Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03566/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 June 2019	**On 10 July 2019**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MR ALI RAZA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs H. Price, Counsel, instructed by Elaahi & Co. Solicitors
For the Respondent: Mr T. Elvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Ali Raza, is a citizen of Pakistan, born 2 May 1991. He appeals against a decision of Tribunal Judge Devittie promulgated 29 January 2019 dismissing his appeal against a decision of the respondent dated 23 April 2018 to refuse his application for a residence card as the family member of an EEA national.

Factual background

2. The appellant entered the United Kingdom in February 2012 as a student, with leave that was later extended until 23 April 2015. He submitted an application for further leave on human rights grounds but that was refused in disputed circumstances relating to whether the immigration surcharge had been paid. The appellant did not pursue that matter, instead submitting an application for a residence card as the family member of an EEA national on 16 November 2017. That application was refused, and it is that refusal decision which the appellant appealed against to the First-tier Tribunal, and which is under consideration in these proceedings.

3. The central issue in this case is whether the appellant was a party to a marriage of convenience. In August 2016, the appellant met Florina Alexandra Bitu, a Romanian citizen born 7 April 1997 ("the sponsor"). They married in a civil ceremony on 21 November 2017, having undertaken an Islamic ceremony in August 2017. The sponsor and the appellant were interviewed separately on 7 February 2018. The respondent considered there to be a significant number of discrepancies in the answers provided by the sponsor and the appellant, such that their marriage was demonstrated to be one of convenience. The respondent also considered that there was insufficient evidence concerning whether the sponsor was a "qualified person" for the purposes of the 2006 Regulations.

4. Before the First-tier Tribunal, the appellant and the sponsor gave evidence. The appellant called four witnesses to give evidence on his behalf, Liaqat Ali, Elisha Watkins-Williams, Wajid Ali and Zafar Ali. The witnesses were present to adopt their witness statements but were not cross-examined by the respondent. At [5], the judge below summarised the contents of these witness statements: "[t]hey state their close relationships to the parties and that they have personal knowledge of the genuineness of their marriage relationship".

5. The judge found that many of the inconsistencies highlighted by the respondent in the marriage interview fell away. He noted at [14] that counsel for the appellant had "rightly" highlighted that there was a "remarkable degree of consistency" across the interviews of both parties. Each were asked around 200 questions, and their answers were largely consistent. In the same paragraph, the judge noted that, "on the evidence as a whole the conclusion must be that there is a high degree of consistency in the responses of the parties…" The judge accepted that they were cohabiting. However, at [16], the judge noted that the parties' consistency was only one factor to be considered.

6. The judge examined some of the inconsistencies highlighted by the respondent. At [18(1)(b)], the judge found that no adverse inference could properly be drawn from the answers the parties gave concerning the appellant's employment. Elsewhere, the judge found that the answers the couple had given concerning the sponsor's work schedule did not call for

an adverse inference. In relation to the respondent's concerns that each party spoke only broken English, the judge found that they spoke sufficient basic English and were able to communicate on that basis, such that the appellant should be given the benefit of the doubt on the point. The respondent's concerns that the appellant and sponsor were unable to describe the home they lived in in sufficiently consistent terms fell away; their answers did not reveal a "serious discrepancy" on that issue.

7. There are some factors which the judge did hold against the appellant. At [18(2)(b)], the judge found that the sponsor's lack of knowledge concerning the appellant's financial means, and his proposed future employment, was a factor which suggested the marriage could have been one of convenience.

8. At [18(5)(b)], the judge noted that the appellant had given a different answer at interview concerning his immigration status. He noted that the appellant said that did not tell the sponsor about the immigration problems he was experiencing. By contrast, the sponsor said that he told her on their first date. This conflict, considered the judge, undermined the credibility of the appellant's case.

9. The judge considered the sponsor's answers in her interview concerning her Islamic marriage to the appellant to reveal a lack of interest in the marriage and her husband's religious beliefs. The judge considered that that revealed a lack of interest in the marriage certificate, which in turn suggested the marriage was one of convenience. See [18(6)(b)].

