



IAC-FH-CK-V1

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

Appeal Number: IA/43899/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 6 October 2015**

**Decision & Reasons Promulgated
On 4 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR. MEHBOOB AHMED
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr. T. Wilding, Home Office Presenting Officer

For the Respondent: Mr. L. Doyle of Messrs Maliks and Khan Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of Tribunal Judge Metzger promulgated on 8 May 2015 in which he allowed Mr. Ahmed's appeal against the Secretary of State's decision not to grant him a residence card as confirmation of his right to reside in the United Kingdom.
2. For the purposes of this decision I refer to the Secretary of State as the Respondent and Mr. Ahmed as the Appellant, reflecting their positions as they were before the First-tier Tribunal.

3. Permission to appeal was granted on the basis that it was arguable that the judge made a material misdirection in law in determining that the burden of proof to establish that the marriage was one of convenience rested on the Respondent. It was arguable that the judge failed to assess whether the evidential burden on the Respondent had been met.

Rule 24 response

4. In the Rule 24 response the Appellant accepted that the judge had made an error in stating that the burden lay on the Respondent to establish that the marriage was one of convenience. The Appellant accepted that the Respondent carried the initial evidential burden and that, when that had been met, the burden of proof shifted to the Appellant to show that the marriage was not one of convenience.
5. The Appellant also accepted that the judge had failed to assess whether the evidential burden on the Respondent had been met or not in the first instance (paragraph 7 of the Rule 24 response). It was submitted that at its highest there may well have been reasonable grounds or suspicion that this was a marriage of convenience given the innocent mistakes and confusion that took place in the interviews (paragraph 8). However, having accepted that it was arguable that the Respondent could say that the initial evidential burden of proof had been met, the Appellant submitted that there was no material error of law in the decision. In paragraph 12 of the Rule 24 response it states:

“In any event, it is submitted that both the appellant and his wife went on to fully and comprehensively discharge the burden of proof on them that their marriage was not one of convenience in light of their comprehensive and detailed supplementary witness statements dated 17 April 2015.”
6. The Appellant submitted that there had been no meaningful challenge in cross-examination or during submissions to the Appellant and his wife’s account that they were in a loving marriage, as any purported inconsistencies, adverse credibility and alleged discrepancies had been accounted for. It was also noted that the Respondent’s representative had not cross-examined the two witnesses who came forward (paragraphs 15 and 16 of the Rule 24 response).
7. It was submitted by the Appellant that, given such evidence and findings which went favourably towards showing that the Appellant and his wife were in a genuine marriage, and that they gave credible evidence, there was no basis in the Respondent’s grounds of appeal for them to argue that such unchallenged credible evidence should be ignored. The Appellant and his wife had responded to the Respondent’s reasonable suspicion by providing volumes of evidential material for their appeal to show that they were in a genuine marriage and to dispel such suspicion.

Submissions

8. At the hearing Mr. Wilding accepted that the Respondent had not challenged the explicit findings in paragraph [15] of the decision. He submitted only that paragraph [15] was topped and tailed by paragraphs [14] and [16] where the judge asserted that the burden of proof lay on the Respondent, and that therefore the assessment of evidence had not been done properly. He could not make any stronger submissions than that.
9. Mr. Doyle submitted that I should preserve the decision by virtue of the findings at paragraph [15], which contained a comprehensive assessment. There had been no challenge to the Appellant's evidence or that of his wife in cross-examination or in submissions, and the findings as to the relationship were safe and intact.

Error of Law Decision

10. In paragraph [14] of the decision, the judge states:

“The burden of proof was on the Respondent to establish that the marriage is one of convenience”.

11. The case of Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 38 (IAC) reaffirmed the principle that the Respondent carries the initial evidential burden of proof to establish that there are reasonable grounds for suspicion that a marriage is one of convenience. Once that burden has been met, the Appellant must discharge the burden of proof that the marriage is not one of convenience.
12. I find, as accepted by Mr. Doyle, that the judge incorrectly stated that the burden of proof to establish that the marriage was one of convenience lay on the Respondent [14]. I also find that he failed to address whether this legal burden was met by the Respondent. I therefore find, as accepted by the parties, that the decision involved the making of an error of law. There remains the question of whether this error was material.
13. I find that it is clear from the evidence before the First-tier Tribunal, referred to by the judge, that the Appellant addressed the Respondent's reasonable suspicion that his marriage was one of convenience. At paragraph [2] the judge refers to the Appellant's witness statement, before setting out his oral evidence. At paragraph [8] he refers to his wife's witness statement, before again setting out her oral evidence.

14. Paragraph [15] of the determination states:

“Having heard the evidence from the Appellant and his wife who addressed all the inconsistencies, and they were quite numerous, in their witness statement I found the Appellant and his wife to be credible witnesses in relation to the genuineness by the marriage and they are supported in respect of the extent of their relationship by the documentation and the two further witness statements of witnesses present at the hearing. Although the Appellant does not have an

attractive immigration history, I do not find that that adversely affects the Appellant's credibility in respect of the extent of his relationship with his wife. There is no challenge to the fact that there was a civil marriage and the evidence is clear, in my view, that they had an Islamic marriage too. Where the Appellant was able to produce documentary evidence to explain the discrepancies, for example in relation to answers concerning the extent of the Appellant's medical treatment, he has produced such documentary evidence."

15. In paragraph [15] the judge finds the Appellant and his wife to be credible witnesses. He finds that they addressed all of the inconsistencies in their witness statements. He found them to be credible witnesses in relation to the genuineness of their marriage. He specifically notes that the Appellant produced documentary evidence to explain the discrepancies where possible, listed at [13]. The Respondent did not challenge the findings in paragraph [15].
16. Irrespective of the error made by the judge in relation to the burden of proof, and his failure to appreciate that the Respondent had only to show a reasonable suspicion that the marriage was one of convenience, I find that this was not a material error given his thorough consideration of the evidence of the Appellant and his wife. He made clear findings that they had addressed "all the inconsistencies". He found that they were in a genuine relationship. He found that they were supported by two further witness statements of witnesses who attended the hearing, but who were not cross examined, [12]. He found, having considered all of the evidence, that the marriage was not one of convenience.
17. I do not find that the judge's findings in paragraph [15] are affected by the fact that he placed the burden of proof on the Respondent, given his clear findings in this paragraph. He did not allow the appeal only because the Respondent had not met the burden of proof, but he allowed the appeal having found that the Appellant and his wife were credible, had addressed the inconsistencies, and were in a genuine relationship.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law but this was not material to the outcome of the appeal.

I do not set aside the decision.

The decision of the First-tier Tribunal stands.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Chamberlain