IS (marriages of convenience) Serbia [2008] UKAIT 00031

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House Date of Hearing: 18 December 2007

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Clements

Between

Appellant

and

ENTRY CLEARANCE OFFICER, SKOPJE

Respondent

Representation
For the Appellant: Mr. D. O'Callaghan instructed by B H Solicitors
For the Respondent: Mr. J. Gulvin, Home Office Presenting Officer

(1) The burden of proving that a marriage is not a "marriage of convenience" for the purposes of the EEA Regulations rests on the appellant: but he is not required to discharge it in the absence of evidence of matters supporting a suspicion that the marriage is one of convenience (i.e. there is an evidential burden on the Respondent). See also AG [2007] UKAIT 00075. (2) An EEA family permit is not "Entry Clearance" and so is not caught by s 85(5).

DETERMINATION AND REASONS

1. The appellant is from Kosovo. He appealed to the Tribunal against the decision of the respondent on 24 August 2006 refusing him an EEA family permit. The Immigration Judge dismissed his appeal. The appellant sought and obtained an order for reconsideration. Thus the matter comes before us.

2. The basis of the appellant's claim is that he is married to a Lithuanian national exercising treaty rights in the United Kingdom, whom we shall

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call the “sponsor”. The marriage took place in Kosovo on 24 May 2006. The application was made and decided under reg 12(1) of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003). That regulation requires a family permit to be issued, on application, to a person who is the “family member” of an EEA national who is residing in the United Kingdom in accordance with the Regulations, which the sponsor was and is. “Family member” is defined in reg 7(1)(a) as including a spouse, but in reg 2 entitled “general interpretation”, is found the following:

> “—(1) In these Regulations—
> …
> "spouse" does not include a party to a marriage of convenience”.

The respondent’s refusal, and the Immigration Judge’s dismissal of the appeal, are both based on a conclusion that the marriage between the appellant and the sponsor is a marriage of convenience.

3. Before looking in detail at the facts of the present case, it is convenient to deal with the first ground for review which Mr. O’Callaghan argues on the appellant’s behalf, which relates to the burden of proof. The Immigration Judge decided that the appellant before him had the burden of establishing that his marriage was not one of convenience. Mr. O’Callaghan submits that that was wrong. He submits that the burden of proof is on the respondent to prove the marriage to be one of convenience.

4. So far as we are aware, this issue has not previously been the subject of judicial decision. In Chang [2001] UKIAT 00012, a starred case dealing with a number of matters in relation to marriages of convenience, the respondent accepted the burden of proof. The Tribunal said this:

> “43. Before the Adjudicator it was common ground that the Respondent had the burden of proving that the Appellant's marriage was a 'sham'. The position before us was the same. For the purposes of this determination we accept it, but it appears to us that that position (as to both burden and standard) might properly be reconsidered in some other case. So far as concerns burden, the burden of proof is, as a matter of the general law, usually on the party who asserts. We should, if we were required to make a decision on the matter, have been inclined rather to say that it is the Appellant who asserts that he is a spouse who has a right of residence than that he merely asserts that he is a spouse, leaving the Respondent to deny that he has a right of residence. We are fortified in that view by the provisions of Rule 31 of the 1984 Rules (which applied to this appeal before the Adjudicator). So far as concerns standard, a high standard is appropriate in cases where misconduct is alleged: but, as at present advised, we are not persuaded that there is anything inherently wrong in marrying for convenience and taking any

advantages that flow from the relationship - provided, of course, that no deception is involved.".

In VK [2004] UKIAT 00305, the Tribunal said this:

> "16. It was common ground between the parties that it was for the Secretary of State to prove that the marriage was a marriage of convenience. This concession is, presumably, based on the general position in common law that a person who makes an assertion has to prove it. We are aware of the starred decision of the Tribunal in Chang … that left open the possibility that the proper approach was for the Appellant who wanted to take advantage of her married status to prove that her marriage was not a marriage of convenience and therefore excluded by the Rules. [The Tribunal] was careful to state in that decision that the Tribunal did not have to decide the point. Whilst it must remain open to argument we find, given the specific concession of the Secretary of State, that unless the Secretary of State makes it plain in a particular case that he takes a different position (in which case the question will have to be reconsidered) it is now established that it is for the Secretary of State to prove that a marriage is a marriage of convenience if that is what he alleges. For the reasons already discussed it is clear that the Adjudicator accepted this and set out to apply it."

