Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01651/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 April 2017	**On 2 May 2017**

Before:
UPPER TRIBUNAL JUDGE GILL

Between

Luz Marina Osorio Leiva Appellant
(ANONYMITY ORDER NOT MADE)

And

Entry Clearance Officer, Bogota Respondent

Representation:

For the Appellant: Ms V Dirie, of Counsel, instructed by Kilic & Kilic Solicitors.
For the Respondent: Mr. I Jarvis, Senior Home Office Presenting Officer

DECISION AND Directions

Introduction and background facts:

1. The appellant is a national of Colombia, born on 19 September 1955. She has been granted permission to appeal the decision of Judge of the First-tier Tribunal Andrew who, following a hearing on 27 July 2016, dismissed her appeal against a decision of the respondent of 24 September 2015 to refuse to issue an EEA family permit as confirmation of her right to join a Mr. Juan Carrasco Torrecilla (the "sponsor") in the United Kingdom under to the Immigration (European Economic Area) Regulations 2006 (the "EEA Regulations").

2. The sponsor is a national of Spain born on 12 April 1932. In interview with the respondent, the appellant said that the sponsor is retired and came to live in the United Kingdom on 12 January 1967. She said that she met the sponsor in the United Kingdom on 20 August 2004 when she was in the United Kingdom. She left the United Kingdom 10 August 2015. She said that they were married in Colombia by proxy on 15 August 2015.

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3. The judge dismissed the appeal under the EEA Regulations and also Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

4. The issues before me may be summarised as follows:

   i. (issue 1) Whether it was conceded in the Notice of the decision dated 24 September 2016 (hereafter the "first decision"), that the appellant and the sponsor were married in Colombia by proxy; and

   ii. (Issue 2) If yes, whether the judge materially erred in law in failing to consider whether to permit the respondent to withdraw the concession.

5. The grounds also contend that the judge erred in law in his consideration of the appellant's Article 8 claim. However, Ms Dirie accepted that she could not realistically advance the Article 8 grounds (i.e. paras 3 and 5 of ground 1 and ground 3) in the light of the judgments in TY (Sri Lanka) v SSHD [2015] EWCA Civ 1233 and Amirteymour [2015] UKUT 00466.

Issue 1

6. It was disputed before the judge that the respondent had conceded that the appellant and the sponsor were married by proxy. This much is clear from paras 5-6 of the judge's decision.

7. The judge summarised this aspect of the proceedings before her at paras 5-7 of her decision which read as follows:

> "5. At the commencement of the hearing the question of whether there was a matrimonial relationship between the Appellant and the Sponsor was raised. The Appellant's representative was of the view that as a sham marriage had been raised by the Respondent it was accepted there had been a valid marriage. The respondent's representative said that he was not accepting there had been a valid marriage and that this was an issue that had to be determined. He confirmed that because the refusal was silent on this point this was not a matter which had been conceded by the Respondent, and he thus withdrew any concession, had there, in fact, been one.
>
> 6. In response the Appellant's representative said that where there is a concession in a refusal letter it is not open to the Tribunal to go behind that concession. He referred to a further decision that had been made by the Respondent which replicated the decision which is the subject of this appeal.
>
> 7. I indicated to the Appellant's representative that it was not the Tribunal who was going behind the refusal but that the Respondent's representative had withdrawn any implied concession in the refusal letter. The Respondent's representative made no application for an adjournment in order that the validity of the marriage could be explored. In this regard I accept that in his later submissions he said he was unaware of the withdrawal of any concession in the refusal letter but both my notes and those of the Respondent's representative confirmed that this was the case, as I explained to him."

8. Ms Dirie submitted that para 7 of the judge's decision shows that she was not aware that she had a discretion not to permit the respondent to withdraw the concession. She relied upon SSHD v Akram Davoodipanah [2004] EWCA Civ 106 where, at para 22, Kennedy LJJ said:

> "22. It is clear from the authorities that where a concession has been made before an adjudicator by either party the Immigration Appeal Tribunal can allow the concession to be withdrawn if it considers that there is good reason in all the circumstances to take that course. (See, for example, Ivanauskieine v Secretary of State for the Home Department 2001 EWCA Civ 1271, and Carrabuk v Secretary of State for the Home Department, a decision of the Immigration Appeal Tribunal presided over by Mr Justice Collins on 18 May 2000. Obviously if there will be prejudice to one of the parties if the withdrawal is allowed that will be relevant and matters such as the nature of the concession and the timing may

> also be relevant, but it is not essential to demonstrate prejudice before an application to withdraw a concession can be refused. What the tribunal must do is to try to obtain a fair and just result. In the absence of prejudice, if a Presenting Officer has made a concession which appears in retrospect to be a concession which he or she should not have made, then probably justice will require that the Secretary of State be allowed to withdraw that concession before the Immigration Appeal Tribunal. But, as I have said, everything depends on the circumstances, and each case must be considered on its own merits."

