Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07611/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 September 2017	**On 5 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SUKHJINDER SINGH BRAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Sowerby, Counsel instructed by ATM Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Greasley, sitting at Hatton Cross on 30 November 2015) dismissing on the papers the appellant's appeal against the decision of the respondent to refuse to issue him with a residence card as confirmation of his right to reside in the United Kingdom as a family member of an EEA national exercising Treaty rights here. The sole ground

of refusal was that the appellant had entered into a marriage of convenience with his EEA national sponsor. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

The Reasons for the Grant of Permission to Appeal to the Upper Tribunal

2. On 7 August 2017, Deputy Upper Tribunal Judge McGeachy granted the appellant permission to appeal for the following reasons:

   (1) The application is made by the appellant in person. He asserts that the Judge of the First-tier has incorrectly placed the burden of proof upon the appellant, when the burden is on the respondent to show that there is a marriage of convenience. The grounds also state that the appellant had not received letters inviting him for interview and that is why he had not attended.

   (2) I consider that there are arguable errors of law in the determination.

   (3) The Judge states that the burden lies on the appellant to show that the marriage is not one convenience; that is arguably wrong.

The Appeal Hearing

3. At the hearing to determine whether an error of law was made out, Mr Sowerby explained that, since the grant of permission to appeal, the appellant had instructed ATM Solicitors, who had in turn instructed him to appear on the appellant's behalf. He acknowledged that Mr Tufan had produced a letter dated 8 July 2014 and a letter dated 18 July 2014 addressed to the appellant at an address in Harlington, Hayes, Middlesex. The first letter invited the appellant and his spouse to attend an interview in Liverpool on 1 August 2014; and the second letter invited him and his spouse to attend an interview on 20 August 2014. However, he submitted, it did not appear that these letters were included in the Home Office bundle which was before the First-tier Tribunal. Accordingly, he submitted, the respondent had not made out a *prima facie* case that the appellant had been invited to attend a marriage interview, and consequentially the respondent had not made out a *prima facie* case that the marriage to the EEA sponsor was one of convenience. Thus, the Judge had erred in law in not recognising the evidential deficiency in the respondent's case, and his finding that the marriage was one of convenience was unsustainable and/or inadequately reasoned.

4. On behalf of the Secretary of State, Mr Tufan adopted the Rule 24 response opposing the appeal settled by a colleague. It was open to the Judge to find that the appellant had failed to attend a marriage interview to which he had been invited. Moreover, the respondent had another ground for suspecting the marriage to be one of convenience, which was that his application for further leave to remain outside the Rules had been voided on 10 January 2014, and so he did not have lawful status under the Rules after his existing leave to remain expired on 10 May 2014.

Discussion

5. The appellant had made an earlier application for a residence card as the spouse of an EEA national sponsor, which had been refused on 13 November 2013 on the basis that there was insufficient evidence of her exercising Treaty rights as a self-employed person. The appellant made a fresh application for a residence card on 9 May 2014, which was the day before his leave to remain as a student expired.

6. When refusing the application on 21 October 2014, the respondent observed that the appellant was now here without authority. In order to provide him with the opportunity to demonstrate that he was a family member of an EEA national exercising Treaty rights in the UK, the Department had invited him to attend a marriage interview on 1 August 2014, for which he had failed to confirm attendance. He was then invited to attend a marriage interview on 20 August 2014, and again he failed to confirm his attendance. The interview was an opportunity for him to provide more evidence to satisfy the Department that he was related as claimed to Izabella Kovacs, a Hungarian national.

7. As he had failed to comply with the request without good reason, the SSHD was allowed to draw any factual inferences about his entitlement to a right to reside as might appear appropriate in the circumstances; and to decide, following such an inference, that the person did not have or ceased to have a right to reside in the UK. Consequentially, his application had been refused under Regulations 2 and 20B(5) of the Immigration (EEA) Regulations.

8. The appellant's grounds of appeal to the First-tier Tribunal were vague and formulaic. They did not put in issue the respondent's assertion that the appellant had twice been requested to attend a marriage interview with his spouse, but had failed to respond to either request.

9. As was rehearsed by Judge Greasley in his decision at paragraphs [8] to [10], the appellant was initially represented by Visa Expert Limited, and later on by Marks & Marks Solicitors. The appellant initially asked for a paper hearing, but then requested an oral hearing. However, shortly before the oral hearing listed for 13 September 2016, the appellant's new representatives, Marks & Marks Solicitors, wrote to the Tribunal to say that they had recently been instructed, and requesting an adjournment of the hearing listed for 13 September 2016. The Tribunal refused the adjournment request, as the appointment of new solicitors was not a ground for an adjournment. On 9 September 2016, the same solicitors wrote back to the Tribunal stating that, "*due to unforeseeable circumstances*" the appellant would not be able to attend the hearing on 13 September, and so he was now requesting a paper appeal disposal.

10. The Judge acknowledged that the appellant had previously provided a short bundle of documents, together with a witness statement signed by him on 15 July 2016. In his witness statement, the appellant claimed that

he had never received any invitation letter to attend an interview. He said that he had always updated his current address to the Home Office from time to time. He claimed that the respondent had a history of sending post to other addresses which were not relevant. For example, on 3 February 2015 his representatives had specifically requested the Home Office to send correspondence to their address, but the Home Office had sent the refusal decision to a different address. The respondent had not enclosed any piece of evidence in their bundle which proved that he had been invited for a marriage interview. The appellant said that this cast doubt upon whether the respondent had written the two letters. The appellant said that he lived with his spouse until the end of March 2016, but that due to family issues they had now separated, and the appellant was now in the process of obtaining a divorce.

11. As stated at paragraph [11], the appellant claimed that he had asked his estranged spouse to provide supporting evidence in relation to her employment and residence, but she had refused to do so.

