IAC-AH-LEM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10918/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25th February 2016	**On 24th March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

IMRAN HOSSAIN
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Lewis of Counsel
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appealed against the decision of Judge Widdup of the First-tier Tribunal (the FTT) promulgated on 19th June 2015.

2. The Appellant is a male citizen of Bangladesh born 8th July 1989 who on 2nd October 2014 applied for an EEA residence card as he is the unmarried partner of a Romanian citizen Maria-Christina Corlaciu (the Sponsor) who is exercising treaty rights in the United Kingdom. The application was made on the basis that the Appellant and Sponsor are in a durable relationship and therefore the Appellant is an extended family member of the Sponsor, and entitled to a residence card pursuant to regulation 8(5) of The Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations).

3. The application was refused on 3rd March 2015 with reference to regulations 2 and 8(5) of the 2006 Regulations. The Respondent contended that the relationship was one of convenience, and this conclusion was reached because of inconsistent answers given by the Appellant and Sponsor when they were separately interviewed. It was also contended that insufficient documentation had been submitted to suggest that the couple are in a durable relationship.

4. The appeal was heard by the FTT on 3rd June 2015. After hearing evidence, the FTT decided that no importance should be given to the answers in interview which were inconsistent, and the interviews alone did not prove that the relationship was one of convenience. However the FTT found that there were other factors which did indicate that the relationship was one of convenience, and the appeal was therefore dismissed.

5. The Appellant applied for permission to appeal to the Upper Tribunal. In summary it was submitted that the FTT erred by dismissing the appeal on grounds not raised by the Respondent. It was noted that the Respondent was not represented before the FTT, and the FTT did not have a copy of the Respondent's bundle at the hearing, but only received this after the hearing had concluded. The FTT found that the Appellant had given oral evidence about his immigration history which was inconsistent with evidence contained in a letter from his solicitors dated 2nd October 2014. It was contended that it was wrong in law for the FTT to draw an adverse inference from this, as the FTT should have reconvened the hearing in order to allow the Appellant to clarify his evidence or submissions to be made on that point.

6. The FTT in dismissing the appeal relied upon other grounds not raised by the Respondent, and which were not raised at the hearing. It was contended that the FTT should not have made the findings contained in paragraphs 49-53 of the decision, without giving the Appellant the opportunity to address issues, which had not been raised either by the Respondent in the refusal letter or at the hearing before the FTT.

7. It was contended that the FTT erred in law in considering regulation 8 of the 2006 Regulations by considering whether the relationship was one of convenience, rather than considering whether the Appellant had proved that he is in a durable relationship.

8. It was contended that the FTT erred by failing to have regard to relevant factors such as the evidence of the Sponsor who was accepted by the FTT to be credible, and in failing to make clear findings on evidence given by a witness, Mr Huda.

9. Permission to appeal was granted and directions issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FTT had erred in law such that the decision should be set aside.

Error Of Law

10. At a hearing before me on 15th January 2016 I heard submissions from both parties regarding error of law. On behalf of the Appellant it was contended that the FTT decision was materially flawed by reason of procedural unfairness. The FTT had rejected the reasons given by the Respondent for refusing the Appellant's application, and thereafter substituted reasons for dismissing the appeal, which had not been put to the Appellant, and therefore the Appellant had not had an opportunity to address those issues.

11. On behalf of the Respondent reliance was placed upon a response dated 6th November 2015 submitted pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 and no further oral submissions were made. In summary the rule 24 response contended that the FTT had directed itself appropriately, considered all the evidence, and provided adequate reasons.

12. I set aside the FTT decision, concluding that the FTT had materially erred in law for the following reasons.

13. The Respondent had refused the application because of inconsistencies displayed in interviews, but the FTT attached no weight to those reasons explaining in paragraph 42:

> "42 Unlike the Respondent I attach no importance to the answers in interview which were inconsistent. Even couples in a long marriage can give differing answers to the same question about their relationship without that meaning that their relationship is not genuine and long-standing."

14. The FTT then went on to find in paragraph 49;

> "49 However, I find that there are other factors of greater weight which do show that this relationship is or may be one of convenience."

15. The FTT then went on in paragraphs 50-56 to set out other reasons for dismissing the appeal. In summary the FTT found that this was a relationship initiated on line between a Bangladeshi Muslim attempting to prolong his right to remain in the UK and a Romanian woman from a Christian background. The FTT found that the Appellant had it in mind at that time to prolong his stay in the UK by making an application pursuant to Article 8, and thereafter by entering into a relationship with the Sponsor was later able to claim that he had family life in the UK.