5. In the present appeal the Presenting Officer, on behalf of the Secretary of State, did indeed make it clear that the Secretary of State took a different position. He submitted to the Immigration Judge that the appellant bore the burden of proving that his marriage was not a marriage of convenience.

6. In the circumstances Mr. O'Callaghan was not able to rely on the previous decisions on the issue as settling the question in his favour. He did, however, point to them as an indication of what might be regarded as established practice. He reminded us of the notorious difficulty of proving a negative, of the fact that it was the respondent who had raised the issue of whether the marriage was one of convenience, and that the question ought to be decided in the context of any relevant rules of European law, because the Regulations implement the Citizens Directive 2004/38/EC. Mr. Gulvin told us that he proposed to repeat the argument of the Presenting Officer to the Immigration Judge, and was fortified in that view by what had fallen from the Tribunal in the course of Mr. O'Callaghan's submissions.

7. We have reached the firm conclusion that the burden of proof lies on the appellant. There are a number of reasons for this: perhaps none is in itself decisive, but together we regard the result as compelling. The first is that, generally speaking, it is for the appellant to prove his case. As the Tribunal pointed out in Chang, it is probably better to put the

appellant's case as that of being a spouse entitled to the benefits of the Directive and the Regulations rather than merely being a spouse. In a case such as the present, an applicant needs to establish that his sponsor is a person exercising treaty rights, and that he himself is related in a particular way to the sponsor. The relationship has to be the relationship defined by the Regulations, and in the case of the relationship of spouses, part of that definition is that the marriage is not one of convenience. So the appellant's general duty to prove his case includes a duty to prove that his marriage is not one of convenience.

8. The second reason tends to reach the same conclusion by a completely different route. If the first reason does not persuade, that would be because the provision that a marriage does not include a marriage of convenience is not an essential part of what the appellant has to prove, but is something additional which may arise in some cases. But then rule 53 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230), which is the successor of rule 31, to which reference was made in Chang, has relevance. That rule reads as follows:

> "**Burden of proof**
>
> 53.—(1) If an appellant asserts that a relevant decision ought not to have been taken against him on the ground that the statutory provision under which that decision was taken does not apply to him, it is for that party to prove that the provision does not apply to him.
>
> (2) If —
>
> (a) an appellant asserts any fact; and
>
> (b) by virtue of an Act, statutory instrument or immigration rules, if he had made such an assertion to the Secretary of State, an immigration officer or an entry clearance officer, it would have been for him to satisfy the Secretary of State or officer that the assertion was true, it is for the appellant to prove that the fact asserted is true."

9. There may be some doubt about the meaning of "statutory provision" in rule 53(1). It clearly excludes the Immigration Rules. Given the formulation in rule 53(2), there seems to be no reason to suppose it does not include both Acts and statutory instruments, because if it was intended to apply to Acts alone one would have thought that that word would have been used in the first paragraph as it is in the second paragraph of the rule. It was not suggested before us that "statutory provision" in rule 53(1) does not include a statutory instrument. The EEA Regulations are a statutory instrument. As we have indicated, reg 2 of those Regulations provide that a marriage does not include a marriage of convenience, and it seems to us that, in a case such as this, the appellant is asserting that that provision does not apply to him in the sense that it is irrelevant to the determination of his application. If that is right, it follows that the burden of proof is placed on the appellant by the Procedure Rules.

10. The third reason is to be found in the relevant provisions of EU law. So far as concerns the Citizens Directive, although "spouse" is not defined so as to exclude marriages of convenience, there is no doubt that "spouse" in EU law bears a meaning excluding marriages of convenience. Article 35 of the Directive is as follows:

> "**Abuse of rights**
> Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31."

Preamble 28 is as follows:

> "To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures."

11. The problem of marriages of convenience has been recognised by the community authorities for many years. Council Resolution 12337/97 includes the following text, which has never replaced or superseded:

> "…
> Noting that marriages of convenience constitute a means of circumventing the rules on entry and residence of third-country nationals,
> …
> Whereas this resolution is without prejudice to Community law,
> …
> 3. Where there are factors which support suspicions for believing that the marriage is one of convenience, Member States shall issue a residence permit or an authority to reside to the third-country national on the basis of the marriage only after the authorities competent under national law have checked that the marriage is not one of convenience, and that the other conditions relating to entry and residence have been fulfilled. Such checking may involve a separate interview with each of the two spouses.
> 4. Should the authorities competent under national law find the marriage to be one of convenience, the residence permit or authority to reside granted on the basis of the third-country national's marriage shall as a general rule be withdrawn, revoked or not renewed."

