Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01750/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 December 2018	**On 23 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

CHETAN KUMAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss J Fisher, of Counsel instructed by M & K Solicitors
For the Respondent: Miss A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of India born on 2 April 1986, appeals with permission against a decision of Judge of the First-tier Tribunal Austin who in a determination promulgated on 20 August 2018 dismissed the appellant's appeal against a decision of the Secretary of State dated 31 January 2018 to refuse a residence card as the former family member of an EEA national who had retained rights of residence.

2. The appellant had arrived in Britain as a student in November 2009 and was granted a further extension of stay in that capacity until September

2013. In October 2013 he had married a Hungarian national and on 21 January 2014 he made an application for a residence card as the spouse of an EEA national living and working in Britain. That request was granted on 13 March 2014 and he was given a five year residence card valid until 13 March 2019. The appellant's evidence was that he and his wife had lived together until March 2015 when they had separated. They divorced on 1 September 2017. The application for a residence card based on retained rights of residence as the former family member of an EEA national was made on 17 October 2017 and was refused because the Secretary of State considered that the marriage was a sham entered into for immigration purposes. On 30 January 2018 the appellant had been interviewed and his residence card was revoked the following day. On 31 January 2018 the appellant's application for a residence card made on 17 October 2017 was refused and a decision made to revoke his residence card.

3. The decision of the Secretary of State was based firstly on a note of an enforcement visit at the appellant's home made on 23 October 2014. The appellant on that occasion had been found asleep and alone upstairs. He had stated that he had been married in October 2013 and that his wife was pregnant, the baby being due in February 2015. He had stated that his wife currently lived at another address that was closer to the hospital and as he did not have a car she lived at that other address with friends. The interviewing officer said there was absolutely no sign that the appellant's wife resided at the appellant's home or even visited and that the room was to all intents and purposes "a man-pad". The officer noted that the appellant had showed him a small bag of his wife's possessions and stated that it was a token storage item at best and that none of her personal effects adorned the room and there were no female items anywhere in the room. There were printed photographs of the wedding and nothing more. There was no evidence from the appellant's phone that the two of them saw each other or spent any time together whatsoever. Documents and bills were requested but the only bill relating to the appellant's wife was dated before the grant of the residence card in March 2014. It was clear from the appellant's phone and text messages that contact was minimal. The Immigration Officer said in his report that he would seek documents relating to pregnancy, and the matter would be taken on from there.

4. The appellant was interviewed in January 2018. He said that his wife had not been pregnant when he had previously been interviewed and he was vague regarding to further evidence about his wife, her previous life and their marriage. In the letter of refusal it was stated that at interview the appellant had stated that all the guests were his friends with the exception of one friend of his wife and he did not know why the his spouse's mother had not come to the wedding. He said that he had never discussed the reason for this. It was stated that the appellant was unable to explain why his wife had gone to hospital rather than doing the pregnancy test herself and it was pointed out that none of her possessions were in the property when an Immigration Officer visited. The appellant had stated that he had

been confused when he had been interviewed. The letter pointed out that no documents addressed to the appellant's wife at the address where the appellant was living had been produced and that there was nothing to indicate that she was self-employed.

5. The appellant appealed that decision and his appeal came before Judge of the First-tier Tribunal Austin on 17 July 2018. Having set out the evidence and the submissions made the judge correctly noted that the burden of proof was on the respondent who had raised the issue of whether the marriage between the appellant and his former wife was a genuine one. The judge found that the respondent had discharged that burden. In paragraphs 65 onwards he set out findings and conclusions.

