Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00458/2019 (P)

THE IMMIGRATION ACTS

On the papers on 17 June 2020 **Decision & Reasons Promulgated On 26 June 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

EUNICE LETITIA [G]
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. On 27 March 2019, a judge of the First-tier Tribunal dismissed the appellant's appeal against the respondent's refusal to issue her a Residence Card as confirmation of a right to reside in the United Kingdom as the family member of an EEA national exercising treaty rights. The EEA national is a Mr [VK] a citizen of Lithuania.
2. That decision was set aside by the Upper Tribunal at a hearing on 12 July 2019 on the basis of a fairness argument. Directions were given for a Resumed Hearing which was listed for 8 January 2020 in Birmingham. That hearing was adjourned as the EEA national wished to give evidence, had been very ill with bowel cancer in the past and continues to receive treatment, and was unable to attend the hearing in Birmingham. Further directions were given providing an extended

time period for the appellant to comply with the direction made at the error of law hearing for the provision of all evidence she was seeking to rely upon, and for arrangements made for the hearing to be transferred to Nottingham to facilitate the EEA nationals attendance.

3. The hearing was listed on 27 March 2020 at Nottingham but vacated as a result of the Covid 19 pandemic. Directions were sent canvassing the parties opinion upon a remote hearing as a result of which the appellant contacted the Upper Tribunal indicating the EEA national would not attend any hearing due to his health needs and that she was happy for the matter to be determined on the papers.
4. The respondent's representative accepted if the appellant was not going to attend there was very little else that could be done and made further submissions which are set out below.
5. I find it is appropriate to determine the merits of the substantive appeal on the papers in light of the position adopted by the appellant in response to directions.
6. The issue in the appeal is whether the appellant's marriage to the EEA national, which was found by the First-Tier Tribunal Judge to be a valid proxy marriage was, nevertheless, a marriage entered into solely for the purposes of obtaining and immigration advantage and therefore a marriage of convenience.

Burden of Proof

7. The European Commission has produced a Handbook which can be found at the website (http://ec.europa.eu/justice/citizen/files/swd_2014_284_en.pdf). This indicates that the Commission are of the view that the burden of proof rests on the national authorities to prove the marriage is one of convenience.
8. In **Rosa [2016] EWCA Civ 14** it was held that the legal burden was on the SSHD to prove that an otherwise valid marriage was a marriage of convenience so as to justify the refusal of a residence card under the EEA Regulations. The legal burden of proof in relation to marriage lay on the Secretary of State, but if she adduced evidence capable of pointing to the conclusion that the marriage was one of convenience, the evidential burden shifted to the applicant (paras 24 – 27).
9. That the burden of proof is on the respondent is now put beyond doubt by **Sadovska v SSHD [2017] UKSC 54** an appeal from the First Division of the Inner House of the Court of Session.

The law

10. The Immigration (European Economic Area) Regulations 2016 at regulation 2 defines a marriage of convenience: "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."

11. In Molina, R (On the Application Of) v The Secretary of State for the Home Department [2017] EWHC 1730 (Admin) (12 July 2017)) 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 section 24(5) of the Immigration Act 1999, which requires:
– The absence of a genuine relationship
– 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
– One or both parties to be a citizen of a country other than the UK, an EEA state or Switzerland.
12. The Deputy Judge then considered the definitions of 'marriage of convenience' in the EEA Regulations 2016 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 (Baiai) v SSHD [2009] 1 AC 287 and the Court of Appeal in Rosa v SSHD [2016] EWCA Civ 14.
13. 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].
14. In Sadovska & Anor v Secretary of State for the Home Department (Scotland) [2017] UKSC 54 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].

Discussion

15. The application was refused by the respondent on 15 January 2019 for the following reasons:

> Your application has been considered under regulation(s): 7 and 18 with reference to 22(4)(b) of the Immigration (European Economic Area) Regulations 2016.

