Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26676/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision and Reasons**
On 15th January 2015	**Promulgated**
	On 11th February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

MR FAHAD MAQBOOL
(ANONYMITY NOT DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Williams, Solicitor
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Pakistan who was born on the 19th January 1987. From the opening sentence of his decision, however, it would appear that First-tier Tribunal Judge Wilson doubted the correctness of even these facts. Hence, in a determination promulgated on the 23rd September 2014, he begins: "Claiming to be a citizen of Pakistan born on

the 19th January 1987, the appellant appealed … against the respondent's decision, made on the 5th June 2014, to refuse him a residence card under regulation 8(5) of the Immigration (European Economic Area) Regulations 2006". The appellant has now been granted permission to appeal to the Upper Tribunal from Judge Wilson's dismissal of his appeal against that refusal.

Background

2. The following facts are uncontroversial.

3. The appellant entered the United Kingdom on the 5th April 2010, with limited leave to remain for the purpose of study. On the 16th August 2012, he married Ms Nicoletta Balogova (hereafter, "the sponsor"). The sponsor is a Slovakian national. The appellant's first application for an EEA Residence Card was refused on the 23rd November 2012, and his appeal against that refusal was dismissed by Judge Levin in a decision promulgated on the 4th December 2013. The basis of both the respondent's decision to refuse the appellant's first application and Judge Levin's dismissal of his appeal against that decision was that the appellant and the sponsor had entered into a marriage of convenience. This was also the basis upon which the decision-maker refused the appellant's renewed application that was the subject of the instant appeal.

The decision of the First-tier Tribunal

4. At paragraph 8 of his determination, Judge Wilson noted that the decision of Judge Levin was not binding upon him but that it was nevertheless the starting point for consideration of the instant appeal. At paragraph 9, he stated that Judge Levin had given "clear reasons" for his finding that the respondent was justified in his "suspicion that the marriage was one of convenience". He stated that it was unnecessary in these circumstances for him to repeat Judge Levin's reasons for reaching that conclusion; a conclusion which he considered was "amply justified". He nevertheless re-visited those reasons. In particular, at paragraph 10, he considered the explanations that were given by the appellant and the sponsor concerning their allegedly discrepant replies when they were interviewed on the 2nd April 2013. At paragraph 11, Judge Wilson found that "both of the parties' explanations lack credibility". He concluded paragraph 11 by stating as follows –

> I have carefully considered Judge Levin's determination and remind myself that it is not my role to consider arguments intended to emasculate it. However I have also carefully considered whether there might be relevant considerations arising after it but I find that the evidence clearly points to both the appellant's and the sponsor's extremely poor credibility in this and other matters to which I will later refer. I regard Judge Levin's assessment of the matters before the appeal hearing as wholly correct and soundly reasoned. I find that this was a marriage of convenience.

Only then did Judge Wilson turn his attention to what was on any view a significant development that had arisen after Judge Levin had made his findings; namely, the birth of the sponsor's twins, in respect of whom it was accepted the appellant was the father.

5. At paragraph 11, the judge noted Mr William's submission that the birth of the children undermined Judge Levin's conclusion that the parties had entered into a sham marriage. The judge rejected that submission. He found that whilst children born of a union "can in some circumstances be an indication of mutual commitment to a relationship", it did not follow from this "that a marriage cannot therefore be a sham". He said that it was clear "from the facts and the oral evidence that the children were conceived after the respondent's first decision and the rejection of the appeal". In paragraph 13, the judge noted that the appellant had said that the sponsor's pregnancy was not planned and that whilst the sponsor had also stated that this was the case, when the judge had sought clarification of this reply, she had subsequently stated that they had planned to start a family. He began paragraph 14 of his decision as follows –

> I can find no grounds whatsoever for concluding that the birth of the appellant's and the sponsor's children was a relevant consideration to the issue of the propriety of the marriage, or that this event in any way undermines the respondent's repeated conclusion and Judge Levin's finding that this was a marriage of convenience.

The judge thereafter noted what he regarded as the discrepant evidence of the appellant and the sponsor concerning who had accompanied the appellant upon his post-natal visits to the sponsor in hospital, who had accompanied him when he had brought the sponsor home, and who had first visited them thereafter. At paragraph 16, he repeated that he did not find the appellant and the sponsor "to be the least bit credible". He found that, "the children are not children of a genuine relationship between the appellant and sponsor". He also regarded it as significant that he had not been provided with evidence from members of the sponsor's family who were said to be supporting her. He found that this was all the more remarkable, having regard to what he found to be "the overwhelming evidence that this was a marriage of convenience, a matter that was the subject of two respondent decisions and the clear finding of a judge on appeal".

The rival arguments

6. The first three grounds of appeal are in fact variants of the claim that the judge's findings were "at best irrational and at worst perverse". It is said that the judge gave inadequate reasons for finding that the birth of the appellant's children did not provide sufficient evidence that he had not entered into a sham marriage. The fourth ground of appeal, which argues that the judge conducted a flawed analysis of the appellant's right to respect for private and family life (by allegedly failing to treat the best

interests of his children as a primary consideration) was abandoned by Mr Williams at the hearing before me.

