Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01967/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 July 2019	**On 12 July 2019**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

NYSRET LLUMNICA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Leskin, instructed by Birnberg Peirce & Partners
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a Kosovan national born on 31 October 1992. He appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse to issue him with a residence card under the Immigration (European Economic Area) Regulations 2016 as the family member (spouse) of an EEA national. First-tier Tribunal Judge Wylie dismissed his appeal.

2. The background to this appeal is as follows. The appellant entered the UK on 19 April 2014 with a Tier 4 (General) Student Migrant visa valid until 29 July 2015. He was granted further leave in that capacity until 14 November 2017. His leave to remain was

subsequently curtailed to expire on 28 May 2016 when his sponsor ceased sponsoring him due to his unsatisfactory academic progress and attendance. On 18 May 2017 the appellant applied for a residence card as the extended family member (durable partner) of an EEA national, Andrea [P], a Spanish national. The application was refused on 7 September 2017 as the appellant provided no ID and the relationship was not durable as they had only met three months prior to lodging the application.

3. The appellant then made an application to marry Andrea [P]. On 20 September 2017 the couple were interviewed separately. As a result of the numerous discrepancies arising in the evidence and the misleading replies of Andrea, she was asked if there was anything she wanted to clarify before checks were carried out and she admitted that she was employed by the appellant's brother-in-law who had approached her with a proposed arrangement to marry the appellant to enable him to remain in the UK and had been offered £10,000. She was paid £1,000 as an initial payment which was used for her mother to do an English course and she was told that she would receive the outstanding £9,000 once they were married. The appellant also gave her £1,000 to put in a joint account for living arrangements. Andrea admitted that the arrangement was to deceive the Home Office and to unlawfully assist the appellant to obtain leave to remain in the UK. She also stated that the appellant had been working cash in hand.

4. The appellant and Andrea [P] were served with non-compliance letters as a result of having failed to produce tenancy agreements and full 6 months bank statements and Andrea was served with a first stage deportation letter. Despite that, the appellant married Andrea on 20 November 2017.

5. On 25 November 2017 the appellant applied for a residence card as the spouse of an EEA national. In the covering letter for that application (which is dated 16 May 2017 – clearly in error), it was stated that the couple met at a night-club in February 2017 and in April 2017 decided to get married. They had been living together since July 2017 and were married on 20 November 2017. The application was refused on 9 February 2018 on the basis that the appellant had entered into a marriage of convenience for the sole purpose of him remaining in the UK.

The appellant appealed against that decision. In the grounds of appeal, it was stated that the appellant and his partner had started living together as husband and wife in July 2017 and were still living together. The relationship was durable and the marriage was genuine.

6. The appeal came before First-tier Tribunal Judge Wylie on 7 September 2018. The judge had before her a bundle of documents for the appellant, as well as the respondent's appeal bundle. The appellant's appeal bundle included statements from the appellant, from Andrea [P] and her mother and a friend, from the appellant's sister and from the appellant's brother-in-law, landlord and neighbour; proof of Andrea's pregnancy, records of the marriage interviews and photographs.

7. In his statement the appellant said that he and Andrea had met at work in May 2014 and started a relationship a few months afterwards. In April 2017 they decided to get married and started living together in June 2017. He moved in with Andrea and her

mother. In regard to the marriage interview, the appellant stated that it was a long interview which took almost an entire day and that he and Andrea had been confused about what to say in particular because he was working cash in hand when they met. They had therefore tried to hide the fact that they met at work and that he was working and it was for that reason that they gave different answers about how they met. The appellant explained that the payment of £10,000 was money which he had saved and which he had told Andrea when they decided to marry that he would use to help with the household expenses and to help her mother.

8. In her statement, Andrea [P] stated that she met the appellant at work in April 2016. She stated that they decided to get married in April 2017 and the appellant moved in with her and her mother in June 2017. The marriage interview contained mistakes. She was not provided with an interpreter and did not understand a lot of the questions. The immigration officer frightened her and threatened her that she would have a problem with the police if her relationship was found not to be genuine. She was treated as a criminal and illegal and she became stressed and scared to respond properly. She was not given a chance to read through the interview record before signing it. They did not want to admit that they met at work as her husband was working without permission and so they gave a different account of where they had met. The immigration officer had believed her to have given misleading information because she had said that her mobile telephone was stolen in Spain and yet she had a mobile with her, but she had mentioned her mobile being stolen because it was that telephone which contained all her photographs, conversations and messages and the telephone she had with her was just a simple phone obtained when she came back from Spain. It was not correct that she worked for the appellant's brother-in-law, but he was a work colleague who had simply come to talk to her about her intentions towards the appellant. The payment of £10,000 was money the appellant said that he had saved up and which they could use to pay any expenses for the marriage and for the house. There was no arranged marriage. Andrea stated further that she was pregnant with the appellant's baby and their relationship was genuine.