16. The FTT did not find the Appellant to be credible or reliable, noting that he had given oral evidence that no decision had been made on his Article 8 claim that he had made earlier, whereas the letter from his solicitors which the FTT discovered after the hearing, indicated that there had been an appeal to the FTT which was unsuccessful, and there had been a further application for permission to appeal to the Upper Tribunal and a decision was awaited on that.

17. In addition the Appellant's evidence that a relationship such as his with the Sponsor would present no problems in Bangladesh was wholly unsupported by background evidence, which caused the FTT to find that the Appellant was minimising difficulties such a relationship would attract in Bangladesh, which damaged his credibility.

18. The FTT was satisfied that the Sponsor embarked on the relationship in the belief that the Appellant intended a long-term relationship, but it was not accepted that the Appellant had the same intention, the FTT finding that his intention was to present the Respondent with evidence of a relationship in support of an application to prolong his time in the UK.

19. The FTT found that the evidence given by the witness Mr Huda was outweighed by the other factors referred to paragraphs 50-55, and therefore concluded that the relationship between the Appellant and Sponsor was not a durable one.

20. I decided that the FTT should have reconvened the hearing. It appeared that the letter from the Appellant's solicitors dated 2nd October 2014 contradicted the oral evidence given by the Appellant. This was only discovered after the hearing. The Appellant should have been given an opportunity to comment upon this. This apparent conflict in evidence influenced the FTT into making an adverse credibility finding.

21. The Appellant was not put on notice of the factors set out in paragraphs 50-55 of the FTT decision, as his appeal was based upon the reasons given for refusing his application, contained within the Respondent's refusal letter dated 3rd March 2015. There is no doubt that difficulties were caused for the FTT by not having received and read the Respondent's bundle prior to the hearing, and the Respondent not being represented.

22. However it was unfair to make findings on issues of which the Appellant was not given notice, and therefore did not have the chance to address.

23. The hearing was adjourned to enable further evidence to be given, so that the decision could be re-made by the Upper Tribunal. The findings contained in paragraph 42 of the FTT decision had not been challenged and were therefore preserved, as was the finding in paragraph 48 that the interviews taken alone do not provide a sound basis for the conclusion that the relationship is one of convenience. Also not challenged and therefore preserved was the finding in paragraph 54 that the Sponsor embarked on the relationship in the belief that the Appellant intended a long-term relationship.

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24. I ascertained that I had received all documentation upon which the parties intended to rely, and that each party had served the other with any documentation upon which reliance was to be placed.

25. I had received the Respondent's bundle with Annexes A-F, and the Appellant's bundle comprising 479 pages, together with a further nineteen-page bundle submitted at the error of law hearing on 15th January 2016 and which had been admitted into evidence pursuant to rule 15(2A) of the 2008 Procedure Rules.

26. Mr Lewis made a further rule 15(2A) application, to admit into evidence a third statement of the Sponsor, together with witness statements from Cheryl Huda and Lucie Philbin, both of whom were present in order to give evidence. There was no objection from Mr Duffy to this application which was granted so that the statements could be admitted into evidence.

27. Mr Duffy advised that he had no oral submissions to make. He explained that this was because the Respondent's case, which was set out in the refusal letter dated 3rd March 2015, was that the relationship was one of convenience, because of inconsistent answers given at interview, when the Appellant and Sponsor were questioned about their relationship. The FTT had rejected this as a reason for finding the relationship to be one of convenience, and those findings had not been challenged and had been preserved. Mr Duffy did not intend to pursue the other matters raised by the FTT.

28. Mr Lewis indicated that the Appellant, Sponsor and witnesses were present and if necessary he would tender them for cross-examination. This was not however necessary as Mr Duffy indicated that he had no questions, and the Tribunal had no questions.

29. Mr Lewis therefore submitted that the appeal should be allowed. Both representatives agreed that because the application was for a residence card as an extended family member, if the appeal was allowed, it should be allowed to the extent that the Respondent's decision was not in accordance with the law, and therefore the decision remained outstanding before the Respondent to consider regulation 17(4) of the 2006 Regulations.

30. I announced at the hearing that the appeal was allowed and that I would issue a written decision confirming my reasons. Mr Lewis applied for a fee award, which Mr Duffy indicated he could not oppose.

My Conclusions and Reasons

31. In allowing this appeal, I have taken into account all of the evidence both oral and documentary placed before the Tribunal, and considered that evidence in the round. Generally, in an appeal against a refusal to issue a residence card, the burden of

proof would be on the Appellant, and the standard of proof is a balance of probabilities.

