Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/02723/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th January 2019	**On 1st February 2019**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

ARBER ISLAMAJ
(ANONYMITY ORDER NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Jaisri, of Counsel, instructed by Oaks Solicitors.
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant, a national of Albania born on 6 April 1989, has been granted permission to appeal against the decision of Judge of the First-tier Tribunal Dean who, in a determination promulgated on 4 July 2018 following a hearing on 6 June 2018, dismissed his appeal against the respondent's decision of 20 March 2018 to refuse to issue him with a residence card as confirmation of his right of residence as the spouse of Ms Patricia Mercaldo (hereafter the "sponsor"), born on 30 April 1983. The sponsor is said to be an EEA national exercising Treaty rights in the United Kingdom. She was born in Brazil and is a national of Brazil and Italy.

2. The appellant and the sponsor were married on 15 December 2017. The respondent interviewed them separately on 27 November 2017. The interviewer made a summary of the interviews which described what the interviewer considered were inconsistencies and other difficulties arising from their answers at their interviews. In

addition, the sponsor's phone was examined, with her permission. The summary states that there was a text message concerning the conversion of € 5,000 to pounds sterling. There were other text messages referring to the appellant getting his 'papers'. The interviewer also stated in the summary: "*It is felt that [the sponsor] is fully committed to the relationship…".*

3. The decision letter states that the respondent had concluded that the marriage was a marriage of convenience.

4. The judge found that the marriage was a marriage of convenience.

5. Permission was granted by Judge of the First-tier Tribunal Page who said that "*an arguably dismissive approach may have been taken to the appellant's evidence*" and that the grounds of appeal merit full consideration.

6. At the commencement of the hearing, I asked Mr Jaisri to explain precisely what errors of law were alleged in the grounds, which were set out in 2 ½ pages (hereafter the "grounds"). Mr Jaisri requested some time to prepare a document and I therefore agreed to put this case back to enable him to produce a document setting out clearly what errors of law were alleged in the grounds. Mr Jaisri produced a 4-page document entitled: "*Clarification of grounds*" (hereafter the "COG"). I then heard submissions from him and Mr Avery.

7. I shall refer to the paragraph-numbering in the judge's decision in square brackets and the paragraph-numbering in the COG and the grounds as "paras".

The judge's decision

8. The judge heard evidence from the appellant, the sponsor, Mr Latif Marku and Mr Safet Zyberaj. She reminded herself of the burden and standard of proof and relevant case-law, including Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 38 (IAC), Rosa [2016] EWCA Civ 14, Sadovska v SSHD [2017] UKSC 54, R (Molina) v SSHD [2017] EWHC 1730 and also Miah (interviewer's comments: disclosure: fairness) [2014] UKUT 00515 (IAC) ([4], [6] and [10]) of the judge's decision).

9. The judge then considered the evidence before her. She found that a marriage had taken place between the appellant and the sponsor ([11]); that the fact that the appellant was recorded in his interview as having given his wife's date of birth as "*3/4/1983*" when it was in fact 30 April 1983 was not a material discrepancy because a mistake could have been made by the interviewer writing "*3/4/1983*" instead of "*30/4/1983*" ([12]); and that the couple had given consistent evidence as to where and when they first met (Gypsy Moth pub in Greenwich on 23 November 2016) ([13]).

10. The remainder of the judge's very detailed reasoning, set out at [14]-[38], concerned matters such as the fact that, when first asked at his interview who he was with when he first met the sponsor, the appellant failed to mention his brothers ([14]); that the appellant and the sponsor had given inconsistent evidence at their interviews as to the date, time and whether they had lunch or dinner together when they met each other the second time ([16]); that the appellant had said that he had made a mistake at his interview when he said that his wife went from part-time work to full-time work in July 2017 when it was August 2017 ([19]); that the appellant had given inconsistent evidence at his marriage interview and at the hearing as to why he was in the Gypsy Moth pub when he first met the sponsor ([21]); that the appellant and the sponsor had

given inconsistent evidence as to who pays the rent and the amount of the rent ([28]); that the appellant's claim that he contributes to the rent was not supported by any documentary evidence ([28]); and that the explanations given by the appellant and Mr Marku about the text messages concerning the conversion of €5,000 to pounds sterling were inconsistent [29]-[33]).