> We have determined that you have not provided adequate evidence to show that you qualify for a right of residence as the family member of your EEA sponsor.
>
> You have not provided adequate evidence to prove that you are direct family member of an EEA or Swiss national and that you are related as claimed.
>
> To enable the Secretary of State reconsider your application, you and your EEA or Swiss national spouse/civil partner, [VK] were invited to attend a marriage interview.
>
> Invitation letters were sent on 5 November 2018 to [private email address] which you listed as our email address on the application form.
>
> You failed to attend this interview and did not give the Home Office any/a good reason for this failure.
>
> The Home Office invited you to a second interview on 22 November 2018. This invitation was sent to email address.
>
> The Home Office then invited you to a third interview on 10 December 2018. This invitation was sent to email address.
>
> Again, you failed to attend this interview.
>
> Whilst you have stated that you could not attend due to medical reasons and have sent pictures of letter detailing your prescriptions, you have not provided written evidence from a relevant GP or doctor stating that you were or are unable to travel for these interviews.

16. At the error of law hearing on 12 July 2019 the appellant, through her then representative, confirmed that she and the EEA national sponsor were willing to attend a marriage interview but had been unable to attend the earlier interviews as a result of the EEA sponsor's medical issues. When specifically asked whether the EEA national and the appellant were capable of attending the interview the Tribunal was advised that the answer in respect of both of them was "Yes". Sufficient time was therefore provided to arrange a further marriage interview which was offered by the respondent but which, again, the appellant and EEA national sponsor failed to attend.
17. No issue has been taken concerning the sponsor's status in the United Kingdom. He has provided a copy Residence Document in the form of a Registration Certificate issued on 16 October 2018. It is also not disputed the EEA national sponsor is unwell.
18. In relation to the EEA nationals health a number of documents have been provided form 2019, the latest of which is a letter dated 16 March 2020 written by an NHS GP based at Peterborough in Cambridge in the following terms:

> Letter Confirming Patient Illness
>
> To whom it may concern
>
> This letter confirms that **Mr [VK (d. o. b.)]** has been under my consultation for several years now with bowel cancer is progressively getting worse without

> no improvement. Our initial aim was to maintain remission, which has been unsuccessful as he still suffers from severe diarrhoea with rectal bleeding, incontinence, and extreme stomach discomfort. I can confirm that he is still unable to carry out any normal activities and he currently struggles with breathing. **Mr [VK]** is unable to walk 15 m without exhibiting symptoms of wheeze and shortness of breath. He is currently on inhalers for these symptoms.
>
> Recent biopsy results show progressive stage 4 cancer that is responsive to treatment, therefore our overall aim is to treat symptoms and support him with pain management where possible. **Mr [VK]** is currently being supported by his local palliative care team at home and Macmillan Cancer support group. Based on the above **Mr [VK]** is aware of his current situation that things will get progressively worse as he is at the end stage of his cancer. We are here to provide all the medical support he needs during this difficult time.

19. The address given on the letter from the GP is that in Peterborough where the EEA national and the appellant are said to have previously resided. The letter refers to support being provided by the GP in Peterborough and support by a local palliative care team. The appellant has, however, now moved to an address at Long Eaton in Nottingham and a letter written by the EEA national dated 8 January 2020 refers to that address.
20. Although the EEA national claims to have been unable to attend the marriage interviews as a result of his medical problems there is nothing to indicate the appellant herself was unable to attend.
21. The EEA national has set out his position in an undated document written in the following terms:

> My plea letter to the court as dictated to my wife (Letitia [G])
>
> This letter outlines the reasons why I cannot attend the court proceedings with my wife. It also contains my plea to the courts asking for compassionately grant my wife had documentation to stay in the UK.
>
> As you are aware, I have been unwell for several years now furring from bowel cancer.
> Firstly, I must apologise to the court and Home Office for not being able to attend with my dear wife Leticia [G]. If I had been in good health and capable of mobility I would have physically supported her all through this journey. I am aware that my health is deteriorating, and I will not get better as this could possibly be the end of my life. My plea to the Tribunal courts or whoever is dealing with my wife's case to grant her legal documentations; be the determining factor. My wife has been nothing but supportive to me, she has been my rock by my side when I needed her the most.
>
> It has been an emotional roller-coaster trying to get her documentations. My final plea would be to grant my wife documentations. I hope this please enough as a final request from possibly my last moments with her on this earth.
>
> Thank you very much for understanding
>
> Yours sincerely
>
> Mr [VK]

22. The appellant's immigration history reads:

13 April 1969 Appellant born in Sierra Leone

2 October 2000 Appellant applied for student Visa which was initially refused but granted on appeal valid from 15 August 2002 to 30 September 2003.

