Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04911/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 June 2019	On 2 July 2019

Before

UPPER TRIBUNAL JUDGE FRANCES
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MR MUHAMMAD ARSHAD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E. Fitzsimmons, Counsel, instructed by Sindhu Immigration Services
For the Respondent: Mr L. Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born on 3 December 1981. He appeals against a decision of First-tier Tribunal Judge C H Bennett promulgated on 18 March 2019. Judge Bennett dismissed his appeal against a decision of the respondent dated 30 June 2018 to refuse his application for a permanent residence card. The application contended the appellant was a family member who had retained the right of

residence, under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations").

Factual background

2. The appellant's application for a permanent residence card was made on the basis of his previous marriage to [LP], a citizen of Lithuania born 5 August 1993 ("the sponsor"). They married on 23 July 2012 and divorced on 25 November 2015. The application was refused on the basis that his marriage to the sponsor was one of convenience.

3. The appellant appealed to the First-tier Tribunal, which found that the Secretary of State had discharged the burden he bore to demonstrate that the predominant purpose of the marriage was for the appellant to secure an immigration advantage, and dismissed the appeal. The First-tier Tribunal also found that the appellant did not meet the remaining criteria necessary for the issue of a permanent residence card as a family member who had retained the right of residence, regardless of the position concerning whether the marriage was one of convenience.

Permission to appeal

4. Permission to appeal was granted by the First-tier Tribunal on the basis that it was arguable that the judge proceeded on a basis which had not been advanced before him, and made observations in his decision, for example concerning the attractiveness of the sponsor, which had no place in a decision of the tribunal.

5. In order to understand the grant of permission, it is necessary to turn to the grounds. The grounds highlight the factual basis upon which the judge resolved the case against the appellant and contrast his findings with the case advanced by the respondent. The judge found that the sponsor thought she was in a genuine relationship with the appellant, and that it was the appellant who had misled her. This, contended the grounds, contrasted with the case advanced by the respondent which was that both parties to the marriage intended it to be a marriage of convenience. This finding also contrasted with an earlier decision of First-tier Tribunal Judge Khan promulgated on 13 January 2017, which found that both parties to the marriage intended it to be one of convenience. In departing from both the respondent's case, and the facts previously established by the First-tier Tribunal, it was incumbent upon the judge to find that the appellant had intended to *deceive* his wife, yet the evidence did not permit such a finding. The judge had rejected two key strands of the respondent's case, thereby minimising the remaining case against the appellant, leaving an insufficient evidential basis to justify such adverse findings.

Submissions

6. Ms Fitzsimons submitted that within the course of the decision the judge found the parties to have been in a genuine relationship, thereby

precluding and rendering irrational his subsequent conclusion that the appellant entered the relationship with the predominant purpose of obtaining an immigration advantage. At [26], the judge accepted that the appellant and sponsor "lived together as husband and wife". He noted at [36] that the witnesses supported the contention that they were seen together as husband-and-wife. At [42], the judge accepted those parts of the appellant's evidence which describe the circumstances in which he met the sponsor and in which the appellant described his physical attraction towards the sponsor. At [45], the judge rejected the suggestion that the sponsor's predominant purpose in entering the marriage was to secure an immigration advantage for the appellant; the judge found: "she married [the appellant] out of genuine love and affection".

7. Against that background, Ms Fitzsimons submits that it was never part of the respondent's case that the appellant deceived his wife into thinking that the marriage was genuine, in circumstances where it was, in fact, one of convenience. She points to Judge Khan's decision in which it was found that both parties intended the relationship to be one of convenience. That was an appeal against removal decisions taken by the respondent in respect of both the appellant and the sponsor, in which both appeals were dismissed. Although the judge below in the present matter quoted extensively from that decision, surprisingly we have not been provided with a copy of it.

8. The above "factual matrix", contends Ms Fitzsimons, was entirely at odds with the case advanced by the respondent. Pursuant to Sadovksa v Secretary of State for the Home Department [2017] UKSC 54 at [29], it is necessary for both parties to a marriage of convenience to have entered the marriage intending for the sole or predominant purpose to be to secure an immigration advantage. The only exception to this is in the case of deceit, whereby the non-EEA national succeeds in convincing his or her spouse that the relationship is genuine, in circumstances when it is not. Cogent evidence is required to justify such a finding, submits Ms Fitzsimmons.

9. Ms Fitzsimons submits that a finding of deceit was not open to the judge on the basis of the reasoning he adopted. At [43], the judge expressly rejected part of the respondent's case that photographs found on the appellant's telephone displaying him in the sponsor had been "staged". Also in that paragraph, the judge rejected the respondent's case that the appellant had sent "flirty" messages to other women, as revealed by a search of his telephone during an immigration enforcement visit. Ms Fitzsimons submits that in dismissing these central elements of the respondent's case, the residual evidence adduced by the respondent was insufficient to merit of finding that the marriage was one of convenience involving the deceit of the sponsor by the appellant.