12. As the Tribunal remarked in Chang,

> "Of course a Resolution … cannot override any legislative provision: indeed this one is specifically subject to Community law. We are, however, entirely unable to accept [the appellant's representative's]

> submission that it 'has nothing to do with European law'. It is a statement by one of the legislative bodies, and as such is entitled to respect. It relates to a subject covered by Council Directives, which are themselves not entirely clear. In addition, it would be surprising if (as [the appellant's representative] essentially has to claim) the Council was so ignorant of its own legislation that it was capable of passing a Resolution the whole contents of which were contrary to Community law. We decline to accept that thesis."

13. It is clear that the terms of the Citizens Directive allow National law to make regulations to prevent abuses founded on marriages of convenience. So far as the detection of such marriages is concerned, it is clear from the Council Resolution that the relevant residence documents are not to be issued if there are "factors which support suspicions for believing that the marriage is one of convenience", until the suspicions are resolved in the applicant's favour. That appears to us to be a clear indication that, so far as EU law is concerned, the burden of proof, as it is called in English law, rests on the appellant, because, the suspicions having arisen, the matter will be resolved against him unless the suspicions are resolved in his favour. The Resolution clearly indicates that what Wigmore calls "the risk of non-persuasion" is borne by the appellant.

14. As we have said, these three reasons taken together lead us to the view that the burden of proving that a marriage is not one of convenience lies on the appellant. We would, however, also associate ourselves with the wording of the Council Resolution to this extent. Not every applicant needs to prove that his marriage is not one of convenience. The need to do so only arises where there are factors which support suspicions for believing the marriage is one of convenience. Translated into the technical language of the English law of procedure and evidence, that means that there is an evidential burden on the respondent. If there is no evidence that could support a conclusion that the marriage is one of convenience, the appellant does not have to deal with the issue. But once the issue is raised, by evidence capable of pointing to a conclusion that the marriage is one of convenience, it is for the appellant to show that his marriage is not one of convenience.

15. If the burden of proof were on the respondent, there would be room for argument that the standard should be higher than the standard of the balance of probabilities. As we have noted, the Tribunal in Chang thought that there was no reason in principle to apply a higher standard. R(CPS) v Registrar General of Births, Deaths and Marriages [2002] EWCA Civ 1661, to which Mr. O'Callaghan referred us, suggests the same. As the burden is on the appellant, however, there can be no reason at all for supposing that the standard is higher than that of a balance of probabilities.

16. In the light of those conclusions we turn now to the facts of this case and the issues before us on reconsideration.

17. The appellant entered the United Kingdom on 21 August 1998 and claimed asylum. The application was refused over three years later on 15 October 2001 and the appellant appealed. His appeal was heard by an Immigration Adjudicator, who dismissed it in a determination dated 5 March 2003. The determination was before the Immigration Judge who noted that at that time the appellant was living with his sister. The appellant's case is that he first met his wife on 18 February 2004, at a friend's house: the appellant was still then in the United Kingdom. They began a relationship in August 2004 and started living together then. In August 2005 they decided to get married. In December 2005 the appellant was removed from the United Kingdom; and the sponsor went to Kosovo to marry him in 2006. In connection with his application the appellant was interviewed. On the basis of the material before him, the Entry Clearance Officer refused his application because, as the Entry Clearance Officer put it:

> "I am not satisfied, on the balance of probabilities that you have not entered into a bogus and sham marriage of convenience for immigration purposes merely to facilitate your re-entry to the UK.
>
> You claimed that you initially went to the UK in 1998 illegally in the back of a lorry then sought to remain permanently in a category outside of the Immigration Rules. This application was refused and you claim you returned to Kosovo voluntarily in December 2005. You were unable to give me satisfactory answers to questions concerning your wife. These were very basic questions which if your marriage was genuine and not a bogus one entered into solely for Immigration purposes I would have expected you to know. In addition at your interview you gave details of where and when you lived with your wife in the UK. These details did not tally with some of the documentation that you submitted with your application. If your marriage was not a bogus one which had not been entered into solely for immigration purposes to facilitate your re-entry to the UK then I would not have expected you to give such answers."

