Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04474/2020**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 November 2021	**On 06 December 2021**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

MR MAZHAR HASSAN SAEED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R De Mello, Counsel, instructed by Law Fare Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan. His date of birth is 25 December 1987.

2. The Appellant was granted permission by Deputy Upper Tribunal Judge Saffer on 19 July 2021 to appeal against the decision of the First-tier Tribunal (Judge R

Hussain) to dismiss his appeal against the Secretary of State's decision (on 10 March 2020) to refuse his application for indefinite leave to remain (ILR).

3. The Appellant came to the UK in 2008 as a student. He was granted periods of leave as a student to 30 December 2015. On 18 September 2014 the SSHD made a decision (the "s.10 decision") under s.10 of Immigration and Asylum Act 1999 (the "1999 Act") as a result of him having submitted a TOEIC certificate in support of an application for leave which according to the Respondent was fraudulent. After this date the Appellant made five applications for a residence card pursuant to the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regs") all of which were rejected or refused by the SSHD.

4. The Appellant issued judicial review proceedings in respect of the s.10 decision on 15 October 2014. Permission was refused on the papers and following oral renewal. A further application was made by the Appellant to the Court of Appeal. While this application was pending, on 26 October 2016, the Appellant applied for an EEA residence card on the basis of his relationship with a Lithuanian national exercising Treaty rights, Ms Palabinskaite ("the Sponsor"). This application was refused by the SSHD on 8 May 2016. The SSHD relied on the Appellant having used deception in relation to the fraudulent TOEIC certificate. The Appellant appealed against the decision of 8 May. He and the Sponsor had married on 26 August 2017. His appeal was dismissed under the 2016 Regs by the First-tier Tribunal (Judge Twydell) in a decision dated 14 February 2019. Judge Twydell found that the Appellant and the Sponsor's marriage was a marriage of convenience. However, Judge Twydell found that the Appellant had not submitted a fraudulent TOEIC certificate in support of a previous application for leave.

5. In respect of the judicial review, on 4 February 2020 the Court of Appeal approved a consent order that had been agreed by the Appellant and the SSHD, following Judge Twydell's decision that the Appellant had not submitted a fraudulent TOEIC. The SSHD agreed to, amongst other things, rescind the s.10 decision and to reinstate the Appellant's leave to allow him to make a further application for leave to remain (LTR).

6. The Appellant made an application for ILR. The SSHD refused the application on 10 March 2020 on the basis that Judge Twydell found that the Appellant had entered into a marriage of convenience and the SSHD's view is that the Appellant had made a false representation, therefore his application was refused pursuant to paras. 276B (ii) and (iii), 322(2), 322(5) and 322(13) of the Immigration Rules (IR). The decision maker stated that the Appellant;

> "failed to establish that your relationship with Ms Palabinskaite was genuine and your claim for a EEA Residence Card was refused by the Home Office and your appeal was dismissed by an Immigration Judge at the First Tier. Your behaviour whilst resident in the United Kingdom does not reflect well on you …".

7. It is the view of the Secretary of State that the Appellant "made false representations in order to obtain documents to remain in the United Kingdom." The false representations were those relating to the Appellant's relationship with the Sponsor.

The decision of Judge Hussain

8. Before Judge Hussain, the SSHD no longer relied on para. 322 (13) of the IR. Furthermore, it was accepted that the Appellant had 10 years lawful continuous residence.

9. The Appellant's position was that the SSHD was prevented from relying on Judge Twydell's decision following the consent order. The judge rejected the Appellant's representative's submission. For the following reasons:-

> "19. I do not accept the Appellant's submissions on this point. The consent order dated 4.2.2020 related specifically to the Appellant's application for JR (which after being initially refused was appealed against) which sought to quash the Respondent's decision dated 18.9.2014 which had invalidated his earlier leave. In fact the terms upon which the Respondent was seeking to settle the Appellant's JR review application are set out at paragraph 11 of the statement of reasons which states:
>
> > '11. Since the FtT decision cleared the Appellant of TOEIC deception on appeal, the Respondent has agreed to take reasonable steps to put the Appellant into the position he would have been in, had that allegation and the Section 10 decision not been made. In the absence of some new factor justifying a different course, that will consist of:
> >
> > a) the Respondent rescinding the Section 10 decision that is the subject of this judicial review challenge;
> >
> > b) the Respondent treating the Appellant as though he had continuous LTR since 18 September 2014 (and any earlier period as may be established);
> >
> > c) the Respondent granting the Appellant a reasonable opportunity (being not less than 60 days) to submit an application for further LTR;
> >
> > d) the Respondent waiving any fee or charge, including any health surcharge, that might be payable for making such an application'.
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> 20. There is no mention either in the statement of reasons as above or in the consent order dated 4.2.2020 of the findings of the Appellant having entered into a marriage of convenience. The only reference to those proceedings is stated at paragraph 7 of