9. Ms Dirie submitted that the judge had failed to consider whether there was good reason in all of the circumstances to permit the respondent to withdraw the concession.

10. I accept that there is nothing at paras 5-7 of the judge's decision which indicates that she was aware that she had discretion as to whether to permit a party to withdraw a concession.

11. However, the *prior* question is whether or not, as a matter of fact, there was a concession on the part of the respondent that the appellant and the sponsor had entered into a marriage. If there was in fact no concession on the part of the respondent, the judge cannot be said to have erred by failing to consider whether there was good reason in all of the circumstances to permit the respondent to withdraw any concession.

12. The judge did not reach a decision as to whether there had been a concession on the part of the respondent.

13. Ms Dirie submitted that, given that the first decision states "*your marriage is one of convenience",* the respondent must have conceded that the appellant and the sponsor had entered into a marriage. She also drew attention to the fact that second decision accepted that the appellant and the sponsor had formed a subsisting relationship after the marriage.

14. Mr Jarvis accepted that the second decision did accept that the appellant and the sponsor had formed a subsisting relationship subsequent to their marriage. Nevertheless, it was the respondent's position that, *if* a marriage had been entered into between the appellant and the sponsor, it was a sham marriage at inception. He submitted that the respondent had not conceded that the appellant and the sponsor had entered into a marriage.

15. In my view, it must be clear and unequivocal that a party has made a concession. It is not permissible to draw an inference to that effect from the circumstances. In my judgment, this is what Ms Dirie seeks to do by relying upon the fact that the first decision contends that the marriage was a marriage of convenience. It is perfectly possible for the respondent to take two alternative positions, i.e. that the parties had not entered into a marriage but that, even if the appellant established that they had entered into a marriage, it was a marriage of convenience.

16. In order to decide whether there was a concession in the first decision that the appellant and the sponsor had entered into a marriage, it is necessary to consider the terms of the first decision. Since the appellant has placed reliance also upon the second decision, I shall consider whether this sheds light on the question whether the respondent had conceded this issue.

17. The relevant parts of the two Notices read as follows:

The first decision:

> "You have applied to join <u>your husband</u> in the United Kingdom who is a Spanish passport holder.
>
> I note that you first entered the UK in 2002 illegally before you were detained in 2004 and claimed asylum. You were next encountered by immigration services in 2014 were [sic] you claimed that you were planning to get married to Juan Carrasco Torrecilla. Considering the evidence provided by immigration services and

> supporting documents you have provided with your application I am satisfied that **there is an element of doubt over the credibility and genuineness of your relationship.**
>
> I am therefore satisfied that **you are not in a genuine relationship** and your marriage is one of convenience, entered into for the sole purpose of obtaining entry into the United Kingdom."
>
> (my emphasis)

The second decision:

> "You have applied to join your husband in the United Kingdom who is a Spanish passport holder.
>
> > I note that you made a previous application for a EEA family permit, in which you were refused as the entry clearance officer was not satisfied that you were in a genuine relationship and that your marriage was not one of convenience, entered into for the sole purpose of obtaining entry into the United Kingdom. I note that you have submitted a statement in your own name where you attempt to remedy the previous reasons for refusal. Whilst I have acknowledged the content of this letter, I am still satisfied that your application for an EEA family permit falls for refusal.
> >
> > I note that you were residing with your husband Juan Carrasco Torrecilla in the UK in 2014 when you were encountered by immigration services. Following checks undertaken by our office and the information we have collated I am satisfied that whilst your relationship might be subsisting, I am satisfied that you entered into a relationship with Juan Carrasco Torrecilla in order for the sole purpose of obtaining entry into the United Kingdom. In light of the above, I am satisfied that you are not in a genuine relationship and your marriage is one of convenience, entered into for the sole purpose of obtaining entry into the United Kingdom." _
>
> (my emphasis)

18. One important purpose of a decision notice is to set out the reasons for refusing the application. This is particularly important in entry clearance cases since both entry clearance officers and appellants in entry clearance cases are not physically within the United Kingdom. If they are represented at the hearing, their representatives will need to have clarity about the issues. Since neither party has suggested that the issues were clarified in any other documents or in any other way, only the first and second decisions fall for consideration.