11. The judge said that she placed little weight on the Tenancy Agreement which the appellant had submitted to establish cohabitation because the document purported to be a 6-month tenancy agreement but the dates for the duration of the lease covered a 12-month period ([24]). At [25] and [26], she said that she gave little weight to the two bills from South East Water (respondent's bundle, F3 and F4) which show the appellant's name and that of the sponsor because the bill at F3 was dated 24 January 2017 which was 3 days before the appellant said he and the sponsor moved in to the address and the bill at F4 purported to cover a period which began 3 days before the appellant claimed to have taken up residence at the address. She therefore found ([27]) that the two South East Water bills, when taken in the round, did not demonstrate that the appellant had lived at the address with the sponsor during 2017.

12. The judge said ([34]) she had also considered evidence after the marriage in December 2017 because such evidence was capable of casting light on their intention at the time of marriage. She said that she placed little weight on the letters of support, witness statements and oral evidence of the supporting witnesses because, when taken in the round, such evidence "*amounted to nothing more than claims to know the parties and, in some cases, a vague claim of socialising with them"* ([35]). At [36], the judge noted that there was almost no evidence before her to demonstrate to the required standard that the appellant and the sponsor had continued to live at the same address since their marriage in December 2017. At [36], the judge also considered the album of photographs which showed the appellant's wedding. However, she said that *"none of the photographs had a date, in particular those of a social nature and therefore I find that these do not advance the appellant's case*".

13. The judge then set out her conclusions at [37]-[38].

> "37. Looking at the evidence in the round I find the lack of post-marriage evidence, together with my finding in paragraph 33 concerning the €5,000, calls into question the intention of the parties when entering into that marriage. The Appellant acknowledges that he entered this country illegally and remained here unlawfully. In her evidence his wife also acknowledged that the Appellant was in this country unlawfully and referred to hoping that he would be able to travel to Italy and Brazil with her. Thus, I find the Appellant's immigration status was, and remains, a matter of concern to them. I further find that the inconsistencies and discrepancies in the Appellant's evidence, together with my findings in paragraphs 14-33 above, lead me to the conclusion that the predominant purpose of entering into this marriage was for the Appellant to obtain a right of residence in this country.
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> 38. Looking at the totality of the evidence before me, I find that the Appellant has not discharged the evidential burden placed upon him and I therefore further find that it is more probable than not that this is a marriage of convenience which was entered into with the predominant purpose being to gain an immigration advantage, namely the Appellant's right of residence."

The grounds, the COG and oral submissions

14. Para 4 of the COG (para 1 of the grounds) contends that, given that the text messages were not produced to the judge, there was no evidence before her as to the alleged 'proximity' of the text concerning the conversion of €5,000 and the text messages about his "papers" and therefore there was no evidence to suggest there was a causal link between the money and his papers.

15. Para 5 of the COG (para 1 of the grounds the grounds) contends that the judge failed to consider the sponsor's explanation at her marriage interview for the presence of the texts referring to the appellant's 'papers' to the effect that her insecurity and worries about his fidelity had given rise to angry responses by her to him by texts. The sponsor had explained that she sometimes felt jealous of other women and when she did she would sometimes say in anger that the appellant had married her for his 'papers'.

16. At the hearing, Mr Jaisri re-formulated the submission at para 5 of the COG. He submitted that this ground is that the judge failed to take into account the sponsor's evidence as to the reasons for the text messages referring to the appellant's 'papers'. He submitted that, if the sponsor was being paid €5,000, she would not have cared about his infidelity.

17. Para 6 of the COG contends that the judge unlawfully placed weight at [29] on the fact that the sponsor had not explained at her marriage interview what the money referred to in the text was for because the sponsor had not been asked this question.