The respondent's reasons for refusal conclude with the indication that he has given consideration to Article 8 of the European Convention on Human Rights.

18. In view of the phraseology used by the Entry Clearance Officer, we pause at this moment to notice the terms of a Home Office document giving general information on marriage, which Mr. O'Callaghan put before us. At para 5 is the following:

> "**Bogus marriages and marriages of convenience**
> 5.1 Bogus marriages are invalid or entirely fictitious and may involve forgery or misuse of documents relating to another person. It should be recognised that a marriage which involves impersonation may still be a valid marriage, and that it is the impersonator who is legally married and not the identity which he or she has used.

5.2 Marriages of convenience are contracted for the specific purpose of evading Immigration control or gaining an easier route to citizenship."

19. There is no real doubt in the present case that the parties are in law husband and wife. Despite the wording used by the Entry Clearance Officer, their marriage is not "bogus" in the sense indicated by the Home Office document. It is clear that the respondent has at all times treated the marriage as formally valid. The issue is whether the marriage is one of convenience, a phrase also used by the Entry Clearance Officer.

20. The Immigration Judge heard oral evidence from the sponsor and had substantial documentary evidence. In his determination he notes and analyses the particular points made in the notice of refusal and points out various inconsistencies or irregularities in the evidence, considers the explanations he has been given, and largely rejects them. He notes the lack of oral evidence from the appellant's sister who had clearly been expected to give evidence. He noted that he asked "the appellant" (meaning, presumably, the sponsor) what she would do if the appeal were to be refused: would she live in Kosovo? She replied that she would continue to live in the United Kingdom: she could not live in Kosovo as she did not understand the language. At the hearing she said this through a Lithuanian interpreter; it is, however, clear that the sponsor has learned a good deal of English, and was using the interpreter for clarity and as directed by the Immigration Judge. The Immigration Judge concluded his determination as follows:

> "Having considered all the evidence in the round including specifically the whole of the interview (and particularly those questions referred to by the representatives), I conclude that the appellant has not satisfied me that this is a genuine marriage. I have considered all the factors which tended to show the relationship was genuine against all those which indicated otherwise. I conclude that it was a marriage that has been entered in to circumvent immigration control. There is no documentary evidence of the couple ever having lived together. The explanation that is provided for lack of such documentation relates only to documentation from the Home Office not from elsewhere. The appellant's sister could have provided evidence going to the nature and genuiness of the relationship. She did not give evidence despite there being an indication that such evidence would be given in the notice of appeal. No explanation for this lack of evidence was forthcoming. The sponsor and the appellant's evidence was contradictory on important issues, the explanation that there were interpreter problems at the interview being raised for the first time at the hearing by the sponsor, with no explanation for why this was not raised earlier.
>
> I do not find the appellant's, or the sponsor's, evidence relating to the nature of the relationship to be credible. For the reasons given above, the Appellant has failed to satisfy me that the immigration decision made was wrong on the basis of any of the grounds set out

in section 84 of the 2002 Act or under the EEA Regulations. I therefore dismiss his appeal entirely."

21. The grounds for review suggest firstly that the Entry Clearance Officer's use of the word "bogus" means that the parties never intended to live together. That, as we have indicated, is not the issue before us. But, with more substance, the grounds point out that the sponsor has been to Kosovo on three occasions, for a week in February 2006, for a week in May 2006 during which the wedding took place, and for ten days in October 2006. The grounds also point out that the Immigration Judge had before him photographs, including photographs of the appellant and the sponsor in nightwear, and that they "clearly looked comfortable with each other". The other grounds are that the sponsor had sought an adjournment of the appeal on the basis of feeling unwell: the adjournment had been refused and no reasons had been given and that "the Immigration Judge has not established as to why it was in the interest of justice to proceed with the hearing". Lastly, it is said that the Immigration Judge ought not to have been "critical of the fact that the appellant's sister failed to attend the hearing", particularly because no issue as to her non-appearance was raised at the hearing itself.