10. At [19], the judge said that he had indicated a number of "highly significant discrepancies that go to the very core of the question whether their marriage is a sham". The judge then underlined what he considered to be the very strong incentive the appellant had to enter a marriage of convenience. He considered the haste with which the parties married after having met to undermine further the claim that the marriage was not one of convenience.

11. In light of the highly significant inconsistencies, said the judge, the evidence of the appellant and sponsor had been undermined significantly. The judge found the marriage to be one of convenience.

12. The judge did not consider whether the sponsor was exercising treaty rights.

Permission to appeal

13. Permission to appeal was granted by a Deputy Judge of the Upper Tribunal on the basis that the judge erred by failing to make any findings in respect of the four witnesses whose evidence was not challenged by the respondent. In addition, although weight was a matter for the judge, it was arguable that the judge had not given sufficient reasons for attaching so much weight to the claimed inconsistencies and discrepancies in the

interviews of the appellant and the sponsor, given the finding reached by the judge that the remainder of the evidence was consistent.

Submissions

14. Mrs Price submitted that the judge's reasons for dismissing the appeal were "puzzling". She highlighted the "remarkable consistency" accepted by the judge across the answers provided by the appellant and the sponsor. She submitted that no clear reasons were given in the decision for dismissing the appeal. The sponsor's medical notes were before the judge; they state that the appellant attended medical appointments with the sponsor for an ongoing medical condition. One of the entries described the appellant as having interpreted for the sponsor. Another simply described him as having accompanied her. Although the judge noted at [20] that he took this into account, Mrs Price submitted that the conclusions reached by the judge were at odds with his findings concerning the remainder of the evidence.

15. Mrs Price also highlighted the fact that the judge made no findings in relation to the four witnesses referred to in paragraph 4, above. These were friends of the appellant and the sponsor, some of whom had attended their wedding, one of whom shared a flat with them at the time of the hearing. Each of the witnesses, whose evidence was not challenged by the respondent, spoke in warm and detailed terms about the genuineness of the relationship enjoyed by the appellant and the sponsor. The judge's failure to make findings in relation to these witnesses suggested that he had overlooked this arguably material evidence. As such, the judge's reasoning in relation to the significance of the claimed inconsistencies across the marriage interview was arguably perverse or irrational.

16. The presenting officer relied upon the respondent's rule 24 response. It states that the judge knew what the appropriate legal test was and reached findings with that in mind. The judge had assessed all the evidence and his finding was not irrational. The presenting officer highlighted the inconsistencies which the judge below found to be fatal to the validity of the marriage. This included the discrepancies in the parties' knowledge concerning their financial arrangements, the lack of knowledge of the sponsor concerning the Islamic marriage certificate. The judge had correctly directed himself concerning the burden of proof and could not be criticised on the basis that his decision was irrational. Weight is a matter for the judge and not something which this Tribunal should interfere with. It was not necessary for the judge expressly to refer to the other witnesses; he had clearly taken into account all relevant evidence, and reached rational findings as a result. The judge noted that the appellant's own brother had not attended the hearing to support her case, even

though he had provided a witness statement. That was a matter which the judge below was entitled to take into account.

Legal framework

17. 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

18. We accept the submissions of Mrs Price that the judge's failure to have regard to the four witnesses called by the appellant but not cross-examined by the respondent amounted to a failure to have regard to material evidence. It is not necessary to recite the details of their witness statements in any depth at this stage, other than to observe that each witness speaks in relatively detailed terms about the life the appellant and the sponsor enjoy together as a married couple, and describes the activities they undertake together and with their friends.