18. Para 7 of the COG (para 1 of the grounds) contends that the judge failed to consider the evidence in the interviewer's summary that "*It was felt that [the sponsor] [was] fully committed to the relationship …..[the sponsor] was quite emotional and had genuine tears in her eyes".*

19. I asked Mr Jaisri to explain why the interviewer's view was relevant to the judge's assessment of credibility, given that she (the judge) had the benefit of seeing and hearing the appellant and the sponsor give oral evidence. Mr Jaisri submitted that it was because the interviewer's view was germane to the respondent's decision-making process and should therefore have been considered by the judge. He submitted that this is to be distinguished from an expert's opinion about the credibility of an appellant's evidence.

20. Para 8 of the COG (para 2 of the grounds) contends that, in reaching her adverse credibility assessment, the judge placed undue reliance upon minor issues, i.e. the appellant's evidence as to when the sponsor went full time.

21. Paras 9 and 10 of the COG (para 10 of the grounds) contend that the judge erroneously placed little weight on the Tenancy Agreement because the document stated that the tenancy was a 6-month tenancy whereas the dates given on the document covered a 12-month period. This is because she looked at the tenancy agreement in isolation. She failed to consider the tenancy deposit certificate (page F2 of the respondent's bundle) which supported the existence of the tenancy.

22. Para 11 of the COG (para 2 of the grounds) contends that the judge erred in her rejection (at [25]) of the Water Bill at page F3 of the respondent's bundle. She failed to consider the interviewer's summary suggesting that the sponsor was committed to

the relationship. Furthermore, this issue had not been put to the appellant or his wife during the hearing. In this regard, reliance is placed upon AM (fair hearing) Sudan [2015] UKUT 656 (IAC).

23. At the hearing, Mr Jaisri submitted that the "unlawful" charge by the water company for three days did not undermine the veracity of the water bills. It was not unknown for people to be billed for incorrect periods. Furthermore, he submitted that the judge had overlooked the water bill at page F4 of the respondent's bundle. If the bill at page F3 of the respondent's bundle was not a genuine bill, he questioned why another bill would be sent to the appellant and the sponsor,

24. Para 12 of the COG (para 3 of the grounds) contends that the judge's finding at [14] was irrational. There was no reason for the appellant to lie about his brothers or his job or the fact that he owned vehicles. Para 3 of the grounds states that the appellant had initially denied being with his brothers in the pub because they were here illegally but their presence came to light later in the course of the interview. There was no reason for the appellant to lie about this. Para 3 of the grounds contends that the same applies to the appellant's job and the fact that he owned vehicles.

25. Para 13 of the COG (para 4 of the grounds) contends that the judge did not consider the evidence in a manner that was consistent with the approach in Papajorgi, in that, she had unlawfully ignored the many consistencies in the evidence, including the fact that the appellant and the sponsor had given consistent answers at their marriage interviews about their movements on the Friday before their marriage interviews and the names of the sponsor's teddy bears.

26. Para 14 of the COG (para 5 of the grounds) contends that the judge failed to properly and lawfully consider the appellant's photograph album which contained the following photographs: (i) the wedding photographs which showed that many guests attended the wedding; (ii) photographs showing that the sponsor's best friend, her daughter and her mother attended the wedding and visited them; (iii) photographs showing that the sponsor's mother visited the appellant and the sponsor in March 2018 and that the sponsor's sister visited them from Brazil in April 2017.

27. Mr Jaisri submitted that, if the judge had been concerned about the fact that the photographs did not have a date, the dates could have been attributed to the photographs by witness evidence. There was no issue between the parties that the marriage took place on 15 December 2017. There were other photographs at around the time of the wedding which showed that individuals had attended the wedding from Italy and that the sponsor's mother and sister had travelled from Brazil to attend the wedding. There was an email at page 33 of the appellant's bundle which confirmed the visit of the sponsor's friend from Italy. Mr Jaisri submitted that this evidence was relevant to the perceptions of others towards the marriage. The judge's dismissal of these photographs on the basis that they did not have a date was not in conformity with the approach that the judge should have adopted, i.e. to consider the evidence as a whole.

28. Para 15 of the COG (para 6 of the grounds) contends that the judge irrationally suggested at [37] that the couple's concern for the immigration status of the appellant was only so that he could travel to Italy and Brazil. She failed to appreciate it was for the purpose of him seeing her family in Italy and Brazil.