19 November 2002 Appellant entered the UK with student visa.
26 September 2003 Appellant granted further leave as a student nurse.

29 October 2004 Appellant granted further leave to remain.

14 November 2005 Appellant applied for further leave to remain which was refused.

22 May 2006 Appellant applied for further leave to remain which was refused.

14 July 2015 Appellant applied for further leave to remain outside the Immigration Rules which was refused.

30 August 2016 Appellant applied for further leave to remain on the basis of her family/private life which was refused.

22 October 2017 Appellant married EEA sponsor.

11 August 2018 Appellant applied for residence card as the source of an EEA national which was refused on 15 January 2019.

23. The appellant has been an overstay with no valid leave since 2006.

24. In her witness statement of 14 March 2019 the appellant expresses disagreement with the refusal but in addition to the alleged failure to attend an interview the decision-maker writes:

> You claim to have met your partner in December 2016, entered a relationship with them in December 2016 and began living together in September 2017. However,
>
> - There is limited evidence of cohabitation and you have provided no tenancy agreements or more letters to support your application.
> - There is no evidence of joint finances/commitments/responsibilities - you are named solely on NPOWER bills provided and have provided no joint bank statements or other bills where you are jointly named.
> - The provided photographs are not evidence of a durable, subsisting relationship.
> - You have failed to provide any accommodating letters for relevant issuing authority to confirm the legality of your marriage by proxy.

25. Further documents provided by the appellant to the Upper Tribunal include Npower utility bills dated 4th September, 28 October, and 4 December 2019 in the joint names of the EEA national and the appellant in relation to the property in Peterborough and an Npower bill dated 21 January 2020 also in joint names relating to the property in Long Eaton. It appears this is a response to the issues raised in the refusal letter.

26. Photographs have been provided showing the appellant purportedly with the EEA national but an issue was raised before the First-tier

Tribunal as there was no evidence the man in the photograph was the EEA national and that judge was clearly of the opinion that the photographs had been staged for the purposes of demonstrating intimacy when showing the appellant purportedly in bed with the EEA national; in a selfie in which the appellant is clearly wrapped tightly in the quilt but the EEA national not. No further evidence has been provided by the appellant in relation to this specific issue.

27. It is not explained by the appellant why the evidence provided to establish her claim is so limited. Following the finding of an Error of Law a direction was given by the Upper Tribunal in the following terms:

> The appellant shall no later than 4 PM 13 December 2019 file with the Upper Tribunal and send to the respondent's representative a consolidated, indexed, paginated bundle containing all the documentary evidence upon which she intends to rely in support of the appeal. Witness statements in the bundle must be signed, dated, and contain a declaration of truth and shall stand as the evidence in chief of the maker who shall be made available for the purposes of cross-examination and re-examination only.

28. The time limit was extended to 5 February 2020 following the adjournment of the hearing and direction for the relisting in Nottingham. The only evidence additional evidence is a copy prescription for the appellant indicating she herself is receiving medication, and the Npower bills referred to above, which are of limited use in establishing the appellant's claim.

29. The Respondent's position set out in an email is as follows:

> "Following A statement she will not attend a hearing - I have now seen the appellant's response to my last submissions. I have also seen copy of evidence that the appellant is receiving anti-depressant medication. However, there is no evidence in the form of a medical report which sets out that the appellant or her husband are unfit to give evidence remotely.
>
> In any event, as the appellant insists that the decision should be made on the papers, the respondent has no choice but to agree. On that basis, the respondent asks that the UT draw an adverse inference from the fact that the appellant and her husband have failed to give live evidence, especially given the live issue in this case, the failure to attend all previous interviews invited to and the husband's failure to attend all hearings listed. It has been impossible to ascertain whether their marriage was entered into for genuine reasons.
>
> I have now received the medical letter dated 16/3/20 in respect of the appellant's claimed husband. I have noted its contents and would submit that there is no mention of the appellant within that documents in respect of living with or attending to the care of her husband. Further, the appellant has failed to address why she and her husband cannot attend a remote hearing, given the fact that the medical letter states that her husband is unable to walk even 15 metres without requiring medical assistance, a remote hearing can take care from their home.
>
> The respondent is still a of the opinion that a remote video hearing in respect of this appeal should be conducted. If a remote video hearing is conducted the appellant and her partner will not need to travel anywhere, which appears to have been the difficulty previously described in not attending the 5 interviews

that the appellant and her partner have been invited to by the Home Office and the partner being unable to attend all 3 hearings at the tribunals. The appellant has not addressed in her submission as to why a remote hearing cannot take place, allowing both her and her partner to give evidence. Given the main issue in this case is in respect of whether their marriage is a marriage of convenience and given that they have not attended all interviews invited to, the respondent has not been afforded the opportunity to test their evidence in respect of their claimed relationship.

