



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/06608/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 27<sup>th</sup> February 2018

Decision & Reasons Promulgated  
On 17<sup>th</sup> May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HAKIM ZOUARGUI  
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr J McGirr, Home Office Presenting Officer  
For the Respondent: Ms C Jacquiss, Counsel instructed by Harrow Law Centre

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against a decision of Judge Freer, promulgated on 1<sup>st</sup> November 2017, whereby he allowed the appeal of Mr Hakim Zouargui against revocation of his residence card that had been granted to him as the spouse of an EEA national exercising free movement rights in the United Kingdom.
2. The case for the Secretary of State was that whilst acknowledging that Mr Zouagri had married Amelie Picard in a civil ceremony on 18<sup>th</sup> September 2010, that marriage was a “sham”; that is to say, a marriage had been entered into in order to secure the Appellant’s immigration status in the United Kingdom.

3. For the rest of this decision I shall refer to the parties by their status in the First-tier Tribunal; that is to say, to Mr Zouargui as “the Appellant” and to Secretary of State as “the Respondent”.
4. Following some early confusion in reported decisions of this Tribunal concerning ‘marriage of convenience’ appeals, the law concerning the burden of proof is now clear and may be simply stated. The legal burden of proof rests from first to last upon the Secretary of State [Sadovska v SSHD [2017] UKSC 54]. Some authorities also refer to a ‘shifting’ evidential burden. At the risk of clouding the issue, I understand this to be a reference to the requirement for the Secretary of State to adduce sufficient evidence for the appellant to have ‘a case to answer’ before he may be expected to adduce evidence of his own. This does not however affect the legal burden of proof, which remains firmly upon the Secretary of State throughout the proceedings.
5. Before turning to the Secretary of State’s Grounds of Appeal, it may be helpful to review the evidence upon which the Respondent relied in discharging the legal burden of proof in this appeal. Mr McGirr very helpfully placed it under two headings. Firstly, an Experian credit agency report which allegedly suggested that Amelie Picard had not been living with the Appellant at their last marital home (1) since September 2011, and that she had thereafter been living at an address in (2) Secondly, the Appellant’s admission that his first marriage to an Italian national (who had been living in the United Kingdom at the time of the marriage) had indeed been a ‘sham’. It was this evidence that caused enforcement officers to pay an unannounced visit to the Appellant’s home at 7.00 a.m. on 15<sup>th</sup> March 2016. There followed an interview with the Appellant at his home in which the evidence contained within an undisclosed Experian credit report was put to him. In reply, the Appellant said that he could not understand why that report suggested that he had been separated from his wife since at least September 2011 and asserted that in fact cohabited until February 2013. That is, I hope, a fair summary of the evidence that the Secretary of State relied on to discharge the burden of proof.
6. The judge dealt with his approach to the fact that the Appellant had, by his own admission, previously entered into a sham marriage at paragraph 39 of the decision:-

The first wedding was a sham but that fact is of no probative value regarding the nature of the second marriage. It raises a suspicion and is not evidence. The second marriage had ended in divorce so there was no legal basis for a check in 2016.

7. The judge dealt with the Experian evidence at paragraphs 49 to 50. Before I quote those paragraphs, it is first necessary to observe that the Respondent never in fact produced the Experian report which, it was said, showed that the Appellant’s second wife had been living at (2) since September 2011. The only evidence from Experian that was produced at the hearing was by the Appellant. I therefore assume that this was the report to which the judge was referring in the following paragraphs:-

49. If I am still in error, then I should assess the contents of the Experian evidence before me by reference to the evidence as a whole. The report before me is baffling and cannot prove what the Respondent suggests without more. Sometimes it give (sic) a long name for the wife and sometimes a short name, raising the possibility

that it has conflated details of two or more wholly separate individuals. If so, that is a fatal weakness in that evidence.