29. Para 16 of the COG contends that, in the light of the other submissions in the COG, the judge had unlawfully failed to place the burden of proof on the respondent and had incorrectly stated, at [38], that the appellant has not discharged the burden, contrary to Sadovska.

30. Mr Avery submitted that the grounds and the COG amounted to mere disagreements with the judge's reasoning and findings. The interviewer's view that the sponsor was fully committed to the relationship was not a relevant consideration, given that the appellant and the sponsor gave oral evidence before the judge and had their evidence tested under cross-examination. In any event, the judge was aware of the interviewer's summary because she referred to it. It is plain that the judge considered the photographs and concluded that they did not advance the appellant's case. He submitted that the appellant was clearly a man who was prepared to lie. He had accepted that what he had said at his interview about his employment and his brothers was not true. He had also denied having a car at his interview but it transpired that he had a van. All of this called into question his overall credibility. He submitted that there was no error of law in the judge's decision which was a good decision.

31. Mr Jaisri did not wish to respond.

32. I reserved my decision.

Assessment

33. In relation to para 7 of the COG, Mr Jaisri submitted that the judge erred in failing to take into account the interviewer's view that the sponsor was fully committed to the relationship. I do not accept that this was relevant to the judge's assessment. Mr Jaisri submitted that the interviewer's assessment was relevant because it was germane to the respondent's decision-making process. Although I accept that the interviewer's assessment was relevant to the respondent's decision-making process, the fact is that the judge had the advantage of seeing and hearing the appellant and the sponsor give oral evidence and having their evidence tested under cross-examination. The interviewer's opinion that the sponsor was fully committed the relationship was not therefore relevant. It was no different from an expert's view about the credibility of asylum seeker (as opposed to whether his or her account is consistent with the background). I therefore do not accept that the judge erred in law by failing to take into the interviewer's view that the sponsor was full committed to the relationship.

34. Turning to the judge's assessment of the text messages, it is necessary to quote [29]-[33] of the judge's decision which read:

> "29. During the marriage interview, [the sponsor's] mobile telephone was, with her consent, examined. Amongst "a number" of text messages referring to the Appellant "getting his papers" was one about the conversion of €5,000 to pounds Sterling (marriage interview, record summary, page 2). [The sponsor] was asked if she was being paid to marry the Appellant and stated she was not (marriage interview, page 7). I note that she did not comment on what the money referred to in the text was for (marriage interview, page 7).
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> 30. In the Notice of Appeal (paragraph 8) the Appellant states "I was merely querying the exchange rate with her as a friend of mine wanted to send some money to his family in Albania." However, the interviewing officer records that the message concerned the conversion of Euros to pounds which I find goes against credibility of the Appellant's subsequent claim that his friend wanted to send money to his family in Albania (marriage

interview, page 7). Furthermore, in oral evidence the Appellant's wife stated that the money was in relation to a family matter involving the Appellant's father. Looking at this evidence I find it is contradictory and goes against the credibility of the Appellant's account of the facts.

31. In his Witness Statement (Appellant's bundle, page 7) Mr Latif Marku, a French national of Albanian origin, states that he lent the Appellant's father €5,000 and that when the Appellant wanted to repay Mr Marku he was unsure of the exchange rate "hence his text message to his wife Patricia". Mr Marku claims he was present when the Appellant sent the text to his wife. However, I find this is inconsistent with the Appellant's version of the facts set out in the Notice of Appeal, namely that a friend wanted to send money to his family, rather than, as Mr Marku claims, the money was to repay a debt arising out of a loan he made to the Appellant's father. I find that this is a material inconsistency which undermines the credibility of the Appellant's claim that the money was not intended for [the sponsor].