the statement of reasons. This merely acknowledges the context within which the relevant findings favourable to the Appellant's JR application and the proposed concession as set out in paragraph 11. The Respondent does however note that the Appellant was no longer seeking permission to appeal the decision of FtTJ Twydell (namely the adverse decision and findings relating to the Appellant having entered into a marriage of convenience).

21. For the above reasons I do not accept that the Respondent is prevented from relying upon the finding made by FtTJ Twydell that the Appellant had entered into a marriage of convenience which meant that he made false representations in relation to his application for a residence card. No (sic) is there any unfairness to the Appellant by the Respondent doing so."

10. The judge noted that the Appellant did not challenge the finding that he had entered into a marriage of convenience. At [para. 23] the judge found that:-

> "… In making and pursuing that application, he was aware that his marriage/relationship with Miss Palabinskaite was not genuine. This was dishonest and amounted to sufficiently reprehensible conduct that makes it undesirable for the Appellant to be granted leave to remain in the UK. There is nothing in the Appellant's conduct in relation to pursuing the residence card that could suggest it was a genuine error or an innocent mistake. Indeed this was one of many applications he had made for a residence card. I do not find that there are any facts peculiar to the Appellant that suggests that the paragraph 322(5) should not be applied"

11. The judge went on to consider the appeal under Article 8 with reference to paragraph 276ADE of the IR and concluded that there were no "obstacles that prevents the Appellant's integration back into Pakistan". He said that in any event given his findings in relation to para. 322(5) of the IR the Appellant falls to be refused on suitability grounds.

12. In relation to the proportionality exercise the judge found that there were no "compelling circumstances which have not already been considered under the Immigration Rules". He set out the case of R v Secretary of State for the Home Department ex parte Razgar [2004] UKHL 27; [2004] 2 AC 368; [2004] 3 WLR 58; [2004] 3 All ER 821; [2004] Imm AR 381; [2004] INLR 349. He concluded that there was an interference with the Appellant's private life however that the interference was proportionate, taking into account the factors in s.117B of the Nationality, Immigration and Asylum Act (NIAA) 2002 Act.

13. The judge rejected Mr de Mello's suggestion of "historic injustice" based on the Appellant's leave having been curtailed by the decision of the Secretary of State on 18

September 2014. He found that even if he was wrong about that, in the light of the Appellant having "employed dishonesty in entering into a marriage of convenience", this weighed heavily against him in the proportionality assessment (see para. [34]).

The Grounds of Appeal

14. Ground 1 asserts that "the judge erred in concluding the consent order did not prevent the Respondent from going behind the terms of the consent order and refusing to grant him appropriate leave to remain". The terms of the consent order are set out in the grounds as follows:-

> "Since the FtT decision cleared the Appellant of TOEIC deception on appeal, the Respondent has agreed to take responsible steps to put the Appellant into the position he would have been in, had that allegation and the s.10 decision not been made. In the absence of some new factor justifying a different course …"

15. It was common ground that at the time of signing the consent order the SSHD was aware of Judge Twydell's findings about the Appellant's marriage and that since then there was no adverse change of circumstances to warrant a departure from the consent order.

16. Ground 2 asserts that the judge was wrong to consider the Appellant's marriage as a sham marriage, as opposed to a marriage of convenience and failed to distinguish the qualitative difference between the two. It does not follow from Judge Twydell's decision that the Appellant made false representations. An Appellant may innocently believe his marriage is genuine but still it may be characterised by a judge as one of convenience.

17. Ground 3 asserts that in concluding that the Appellant's marriage is not genuine, the conclusion that the Appellant's conduct "amounted to sufficiently reprehensible conduct making him of undesirable character" does not automatically follow. The judge was wrong to consider the Appellant's marriage as a sham as opposed to a marriage of convenience. The case of R (on the application of Molina) v Secretary of State [2017] EWHC 1730 is relied on. Grubb J considered the statutory definition of "sham marriage" and concluded that a sham marriage can only be established if there is no genuine relationship between the parties, whereas the hallmark of a marriage of convenience is one that has been entered into … for the purposes of gaining an immigration advantage. This means that a marriage of convenience may exist where there is a genuine relationship if the sole aim of at least one of the parties is to gain an immigration advantage. Grubb J held [para. 73] as follows:-

> "73. In short, therefore a 'marriage of convenience' may exist despite the fact that there is a genuine relationship and in the absence of any deception or fraud as to its existence. The focus is upon the intention of one or more of the parties and, in the present context, whether the sole aim is to gain an immigration advantage …".