22. So far as the last point is concerned, it is not a matter of criticism. The Immigration Judge had decided that the burden of proof was on the appellant, and noted, as he was perfectly entitled to do, the absence of evidence from one particular source. Absence of evidence is not itself evidence: but the absence of evidence may well hinder a party's ability to discharge the burden of proof. The Immigration Judge made no error in making the comments he did. The fact that it had been expected that the appellant's sister would be at the hearing, and that arrangements had been made for her to give evidence, merely drew to his attention the absence of her evidence and the consequent difficulty that the appellant had in discharging the burden of proof. So far as the adjournment is concerned, the position is that the presumption in rule 21(2) is against adjournment. It was not for the Immigration Judge to establish that it was in the interest of justice to proceed: it was for the party seeking adjournment to show that an adjournment was necessary. We have been referred to a witness statement, made by the sponsor since the hearing of the appeal, in which she asserts that she was not feeling well because of depression, but we note that in correspondence in relation to the reconsideration, it has been asserted that, for the same reason, she seeks an early determination of this appeal. It seems to us that there is no reason to suppose that the sponsor was unable because of illness to tell the truth about her marriage and her relationship with the appellant, nor that any other day for the hearing would have been any better than the one originally fixed. There is no substance in this ground for reconsideration.

23. So far as concerns the Immigration Judge's treatment of the evidence, there was no doubt that he was fully aware of at least two of the sponsor's journeys to Kosovo because he mentions them specifically. He

also had the photographs before him. We do not think that the Immigration Judge can properly be criticised for not drawing from the photographs the conclusions suggested in the grounds for review. Photographs of people apparently "comfortable with each other", with or without members of their family and friends, exist in what must be millions. It would be quite wrong to assume that the subjects of such photographs live together as husband and wife or intend to do so. The photographs add nothing to the appellant's case.

24. Nor, as it seems to us, does the evidence of the sponsor's three journeys to Kosovo cast any doubt on the Immigration Judge's overall conclusions. Given that a marriage between the appellant and the sponsor has taken place, if it is a marriage of convenience, then that is a matter with which they are both concerned. It would not be surprising if the sponsor continued to maintain the outward form of a relationship with the appellant. The Immigration Judge did not regard the sponsor, who gave oral evidence before him, as credible on the circumstances of her relationship with the appellant, and any travel by her has to be seen in that context. Looking at the matter as a whole as we do it does not appear to us that the Immigration Judge erred in his conclusions on the evidence before him.

25. There is one other matter to which we should refer. In para 9 of his determination the Immigration Judge said that by virtue of Section 85(5) of the Nationality Immigration and Asylum Act 2002, he was required only to take into account circumstances appertaining at the time of the decision to refuse. That was wrong. The restriction imposed by s 85(5) applies only to "refusal of entry clearance or refusal of a certificate of entitlement". Although an EEA family permit under reg 12 of the EEA Regulations is similar in its function to entry clearance, it is not entry clearance and is therefore not caught by the terms of s 85(5). The Immigration Judge was entitled to look at all evidence "relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision". The Immigration Judge's error may be connected with his failure to mention the sponsor's visit to Kosovo in October 2006, but there is no doubt that he did consider a number of items of evidence that post-dated the decision, and his general conclusion is expressed in contemporaneous, rather than historical terms. In the context of the evidence before him as a whole and the way he dealt with it, this is a small error and one which had no perceptible effect on the outcome of the appeal

26. Mr. O'Callaghan suggested to us that a marriage that was a marriage of convenience at his inception might become a marriage that was not one of convenience in due course. We do not think that that issue strictly arises on the facts of this appeal, because the Immigration Judge was not prepared to accept the evidence of the relationship at any stage. For the avoidance of doubt we should indicate that we reject Mr. O'Callaghan's submission. The relationship which gives rise to any rights under EU law

and the Regulations is the marriage, formerly valid, and entered into at a specific time and place. It is the ceremony and the act which count for these purposes and it is the ceremony and the act which, in the circumstances that give rise to it, amount to or do not amount to a "marriage of convenience". If the question had arisen on the facts of this case we should have held that the development of a real relationship after the marriage would not have assisted the appellant in his claim based on the marriage itself.

27. The Immigration Judge's assessment of the evidence before him discloses no material error of law. In our view he was also correct in the view he took on the incidence of the burden of proof. It follows that his determination as a whole contains no material error of law and we accordingly order that it shall stand.

C M G OCKELTON
DEPUTY PRESIDENT
Date: