious identity. In any event it is unusual at best that Mr Latif should have little contact with the sponsor if his evidence of regular visits to the home address is to be accepted.

24. The judge concluded in paragraph 80 that upon the available evidence he was satisfied beyond the civil standard that the appellant and the sponsor were dishonest individuals who had conspired to defeat the respondent. The judge dismissed the appeal under the Regulations 2006 and also under Article 8 ECHR.

The Initial Refusal of Permission

25. On 24 January 2014 First-tier Tribunal Judge Parkes refused the appellant permission to appeal. The reasoning was as follows:
 3. The grounds argue that the judge erred in failing to apply the correct burden of proof in genuine marriage cases and focused on relatively minor parts of the evidence and overlooked the bulk of consistent and lengthy evidence in support of the appeal.
 4. At the start of the determination the judge correctly identified that the burden in the appeal was on the Secretary of State and referred again to the burden being on the respondent in paragraph 62 at the start of the findings. Discussion in that section followed a full account of the evidence that had been given to the Tribunal. The judge noted divergences in the evidence in cross-examination and went on to find that the appellant and the sponsor had dishonestly sought to defeat the respondent.
 5. The determination shows that the judge properly considered all of the evidence in the context of the correct burden of proof and applied that to the decision reached. The grounds amount to a disagreement of the findings properly made and open to the judge on the evidence presented. The grounds disclose no arguable errors of law and permission to appeal is refused.

The Eventual Grant of Permission

26. On a renewed application for permission to appeal to the Upper Tribunal, Upper Tribunal Judge Chalkley granted permission to appeal for the following reasons:

Many of the challenges contained in the application are entirely without merit and fail to identify any properly arguable error of law but I am concerned that the judge may have erred by failing to adequately reason his findings in paragraph 79. I am also concerned that he does not demonstrate that he has considered the large bundle of evidence submitted on behalf of the appellant. All challenges may be argued.

The Hearing in the Upper Tribunal

27. At the hearing before me, Mr Ahmed developed the arguments raised by him in the grounds of appeal. He referred me to **Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 38 (IAC)** and to various passages within this authority upon which he relied.
28. In reply, Mr Wilding stood by the Rule 24 response dated 29 April 2014. The judge was entitled to find the evidence between the appellant and the sponsor was rehearsed as stated at paragraph 77 of his determination. At paragraph 79 it was

clear that the judge found that the evidence of the supporting witnesses could not be relied on, and the judge gave adequate reasons for that finding.

Discussion

29. In **Papajorgji**, the Tribunal held that there was no burden at the outset of an application on a claimant to demonstrate that a marriage to an EEA national was not one of convenience. **IS (marriages of convenience) Serbia [2008] UKAIT 31** established 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.

30. At paragraph 62 of his determination, the judge held as follows:

The respondent has satisfied the burden upon her. The historic evidence of immigration abuse and the failure to provide reliable evidence of cohabitation upon the investigation of the Immigration Officer make it reasonable to conclude the respondent was entitled to arrive at her decision. Whilst it is possible that the evidence of cohabitation may have been behind a locked door, the respondent was reasonably entitled to arrive at her conclusion based upon the available evidence.

Whether there was evidence justifying reasonable suspicion

31. Mr Ahmed submits that the judge failed “to pay heed” to **Papajorgji** in this paragraph, and that he was wrong to find that the respondent had discharged the burden of proving that there were factors which supported suspicion for believing the marriage was one of convenience: see paragraph 19 of **Papajorgji**. The evidential onus for showing that there were reasonable grounds to suspect a marriage of convenience lay on the respondent, and Mr Ahmed submits that on analysis of the evidence the respondent had not discharged this burden.

32. Mr Ahmed’s reasoning is twofold. Firstly, he points to the fact that the appellant returned to Pakistan following his arrest as an immigration offender, and successfully re-entered the country on 17 October 2006 in possession of an EEA family permit visa. He then made a successful in country application for a five year residence card as an EEA family member.

33. Secondly, Mr Ahmed submits that the judge ought to have treated the oral evidence of Mr Khan, which was corroborated by the contents of the documents in the appellant’s bundle (in particular the shift pattern document at page 229), as neutralising the evidence of the Immigration Officer, whose evidence had not been tested in cross-examination.

34. I do not consider that the judge misdirected himself in law in finding that the respondent had discharged the evidential onus of establishing that there were reasonable grounds for suspecting that the marriage was one of convenience. I accept that the corollary of the respondent’s reliance on historic matters giving rise to the suspicion is that the concern over whether the marriage was one of convenience could and should have been raised in 2006 when the appellant was

seeking to re-enter the country as the family member of an EEA national. A fortiori, the allegation that the appellant's marriage to Ms Goncalves is one of convenience could and should have been raised in response to his application for a five year residence card in 2007. But I do not consider that the Secretary of State is thereby estopped from raising it now, or from relying on historic matters in order to discharge the evidential onus on her. The principle that "fraud unravels all" applies in public law, as well as in private law. If the enforcement visit in 2013 had allayed concerns over whether this was a marriage of convenience, it would have been unreasonable for the respondent to rely solely on historic matters to assert the suspicion that it was a marriage of convenience. But, far from allaying such concerns, the outcome of the enforcement visit in 2013 was calculated to compound them.