The Immigration Rules (IR)

18. The SSHD's decision was made under para 276B of the IR which contains the requirements to be met by an applicant for indefinite leave to remain on the ground of long residence. It reads as follows:-

    (i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.

    (ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:

        (a) age; and

        (b) strength of connections in the United Kingdom; and

        (c) personal history, including character, conduct, associations and employment record; and

        (d) domestic circumstances; and

        (e) compassionate circumstances; and

        (f) any representations received on the person's behalf; and

    (iii) the applicant does not fall for refusal under the general grounds for refusal

    (iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.

    (v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where –

        (a) the previous application was made before 24 November 2016 and within 28 days of the expiry of leave; or

        (b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied.

19. The relevant general grounds of refusal relied on by the SSHD are paras. 322 (2) and (5) of the IR.

20. Para. 332 (2) provides a discretionary ground for refusal based on:

    " the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave or in

> order to obtain documents from the Secretary of State or a third party required in support of the application for leave to enter or a previous variation of leave"

21. Para. 332 (5) provides a discretionary ground for refusal based on:

> "the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security"

Submissions

22. I heard submissions from the parties. Mr De Mello relied on the grounds of appeal. He submitted that the judge erred in failing to distinguish between a marriage of convenience and a sham marriage. If the Appellant was aware that the marriage was not genuine then Mr De Mello accepted that his behaviour would be sufficiently reprehensible but this was not the finding of Judge Twydell. The SSHD did not consider the consent order in her decision.

23. The judge said that the underlying facts were not in dispute; however, this was not the case. He was wrong to characterise the marriage as a sham which was not accepted by the Appellant. The Appellant's evidence, in his witness statement dated 27 March 2021, is that the relationship was genuine.

24. Ms Everett accepted that there is a distinction between a marriage of convenience and a sham. Judge Twyndell found that the marriage was one of convenience. However, whatever the case, there was dishonesty by the Appellant. The consent order concerned the TOEIC only.

Discussion

25. Regulation 2 of the 2016 Regs defines a marriage of convenience as follows : "marriage of convenience" includes a marriage entered into for the purpose of using these Regulations, or any other right conferred by the EU treaties, as a means to circumvent – (a) immigration rules applying to non-EEA nationals (such as any applicable requirement under the 1971 Act to have leave to enter or remain in the United Kingdom); or (b) any other criteria that the party to the marriage of convenience would otherwise have to meet in order to enjoy a right to reside under these Regulations or the EU treaties."

26. In Molina the High Court considered whether there was a difference between a 'sham marriage' and a 'marriage of convenience'. Deputy Judge Grubb considered the statutory definition of 'sham marriage' in s. 24(5) of the 1999 Act, which requires:

    a. The absence of a genuine relationship

b. One or both parties to enter into the marriage to avoid immigration law or the Immigration Rules and/or to obtain a right conferred by law or those Rules to reside in the UK

c. One or both parties to be a citizen of a country other than the UK, an EEA state or Switzerland.

27. The Deputy Judge then considered the definitions of 'marriage of convenience' in the 2016 Regs and the definition in Article 1 of Council Resolution 12337/97', which refers to 'a marriage concluded…with the sole aim of circumventing the rules on entry and residence of third-country nationals and obtaining…a residence permit or authority to reside'. The latter definition had been applied by the House of Lords in R (on the application of Baiai and Others) v Secretary of State for the Home Department [2008] UKHL 53 ; [2009] 1 AC 287; [2008] 3 WLR 549; [2008] 3 All ER 1094. and the Court of Appeal in Rosa v Secretary of State for the Home Department [2016] EWCA Civ 14; [2016] 1 WLR 1206; [2016] 2 CMLR 15; [2016] Imm AR 402; [2016] INLR 514. The Deputy Judge concluded that a 'sham marriage' can only be established if there is no genuine relationship between the parties; whereas the 'hallmark of a marriage of convenience is one that has been entered into… for the purpose of gaining an immigration advantage' [para. 64]. This means that a 'marriage of convenience' may exist where there is a genuine relationship if the sole aim of at least one of the parties is to gain an immigration advantage [para. 73].