7. The core of the Secretary of State's written response to the Notice of Appeal is to be found in the statement that is contained in paragraph 3: "It is far from inconceivable that a party to a marriage of convenience, with all that that implies, would be prepared to give birth to a child to support an application". It is argued, at paragraph 5, that "it was clearly open to the judge to find that he was not persuaded by the DNA evidence as overtaking the previous findings".

8. At the hearing, Mr Diwnycz adopted the arguments in the respondent's written response. He also drew attention to what he argued were matters of concern arising from the DNA report, wherein the author concluded that the appellant was the father of the sponsor's children.

Analysis

9. I have concluded that there a number of legal errors in the First-tier Tribunal's determination of this appeal, and that the cumulative effect of these is to render it unsafe and to require it to be set aside.

10. Firstly, there is confusion as to the basis upon which the respondent refused the appellant's second application for an EEA Residence Card. The 'Reasons for Refusal Letter', dated the 6th April 2013, states that the decision-maker concluded that the appellant had entered into a marriage of convenience. However, he later referred to unmarried partners being 'extended family members', and to the consequent need for the appellant to prove that he was in a "durable" relationship with the sponsor. The decision-maker thereafter refused the application under the Regulation that governs the position for extended family members [Regulation 8 of the 2006 Regulations]. This confusion appears to have infected the decision of the First-tier Tribunal. This is apparent from the opening sentence of the decision, which I cited at paragraph 1 (above). It will be recalled that this referred to a regulation that is relevant only to extended family members who are in a durable relationship with (rather than married to) an EEA national exercising Community Treaty rights in the United Kingdom.

11. Secondly, Judge Wilson's statement concerning the burden of proof, at paragraph 7 of his determination, was incorrect. He stated that the burden of proof in immigration appeals is upon the appellant and that the standard of proof is a balance of probabilities. Although not a point that was originally taken in the grounds of appeal, Designated Immigration Judge French pointed out, when granting permission to appeal, that this general proposition is not applicable to 'sham marriage' cases. In such cases, it is for the respondent to show that there are reasonable grounds for believing that the marriage may be one of convenience. Only if that evidential burden had been discharged does the legal burden of proving that the marriage is not one of convenience pass to the appellant.

12. Thirdly, Judge Wilson's approach to the principles in Devaseelan [2002] UKIAT 000702 was flawed. The decision of Judge Levin was the starting point for considering the issue of whether the appellant had entered into a marriage of convenience. It was therefore unnecessary for Judge Wilson to revisit or even to rehearse the reasons that Judge Levin had given for his conclusion. It was also unnecessary for Judge Wilson to express his agreement with those reasons. As he himself pointed out, Judge Wilson's role was not to hear an appeal from the decision of Judge Levin. Moreover, on one reading of his decision, Judge Wilson appears to have treated Judge Levin's decision as the end-point for consideration of the central issue in the appeal. Thus, following an exhaustive consideration of evidence upon which Judge Levin had already made his findings, but before undertaking any analysis of what was potentially critical evidence concerning the birth of the appellant's children, Judge Wilson made the unequivocal finding that, "this was a marriage of convenience" [see the final sentence of paragraph 11, cited at paragraph 3 above]. That was clearly the wrong approach and was not saved by the fact that the judge had earlier made a somewhat cryptic reference to matters that "might have been relevant considerations" arising after Judge Levin had determined the earlier appeal. The entire structure of his decision is thus capable of leaving the reader with the impression that the judge had already closed his mind to the possibility that this was not a 'sham' marriage before prior to considering all the evidence.

13. Fourthly, to find that there were "no grounds" for concluding that the birth of the parties' children was "relevant … to the issue of the propriety of the marriage" was simply wrong in principle. The apparent fulfilment of what is generally regarded as the primary purpose of a genuine marriage – namely, the procreation of children - is necessarily relevant to a fair assessment of whether a marriage was entered into for some other purpose, and to suggest otherwise is irrational.

Future conduct of the appeal

14. I have concluded that this is an appropriate case for remittal to the First-tier Tribunal for the matter to be determined afresh. This is partly because I am satisfied that none of the original factual findings should be preserved. However, there is an additional reason for remittal in this case. Mr Dimwniycz raised a number of legitimate questions relating to the integrity the DNA testing process which were capable of calling into question the hitherto undisputed claim that the appellant is the father of the sponsor's children. This potentially opens up an entirely new front in what is sadly proving to be a somewhat protracted battle over the issue of the propriety of the appellant's marriage. It is one that is in my view most appropriately determined within the arena of the First-tier Tribunal.

Notice of Decision

15. The appeal is allowed, and the decision of the First-tier Tribunal to dismiss the appeal against refusal of the appellant's application for an EEA Residence Card is set aside.

16. The appeal is now remitted to the First-tier Tribunal to be heard afresh before a judge (excepting Judge Wilson) to be nominated by the Resident Judge at Bradford.

Signed Date **11th February 2015**

Deputy Judge of the Upper Tribunal