10. The judge's reasoning is further undermined when [47(b) and (c)] are considered, submitted Ms Fitzsimons. This submission is that judge's

reasoning was irrational, given he made the following findings which are completely at odds with his overall conclusion:

> "(b) The photographs show that [the sponsor] is an attractive young woman. There is nothing inherently improbable in the propositions that [the appellant] should have found her physically attractive.
>
> (c) The photographs are consistent with the relationship having been at the time of the marriage based on genuine love and affection. But they do not establish that that was the predominant purpose of the marriage.
>
> (d) The fact that the marriage broke down… in 2014 [is] consistent with the marriage having been entered on the basis of genuine love and affection, but that… [the appellant and sponsor] simply fell out of love, having little, if anything in common…"

11. Ms Fitzsimons highlights the terminology used by the judge at [50] to demonstrate that he was approaching his analysis improperly, taking into account irrelevant considerations, and viewing the marriage through the lens of domestic cultural expectations. The judge expressed matters in these terms:

> "…it cannot but have been obvious to [the appellant], as a man of c.30, that [the sponsor] was, in emotional terms, an immature young woman."

The judge footnoted the term "immature young woman" with the following observation:

> "In case there be any who cannot see this, if the position were that [the sponsor] had told [the appellant], in March 2012, when they had, at best, known one another for circa two or three weeks that she wished to marry him, she could not but have been emotionally immature."

The judge made another reference to her "emotional immaturity" at [50 (e)], in which he stated that this quality made her a "suitable candidate" for the appellant, as she was less likely to consider that she was being exploited in order to confer an immigration advantage on the appellant.

12. At [50(d)], the judge highlighted the differences in the backgrounds and ages of the sponsor and the appellant; they married when she had just turned 18 and he was 30. The judge highlighted the fact that the only motivational factor described by the appellant for marrying the sponsor was her physical attractiveness and expressed doubt as to whether a genuine relationship.

13. Finally, Ms Fitzsimons submits that the approach the judge took to examining the case advanced by the appellant demonstrated that he applied the wrong burden of proof. She submits that the judge approached the matter on the basis that it was for the appellant to demonstrate that the marriage was not one of convenience, rather than the burden being on the respondent throughout to demonstrate that it was.

14. For the respondent, Mr Tarlow contended that the judge approached the issue of the evidential burden shifting to the appellant, in accordance with the authorities: see [50 (b)]. The judge arrived at legitimate findings of fact which were open to him to reach on the evidence before him.

Legal framework

15. Where the respondent alleges that a marriage is one of convenience, the burden rests on him to demonstrate that the marriage falls into that category (see Papajorgi (EEA spouse marriage of convenience) Greece [2012] UKUT 00038 (IAC), Agho v Secretary of State for the Home Department [2015] EWCA Civ 1198 at [13] and Sadovska v Secretary of State for the Home Department [2017] UKSC 54 at, for example, [28]. The burden upon the respondent is not discharged merely by demonstrating there to be a reasonable suspicion that the marriage is not genuine (that is, was contracted for the sole purpose of circumventing the domestic immigration control regime) but, if he does establish the presence of such a reasonable suspicion, the appellant will be expected to respond to the allegation. In those circumstances, the evidential pendulum will swing to the appellant. However, the basic rule is this: "he who asserts must prove": see Sadovska at [28] per Lady Hale PSC.

Discussion

16. Ms Fitzsimons does not challenge the judge's finding that the requirements contained in regulations 10(5)(c) and 10(6) of the 2016 Regulations were not met. The relationship had not lasted for three years prior to the initiation of divorce proceedings and there was an absence of evidence that the appellant, if he were an EEA national, had been exercising Treaty rights since the date of divorce. On that basis, she accepts that it is not possible for the appellant to succeed in this appeal. Understandably and quite properly, the appellant has challenged the decision below as he seeks to challenge the substantive finding that he was a party to a marriage of convenience. The focus of this decision, therefore, will be that issue.

17. We do not consider the judge below to have erred in law on the marriage of convenience point, for the following reasons.

18. First, Ms Fitzsimons' submission that the judge resolved a case on a factual basis not advanced by the respondent is based on the erroneous premise that the fact-finding function of a judge in the First-tier Tribunal is constrained by the submissions of the parties. On this approach, the parties would be able to tie the hands of a judge, merely by virtue of the scope of the submissions they make. That cannot be right. There is no

doctrine which states that the fact-finding function of the Tribunal is limited by the submissions advanced by the parties.

19. Of course, where a judge proposes to resolve the case on an entirely different basis to that advanced by the parties, fairness may require that the judge gives the parties the opportunity to make submissions on the proposed course of action: see AM (Fair hearing) Sudan [2015] UKUT 656 (IAC), headnote (v). The reason for that is essentially for reasons of procedural fairness. A judge is not required to give a running commentary on the approach he or she is minded to take, but where the resolution of the case is likely to take place on an altogether different basis to that canvassed by the parties, fairness dictates that the parties should be provided the opportunity to make submissions on the point.