28. In Sadovska and Another v Secretary of State for the Home Department [2017] UKSC 54 ; [2017] 1 WLR 2926; [2018] 1 All ER 757; [2018] 1 CMLR 37; [2017] Imm AR 1473; [2017] INLR 944, Baroness Hale considered the approach to marriages of convenience, finding that earlier definitions had been moderated by the Commission's 2014 Handbook, such that the predominant, rather than sole, purpose of the marriage should be to gain rights of entry/ residence. Incidental immigration and other benefits (e.g. tax advantages) that a marriage may bring are not relevant, if this is not the predominant purpose of at least one party to the marriage [para. 29].

29. From the case law I draw the following conclusions:-

(i) There are different tests to determine whether a marriage is a "sham" or whether a marriage is one of convenience under EU law, in this case the 2016 Regs. The former is defined in s.24 (5) of the 1999 Act (see Molina) and requires the absence of a genuine relationship. In respect of the latter, the predominant purpose test applies (see Sadovksa).

(ii) The terms "sham marriage" and "marriage of convenience" are not mutually exclusive. The absence of a genuine relationship at the time of the marriage being entered into would render the marriage one of convenience (and a "sham"); however, if there is a genuine relationship at the time of the marriage, while it could not be categorised as a "sham" marriage, it may still amount to a marriage of convenience (depending on the predominant purpose).

(iii) When deciding whether a marriage is one of convenience under the 2016 Regs, a Tribunal should make clear findings about whether it is accepted that there was a genuine relationship between the parties to the marriage at the material time (the time of the marriage).

(iv) There is deception deployed by a person who knowingly enters into a marriage of convenience with another in the absence of a genuine relationship. In the absence of a genuine relationship at the relevant time, a Tribunal may be entitled to infer that deception was exercised by the Appellant or the Sponsor or both. Depending on the facts there may be deception in a marriage of convenience.

Conclusions

Ground 1

30. The consent order followed the application by the Appellant for permission to seek judicial review of the SSHD's s.10 decision (following his alleged submission of a fraudulent TOIEC certificate) in the light of the finding of the First-tier Tribunal (Judge Twyndell) that the Appellant had not used deception in respect of the certificate. This was the reason the SSHD agreed to rescind the s.10 decision to remove the Appellant. The SSHD agreed a number of matters, all of which were followed through. Judge Twyndell had, however, dismissed the appeal under the 2016 Regs having found that the Appellant had entered into a marriage of convenience. There was no appeal against this decision and it was not the subject of judicial review proceedings.

31. Following the consent order the Appellant was put in the position that he would have been in had his leave not been curtailed i.e. he had his leave reinstated and was able to make an in-time application for ILR. The SSHD complied with all that she agreed to do in the consent order.

32. Mr De Mello submitted that there was an implicit agreement in the consent order that the SSHD accepted that the Appellant did not use deception (in entering a marriage of convenience). He said that otherwise it would be "alarming" that she agreed to the consent order. This submission is misconceived because the consent order related to an entirely separate matter to the marriage of convenience. The judge was unarguably correct to reject Mr De Mello's submission that the SSHD had waived her right to rely on the unchallenged findings of Judge Twyndell. I fail to see any connection between the rescinding of the s.10 decision and the decision of Judge Twyndell under the 2016 Regs.

33. Mr De Mello's argument that there was unfairness is wholly misconceived. There is no reason for the Appellant's solicitors to have taken the view that the marriage of convenience was no longer a part of his immigration history. The suggestion that the consent order prevented the SSHD from relying on the Appellant having entered a marriage of convenience is illogical as is the suggestion that Judge Hussain went behind the terms of the consent order.

34. Mr De Mello submitted that when considering the application for ILR following the consent order the SSHD should have considered the situation as it was in 2015 and therefore should not have taken into account the marriage of convenience which post-dated this. This submission is similarly misconceived. The SSHD agreed to put the Appellant back in the situation he would have been in but for the curtailment of his leave. It does not follow that any application or appeal should be considered on the facts as they were in 2015. There is simply no support for this. Indeed if Mr De Mello is correct the Appellant could not meet the substantive requirements of the long residence rules.

