Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00817/2016

THE IMMIGRATION ACTS

Heard at Bradford	**Decision and Reasons**
On 22nd June 2017	**Promulgated**
	On 11th July 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

MR MUHAMMAD FAISAL
(ANONYMITY NOT DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R O'Ryan, Counsel instructed by SMK Solicitors
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Simmonds, promulgated on the 9th November 2016, to dismiss the appeal against the respondent's decision to revoke the appellant's EEA Residence Card (hereafter, "the decision").

2. The appellant is a citizen of Pakistan who was born on the 10th December 1988. His EEA Residence Card had been issued to him on the 1st November 2012 as confirmation of a right to reside in the United Kingdom as the

spouse of a Polish national, [JP]. The appellant and [JP] were married at the Stoke-on-Trent Registry Office on the 16th June 2012.

3. The reason for the decision was that the respondent believed the appellant's marriage to have been one of convenience. In reaching that conclusion, the respondent noted that the appellant had been encountered by Immigration Officers on the 19th November 2015 at an address in Stoke (18 [ ] Place) at which there was no evidence to suggest [JP] was residing. The appellant had explained at that time that he had been living separately from [JP] since January 2015 and that she had a child ([DP]) with another man ([WH]). Given that there was no mention of [JP] having a child when the appellant applied for his Residence Card, it was reasonable to infer that [DP] had been born after it had been issued. It was noted by the Officers that he appeared to be texting [JP] "to advise her of what [he] had told the Immigration Officers" (Notice of Decision, dated 9th January 2016). This damaged the appellant's credibility.

4. The appellant's case in the First-tier Tribunal can conveniently be summarised as follows. It was he who had left the marital home (rather than the other way around) when the parties had separated in January 2015. [JP] had accordingly never resided at 18 [ ] Place. It was thus unsurprising that there should have been no evidence of her having done so. Whilst [DP] was indeed born after the marriage (some 9 days later, to be precise) she was conceived before the appellant had met [JP] in November 2011. Her birth does not therefore signify that [JP] had been in a relationship with another man after the marriage. The Immigration Officer's record of the enforcement visit is highly selective, omitting as it does any reference to a conversation that he had had by mobile telephone (in the appellant's presence) in which [JP] had confirmed the appellant's account of their current separation due to marital difficulties.

The First-tier Tribunal Decision

5. Judge Simmonds reasons for concluding that the marriage was one of convenience can be summarised as follows –

    (i) The appellant had clearly been separated from his wife for some time by the time he was encountered in November 2016, and yet he had failed to notify the respondent of this fact [paragraph 22].

    (ii) The evidence that the appellant had been receiving post at [JP]'s address – and thus, by implication, had been cohabiting with her there - was "mitigated" by the fact that this had continued "long after" the time when he had, on his own admission, "moved out" [paragraph 23]. Indeed, the fact that the appellant continued to receive post at [JP]'s address "when he admits he wasn't living there" cast doubt upon his claim to have lived there at all [paragraph 29].

(iii) There would have been "no need" for the appellant "to coach [JP] about what to say if their relationship was genuine and they had in fact been together until January 2015 as he told the officer" [paragraph 24].

(iv) [JP]'s 'Facebook page' contained no reference to the appellant or his relationship with her child.

(v) The appellant had been unable to recall the date of his marriage or date of birth of his step-daughter when encountered by Immigration Officer in November 2016 [paragraph 26].

(vi) The texts between the appellant and his wife all related to mundane matters (such as money, and collecting the post); there were no texts suggestive of a relationship that was "anything more than one of convenience" [paragraph 27].

(vii) A letter from a marriage guidance counsellor post-dated the decision and thus, "could be said to be a response to the revocation rather than a spontaneous and genuine attempt to address relationship difficulties" [paragraph 28].

(viii) The absence of any supporting evidence from [JP] was significant given that this "would be easily obtainable" [paragraph 30].

(ix) There was "no other evidence [such as witnesses, photographs, phone records, and posts on social media] to support the Appellant's contention that this was a genuine relationship from the start". Instead, there was only "… some correspondence addressed to the Appellant at [JP]'s address".

For these reasons, the judge found that the appellant was not a credible witness [paragraphs 32 to 35] and had thus "failed to discharge the burden on him to prove that the marriage is not a 'marriage of convenience'". In giving notice of her decision, the judge repeated that "the appellant has not discharged the burden of proof on him to show that the terms [of] regulation 2 of the Regulations are met" [paragraph 37].

Error of Law

6. The most glaring error of law in the above is in relation to the burden of proof. At paragraph 6 of her decision, the judge states that this was, "upon the Appellant". However, it was clearly stated by the Court of Appeal in **Rosa** [2016] EWCA Civ 14 that the legal burden of proof is (and remains throughout) upon the respondent. The Court of Appeal also expressed disapproval of the reasoning in **IS (Serbia)** [2008] UKAIT 00031, which it described as "seriously confused" [paragraph 29]. Judge Simmonds nevertheless cited it as providing support for her analysis of the law [see paragraph 10 of the Decision].

7. The error is not however simply confined to the legal self-direction at paragraph 6. It infects every single aspect of the reasoning of Judge Simmond's decision. It repeatedly resurfaces during the analysis of the evidence (see, for example, the summary of that analysis at sub-paragraphs 5(i) to (ix) above) and it permeates throughout the legal conclusions (see paragraph 35 of the Decision, quoted at the end of paragraph 5 above). It even appears in the Notice of Decision itself (see paragraph 37, also quoted at the end of paragraph 5 above).