In spite of the above, if the tribunal is still minded to decide this appeal on the papers, the respondent continues to rely on the refusal letter dated 15 January 2019. In addition to the letter the respondent asserts that the appellant failed to provide clear evidence as to why her partner was unable to attend the further 2 interviews they were invited to after the error of law hearing. It is asserted that the evidence concerning the appellant's husband's health has been extremely vague and although he may have had more severe medical problems in the past, the appellant has failed to show how these have affected him over the last year when he failed to attend the interviews and the further hearing which was listed in Birmingham IAC on 10 January 2020.

No further evidence in respect of cohabitation or any joint household bills have been provided to shed light on their relationship. As per Rosa it is accepted that the tribunal must consider the intention of the parties at the time when the marriage was entered into and subsequent evidence is capable of shedding light on that. It is asserted that limited evidence has been provided to show that this marriage has ever been genuine. Photographs in themselves do not indicate that a marriage in or has ever been genuine, all that photographs are capable of showing is that the parties know each other.

It is also accepted that the legal burden of proving a marriage of convenience is on the respondent, however it is asserted that the respondent discharged the initial evidential burden by showing that the appellant and her partner failed to attend multiple interviews with the Home Office and only provided limited evidence in respect of their relationship. This refusal to attend interviews and now hearings within the tribunals has continued, without good excuse or reasonable evidence to show failure to attend. In addition to that, the appellant has failed to set out why they cannot now attend a remote hearing. The appellant has failed to rebut the inference drawn under Regulation 22(4)(b). Despite the appellant's reliance on Regulation 22(6) and (7), the regulation is not invoked systematically, and the decision was not based merely on the failure to attend the interviews, the SSHD also referred to the limited evidence provided and now provides further reasoning above to support the decision taken.

The respondent continues to rely on the submissions of Ms Sandal to the FTT in respect of the documents that were before the FTT and in respect of the appellant's oral evidence. The FTT decision notes that a full record of those submissions are contained in the record of proceedings.

The respondent maintains her submissions dated 21 May 2020 and invites the UT to either direct a remote hearing or make a decision on the papers in respect of submissions from both parties.

30. The key issue is whether at the date the appellant entered into the marriage it was not a genuine marriage but a marriage of convenience. The appellant's immigration history shows numerous attempts to secure status in the United Kingdom once her student leave expired. Even discounting the failure to attend the marriage interview together, on the basis of the EEA nationals medical

condition, there is nothing to suggest the appellant herself could not have attended and there is arguable merit in the respondent's contention that the reasons why the marriage interviews were not attended was not properly explained to the respondent.

31. Despite the appellant being aware of the concerns regarding lack of relevant evidence there has been a failure by her to provide anything of worth to show the marriage was entered into because it is a genuine marriage and was not a marriage to enable the appellant to obtain an immigration advantage.

32. It is not disputed the appellant may be providing support to the EEA national who may be extremely grateful for the same in light of his own medical difficulties. It may be that the utility bills have been put into joint names of the appellant and the EEA national, but the GP provides an address in Peterborough for the EEA national and refers to local support services assisting.

33. As noted by the respondent in the submissions there is insufficient evidence to enable a finding to be made on the balance of probabilities that this is a genuine marriage and not a marriage of convenience. I have given very careful consideration to the limited evidence available and I find the respondent has discharged the burden of proof upon her to the required standard to prove this is a marriage of convenience. The appellant was aware of the respondent's concerns but fails to rebut them by the provision of sufficient cogent evidence despite having been given the opportunity to do so on numerous occasions.

Decision

34. **I remake the decision as follows. This appeal is dismissed.**

Anonymity.

35. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed
Upper Tribunal Judge Hanson

Dated the 17 June 2020