9. At the hearing, the judge heard oral evidence from the appellant, Andrea [P] and Andrea's mother. The judge did not consider that, at the time the marriage was entered into, the intention was to have a genuine marriage and she concluded that the marriage was one of convenience. The judge accordingly found that the appellant was not entitled to a residence card as the spouse of an EEA national and dismissed the appeal.

10. The appellant sought permission to appeal that decision to the Upper Tribunal on the grounds that the judge had erred in the way she had approached the consideration of the parties' intentions at the date of the marriage and had failed to consider the change in intentions since the time of the "sham" agreement; or, in the alternative, the judge had erred by failing to consider that the relationship was genuine at the time of the hearing.

11. Permission was refused in the First-tier Tribunal and the Upper Tribunal. However, in a "Cart" challenge to the Administrative Court, the appellant sought to judicially review the refusal to grant permission on the grounds and permission was granted by Sr Ross Cranston sitting as a High Court judge on the following basis:

> "The factual position is somewhat confusing and it may be that this is where things went wrong. In essence, as I understand it, although the wife said in her 20 September 2017 interview that the marriage when arranged the previous February was intended to be one of convenience, she went on to say that by then (i.e. the September interview) the situation had changed. Indeed (a) the parties went on to marry in November 2017 even though they knew the Secretary of State regarded the marriage as a sham; and (b) by the time of the hearing the following September 2018, she was pregnant and the hospital named him as the father. With that background it seems to me that both grounds are made out sufficiently to grant permission."

12. In the absence of any request for a substantive hearing following the grant of permission the Administrative Court quashed the decision of the Upper Tribunal refusing permission and permission was subsequently granted by Vice-President Ockelton in the Upper Tribunal on 29 May 2019. Thus the matter came before me.

13. The parties made submissions.

14. Mr Leskin submitted that it was accepted that the judge was right to find that there was originally an agreement to enter into a marriage of convenience. However that was not sufficient to conclude that the marriage was one of convenience at the time it was entered into. The relevant issue was the intention of the parties at the time of the marriage. The judge accepted at [33] that that was the relevant issue, but that was not what she then went on to do, as she continued to look at the intentions at the time of the agreement and failed to consider the evidence after the interview. The sponsor admitted having lied about when she and the appellant had met and about the agreement to receive money but said the rest was true. By the time of the interview there was a genuine relationship and even more so by the time of the marriage. Mr Leskin relied on the case of Sadovska & Anor v Secretary of State for the Home Department (Scotland) (Rev 1) [2017] UKSC 54 in submitting that the burden of proof was upon the Secretary of State to show that at the time the marriage was entered into, it was a marriage of convenience. The judge had erred in that respect and by failing to look at the facts at the date of the marriage and the developments since the arrangement was made. The judge also relied upon the fact that the sponsor had not met the appellant's sister, yet she clearly had met her by the time of the marriage. Mr Leskin submitted that, in the alternative, the judge ought to have considered whether the marriage had become genuine by the time of the hearing, which was a matter left open in Rosa v Secretary of State for the Home Department [2016] EWCA Civ 14 at [41].

15. Ms Fijiwala submitted that it was never argued before the First-tier Tribunal that this was an agreement to enter into a sham marriage which had later changed into a genuine marriage. The judge could not therefore be said to have erred in law by failing to consider a matter not raised before her. The judge had looked at the evidence as a whole and not just the evidence at the interview. The reference to a subsequent conjugal relationship was after the marriage, but at the date of the marriage the judge considered the evidence to show that the intentions were not genuine. That was the relevant point in time to be considered and not after the marriage. Ms Fijiwala relied upon the case of Molina v SSHD [2017] EWHC 1730 in that regard, at [59] and [60] in submitting that the relevant issue was

whether the marriage was entered into for the purposes of gaining an immigration advantage.

Discussion

16. The grant of permission in the Administrative Court was made on the basis that there had been a misunderstanding and confusion about the EEA national's admission at her interview and that whilst she had admitted, at the interview of 20 September 2017, to have previously entered into an agreement for an arrangement for a marriage, her evidence at the interview was that the situation had changed by then. However it seems to me that that itself is a misunderstanding. It was a misunderstanding which no doubt arose from the grounds seeking permission which were made on such a basis, namely that the appellant's case was that, having admitted and come clean about the initial arrangement, the situation had changed since then and the relationship has since become a genuine one and the intentions had changed.