8. Furthermore, of the nine reasons summarised at paragraph 5 above, only numbers (iii) and (arguably) (v) are based upon positive evidence that the marriage was one of convenience. The other reasons are essentially based upon an absence of evidence to discharge the burden of proof that supposedly rested upon the appellant. The error thus strikes at the very core of the Tribunal's decision.

9. Given the above, it is particularly surprising to find that the grounds (which, I hasten to add, were not settled by Mr O'Ryan) failed to make any reference to the error concerning the burden of proof. Nevertheless, and in the absence of any opposition from Mr Diwnycz, I gave leave at the hearing for this ground to be argued. That done, Mr Diwnycz did not seek to gainsay any of the observations that I have set out in the preceding paragraphs. I thus have no hesitation in holding that the First-tier Tribunal not only erred in law but that it did so in a way that was critical to the outcome of the appeal. For this reason alone, its decision must be set aside.

10. However, Mr O' Ryan drew my attention to another error of law that has also led to me to conclude that the decision of the First-tier Tribunal cannot stand. That error arises from the judge's fundamental misunderstanding of the evidence concerning the address of the former marital home. Thus, a significant part of her reasoning was predicated upon the mistaken belief that the former marital home was the address to which the correspondence at page 81 of the appellant's bundle had been sent (namely, 81 Brunswick Drive) whereas all the evidence pointed to this being the address to which the appellant had moved when he vacated the former marital home at number 1 Grove Place, London Road (see paragraph 4, above). The documentary evidence was thus entirely consistent with the explanation that the appellant had given to the Immigration Officers during the enforcement visit on the 19th November 2015 and which they appear to have accepted at the time [see Immigration Officer Briggs' unsigned and undated witness statement]. It was thus entirely unsurprising that the appellant should have been receiving correspondence at that address many months after the separation and the judge's reasoning to the contrary, at paragraphs 23 and 28 (summarised at paragraph 5(ii) above), was contrary to the evidence.

Re-making the Decision

11. Both Mr O'Ryan and Mr Diwnycz agreed that I should re-make the decision in the Upper Tribunal rather than remit it to the First-tier Tribunal.

Mr O'Ryan therefore tendered the appellant for cross-examination and Mr Diwnicz proceeded to ask him a number of questions concerning his own and [JP]'s work-history whilst residing in the United Kingdom. I do not consider their replies to be material to the issue of whether the marriage was one of convenience and I do not therefore record them here.

12. I start with my analysis of what Judge Simmonds considered to be evidence that that the appellant had been attempting to "coach" his wife during the enforcement visit of the 19th November 2015; something which the appellant denies. The evidence in question consists of an undated and unsigned witness statement from Immigration Officer Mai Briggs, together with relevant entries in the pocket notebooks of Immigration Officers Briggs, Edwards, and Shaw. The relevant passage from IO Briggs' statement reads as follows:

> "While I was on the phone FAISAL was texting someone. When I asked him what he was doing I saw that he had text [JP] in an attempt to advise her of his account to me, he had attempted to write something about January but the message was not complete and most words were not spelt correctly."

There is very little in the above statement to inform the reader what it was, precisely, that the appellant had written in his text message. All we are told is that it was "something about January". This appears to me to be an extremely tenuous basis for concluding that the appellant was attempting to notify his wife of what he had said about the circumstances of their claimed separation. I therefore reject it.

13. Judge Simmonds based an adverse finding upon the appellant's failure to notify the Home Office of his separation from his wife. However, as Mr O'Ryan pointed out, cohabitation is not necessary for continued residency rights as the spouse of an EEA national: **Diatta** [1985] ECHR 567; **PM (EEA – spouse – "residing with")** [2011 UKUT 89. There had thus been no reason for the appellant to have done so.

14. I have already noted that the finding that the appellant was continuing to receive correspondence at the former marital home many months after his claimed separation from his wife is one that was based upon a fundamental misunderstanding of the evidence [paragraph 10 above]. The evidence of the appellant's correspondence address is thus entirely in accordance with his explanation of separation following recent marital difficulties.

15. The mere possibility that the marriage guidance counselling may have been undertaken by the appellant and his wife to give the false impression that theirs was a genuine marriage in difficulties is not one that assists the Secretary of State in discharging the burden of proving that the marriage was one of convenience at its inception. On the contrary, when viewed within the context of the evidence as a whole, the likelihood is that such counselling was undertaken in the circumstances claimed by the appellant.

16. Absent an admission from the parties, evidence to support a claim that a marriage is one of convenience will necessarily be circumstantial.

Circumstantial evidence can of course be compelling. However, I do not find this to be the case in the present appeal. On the contrary, I find that it is equally (if not more) consistent with a marriage that was genuine at its inception but has since foundered. Moreover, as Judge Simmonds rightly pointed out, the parties were interviewed by Home Office officials shortly before their marriage ceremony and were nevertheless permitted to proceed. This strongly suggests that the marriage was accepted by those officials as genuine at a time that was very much closer to the relevant event than an enforcement benefit taking place several years later.

17. Finally, the Tribunal now has the benefit of evidence on oath from [JP] (by way of affidavit) wherein she attests to there having been no ulterior motive for entering into the marriage, albeit that she also confirms that it has now broken down irretrievably.

18. I therefore find that the Secretary of State has failed to discharge the burden of proving that the appellant's marriage to [JP] was one of convenience. It follows that she ought not to have revoked his Residence Card.

Notice of Decision

19. The decision of the First-tier Tribunal to dismiss the appeal against revocation of the appellant's EEA Residence Card is set aside and substituted by a decision to allow that appeal.

Anonymity is not directed

Signed Date: 10th July 2017

Judge Kelly

Deputy Judge of the Upper Tribunal