19. In my judgement, it is clear from the terms of the first decision that the respondent had conceded that the appellant and the sponsor had entered into a marriage due to the combination of the fact that the sponsor was referred to as "*your husband*" in the opening line and that there was no mention at all in the first decision of any concerns on the part of the respondent as to whether the appellant and the sponsor had entered into a marriage. When read as a whole, it is clear in my judgement that the respondent considered that the marriage was a marriage of convenience because he considered that the appellant was not in a genuine relationship.

20. This is consistent with the wording of the second decision which refers to the sponsor twice as "husband". The first sentence of the first paragraph of the second decision refers to the first decision and appears to set out the issues raised in the first decision. This does not mention that the respondent also took issue with whether the parties had entered into a marriage.

Issue 2

21. It is unfortunate that neither party referred the judge to Carcabuk & Bla v SSHD (00/TH/01426) (its correct name and case number) or NR (Jamaica) and thus the judge failed to consider whether the respondent should be allowed to withdraw the concession.

22. Mr Jarvis relied upon the fact that Mr B Amunwa, who represented the appellant at the hearing before the judge, did not request an adjournment. However, it is not necessary to show that a party will suffer prejudice if the withdrawal of the concession is permitted (NR (Jamaica) at para 11 and Davoodipanah at para 22).

23. It is clear from the last sentence of para 7 of the judge's decision that the appellant's representative had proceeded in his submissions, until the point when he said he was unaware that the concession had been withdrawn, on a false footing. On this basis alone, I am satisfied that the appellant did not have a fair hearing, whatever the position as to whether or not the judge's failure to consider whether to permit the respondent to withdraw the concession led to an unfair hearing.

24. Mr Jarvis submitted that, given the judge's assessment of the remaining issues, any error of law is not material. Given my conclusion that the appellant has not had a fair hearing, it is not necessary for me to consider this issue, strictly speaking. However, I will proceed to do so.

25. At the time of the hearing before the judge, the Upper Tribunal's decision in Kareem (Proxy marriages – EU law) [2014] UKUT 24 applied. Kareem is no longer good law following the judgment of the Court of Appeal in Awuku v SSHD [2017] EWCA Civ 178. However, the fact that the judge applied Kareem does not affect my decision on this appeal, for reasons which will become apparent below.

26. In applying Kareem, the judge concluded that the appellant could not establish that she was a family member for the purposes of regulation 7. In summary, her reasons were that there was no translated copy of the marriage certificate and that there was no evidence before her that Spanish law recognises that the marriage was a valid marriage.

27. The judge then proceeded to consider whether the appellant was an extended family member on the basis that she was in a durable relationship with the sponsor. She decided this issue against the appellant. She gave her reasons at paras 16-19 which read:

> "16. It is said that the Appellant and the Sponsor have been living together for over four years. The difficulty that I have with this claim is that I have heard no evidence at all from the Sponsor. I am unable to place any weight on his statement because I have not heard that evidence and there has been no opportunity for the Respondent's representative to cross examine the Sponsor. As such there is no direct evidence from the Sponsor to confirm that he is, in fact, in a durable relationship with the Appellant.
>
> 17. I accept that the witness I heard from claims in her statement that the Appellant and the Sponsor have lived together for four years and even gives the date on which she says they moved in together. Unfortunately her evidence to me was not so exact. She could only remember that she met the Appellant 'about four years ago' and she was clearly unable to remember dates with any certainty.
>
> 18. I do have before me Council tax bills at pages 29 to 33 of the Appellant's Bundle which are in the joint names of the Appellant and the Sponsor. However, I cannot take these as proof the Appellant and the Sponsor were living together, as has been claimed. Anyone can ask that their name is placed on a bill. The same remarks apply to the letter at page 28 of the Appellant's Bundle. It is of further note that some of the BT bills in the Appellant's Bundle have been sent to the Appellant at a time when she was clearly not living in the property of the Sponsor as she was in Colombia.