35. With regard to Mr Ahmed's second submission, the judge was not bound to give more weight to the oral evidence of the witnesses before him, than to the written evidence of the Immigration Officer.
36. The documentary evidence provided by the appellant showed that he had a good excuse for not being present at the property in the early hours of the morning. But it did not prove the converse, which was that he and his wife would have been there, if he had not been working a nightshift.
37. Accordingly, it was open to the judge to find, as he did at paragraph 63, that the burden now shifted to the appellant to demonstrate that his marriage was not one of convenience.

The oral evidence of the appellant and the sponsor

38. The judge acknowledged that the appellant and the sponsor had provided consistent evidence of their alleged relationship "in some regard." But he found that the appellant and the sponsor began to depart from their respective accounts when cross-examined "on less predictable themes".
39. The judge then went on to set out in considerable detail the respects in which he found their accounts to be divergent. At paragraph 75, the judge held the sponsor was vague in relation to the visit made by the Immigration Officer. He found it was significant that she was unable to recall with any accuracy the timing of the visit. He considered that this would be a significant event for the sponsor and the appellant, and that she should be able to recall this event with more clarity. He found it unusual that the sponsor should not challenge Mr Khan in relation to alleged statements which he had made which damaged the appellant's position.
40. At paragraph 76, the judge observed that it was unusual that the sponsor was unaware of the appellant's motivation for keeping his toiletries in the bedroom. It was reasonable to expect that had the interference with his toiletries occurred as claimed, this fact would have been communicated to the sponsor.

41. At paragraph 77 the judge held that the sponsor's lack of awareness of this alleged event (Mr Khan's daughter placing the appellant's toothbrush in the tub) and a failure to identify any meaningful reason for her decision to keep her toiletries in the bedroom, led him to the reasonable conclusion that the appellant and the sponsor had rehearsed and improvised their evidence in a transparent attempt to facilitate the appellant's residence in the UK.
42. When the evidence was considered in the round, it was more likely than not that the sponsor was not connected to the home address as claimed. He was satisfied to a high degree of probability that the sponsor had conspired with the appellant to create the appearance of marriage with the exclusive purpose of facilitating his residence in the UK.

The bundle of documents

43. It is convenient at this juncture to consider the error of law challenge that the judge failed to take account of the contents of the appellant's bundle. As indicated by the appellant in his witness statement, the contents of the bundle were consistent with the appellant living at the same address as the sponsor since November/December 2007. But the ultimate issue which the judge had to decide was whether the appellant had rebutted the suspicion that he had entered into a marriage of convenience with the sponsor. Even if they had been living under the same roof, and indeed in the same room, it did not necessarily follow that the marriage was not one of convenience. Moreover, the allegation of the respondent was that the appellant and the sponsor had gone to the trouble of presenting themselves in official documents (such as bank statements) as living at the same address, when this did not reflect the underlying reality (see page 2 of the Reasons for Refusal Letter). Given the nature of the case against the appellant, the judge reasonably gave great weight to the performance of the appellant and the sponsor in cross-examination, and it was open to him to reach the conclusions which he did, notwithstanding the documentary evidence of long cohabitation contained in the appellant's bundle.

The supporting witnesses

44. Turning to paragraph 79, it was also part of the respondent's case in the refusal decision that Mr Khan was a co-conspirator in the maintenance of the deception. The judge had earlier in his determination set out the evidence given by Mr Khan and the other two supporting witnesses. So it is reasonably to be inferred that he took their evidence into account before reaching the conclusion at paragraph 78 that the sponsor had conspired with the appellant to create the appearance of marriage for the exclusive purpose of facilitating his residency in the UK.

45. Mr Ahmed accepts that the judge gave adequate reasons for rejecting the evidence of Mr Latif, but submits that his rejection of the evidence of Mr Khan and Mr Jamal is not adequately reasoned.
46. I consider that it was open to the judge to find that it was more likely than not that all three witnesses had agreed to provide supporting evidence exclusively to assist the appellant "where no merit exists". Mr Jamal was a friend of the appellant, and he was not giving evidence on oath. Mr Khan was also not giving evidence on oath, and there was a direct conflict of evidence between the account which he gave in cross-examination of the visit by the Immigration Officer and the account given by the Immigration Officer in the report. It was open to the judge to prefer the evidence of the Immigration Officer, and to find that it was more likely than not that Mr Khan was not telling the truth.

Continuous exercise of treaty rights

47. The Presenting Officer accepted that the sponsor was currently exercising treaty rights as a worker, but the evidence put forward by the appellant did not establish that she had been exercising treaty rights for a continuous five year period.

Decision

The decision of the First-tier Tribunal dismissing the appeal under the Regulations 2006 did not contain an error of law, and the decision stands. This appeal to the Upper Tribunal is dismissed.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Signed

Date

Deputy Upper Tribunal Judge Monson