19. Whilst, in principle, there is superficial force to the presenting officer's submissions that the issue of weight is a matter for the judge, that principle is of little assistance where weight is assessed without reference to material evidence. Weight would be a matter solely for the judge below had he clearly had regard to all relevant material evidence. The judge noted at [5] that each of the four unchallenged witnesses had "personal knowledge of the genuineness of [the appellant and sponsor's] marriage relationship" but made no reference to the impact of those four witnesses to the issue of weight and his overall analysis of the case. These were witnesses whose evidence was potentially significant and, especially given the absence of challenge to their evidence by the respondent, would need to be discussed and analysed in some detail before reaching the conclusion arrived at. This the judge failed to do.

20. When these concerns are placed in the context of the judge's overall assessment of the weight he ascribed to the evidence of the sponsor and the appellant, the judge's findings about the "remarkable" degree of consistency between the appellant and the sponsor's answers during their interviews acquire a greater significance. The judge's conclusion that the

three inconsistencies were such as fundamentally to undermine the appellant's innocent explanation was inconsistent with his analysis of the "remarkable consistency", when taken alongside the evidence of the supporting witnesses. We accept that the judge did highlight the absence of the sponsor's brother at the hearing; the reason provided by the appellant was that he was out of the country. However, there were four supporting witnesses at the hearing. They were not cross-examined, and the judge did not have any questions for any of them himself.

21. We consider that the Judge failed to have regard to material evidence and accordingly failed give adequate reasons for his findings. We consider these errors to be material and accordingly set aside the Judge's findings that the marriage was one of convenience.

22. As we indicated at the hearing, we consider that the claimed inconsistencies, although in isolation capable of being viewed as significant, are less so when viewed alongside the remainder of the evidence as a whole. We bear in mind the findings of fact from the first-tier Tribunal that there was a "remarkable" degree of consistency across the evidence as a whole. We also recall the evidence of the four unchallenged witnesses, summarised by the judge as demonstrating the genuineness of the relationship between the appellant and the sponsor. We also recall the judge's finding that the appellant and the sponsor are cohabiting, and the medical notes of the sponsor, which revealed that the appellant had attended medical appointments with her. The overall picture that emerges is one of a genuine relationship.

23. We accept that the sponsor's apparent lack of knowledge during her interview concerning the appellant's immigration status is a matter for some concern. Similarly, it is also of some concern that she displayed only vague and uncertain knowledge concerning the Islamic marriage ceremony, and the appellant's finances. However, these are factors which must be viewed in the context of the remaining evidence as a whole.

24. We do not consider the sponsor's knowledge of the Islamic marriage certificate to be capable of being a determinative issue. She does not profess to adhere to the Islamic faith. The legal marriage was the civil ceremony. It is clear from the sponsor's witness statement, and that of the appellant, that the Islamic ceremonial aspects of their marriage were at the instigation of the appellant, and pursuant to his religious beliefs. At [7] of her statement, the sponsor writes that she is from a Christian background. At [24], she writes that she has little interest in the appellant's Islamic faith. During her marriage interview, she wrote, she was confused when asked about her marriage certificates, given she had the civil marriage certificate from the registry office, in addition to the Islamic certificate. In our view, this is an innocent explanation to this aspect of the concerns manifested by the respondent. In light of the remaining evidence, taken in the round, the sponsor's lack of knowledge concerning the Islamic certificate is not a matter which carry significant weight. It is not a factor which is capable of undermining the remainder of

the “innocent explanation” provided by the appellant and the sponsor to the allegations raised by the respondent.

25. The remaining significant inconsistency identified by the respondent relates to the answers provided by the appellant and sponsor concerning the appellant’s immigration status and the sponsor’s lack of knowledge concerning the appellant’s financial affairs. We accept that there some are inconsistencies and knowledge gaps, respectively.

26. In his interview, the appellant said that he had not told the sponsor that he was living in the United Kingdom unlawfully. By contrast, the sponsor said that he told her on her on their first date. The question for us is whether this inconsistency, taken against the background of the “remarkable” levels of consistency across the remainder of the interviews, alongside the findings of the judge below, and the four unchallenged witnesses, amounts to a sufficient basis to call into question all factors which point in favour of the case advanced by the appellant. We do not consider that it does.