12. At paragraph [13], the Judge referred to **Papajorgji (EEA spouse/marriage of convenience) Greece [2012] UKUT 00038.** He said that the ratio of that decision was that the appellant did not bear the burden of proof to establish that the marriage was not one of convenience until such time as the respondent raised the issue by evidence. If such evidence was raised, it was for the appellant to properly address any such suspicions. The Judge found, at paragraph [14], that evidentially the respondent had raised "*such evidential suspicions of a proper and legitimate basis, namely by virtue of the appellant's failure to attend the marriage interviews.*"

13. At paragraph [15], the Judge held that the appellant did not properly address these assertions. Notwithstanding the appellant's appeal statement, there was no letter from his previous representative dated 3 September 2015 specifically requesting the respondent to send all correspondence "*to the appellant's address*". Nor was there any available documentary evidence to suggest that the appellant specifically notified the Home Office of any changes of address in the past. It was relevant that the appellant had settled on having his appeal determined on the basis of documentary evidence; he had not availed himself of the opportunity to attend any appeal hearing where his account could have been tested through proper cross-examination.

Ground 1

14. The Judge directed himself, in paragraph [2], as follows: "*The burden of proof is upon the appellant to demonstrate, on a balance of probabilities, that the marriage is not one of convenience in the event that I find that the respondent has raised reasonable suspicions on this issue by virtue of credible evidence. There is an evidential burden on the claimant to address evidence justifying reasonable suspicion that the marriage was entered into for the predominant purpose of security residence rights.*"

15. The Judge's self-direction in the second sentence of paragraph [2] is correct. The Judge's self-direction in the first sentence is wrong. The Judge's error in this regard is replicated in paragraph [13] of his decision where he summarises and adopts the ratio of **Papajorgji**. His understanding of the ratio is not wrong, but the authority is no longer good law on the question of the incidence of the legal burden of proof. The legal burden of proof always rests with the SSHD to make out a case that the marriage is one of convenience, as was clarified in **Agho v SSHD [2015] EWCA Civ 1198**. However, the differences between the two approaches are quite subtle and the outcome of the two approaches is, in practice, likely to be the same, albeit not in **Agho** (where the *prima facie* case was very weak). If an appellant does not put in credible evidence to rebut the evidence which engenders reasonable grounds to suspect that the marriage is one of convenience, the legal burden of proving a marriage of convenience is likely to be discharged.

Ground 2

16. Mr Sowerby rightly (in my view) focused his attention on the question of whether it was open to the Judge to find, as he did in paragraph [14], that the respondent had raised a *prima facie* case by virtue of the appellant's failure to attend the marriage interviews.

17. On the particular facts of this case, I find that it was open to the Judge to find as a fact that the appellant had failed, without reasonable excuse, to attend the marriage interviews to which he and his spouse had been invited.

18. As a general rule, there is no requirement to give disclosure in respect of an agreed fact. Although it would have been best practice for the invitation letters to have been included in the Home Office bundle, the appellant had not raised an issue in his grounds of appeal about the letters not being sent or received. The letters were addressed to the appellant at the address which he had said in his application form should be used for correspondence. It was not the appellant's case that he had changed his correspondence address before February 2015. The appellant did not raise an issue about receiving the invitation letters until nearly two years after they had been supposedly sent. If the appellant had elected for an oral hearing, it is likely that the Presenting Officer at the oral hearing would have dug out the two letters, as Mr Tufan did for the hearing in the Upper Tribunal. But as the appellant elected for a paper hearing, it was not procedurally unfair for the Judge to proceed on the premise that the hearsay assertions made in the refusal letter were true, namely that the invitation letters had been sent to the appellant at the address which he had nominated for the receipt of correspondence from the Home Office. Although the factual assertions made in the refusal letter were not the best evidence (the best evidence being the production of the letters themselves, and proof of delivery), they constituted hearsay evidence which the Judge could properly take into account.

19. Although not directly on the point, the observations of the Upper Tribunal in **Mitchell (Basnet revisited) [2015] UKUT 563** have some relevance to the issue under discussion. In **Mitchell**, the Tribunal distinguished the earlier case of **Basnet** on two grounds. The second ground that distinguished the case before them was that there had been a lengthy delay before the appellant had asserted that the application in question had been wrongly rejected on validity grounds. The Tribunal found that the appellant's failure to raise the matter at the time impacted upon the question of where the burden of proof lay, and that in such a case, *"a more nuanced approach to the burden of proof may be needed"* (headnote, paragraph 2). At paragraph [12], the Tribunal said:

> Further, the position is that at all relevant times the applicant knew that the Secretary of State's position was that her leave had expired on 31 January 2010. We have great sympathy with Mr Matthews's submissions that if she wanted to assert the Secretary of State's view was wrong, she should have done so at the time: this view is if anything reinforced by the evidence to which we refer below. *One reason why any difficulty needs to be taken up promptly is that nobody is entitled to require anybody else to keep documents indefinitely* (my emphasis).

20. In the light of the appellant's lengthy delay in raising the issue of the alleged non-service of the invitation letters, coupled with the appellant electing not to attend an oral hearing, it was open to the Judge to find that the appellant had not credibly shown that the invitation letters had not been sent to him and received by him. Accordingly, consistent with Regulation 20B, it was open to the Judge to dismiss the appeal for the reasons which he gave.

Conclusion

21. Although the Judge's line of reasoning could have been better, and he erroneously implied that the legal burden of proof – as distinct from an evidential burden - shifted to the appellant to dispel reasonable suspicion, the decision is not vitiated by a material error of law.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed Date 27 September 2017

Judge Monson
Deputy Upper Tribunal Judge