Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: EA/07311/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th October 2018	**On 6th November 2018**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

MR AHMED SALAMA SHAABAN ALY
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms N Katambala, Finsbury Law Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

1. The Appellant is a citizen of Egypt. His date of birth is 1st February 1971.

2. On 1 February 2017 the Appellant made an application for a Residence Card under the Immigration (European Economic Area) Regulations 2016 (the "2016 Regulations") on the basis that he has a retained right of residence following his divorce from an EEA national of Slovakian nationality, Ms Gaborova (the "Sponsor") which was finalised on 30 December 2015. The application was refused by the Secretary of State on 27 July 2017.

3. The Appellant appealed against the decision of the Secretary of State. His appeal was allowed by Judge of the First-Tier Tribunal Cockrill in a decision that was promulgated on 10th July 2018, following a hearing at Taylor House on 2nd July 2018. Judge Cockrill dismissed the Appellant's appeal. The Appellant was granted permission by First- Tier Tribunal Judge Andrew on 15th August 2018. Thus, the matter came before me to determine whether Judge Cockrill made an error of law.

4. The Appellant was granted a residence card on 31 October 2010, as the spouse of an EEA national. The Respondent refused the application for permanent residence because it was his view that the Appellant married the Sponsor in a marriage of convenience.

5. According to the Respondent the Appellant failed to submit evidence that the Sponsor was exercising treaty rights. Experian credit reports showed that there was no trace of the Sponsor having a connection to any of the addresses where the Appellant lived. In addition, in February 2013 a Lloyds Bank Account was opened in the Sponsor's name connecting her with an address in Gravesend which had no connection to the Appellant. Checks were conducted on her international travel history to and from the UK over the period between 20 July 2012 and 20 July 2017 and there was only one trace of her coming to the UK during that period for a visit between 30 June 2015 and 10 July 2015, when she returned to Slovakia.

6. The Appellant in his application gave his home address as [~], Cricklewood. A visit was made on the 21 July 2017 by an Immigration Officer and enquiries were made with the occupants of the property (see B1-2 Respondent's bundle). One of the occupants recognised the Appellant from a photograph and stated that he was a friend who had stayed with him in his room for a month one year ago. He said that he did not know where he was now residing. It was concluded by the Immigration Officer that the Appellant had been using the address as a postal drop and that he had lived there for no more than a month. The conclusion was that the Appellant had never been in a genuine relationship with the sponsor and that she was clearly not resident in the UK throughout the period of the marriage. It was concluded that she had never exercised treaty rights in the UK throughout the period of the marriage or that she was in the UK at the time of the divorce on 30 December 2015.

7. Judge Cockrill heard evidence from the Appellant. The Appellant corrected his witness statement which indicated that he had lost contact with the Sponsor. His oral evidence was he had been in contact with her before making the application. She assisted him by providing him with some payslips and P60s. These documents all show an address in London where the Appellant claimed to have lived. They couple separated in April 2015. In response to the Experian report he stated that the Sponsor was living in Kent initially and she continued to use the address as her postal

address because the address in London was not safe. His evidence was that divorce proceedings commenced in March or April 2015. He could not be clear about this.

8. The judge heard evidence from Mr Jeredat, a friend of the Appellant. He gave evidence that the Appellant and the Sponsor lived together as man and wife. He had visited them twice, once in 2011 and once in 2013.

9. The judge made findings at paragraphs 27 - 36 of the decision as follows:-

> "28. I have had the obvious advantage of seeing the appellant and have listened to him give oral evidence and be subject to cross-examination. I have also had evidence from one witness called on his behalf. That witness could say fairly general terms that he had known the appellant and Miss Gaborova to the extent that he had been a friend of the appellants for about 7 years. They had worked together at a restaurant and the witness could confirm that there had been a time when Miss Gaborova would come to the restaurant at the end of the day to meet the appellant. There had been 2 visits made by the witness to the appellant's home. There were 2 different addresses and his evidence was helpful to me, but quite limited in its extent. He does not really deal in any substantial way with the issue that is now raised as to whether this is a marriage of convenience.
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> 29. It is important to recognise that there is not a burden on the appellant to show that his marriage is a genuine one. I remind myself of the decision in **Rosa [2016] EWCA Civ14**. That Court of Appeal decision makes reference to the principles laid out in *Papajorgji* **(EEA Spouse – Marriage of Convenience) Greece [2012] UKUT 00038.** The burden is on the respondent to raise, by reference to the evidence, reasonable grounds for suspecting that this is not a genuine marriage and then it is on the appellant to answer that.
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> 30. In this particular case, I am not persuaded, looking at the totality of the material, that the respondent discharged that burden that lies upon her. Although the reference is to different addresses for the appellant and sponsor, that in itself is not sufficient in my judgment to raise reasonable suspicion.
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> 31. I have commented already that the visit which took place at the address in Cricklewood in July 2017 does not assist me very much, because of course on the appellant's case, by that stage, he had separated from his wife and so of course there had been no reference to her there.
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> 32. As far as I can see, the crux of this matter is not so much whether this is a marriage of convenience, because I am not persuaded, looking at the totality of the material, that it is a marriage of convenience, but the issue that to my mind is very real one is whether the applicant can show that his now former spouse was exercising Treaty Rights when the divorce commenced.
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> 33. It has to be pointed out that it was he that commenced the divorce proceedings, but he has been vague about when that happened. He puts it as March or April 2015. I have been provided with some pay slips for the sponsor, but they do not cover March 2015.