32. In oral evidence Mr Marku was asked why the Appellant had asked his wife for the exchange rate rather than looking it up on the internet or going to a high street bank. He stated that there is a difference in the exchange rate and it was to give him an idea. However, I give this explanation very little weight because it does not explain why [the sponsor] was in a better position to provide an exchange rate than a high street bank or an exchange rate website. Furthermore, I find it is not a credible explanation because if the Appellant was to repay Mr Marku he would have been paying him in pounds and would therefore have asked for the exchange rate from pounds to Euros rather than from Euros to pounds. Additionally I find that, Mr Marku's evidence does not provide a credible explanation of why the Appellant would ask his wife for an exchange rate rather than check on the internet or at a high street bank, particularly when there was a considerable sum of money involved. Thus, when taken in the round, I find that Mr Marku's evidence was neither consistent nor credible.

33. Accordingly, looking at all of the evidence concerning the text and the conversion of €5,000 to pounds, I find it contains inconsistencies and discrepancies which undermine the credibility of the Appellant's account of the facts. The text had been sent before the Appellant's marriage to [the sponsor] and, when taken in the round, I find it more likely than not that money was to pass to [the sponsor] because the Appellant has failed to provide evidence which is consistent and credible with the regard to the content of the text and the purpose of the money transaction."

(my emphasis)

35. As can be seen, there is nothing in the judge's reasoning at [29]-[33] which shows that she erroneously considered that the respondent had produced evidence establishing a link between the text message concerning the conversion of €5,000 and the text messages about the appellant's 'papers', nor is there anything which shows that she considered that the text message concerning the conversion of €5,000 and the text messages about the appellant's 'papers' occurred close together in time as opposed to the text message concerning the conversion of €5,000 having been sent before the marriage. It has not been suggested on the appellant's behalf that the judge misapprehended the evidence when she said that the text message concerning the conversion of €5,000 was sent before the marriage.

36. Paras [29]-[33] of the judge's decision show that she did not consider that the appellant had given a credible explanation for the text message about the conversion of €5,000, nor did his witness Mr Marku. She then made her finding on the issue of whether the marriage was a marriage of convenience on the basis of her assessment of the whole of the evidence, including, but not limited to, the evidence of the text messages.

37. I accept that the judge did not mention, in terms, the sponsor's explanation for the reasons for the test messages referring to the appellant's status, i.e. that her insecurity about his fidelity had given rise to angry responses by her to him by text messages saying that he had married her for his 'papers'. However, the mere fact that this was not mentioned in terms does not mean that it was not considered. Judges are not obliged to refer specifically to every piece of the evidence. The fact is that she was plainly aware of, and took into account, the appellant's and the sponsor's answers at their interviews. There is therefore no reason to think that she did not take the totality of the evidence they gave at their respective interviews into account when assessing the evidence in the case.

38. There is no substance in the contention that it was unfair for the judge to take into account the fact that the sponsor did not explain at her marriage interview what the €5,000 was for on the basis that she had not been asked this question at her interview. At page 7 of her marriage interview, the sponsor was asked: "*Is [the appellant] paying you?".* She answered "*no*". On any legitimate view, the existence of a text message concerning the conversion of €5,000 was a matter that was "crying out" for an explanation. This was a perfect opportunity for her to explain what the €5,000 was for, on any legitimate view. She did not need to be specifically asked what the money was for. The judge was perfectly entitled to note that the sponsor had not commented on what the money was for at her interview.

39. There is therefore no substance in paras 4, 5, 6 and 7 of the COG.

40. It also appears to be suggested (see paras 22 and 27 above) that there had been unfairness, in that, the following had not been put to the appellant and the sponsor at the hearing: (i) the fact that the water bill at page F3 charged the appellant and the sponsor for a period commencing 3 days prior to the date that the appellant claimed to have taken up residence at the property; and (ii) the fact that the photographs had not been dated.

41. However, the fact is that the judge was entitled to consider such evidence as was before her. I do not accept that the fact that these points were not put to appellant led to unfairness. He was represented at the hearing by Counsel (not Mr Jaisri). It should have been obvious that the water bill at F3 was dated 3 days before the date when the appellant claimed to have taken up residence at the property. Likewise, it should have been obvious that photographs that are not dated are less helpful than photographs that are dated. The appellant, through his representative, could have dealt with these maters in evidence at the hearing before the judge.

