IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/06287/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 March 2015	**On 27 March 2015**

Before

MR JUSTICE MALES
DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MALIK ADEEL ABDULLAH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr D Clarke, Home Office Presenting Officer
For the Respondent: Mr J Dhanji, Counsel, instructed by Maalik & Co

DECISION AND REASONS

1. This is an appeal by against the decision of First-tier Tribunal Judge Kimnell dated 27 October 2014 which allowed the appeal against the Secretary of State's decision dated 8 February 2013 refusing to issue a residence card as confirmation of a right of residence under European Community law to Mr Malik Abdullah as the spouse of an EEA national exercising treaty rights in the United Kingdom. The sole issue before the First-tier Tribunal was

whether Mr Abdullah's marriage to an EEA national was a genuine marriage or a marriage of convenience.

2. Mr Abdullah entered the United Kingdom on a visit visa which was valid until July 2005 and has since been here without leave. He married an EEA national, a lady speaking Slovak with a Carpathian Romani dialect, on 10 September 2012 and applied for his residence card on 6 December 2012. The application was refused on 8 February 2013 on the basis that the marriage was one of convenience.

3. It was accepted by the Secretary of State that the appellant and his wife resided together at the same address but there were a number of concerns suggesting that the marriage might be one of convenience. Both had a limited knowledge of English, raising a question about how they could communicate with each other effectively. Their interview transcripts revealed inconsistencies which suggested to the Secretary of State's officials that the couple were not in a genuine relationship. For example there were differences about who had completed the application form, about how they had met, where marriage had been proposed, and what had been said in the proposal. Mr Abdullah also had incomplete knowledge about where his wife had lived in Europe. There were different accounts about what they did after the wedding and a difference as to the purchase of wedding rings in the accounts which they gave. It was moreover considered to be suspicious that the marriage had taken place just ten days after a visit by Immigration Officers on 31 August 2012.

4. Other contradictions concerned information about their knowledge of each other's birthdays, when and where they last went out together and Mr Abdullah's knowledge of body piercings which his wife had which were plain to see in wedding photographs. From all this the Secretary of State concluded that the marriage was one of convenience.

5. That led to an appeal to the First-tier Tribunal in which all of the matters to which we have just referred were set out.

6. Against those matters it was found by the First-tier Tribunal that the appellant and his wife had a daughter together. That was shown not only by her birth certificate but by DNA analysis confirming that the child was the daughter of both of them. There were two visits unannounced by enforcement officers. One was the visit to which we have already referred, at the end of August 2012. The other was on 31 July 2014. On both occasions Mr Abdullah and his wife (although they were not yet married on the first occasion) were found living together. On the second occasion the child was there as well. That appeared to be a genuine arrangement. In addition there were documents relating to the same address in which both Mr Abdullah's name and his wife's name appeared.

7. On the basis of that evidence the First-tier Tribunal determined that the appeal should be allowed on the basis that the marriage was genuine. We return to his reasoning shortly.

8. There are two grounds of appeal. The second, which was to the effect that the judge had applied the wrong test for the standard of proof, was not pursued by Mr Clarke (representing the Secretary of State) before us this morning. He recognised that the judge had indicated that it made no difference in his view as to whether the standard of proof was the balance of probabilities or a different test.

9. The sole ground remaining for decision is that the judge made a material error of law in failing to follow the guidance in the case of **Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 38 (IAC)** which deals with the burden of proof in marriage of convenience cases. What that case decides is that although the legal burden of proof is on an applicant to show that the marriage is genuine, there is "no burden on an applicant in an EU case until the respondent raised the issue by evidence. If there was such evidence it was for the applicant to produce evidence to address these suspicions." The quotation is from paragraph 20 of the decision referring to a previous case which the Upper Tribunal upheld in the **Papajorgji** case.

10. In this case the reasoning of the First-tier Tribunal did not follow that approach and in that respect contained an error of law as Mr Dhanji (representing Mr Abdullah) recognised. The question however is whether that error is material in the circumstances of this case.

11. What the judge said was this at paragraph 30:

> "The burden in this case is on the respondent to establish that the marriage is one of convenience. The respondent has not discharged the burden. The conflicting answers recorded at the interviews and rehearsed in the refusal letter certainly give strong grounds for suspicion but against that the appellant and the sponsor have established that they have been living together for some time and indeed they have a child together. DNA evidence confirms that they are the parents."

12. The judge went on refer to the evidence showing that the evidence about the couple living together was reliable. He added at paragraph 32 that "There is no getting away from the fact that the couple do have a child" and concluded at paragraph 33:

> "Against that background the answers at interviews, whilst suspicious, are not sufficient to prove the respondent's case whether one imposes the standard of a balance of probabilities or even a somewhat higher test than that, given that some duplicity is being alleged here."

13. The judge's statement that the burden in this case was on the Secretary of State to establish that the marriage was one of convenience was wrong if by that he was referring, as it looks as if he was, to the legal burden of proof. Rather, the approach should have been as in the **Papajorgji** case that the legal burden was on Mr Abdullah as the applicant for a residence card and that once suspicions were raised as they were it was for him to

satisfy that burden. The standard to which he was required to do so was the normal civil standard of balance of probabilities.

14. However, despite the error in the judge's statement as to the burden of proof, it is clear that he was alive to all of the suspicious features of the appellant's interview and that of his wife and to the various factors relied upon by the Secretary of State for saying that the marriage was a marriage of convenience. He took all of those matters into account but it is clear from the way he expressed his conclusion that he regarded the facts that the couple were living together at the same premises, that that was not an artificial arrangement but a genuine one, and that they had a child together as outweighing those suspicious features. In the light of that he concluded that notwithstanding the suspicions the marriage was genuine.

15. In those circumstances it seems to us that the error in the way that he stated the burden of proof is not material. Notwithstanding that error, on a fair reading of the decision it is clear that the judge's view was that despite the existence of strong grounds for suspicion, the marriage was genuine and subsisting. This was not a case of the judge fastening on a limited factor or one sole feature of the case. In our judgment despite the error which we have identified, the judge did give due attention to all the circumstances of the case and reached a conclusion which was open to him on the evidence.

16. For those reasons this appeal is dismissed.

NOTICE OF DECISION

The appeal is allowed under the Immigration Rules.

No anonymity direction is made.

Signed Date **18 March 2015**

Mr Justice Males