> 19. In any event what is apparent is that the Appellant and the Sponsor cannot have been in a durable relationship after the Appellant left the United Kingdom for Colombia. They have not been living together now (if they were, in fact living together) for a period of very nearly a year, the Appellant having left the United Kingdom on 10th August 2015."

28. Mr Jarvis submitted that, given the judge's reasoning on the issue as to whether the appellant was in a durable relationship, she would have been bound to conclude that, even if the marriage was a valid one, it was a marriage of convenience.

29. In my judgement, this submission is misconceived. In considering whether the appellant was in a durable relationship, the judge was considering the evidence of the relationship over time and answering a different question, whereas the issue was whether the marriage, at the point of inception, was a marriage of convenience. Whilst it is true that subsequent events can cast light on the situation at the time of the marriage, it is nevertheless a different question concerning a specific point in time. There is insufficient in the judge's reasoning for me to say that she would have been bound to conclude that the marriage was a marriage of convenience at the point of inception. This difficulty is compounded by the fact that the respondent accepted in the second decision that the appellant's relationship with the sponsor may be a subsisting one as at the date of the second decision, although he still took issue with whether it was a genuine relationship.

30. Mr Jarvis drew my attention to the fact that the sponsor had not attended the hearing before the judge nor before me. However, I do not consider that this is determinative.

31. I am therefore satisfied that the judge materially erred in law. I therefore set aside her decision under the EEA Regulations.

32. In relation to Article 8 claim, the judge erred in considering Article 8 because the Tribunal had no jurisdiction to decide the Article 8 (TY (Sri Lanka) v SSHD and Amirteymour). She should therefore have dismissed the appeal for want of jurisdiction instead. Accordingly, her decision to dismiss the appeal on human rights grounds stands, albeit for a different reason.

33. In relation to the EEA ground of appeal, Ms Dirie and Mr Jarvis agreed that, if I were to conclude that the judge had materially erred in law, the appropriate course would be to remit the case to the First-tier Tribunal.

34. In the majority of cases, the Upper Tribunal when setting aside the decision will be able to re-make the relevant decision itself. However, the Practice Statement for the Immigration and Asylum Chamber of the Upper Tribunal at para 7.2 recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

> "(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

35. In my judgment this case falls within para 7.2(b). In addition, having regard to the Court of Appeal's judgment in JD (Congo) & Others [2012] EWCA Civ 327, I am of the view that a remittal to the First-tier Tribunal is the right course of action.

36. The appellant now has notice that the respondent wishes to withdraw the concession. She had notice of this issue at the hearing before the judge which has been reinforced by the proceedings before me. She has ample time to prepare for the next hearing on this basis. I therefore permit the respondent to withdraw the concession.

37. Accordingly, the issues at the next hearing will be:

    i. Whether the appellant and the sponsor have entered into a marriage.

    ii. If so, whether the marriage is valid, applying Awuku.

    iii. If so, whether the marriage is a marriage of convenience. In this respect, it will be for the judge on the next occasion to decide the extent to which (if at all) the fact that the respondent has accepted that the relationship between the appellant and the sponsor subsequent to the date of the first decision was a subsisting one, albeit not a genuine one, helps him/her decide whether the marriage was a marriage of convenience at the point of inception.

    iv. If the appellant and the sponsor did enter into a valid marriage but the marriage was a marriage of convenience at the point of inception, whether the appellant was in a durable relationship as at the date of the first decision (24 September 2015).

DIRECTIONS

Any documents that the appellant wishes to rely upon on the issue of the validity of the proxy marriage, together with a translation of the marriage certificate, to be served at least 21 days before the hearing date.

Decision

The decision of Judge of the First-tier Tribunal Andrew involved the making of errors on points of law such that the decision to dismiss the appeal under the EEA Regulations is set aside. Her decision to dismiss the appeal on human rights grounds stands.

This case is remitted to the First-tier Tribunal for that Tribunal to re-make the decision on the appellant's appeal under the EEA Regulations by a judge other than Judge of the First-tier Tribunal Andrew.

Signed Date: 28 April 2017
Upper Tribunal Judge Gill