42. The judge specifically referred to the album of photographs. She also had before her an email dated 28 May 2018 timed at 10:42 from the sponsor to someone named Kevin Murphy which described the photographs. There is simply no reason to think that she did not take this evidence into account when assessing the case as a whole.

43. There is therefore no substance in para 14 of the COG.

44. I reject Mr Jaisri's submission (see para 23 above) that the judge had failed to take into account the water bill at page F4 of the respondent's bundle. Mr Jaisri questioned why another bill would be sent to the appellant and the sponsor if the bill at page F3 of the respondent's bundle was not genuine bill. However, the fact is that judge specifically referred to the water bill at page F4 of the respondent's bundle. It simply

cannot be said that she overlooked it. In reality, Mr Jaisri is seeking to re-argue this evidence. Accordingly, there is no substance in para 11 of the COG.

45. As I have said already, the mere fact that the judge did not mention a specific piece of evidence does not mean that she did not take it into account. This applies as much to the sponsor's evidence concerning the reason for the text messages referring to the appellant's 'papers' as it does to the fact that she did not mention the tenancy deposit certificate at page F2 of the respondent's bundle (paras 9 and 10 of the COG) and the consistencies between the appellant's and the sponsor's answers at their marriage interviews concerning their movements on the Friday before the marriage interviews and the names of the sponsor's teddy bears (para 13 of the COG).

46. Arguments concerning the weight to be given to various aspects of the evidence will rarely demonstrate an error of law. The threshold for irrationality is far from being reached in this case. It was for the judge to decide what weight was to be given to the appellant's evidence as to when the sponsor went full-time para 8 of the COG) and the fact that the Tenancy Agreement stated that the tenancy was for 6 months but the dates given on the document covered a 12-month period (paras 9 and 10 of the COG).

47. Paras 12 and 15 of the COG amount to no more than a disagreement with the judge's reasoning and an attempt to re-argue the case.

48. I drew Mr Jaisri's attention to the fact that the submission in para 16 of the COG, that the judge had unlawfully failed to place the burden of proof on the respondent and had incorrectly stated at [38] that the appellant had not discharged the burden of proof, was not in the original grounds and therefore he did not have permission to argue this ground. In any event, the judge directed herself at para 4 in the following terms:

> "Burden and Standard of Proof
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> 4. This is a case where the Respondent alleges the Appellant has entered into a marriage of convenience. I have therefore considered the cases of Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 38 and Rosa [2016] EWCA Civ 14. These make clear that the legal burden of proof is on the Respondent to prove that an otherwise valid marriage is a marriage of convenience so as to justify the refusal of a residence card under the EEA Regulations. However, if the Respondent adduces evidence capable of pointing to the conclusion that the marriage is one of convenience, the evidential burden shifts to the Appellant. Sadovska v SSHD [2017] UKSC 54 confirms that the legal burden of proof is on the Respondent. The standard of proof remains that of the balance of probabilities."

(my emphasis)

49. It is clear that the judge was aware that the legal burden of proof rested on the respondent and that, if the respondent adduced evidence capable of pointing to the conclusion that the marriage was one of convenience, the *evidential* burden would shift to the appellant. At [38] of her decision (quoted at para 13 above) the judge said *in terms* that the appellant had not discharged the *evidential* burden upon him. In view of [4] and [38], it is simply misconceived to suggest that the judge applied the burden of proof incorrectly.

50. Even if I am wrong to say (para 33 above) that the interviewer's view that the sponsor was fully committed to the relationship was not relevant to the judge's assessment of credibility, this is not material to the outcome, given the very detailed reasons given

by the judge for her adverse credibility assessment and the fact that the judge was plainly aware of the interviewer's summary and therefore must have been aware of his opinion.

51. When one steps back from the detail, it is clear that the grounds and the COG advance arguments dressed up as errors of law which are in reality no more that a disagreement with the judge's decision. I have no difficulty in saying that, in my judgment, permission should not have been granted.

Decision

The decision of Judge of the First-tier Tribunal Dean did not involve the making of any error of law. Accordingly, her decision to dismiss the appellant's appeal against the respondent decision stands.

Upper Tribunal Judge Gill Date: 25 January 2019