32. In this appeal, the primary reason for refusing the application was that the Respondent contended that the parties had entered into a relationship of convenience. The Court of Appeal recently gave guidance in Rosa v Secretary of State for the Home Department [2016] EWCA Civ 14. The guidance related to marriages of convenience, but the same principles apply in relation to relationships of convenience. It was held that the legal burden was on the Secretary of State to prove that an otherwise valid marriage was a marriage of convenience so as to justify the refusal of a residence card under the 2006 Regulations. The Upper Tribunal decision in Papajorgji [EEA spouse – marriage of convenience) Greece [2012] UKUT 38 (IAC) was approved. Although the legal burden of proof in relation to marriage lay on the Secretary of State, if the Secretary of State adduced evidence capable of pointing to the conclusion that the marriage was one of convenience, the evidential burden shifted to the Appellant. In this appeal, I do not find that the Secretary of State has adduced evidence capable of pointing to the conclusion that the relationship was one of convenience.

33. The issues raised by the FTT at the hearing, had not been raised by the Respondent when the application for a residence card was refused, and were not relied upon at the hearing before the Upper Tribunal.

34. I have already set out paragraph 42 of the FTT decision, which finding was preserved, and I set out below paragraph 48 which is also preserved;

> "48 I do not accept that the interviews taken alone provide a sound basis for that conclusion. If that were the only basis upon which it could be said that this relationship was one of convenience the appeal would fail." (the FTT must have meant the appeal would succeed)

35. Having preserved the unchallenged findings that the answers given in interview do not provide a basis for contending that the relationship is one of convenience, I am satisfied that the parties are in a durable relationship. The Sponsor was found to be credible by the FTT and that finding was preserved. I am satisfied that the Appellant did not enter into this relationship for the purpose of gaining leave to remain in the United Kingdom. I accept his evidence that he and the Sponsor first made internet contact in November 2012, and thereafter remained in contact until the Sponsor visited the United Kingdom in May 2014, and that the parties started to cohabit on 10th May 2014 and are still living together.

36. There is extensive documentary evidence contained within the Appellant's bundle, to prove that the parties cohabit, and to support their contention that they are in a durable relationship. It is accepted that for the purposes of the 2006 Regulations, and consideration of a durable relationship, there is no formal requirement that the parties must have cohabited for at least two years.

37. I note that further evidence, which I regard as independent, has been produced in support of the claim that the parties are in a durable relationship. This is the witness statement evidence of Cheryl Huda, and Lucie Philbin. I attach particular weight to the evidence of Lucie Philbin who explained that she rented a room in the flat occupied by the Appellant and Sponsor and lived there from August 2014 until October 2015. At this time Ms Philbin was working full-time with the Army Reservists at the University of London Training Corps. She has explained in her witness statement that in her view the Appellant and Sponsor were in a normal committed relationship during the time that she shared their flat with them.

38. Ms Philbin has commented specifically in her statement, that she is closer to the Sponsor than the Appellant, and that if she thought that the Appellant was using the Sponsor, she would not consider attending the Tribunal to give evidence to support him. She did attend the Tribunal hearing, and was prepared to answer any questions put to her, and I do attach significant weight to her independent evidence.

39. I therefore conclude that the Secretary of State has not discharged the burden of proof, whereas the Appellant has provided sufficient evidence to prove that he and the Sponsor are in a durable relationship, and therefore the appeal should be allowed.

40. I set out below the third paragraph to the head note to the decision in Ihemedu (OFM – meaning) Nigeria [2011] UKUT 00340 (IAC);

> "(iii) Regulation 17(4) makes the issue of a residence card to an OFM/extended family member a matter of discretion. Where the Secretary of State has not yet exercised that discretion the most an Immigration Judge is entitled to do is to allow the appeal as being not in accordance with the law leaving the matter of whether to exercise this discretion in the Appellant's favour to the Secretary of State."

41. In this case I have found that the Appellant is an extended family member of the Sponsor. However the Respondent has not exercised discretion pursuant to regulation 17(4) and therefore I conclude that the decision is not in accordance with the law, which means that the Respondent must now consider the issue of discretion pursuant to regulation 17(4) of the 2006 Regulations. In my view, and both representatives agreed, this disposal is open to the Tribunal because the Respondent's decision pre-dated the changes made to appeal rights introduced by the Immigration Act 2014, which abolished the right of appeal on grounds that the decision is not in accordance with the law.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision.

The appeal is allowed, to the extent that the Respondent's decision is not in accordance with the law.

Anonymity

No anonymity direction was made by the FTT. There has been no request for anonymity to the Upper Tribunal and I see no need to make an anonymity order.

Signed Date 29th February 2016

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The appeal is allowed. I make a full fee award in the sum of £140.

Signed Date 29th February 2016

Deputy Upper Tribunal Judge M A Hall