27. At questions 154 and 155 of his interview, the appellant said that he had not used the term “illegal” in relation to his residence, but that he had told the sponsor that he did not have a visa. It is clear from his answer to question 155 that the appellant did not view remaining in the United Kingdom without a visa is residing in the UK illegally. He appears to have been pressed on the matter by the interviewing officer. However, the issue for our consideration is not the terms in which the appellant described the status of his residence in this country, but whether the answers he gave were consistent with those provided by the sponsor. He did confirm in his interview that he told the sponsor he did not have a visa. That is entirely consistent with the sponsor’s recollection of the early stages of their relationship, when she recalls being told by the appellant that he did not have a visa. The fact that the interviewing officer sought to press the appellant into using the term “illegal” in relation to his residence status is, in our view, irrelevant. For present purposes, what matters is the fact that the appellant said that he informed the sponsor at an early stage in their relationship that he did not have a visa, and that matches the account provided by the sponsor.

28. That leaves the sponsor’s lack of knowledge of the appellant’s earning power. The judge below at [18(2)(b)] was concerned that the absence of financial knowledge on the part of the sponsor fundamentally undermines the validity of their relationship. In our view, taken alongside the remaining evidence in the case, it is important to recall that relationships take many forms. Spouses have very different degrees of knowledge of each other’s financial situation. We do not consider that the sponsors relative lack of knowledge on this issue fundamentally to undermine the remaining evidence which, as we have demonstrated, tends to demonstrate that the sponsor and appellant are in a genuine and subsisting relationship.

29. Accordingly, in light of the above analysis, we find that the appellant has provided the necessary "innocent explanation" in answer to the allegations advanced by the respondent. It follows, therefore, that the evidential burden has shifted back to the respondent. The remainder of the case advanced by the respondent is not sufficient to overcome the innocent explanation proffered by the appellant, even accounting for the weaknesses outlined in the previous paragraph.

30. We find that the appellant and the sponsor are in a genuine relationship of marriage. They are cohabiting. They provided four witnesses before the judge below, all of whom were unchallenged by the respondent, speaking to the validity of their relationship. We accept that the appellant did have a significant incentive to marry an EU citizen in order to secure a right to reside. However, looking back to the intentions of the appellant and the sponsor at the time they entered into their marriage through the lens of the quality of their relationship at the moment, we do not find that the respondent has demonstrated that the sole, as in predominant, purpose of their relationship was in order to secure an immigration advantage for the appellant. Many features of their relationship are as one would expect to find in a genuine and subsisting relationship, in particular the appellant accompanying the sponsor to medical appointments, their cohabitation, the remarkable consistency across the answers that each provided in their marriage interview, and the support of the four witnesses, one of whom shares a flat with the appellant and the sponsor.

31. In light of these findings, it follows that the respondent has not discharged the burden of proof he faces in order to demonstrate that the marriage is one of convenience. That being so, the appellant and sponsor are not in a marriage of convenience. The appellant, therefore, falls into the definition of "spouse" contained in regulation 2(1) of the 2006 Regulations.

32. That is not the end of the matter. In order for this appeal to be allowed, the appellant would have to have demonstrated that the sponsor was exercising Treaty rights at the material time. The absence of such evidence was one of the reasons given by the refusal letter for rejecting the application. The exercise of Treaty rights was not an issue covered by Judge Devitte, and whether that amounted to a material error of law was not addressed in the grounds of appeal or before us. It follows, therefore, that the appellant has not demonstrated that Judge Devitte erred in that aspect of his analysis and we have not been invited to find that this was a material error of law. As such, although we are satisfied that the marriage between the appellant and sponsor was not one of convenience, this appeal is dismissed.

33. The appellant will be able to make a fresh application to the respondent exhibiting a copy of this decision to address any concerns the respondent may previously have had concerning whether the marriage was one of convenience.

Notice of Decision

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

No anonymity direction is made.

Signed *Stephen H Smith* Date 5 July 2019

Upper Tribunal Judge Stephen Smith