17. However, as Ms Fijiwala submitted, that was not the way that the case was presented to the judge. The case was presented to the judge on the basis that there had never been any arrangement for a sham marriage and that the respondent had misunderstood the evidence of the appellant and the sponsor at their interviews, in particular the sponsor's response to question 35 of her interview. That is clear from the sponsor's appeal statement of 29 August 2018 in which she denied that there had ever been any such agreement or arrangement and was attempting to backtrack from the evidence suggesting as much. That was the basis upon which the judge approached the case before her and she cannot be said to have erred in law by so doing. Having rejected the appellant's and sponsor's denial of entering into such an agreement for the reasons properly given, the judge was perfectly entitled to approach the evidence of the development of the relationship since that time with some caution. The judge was, of course, fully aware that she had to consider the parties' intentions at the time of the marriage rather than at the time of the arrangement or the interview, but was fully entitled to take into account, in undertaking that exercise, the fact that the appellant and sponsor were lying about not having previously entered into any arrangement.

18. Mr Leskin placed reliance upon the sponsor's answer to question 43 of her interview, that she had not lied about her account of the relationship other than in regard to how it commenced and how she and the appellant had met, in submitting that the judge had erred by failing to consider and to give weight to the evidence of the couple living together since July 2017, sleeping together and having a loving and sexual relationship, leading to the pregnancy and to the marriage. However, and on the contrary, the judge clearly did consider all the relevant evidence and she provided full and cogent reasons for concluding that the evidence as a whole did not demonstrate a genuine relationship at the time of the marriage. At [32] she considered the genuineness of the relationship leading up to the marriage to be undermined by the fact that the appellant had not even introduced his sister to the sponsor prior to the wedding, a matter from which she was fully entitled to draw the adverse conclusions that she did. At [33] the judge expressly confirmed that

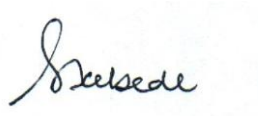
she had looked at the evidence since the marriage to cast light on the parties' intentions at the relevant time and she then went on to analyse that evidence in the subsequent paragraphs to [41]. I do not agree with Mr Leskin that the judge was basing her conclusion solely on the previous arrangement, but it is clear that she undertook a full assessment of the relationship subsequent to that time and at the time of the marriage itself, clearly referring to evidence at the time of, and subsequent to the marriage, at [36] to [41]. Whilst the judge did not specifically refer to the evidence of the couple sleeping together and having an intimate relationship, it is clear that she considered all the evidence in the round and rejected it for the reasons fully and properly given. In any event, and whilst not raised by the judge, it is relevant to note that the evidence as to the intimate nature of the relationship was not consistent, with the appellant's evidence at questions 68, 76 and 89 suggesting a full sexual relationship but the sponsor's evidence at 15 and 21 suggesting otherwise.

19. Mr Leskin relies on the judge's reference at [41] to the sponsor's pregnancy and at [42] to a conjugal life possibly having been embraced subsequently. The evidence as to the appellant being the father of the unborn child was limited to a single reference in a hospital form at page 31 of the appeal bundle and the judge clearly had regard to that evidence. However she properly found that that was not sufficient to show that there was a genuine relationship at the time of the marriage and, in light of the otherwise limited evidence and the appellant's and sponsor's unreliable evidence, the judge was perfectly entitled to accord that one document limited weight, in particular in regard to the situation at the time of the marriage. Mr Leskin submitted, as an alternative argument, that the judge ought to have considered the situation at the time of the hearing and therefore found in favour of the relationship given her finding of a conjugal life, but it seems to me that not only does the case law refer to the relevant time being the date the marriage was entered into (Rosa paragraph 41), but also the judge made no firm finding in that regard and was simply leaving the way open for a future application. Clearly that was the correct approach and, if it is the case that the appellant and sponsor enjoy a genuine relationship and a family life with their child, that may form the basis of a fresh application rather than a basis upon which the appeal before the First-tier Tribunal ought to have been allowed.

20. Accordingly it seems to me that the judge was fully and properly entitled to make the adverse findings and reach the adverse conclusion that she did on the evidence before her and for the reasons fully and properly given. The judge's approach to the evidence, and to the question of the appellant's intentions in regard to his marriage, was in accordance with the relevant caselaw and the correct test and principles. She was fully and properly entitled to conclude that the appellant had entered into a marriage of convenience, for the sole and also the predominant purpose of gaining an immigration advantage, and that he was not, therefore, entitled to a residence card as the family member of an EEA national. There were no errors of law in her decision.

DECISION

21. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

Signed:  Dated: 8 July 2019

Upper Tribunal Judge Kebede