



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/07091/2014

THE IMMIGRATION ACTS

Heard at Field House

On 13 January 2015

**Decision & Reasons
Promulgated**

On 23 January 2015

Before

**THE HON. MR JUSTICE NICOL
UPPER TRIBUNAL JUDGE MOULDEN**

Between

**ERSHAD MIAH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Bhuiyan a Solicitor from PGA Solicitors LLP

For the Respondent: Mr M Whitwell a Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal of Mr Ershad Miah who is a citizen of Bangladesh who was born on 22 August 1988 (“the appellant”). His appeal is against the decision of First-tier Tribunal Judge Scobbie (“the FTTJ”) who, following a hearing on 9 September 2014, dismissed his appeal against the respondent’s decision of 18 January 2014 to refuse to issue him with a

residence card under the provisions of the Immigration (European Economic Area) Regulations 2006 (“the 2006 Regulations”).

2. The appellant claimed to be the husband of his sponsor and wife, Justina, a Polish and EU citizen born on 17 April 1987 (“the sponsor”). They claimed to have married in this country on 30 July 2013 and that she was exercising Treaty rights in this country as a worker. The appellant and the sponsor were interviewed separately on 14 January 2014. The respondent took the view that there were a significant number of discrepancies in their evidence. She refused the application on the basis that the marriage was one of convenience. The definition of a spouse in Regulation 2 of the 2006 Regulations does not include a party to a marriage of convenience. The respondent appears to have accepted that the marriage itself was a valid one.
3. The appellant appealed and the FTTJ heard the appeal on 9 September 2014. Both parties were represented and the appellant and the sponsor gave evidence. The FTTJ had before him a bundle of documents from the appellant's then representatives. The FTTJ set out the burden and standard of proof in paragraph 5 of the determination where he said “The burden of proof is on the appellant and the standard is the balance of probabilities”. That is a point to which we will need to return.
4. The judge reviewed the evidence in detail between paragraphs 14 and 53 of the determination. In paragraph 53 he reached the conclusion that this was a marriage of convenience and therefore the appeal failed under the 2006 Regulations. The FTTJ also considered the Article 8 human rights grounds, coming to the conclusion that in the light of the earlier findings the family life element of the claim was bound to fail and that the appellant had demonstrated very little private life in this country. He went on to dismiss the appeal under the 2006 Regulations and on human rights grounds.
5. An application was made for permission to appeal to the Upper Tribunal which was granted. We have to say that we find the grounds far from clear; in substance they appear to be no more than disagreements with conclusions properly reached by the FTTJ on all the evidence.
6. However the judge who granted permission to appeal raised another question; whether the FTTJ applied the correct burden and standard of proof. This is set out in paragraph 5 of the determination.
7. The appellant's representatives have changed since the hearing before the FTTJ and Mr Bhuiyan who appears before us did not appear before the First-tier Tribunal. He has submitted a skeleton argument and in his submissions he seeks to amend the grounds in order to argue the point raised by the judge who granted permission to appeal. We gave permission for the grounds to be amended without objection from Mr Whitwell.

8. Mr Bhuiyan not only relied on his skeleton argument but submitted that the FTTJ should have adjourned to enable the Secretary of State or to compel the Secretary of State to produce the full record of the interviews with the appellant and the sponsor. However, he accepts that at the hearing before the judge there was no application for an adjournment. Furthermore, what the judge said about this at paragraph 41 was:

“I considered all that had been set out in the note of the meeting. The first thing I would point out is that it is not in any way disputed by either the appellant or his wife the questions which were asked or the answers given.”

If the point was to be taken it should have been raised earlier. Mr Bhuiyan did not pursue it.

9. Mr Whitwell relies on the case of Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC). He accepts, as does the Rule 24 response, that the First-tier Tribunal Judge erred in law as to the burden of proof for establishing that this was a marriage of convenience. However, he submits that this was not a material error of law. He submitted that from paragraph 8 onwards the determination gave clear reasons for the FTTJ’s conclusions and there were many discrepancies which covered a lengthy period. He argued that this went to the core of the relationship. He argued that on the balance of probabilities the respondent had established that this was a marriage of convenience.
10. In his reply, Mr Bhuiyan said that from paragraph 8 the determination was no more than a cut and paste exercise from the respondent's decision and the FTTJ’s reasoning did not support his conclusions. He asked us to find that there were material errors of law, to set aside the decision and to send the case back to the First-tier Tribunal to be decided again.
11. We find that the FTTJ erred in law. The statement in paragraph 5 is incorrect. As Mr Whitwell concedes, the burden of proving that a marriage is a marriage of convenience falls on the Secretary of State, not the claimant and the standard is that of the balance of probabilities. He referred us to Papajorgji in which the then President of the Upper Tribunal said in his conclusions in paragraph 39:

“In summary our understanding is that where the issue is raised in an appeal the question for the judge will therefore be in the light of the totality of the information before me including the assessment of the claimant's answers and any information provided, am I satisfied that it is more probable than not this a marriage of convenience.”

12. Even if Mr Bhuiyan had gone on to argue the point as to the non-disclosure or the non-production of the full record of the interviews, we find no merit in the argument that the FTTJ should have adjourned to enable them to be produced. At the hearing before the FTTJ there was no application for an adjournment and what he said in paragraph 41 records that neither the

appellant nor the sponsor queried the questions or answers set out in the summary of the interviews.

13. We also find that the FTTJ did not limit himself to addressing the problems and inconsistencies raised by the respondent. As paragraph 44 of the determination makes clear: "However that is not all. Both the appellant and his wife were cross-examined and further inconsistencies arose. I highlight some of these." That indicates to us that the FTTJ went on to consider matters which arose at the hearing in addition to those raised by the respondent in the refusal letter.
14. We find that the FTTJ reached clear conclusions as to many problems with the evidence of the appellant and the sponsor. These are set out at length in paragraphs 15 to 53 of the determination. We find that on the assessment of the evidence carried out by the FTTJ any judge properly directing himself or herself would inevitably have come to the conclusion that, to the standard of the balance of probabilities, the respondent had established that this was a marriage of convenience.
15. We have not been asked to make an anonymity direction and can see no good reason to do so. We find that the FTTJ erred in law but this was not a material error or an error such that the decision should be set aside. We dismiss the appellant's appeal to the Upper Tribunal and uphold the decision of the FTTJ to dismiss the appellant's appeal under the 2006 Regulations and on human rights grounds

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Signed
Upper Tribunal Judge Moulden

Date: 19 January 2015