50. The report does not show who was living where when, by reference to start and finish dates or spot checks. It may even show that one person was living at two addresses at the same date, in which case the Respondent's case collapses, but that is a matter of interpretation for which the Respondent has produced no expert evidence. If the Respondent wishes to rely on such a frankly baffling credit report, it is necessary to produce an expert on such reports, one who can advise a Judge with no expert knowledge of the topic.
  51. I am on more solid ground when I take account of the solicitor's evidence in his witness statement. He confirms that the report comes from the wife. This is not obviously likely to occur, if there is no past relationship. Then I turn to the letter from Harrow Law Centre, which attached Amelie Picard's own Experian report and placed an interpretation upon it, which was seriously at odds with the officer's view. It is also at odds with the dates (if not the sequence) given by the Appellant in the surprise visit. I accept the unchallenged evidence that he had taken Tramadol for pain relief and that he was vague at the time.
  52. I draw a conclusion that Ms Picard had lived at (2) at least from April 2013 or at any rate for some period of 3 years and 1 month commencing prior to the 2016 search date. The statement of the Appellant suggests that she moved there to rent a studio flat in February 2013 as the relationship was winding down ...
8. I turn now to the grounds. It is said that the judge's approach to the relevance of the previous marriage is irrational, or at the very least, inadequately explained. The Appellant now accepts that his marriage to his first wife, a Miss Scifo, was a marriage of convenience. The second ground is that his approach to the credit agency evidence was also flawed because that evidence showed that Miss Picard had been living at a different address to the claimed marital home since 2011 and thus gave sufficient grounds for suspicion to justify undertaking an enforcement visit to the Appellant's property so as to interview him in relation to the Secretary of State's concerns.
  9. I deal firstly with the Experian report. I am told by Miss Jacquiss (who also appeared before the First-tier Tribunal) that at no point did the Secretary of State adduce a report from Experian in order to support her claim that the Appellant's second wife had been living at (2) since September 2011. That was a very grave failing on the part of the Secretary of State. There is in my experience a tendency amongst those who prepare cases for the Secretary of State to assume that the burden of proof will necessarily be upon the Appellant and that an appeal may be successfully resisted by simply challenging the evidence relied upon by the Appellant at the hearing. However, where the Secretary of State bears the burden of proof, it will generally be necessary for her to prepare her cases in a similar fashion to a criminal prosecution. This involves ensuring that there is sufficient evidence to prove each ingredient of the charge that is to be laid against the applicant who is appealing the adverse decision. It is therefore reasonable to expect that an Immigration Officer will have made a contemporaneous written note of an otherwise unrecorded interview and, where it is clear that the account of the interview will be disputed, for him or her to be made available for cross-examination at the hearing of the appeal. Fortuitously, in this case the Appellant did

not challenge the Immigration Officers' account of the interview. This was no doubt because he was not alleged to have made any admissions during the course of it. It accordingly took matters no further in assisting the Secretary of State to discharge the burden of proof.

10. There was, however, a very significant challenge to Respondent's case with regard to what was claimed to be the contents of an 'Experian' report that had apparently been in the possession of the Immigration Officers who made the unannounced visit to the Appellant's home in March 2016. As I have noted already, it was the Home Office case that the Appellant's second wife had been living separate and apart from him since September 2011. The Appellant's case on the other hand, as he made plain in his interview with the Immigration Officers, was that they had continued living together until April 2014 [see paragraph 4, above]. Despite being placed on notice of this issue, I am told by Ms Jacquiss that the Respondent failed to disclose the Experian report. This was in spite of repeated requests to do so. The judge was therefore left with no alternative but to accept the Appellant's account that he had continued to live with his second wife until April of 2014. The Respondent's complaint that the Tribunal ought to have accepted her 'evidence' in preference to that of the Appellant is thus wholly without merit
11. There is however merit in the complaint that the judge adopted a flawed approach to the Appellant's previous sham marriage. It is most decidedly not the case, as the judge suggested, that this was of "no probative value regarding the nature of the second marriage". The true position was that the Appellant's admission that he had previously entered into a 'sham' marriage was what a criminal lawyer might characterise as evidence of "propensity". It would thus defy common sense to suggest it could never be capable of providing evidence of similar alleged misconduct. It is however right to say that evidence of propensity is not by itself capable of proving other similar misconduct. It is at most capable of providing some support for other evidence of the alleged subsequent misconduct.
12. I have nevertheless concluded that the judge's error in his approach to the Appellant's first marriage was immaterial to the outcome of the appeal. This is because, given my findings in relation to the 'Experian' report (above), there was no other evidence of a second 'sham' marriage for the evidence of the first marriage to support. The judge was thus not only entitled, but bound to find that the Respondent had failed to prove her case.
13. Before leaving this case, I consider it appropriate to make one further observation concerning the judge's approach to the evidence. I have noted that he was considerably excised by what he viewed as breaches of the appropriate procedures and protocols to be followed by enforcement officers prior to making an unannounced visit to the home of a suspect. Moreover, he appears to suggest that the appropriate remedy for such breaches is to exclude the tainted evidence altogether. I would simply observe that, whilst the exclusion of evidence may be appropriate in a case that is being heard by a jury, it is not an appropriate approach for a Tribunal. The correct approach where such breaches adversely affect the reliability of the evidence in question is to attach reduced weight to it. This was not however a matter that affected the ultimate outcome

of this appeal, and it accordingly does not alter my conclusion that this appeal should be dismissed.

**Notice of Decision**

The appeal is dismissed.

Signed

Date: 14<sup>th</sup> March 2018

Deputy Upper Tribunal Judge Kelly