> There is a significant question mark therefore raised over whether or not the sponsor was in fact exercising Treaty Rights at that material time of commencement of the divorce proceedings. On that basis alone in my judgment, the appellant is bound to fail in relation to the present appeal.
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> 34. The other issue that of course has created some concern on the part of the respondent is the fact that an Experian credit report that was carried out, and which has been filed in this appeal, appears to show that the sponsor had an address in Kent and had not shown up on any system as sharing an address with the appellant when the appellant has moved address periodically. That also is a matter of concern for me as to whether the sponsor has in fact really been living down in Kent, or whether what has happened is that she has been with the appellant, but for some reason there has been no trace of her occupation at these several addresses, where the appellant has said that they have lived.
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> 35. As I have already made plain though, the appeal does not succeed because it has not been shown to the requisite civil standard, which is a balance of probabilities, that the sponsor was indeed exercising Treaty Rights when the divorce proceedings commenced. It is unnecessary to come to a definitive answer as to where the sponsor was living from time to time. I do acknowledge that her employer, Cafe de Vie has shown her address as being one and the same as the address occupied by the appellant in Maida Vale area of London and of course as I have indicated that is at odds with the Experian report.
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> 36. Looking at the totality of the material, I conclude that this was not a marriage of convenience. Insufficient evidence has been adduced by the respondent to discharge that burden which lies upon her. The appellant has also adduced evidence in my judgment sufficient to show that he has maintained a relationship with Miss Gaborova. Clearly the couple got married and that has not been the subject of formal challenge and equally they were divorced with Decree Absolute on 30th December 2015. There is sufficient evidence in my judgment to show that they had a marital relationship. I emphasise that what is missing in this case, and it would appear that the focus of attention was not on this point, is that there is a lack of evidence to show exercise of Treaty Rights at the commencement of the divorce proceedings. On that basis the application for the residence card on the basis of being a former family member who has retained a right of residence is dismissed."

Error of Law

10. The judge, as conceded by Ms Everett erred because there was sufficient evidence, subject to that evidence being found reliable, to establish that the Sponsor exercised Treaty Rights until divorce proceedings were initiated. The Appellant submitted payslips for March and April 2015 and a P60 for 2014/2015. Ms Everett accepted that the judge had not properly applied *Baigazieva v SSHD [2018] EWCA Civ 1088.*

Conclusions

11. Ms Katambala's view was that I should allow the appeal on the basis that the evidence before the judge was sufficient to establish a retained right of residence in the UK under Article 13(2) (a) of the Citizens' Directive [2004/38/EC]. However, this was not accepted by Ms Everett who stated that there were credibility issues and the judge was troubled by the issues raised by the Experian credit checks and the reliability of the evidence relied on by the Appellant.

12. Whilst the judge was concerned by the issues raised in the Immigration Officer's report which undermined the Appellant's evidence that he relied on in order to establish that the Sponsor was exercising treaty rights (namely, P60s and payslips) he did not believe it necessary for him to make a clear finding relating to the reliability of this evidence because he, albeit mistakenly believed the evidence insufficient in any event. It follows that in the light of the error it is now necessary to make a clear unequivocal finding about that evidence. I wholly reject the proposition that because the judge found that the marriage was not a marriage of convenience, it automatically follows that the evidence submitted is reliable. I similarly reject the proposition that in the absence of evidence establishing that the documents are forged they should be accepted as reliable.

13. Ms Katambala stated that should there be a need to be a finding on the issue, the matter should be remitted to the First-Tier Tribunal for a re-hearing. This in my view is unnecessary. I was not given a good reason why I was not able to make a finding on the evidence that was before the First-Tier Tribunal. Neither party submitted further evidence following the standard directions issued by the Upper Tribunal.

14. The Appellant in my view has failed to properly engage with the issues raised by the Respondent concerning the Sponsor's whereabouts and the address shown on the documents that he submitted in support of his application. There was no challenge to the accuracy of the Experian credit check or the record of the visit by Immigration Officers on 21 July 2017. The Appellant changed his evidence from that in his witness statement, telling Judge Cockrill that he was in contact with the Sponsor. However, he has failed to explain if this is the case why he was not able to obtain a witness statement from her explaining the result of the Experian credit check and why there was found to be no trace of her ever having been connected to any of the addresses where the Appellant lived (or indeed the issue relating to her travel history). While I take into account the Appellant's explanation for the use of an address in Kent (see paragraph 18 of Judge Cockrill's decision), it is in my view unsatisfactory. He stated that the address (in London) was not a safe place, therefore implying that she continued to use an old address in Kent. However, if this is the case, it does not explain why the Sponsor used the London address for important documents such as payslips and P60s. The Appellant's evidence was

unsupported and lacking in credibility. I have taken into account that Judge Cockrill found that although Mr Jeredat's evidence was helpful it was limited. The evidence does not assist me with respect to whether the documentation is reliable and the issue relating to the exercise of treaty rights.

15. I find, having considered the documentary evidence, in the round that it is unreliable. I conclude that the Appellant has not established that the Sponsor was exercising Treaty Rights at the material time (or indeed that she was residing in the UK until the commencement of divorce proceedings). The Appellant has failed to properly engage with the issues arising from the decision of the Respondent.

16. Judge Cockrill made an error of law. However, the error was not material. Ultimately, he reached the correct conclusion and it is unnecessary for me to interfere with his decision.

17. The Appellant's appeal is dismissed. The decision of the FTT to dismiss his appeal under the 2016 Regulations is maintained.

Signed Joanna McWilliam Date 24 October 2018

Upper Tribunal Judge McWilliam