



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: UI-2021-001725

EA/50673/2020; IA/01981/2020

THE IMMIGRATION ACTS

**Heard at Field House
On the 12 August 2022**

**Decision & Reasons Promulgated
On the 30 November 2022**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

**SAJID LATIF
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Garrod, Counsel, instructed by Marks & Marks
Solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of the First-tier Tribunal dismissing the appeal of the appellant against a decision of the Secretary of State refusing him a residence card as confirmation of a right of residence under European Community law.

2. The point of contention was whether his marriage was a marriage of convenience. The respondent said that it was and it is accepted law that this was for the respondent to prove.
3. The difficulty I have is that in many ways the First-tier Tribunal's decision is hard to criticise. As Mr Tufan pointed out firmly, a particular problem for the appellant is that the judge directed herself correctly and, when a judge has set out the necessary legal tests correctly, it is not easy to conclude that she has not in fact applied them. I feel the weight of this submission.
4. However, the crucial paragraph is at paragraph 82 where the judge says:

“Looking at all the evidence including (sic) I am not satisfied that the marriage between the appellant and the sponsor is a genuine one. It appears to me that it is a marriage of convenience, entered into for immigration purposes”.
5. The judge then dismissed the appeal.
6. The judge reached that conclusion by analysing the evidence before her. She particularly noted the lack of any evidence of the appellant and his wife enjoying any life together and the judge apparently accepted evidence that some months before the marriage ceremony the appellant's wife was living with another man and admitted to assisting the appellant improperly by supporting his application.
7. These findings are very much against the appellant's case but that is not the area of dispute.
8. Permission was granted by a First-tier Tribunal Judge who draws a contrast between the trial judge's direction at paragraph 45 which the granting judge saw as correct and the application of that suggested at paragraph 46 which the judge found to be at least arguably wrong. Paragraph 45 of the Decision and Reasons might be a little hard to read at first but I am satisfied that the judge correctly directed herself that the burden of proof was on the Secretary of State and that an evidential burden may then shift to the appellant if that burden is discharged. There is no complaint about that.
9. At paragraph 46 the judge directed herself that reasonable suspicion is not enough but she says:

“If there is sufficient to infer that the marriage is not genuine, the evidential burden that the marriage is a genuine one moves to the appellant. In this case the responses of the sponsor to questions in interview when the Immigration Officers visited the address at [London] were sufficient to raise the inference that the subsequent marriage was not genuine and the evidential burden moves to the appellant”.
10. The concern is that although the judge directed herself carefully elsewhere that it was the evidential burden that shifted, paragraph 46 suggests that in reality the judge shifted the legal burden and thereby reached a conclusion for unsustainable reasons.

11. The grounds of appeal were not drawn by Mr Garrod but he adopted them. They fill twelve paragraphs. They complain that the judge appeared more concerned with the quality of the relationship which was described in the grounds as “immaterial to the assessment of whether the marriage is one of convenience” rather than actually deciding if the Secretary of State had proved that the marriage was in fact one of convenience.
12. I do not agree that the quality of the relationship is *immaterial* to the necessary assessment but the grounds are right to assert that assessing the quality of the relationship did not determine if the marriage was one of convenience which is what the judge had to decide.
13. I do respectfully wonder if the concern with shifting evidential burdens is more of a distraction than assistance. In **DK and RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 (IAC)** the Vice President, Mr C G M Ockelton, considered the proper approach when the Secretary of State had to prove that someone had been dishonest. There the Vice President explained at paragraph 7 that the language of shifting burdens might be an analysis of what in many cases actually happens when a fact-finder is deciding if, for example, someone was dishonest but “the burden of proof does not shift from one side to the other during the course of a trial”.
14. What is needed is a clear analysis of the respondent’s case that the marriage was one of convenience and a clear decision about whether that assertion in fact has been proved.
15. I can go through the Decision and Reason in a particular way and find passages which clearly support the Secretary of State’s case and Mr Tufan’s submissions. Nevertheless, I remain unpersuaded in the light of paragraph 82 that the judge was truly focused on whether the respondent had proved that the marriage was one of convenience and I am persuaded that the appellant is entitled to the benefit of my uncertainty.
16. I find the First-tier Tribunal erred in law by not applying clearly the correct self-direction that it was for the Secretary of State to prove that the marriage was one of convenience.

Notice of Decision

17. I find the First-tier Tribunal erred in law and I set aside the decision and direct that the case be heard again in the First-tier Tribunal.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 17 November 2022