6. The judge went very carefully over the evidence that had been produced and indeed considered some documentary evidence which showed that the appellant's wife was being pursued for enforcement action on an unpaid debt and it appeared that she was using different addresses. The judge referred to the visit of the Immigration Officer and noted the appellant's landlord's evidence which contradicted the Immigration Officer's note. The judge said that he found the landlord's evidence lacked credibility because the landlord had said the appellant and his wife shared a single bed during their stay of eighteen months as tenants. He noted the contradictory evidence of the appellant and the landlord but stated in paragraph 72 that he preferred the Immigration Officer's written record of the visit which was detailed and was not in his view one-sided, nor did it exhibit the bias attributed to him by the appellant. He pointed to the fact there was little evidence of a female living at the address and noted that the appellant had not claimed that there was widespread evidence of his wife's presence, but said that all her belongings were stored in one bag, the one bag which the officer had seen. He noted the landlord had said that the room contained ample storage space. He placed weight on the fact the appellant's wife was not there and referred to the appellant's comments that his wife was pregnant when in fact that was not the case despite the fact that the appellant had said the baby was due four months after the visit. The judge noted that, although the appellant's wife had supposedly produced written evidence of the relationship, she had not attended as a witness. He also placed weight on the fact that the appellant had said that he had no idea what his wife did before she came to Britain and referred to the fact that the appellant's wife's mother had not attended the wedding. The judge concluded that on the evidence the marriage was not genuine and that the respondent had discharged the burden of proof to show that the marriage was not genuine. He therefore dismissed the appeal.

7. The grounds of appeal stated that the judge should not have placed weight on the immigration visit and to attach significant weight to the document produced by the Immigration Officer: he was wrong to prefer the content non-contemporaneous unsigned document over and above the oral evidence of the appellant and the landlord. The argued that there

were shortcomings in the respondent's evidence which the respondent had not overcome and the judge was wrong to find that the appellant was not credible. It was also argued that the judge had placed weight on the lack of explanation about the living arrangements relating to the number of occupants in the two-bed property and stated that had not been raised in the hearing and that therefore the hearing was unfair.

8. Permission to appeal was granted by Judge of the First-tier Tribunal Gibb who found that the grounds were arguable. Judge Gibb stated that the judge had not placed sufficient weight on the judgment in **Sadovska & Anor v The Secretary of State [2017] UKSC 54** stating that too much weight should not be given to inconsistencies, which had to be considered in the context of all the evidence and that the marriage would only be one of convenience if the immigration benefit was at the date of the marriage the predominate purpose of it. It was arguable that the judge had not considered those matters.

9. At the hearing of the appeal before me Miss Fisher argued, firstly, that the judge had placed too much weight on the enforcement visit in 2014 and that he had been wrong to say that he preferred the written record of that visit rather than the evidence of the appellant. She stated that the report was not signed nor contemporaneous and that there were comments in brackets and there was no witness statement and that that evidence had not been tested in court. She effectively stated that this showed that the respondent had not discharged the burden upon him. She argued that the interview was not inconsistent as it clearly set out detail of the marriage and why the marriage had broken down. Moreover, the judge had placed insufficient weight on the oral evidence from the landlord. In addition, there was clearly evidence on which the judge relied which has not been put to the appellant.

10. Miss Everett merely argued that the judge was entitled to place weight on the note and that what had been said during the visit which was not in dispute.

Discussion

11. I find there was no material error of law in the determination by the judge. It is disingenuous for it to be argued that the Secretary of State had refused the application made merely on the evidence of the Immigration Officer: that is simply incorrect. The appellant was given an opportunity at the interview to deal with the concerns raised by the Immigration Officer's report and the Secretary of State clearly weighed up the responses at interview and took those, together with the Immigration Officer's report into account when reaching a logical conclusion that the marriage was one of convenience. The reality is that in the Immigration Officer report the Immigration Officer pointed out the further evidence relating to the appellant's wife's pregnancy was required. When it came to the interview it is clear that she had not been pregnant when the

appellant had been interviewed and had never been pregnant and therefore there was no reason for her not being present where the appellant was living. I note that the appellant was interviewed in October and said that his wife was due to give birth the following February. It is simply not credible to consider that a man would believe his wife to be pregnant and to give birth within four months when she was not. The Secretary of State was entitled to rely on that factor and on the other factors set out in the Immigration Officer's report when reaching his conclusion. The judge was fully entitled to find that the Secretary of State had discharged the burden of proof upon him. Moreover, the judge thereafter weighed up all the evidence and reached conclusions that were fully open to him thereon. Insofar as the grounds of appeal challenged the findings of the judge, the reality is that that challenge can be considered as no more than a disagreement with the findings the judge was fully entitled to make on the evidence.

12. In these circumstances I consider there is no material error of law in the determination of the Judge of the First-tier Tribunal and I therefore dismiss this appeal.

13. No anonymity direction is made.

Signed:  Date: 5 January 2019

Deputy Upper Tribunal Judge McGeachy