35. Judge Hussain stated that he did not accept that there had been any "historic" injustice because the Appellant had been placed back to the situation he was in before the curtailment of his leave. In my opinion, there has been "historical injustice" (see Patel (historic injustice; NIAA Part 5A) [2020] UKUT 351 (IAC); [2021] Imm AR 355); arising from the decision of the SSHD to curtail the Appellant's leave; however, by the time the matter came before Judge Hussain that situation had been rectified by the SSHD'S compliance with the consent order and it cannot properly be said that there still remained historical injustice.

36. The approach of the First-tier Tribunal to Mr De Mello's submissions was unarguably lawful.

Grounds 2 and 3

37. Judge Hussain found the Appellant's deception a material factor when considering the application of para. 322 (5) of the IR . I accept that had the relationship between the Appellant and his wife been genuine (or the Appellant reasonably thought it was) notwithstanding the marriage of convenience, the judge's language at [para.23] referring to the Appellant's "dishonest" and "reprehensible conduct" may have been unjustified therefore bringing into question the rationality of his decision under para. 322(5).

38. Judge Twydell did not make an express finding that the marriage was a "sham." There was no need for such a finding to be made in an appeal under the 2016 Regs. However, the only conclusion that can reasonably be drawn from Judge Twydell's decision, having regard to the evidence and the factual matrix before him, is that the Appellant knowingly entered into a marriage of convenience with another person in the absence of a genuine relationship. At the hearing before Judge Twydell the Sponsor gave evidence. The judge recorded that she had previously entered into a marriage with a Pakistani national who made an application that was refused by the SSHD "due to failing to establish that the marriage was valid and/or failing to show there was a genuine and subsisting relationship." On 26 October 2016 the Appellant applied for a residence card on the basis of his relationship with the Sponsor and they were invited to an interview. They did not comply with the investigation. They eventually attended with the Sponsor's son who was aged 11 months. They had been informed that the interview was not an appropriate environment for him. They were

given another date to attend. They again attended with the child. They were given another opportunity to attend. They complied and were interviewed.

39. Judge Twydell made the following findings: the Appellant had not established that he was living with the Sponsor as claimed; there was little evidence of "joint spending"; there had been limited discussion between the Appellant and the Sponsor about their religious beliefs; it was surprising that the Appellant had not spoken to the Sponsor's mother on the 'phone; they (the Appellant and the Sponsor) had opposing views about whether the Sponsor would return with the Appellant to Pakistan; and that they had had little discussion about what the judge found was to be such an important issue. Neither had produced their mobile phones having been given the opportunity to do so and Judge Twydell stated; "I therefore draw the inference either a lack of communication on their mobile phones, or certain communication that did take place via their mobile phones, does not support their case".

40. There was no evidence before Judge Twydell that the parties were in a genuine relationship. This is in contrast to Sadovksa where the Supreme Court acknowledged that there was a body of evidence which supports the couple's claims to have been in a genuine relationship, dating back some time before they gave notice of intention to marry. There was no such evidence in this case.

41. Judge Twydell did not believe the Appellant or the Sponsor. It was not a matter of there being insufficient evidence. There was no appeal against this decision. The assessment of Judge Twydell's decision by the Judge Hussain at [para. 23] is unarguably accurate. Judge Hussain was unarguably entitled to conclude that the Appellant was aware that the marriage (relationship) was not genuine and had therefore been dishonest.

42. I take into account that the Appellant's evidence before Judge Hussain was that he was in a genuine relationship with the Sponsor. Mr De Mello said that the judge overlooked this evidence when he said that there was no dispute as to the facts of the marriage. However, in the light of the unchallenged findings of Judge Twydell, the submission has no force. While the Appellant made assertions in his witness statement before Judge Hussain, there was no good reason to go behind Judge Twydell's findings.

43. Mr De Mello conceded that had the Appellant used deception and the marriage could properly be described as a "sham" he would be in some difficulty as far as the application of para. 322 (5) of the IR is concerned. In any event, I conclude that the judge was entitled to conclude that it should not be applied in the Appellant's favour in the light of his conduct.

44. The judge did not make a finding in respect of para. 322 (2) of the IR; however, neither party raised this and I not hear submissions on this. In these circumstances, I am not satisfied that the SSHD has established that it applies to the facts of this case.

Therefore I find that it should not be applied to the Appellant. However, it makes no material difference to the outcome of this appeal.

45. There was no free standing challenge to the assessment of Article 8 (including para.276ADE of the IR) and or the findings made by the judge in respect of proportionality.

46. The decision of Judge Hussain to dismiss the Appellant's appeal is maintained.

47. The appeal is dismissed.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed *Joanna McWilliam* Date 30 November 2021

Upper Tribunal Judge McWilliam