20. That is not the territory of the submissions advanced by Ms Fitzsimons. No part of Ms Fitzsimons' submissions contended that the hearing was procedurally unfair in this way. She did not identify how the judge could have conducted the hearing differently, so as to cure this claimed procedural defect. The respondent advanced reasons as to why he considered the marriage between the appellant and the sponsor to be one of convenience. Quite properly, the judge analysed the respondent's case, rejecting some of it, and accepting other parts. The judge found that the sponsor had not intended the relationship to be one of convenience, whereas the appellant had. The Judge did not go as far as the respondent invited him to go, but nor were his findings incompatible with the respondent's primary case concerning the appellant. In adopting this approach, the Judge departed from the findings of Judge Khan, correctly viewing that decision through the lens of Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702. Again, Ms Fitzsimons did not submit how or why Judge Khan's decision should have led to a different conclusion on the part of the Judge in this matter.

21. Ms Fitzsimons' submissions rely on a misreading of the decision. She highlighted the apparent inconsistencies between the "findings" of the judge at [47], referred to paragraph 11 above, and his eventual conclusions at [50].

22. Properly understood, at [47], the judge was highlighting the counter arguments that could be advanced on behalf of the appellant. It was part of the thorough and detailed examination of all sides of the case which this judge conducted over the course of his 39-page decision. So much is clear from the introductory words which feature at the beginning of [47]: "as against the points in paragraph 46, there are the following points…" Plainly, the judge was rehearsing the factors in favour of the appellant's case. Nothing in that paragraph contains the judge's final findings of fact. There is no merit to this aspect of the appellant's case.

23. It will be helpful at this point to consider the criticisms levied under Ground 3, namely that the judge made findings of fact using inappropriate terminology based on the appearance of the sponsor, and his own

domestic cultural expectations. The references to the sponsor being "an attractive young woman" were in the context of the judge having accepted the appellant's evidence that he, the appellant, found the sponsor to be an attractive young woman. The reason the judge described the sponsor in these terms was because he was considering the appellant's case that he found the sponsor to be an attractive woman. While there is superficial force in Ms Fitzsimons' submissions that the judge should have avoided terminology which appeared to convey his own subjective analysis of the sponsor's appearance, it is clear that he was doing so in order to consider this aspect of the appellant's evidence. and does not demonstrate that the judge erred in law in this aspect of his analysis.

24. The judge's finding that the appellant used the age difference and the relative gap in maturity and experience between him and the sponsor to his own ends was within the range of findings properly open to the judge on the evidence before him. But for his marriage to the sponsor, the appellant would have had no right to reside in the United Kingdom. His immigration status was such that he had every incentive to benefit from a marriage to an EU citizen. The judge was highlighting the sponsor's vulnerability and contrasting it with the scheming approach of the appellant. These are factors which the judge was entitled to take into account, and his terminology does not undermine his findings.

25. This brings us to the final submission advanced by Ms Fitzsimons, namely that the judge erred in his application of the burden and standard of proof concerning marriages of convenience. Ms Fitzsimons submits that the judge approached the marriage of convenience issue on the basis that the appellant bore the burden of demonstrating that the marriage was not one of convenience, rather than the burden to demonstrate that it was resting on the respondent. We reject this submission.

26. First, at [12] to [16], over the course of five pages, the judge correctly directed himself as to the relevant legal framework. Ms Fitzsimons has not attacked any aspects of this part of the judge's decision.

27. Secondly, the judge applied that legal framework to the facts of the case. At [13], the judge correctly identified that the Secretary of State bears the burden of demonstrating that the marriage was entered into for the sole (as in predominant) purpose of securing an immigration advantage for the appellant. He also correctly identified that the evidential burden shifts to an appellant upon the provision of material which demonstrates the presence of reasonable suspicion by the Secretary of State. At [50], the judge applied those principles to the facts of this case. Specifically, at [50(b)], the judge noted that his analysis was sufficient to cause the evidential burden to shift to the appellant. He did not consider the evidence of the appellant to have caused the evidential pendulum to have swung back to the Secretary of State, as required by the authorities, if the appellant is to provide an answer to the allegation.

28. These findings all were made against the background of the decision of Judge Khan which found that the appellant and the sponsor had entered into a marriage of convenience. Judge Bennett correctly noted that the previous decision was his starting point, but not his finishing point. Throughout the course of his very detailed and careful analysis, the judge applied the relevant legal principles to the issue of the appellant's intentions at the point he entered into the marriage. The judge gave clear reasons as to why he accepted the respondent's case that the sole or predominant purpose for which the appellant had entered into the marriage was to secure an immigration advantage. The fact that in doing so he made findings of fact which were more favourable to the sponsor than those of Judge Khan and the case advanced by the Secretary of State does not in any way render those findings unsafe.

29. We consider that the decision of the first-tier Tribunal does not contain any material errors of law.

Conclusion

30. This appeal is dismissed.

Notice of Decision

This appeal is dismissed under the Immigration (European Economic Area) Regulations 2016.

No anonymity direction is made.

Signed *Stephen H Smith* Date 28 June 2019

Upper Tribunal Judge Stephen Smith