IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005148
First-tier Tribunal No: EA/01581/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 April 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ESKENDER ZAYDULAEV
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Presenting Officer
For the Respondent: Mr Z Malik, KC, Counsel, instructed by iConsult Immigration

Heard at Field House on 3 March 2023

DECISION AND REASONS

1. We shall refer to the parties as they were before the First-tier Tribunal and so the Secretary of State is once more the Appellant and Mr Zaydulaev is the Appellant.

Introduction

2. The Respondent appeals against the decision of First-tier Tribunal Judge Gibbs ("the judge"), promulgated on 1 September 2022, by which she

allowed the Appellant's appeal against the refusal of his EUSS application.

3. The Appellant, a citizen of Uzbekistan born in 1987, had married a Latvian citizen, KM, in 2011. An application under the EEA Regulations 2016 had been made, that had been refused and an appeal came before First-tier Tribunal Judge Plumptre. By a decision promulgated on 4 June 2018, Judge Plumptre found that KM had not been exercising Treaty rights and that the couple's marriage was one of convenience.

4. Later in 2018 the Appellant and KM divorced. An application was subsequently made by the Appellant under the EUSS. This was refused, based in large part on the decision of Judge Plumptre. The Appellant appealed and the matter came before Judge Gibbs.

The judge's decision

5. Judge Gibbs referred herself to the decision in Papajorgji (EEA souse – marriage of convenience) Greece [2012] UKUT 38 (IAC) and to the conclusions of Judge Plumptre. She reminded herself that in light of the well-known Devaseelan principles, Judge Plumptre's decision was the starting point for her assessment of the evidence. The judge made reference to evidence from the Appellant, a number of witnesses and documentary sources relating in particular to events post-dating Judge Plumptre's decision, and indeed postdating the couple's divorce in 2018. Ultimately, the judge found the evidence as a whole to be credible and concluded that evidence went to show that the Appellant's marriage to KM "was not a marriage of convenience at any time":[21].

The Respondent's challenge

6. The Secretary of State made an application for permission to appeal, relying on what was said by the Court of Appeal in Rosa [2016] EWCA Civ 14; [2016 Imm AR 402, with particular reference to what was said at paragraph 41. The grounds asserted as follows:

> "It is submitted that the FTTJ has departed from the previous conclusions of the First-tier Tribunal that the marriage was one of convenience on an incorrect basis. It is submitted that the FTTJ has incorrectly looked at evidence of a subsisting relationship or claimed cohabitation as being capable of displacing the finding that the marriage was one of convenience at its inception.
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> It is submitted following the findings in Rosa that continuous cohabitation does not overcome the finding that the marriage was entered into in order to gain an immigration advantage.

7. The grounds went on to cite one of the principles of Devaseelan in respect of facts personal to the individual but had not been brought to the attention of the first judge and in respect of which "the greatest circumspection" should be exercised by a subsequent judge."

8. Permission was granted on all grounds. Subsequent to the grant of permission Mr Malik, KC, drafted a concise rule 24 response.

The hearing

9. At the hearing Mr Whitwell relied on the grounds of appeal and acknowledged quite properly that there was no perversity challenge in play. He referred us to [17] of the judge's decision and suggested that she had failed to apply the proper approach to the case before her in the light of Rosa. In response, Mr Malik in essence submitted that there had been no legal misdirection, no challenge to relevant evidence, and that the judge's conclusions were open to her.

Conclusions

10. In our view there are no material errors of law in the judge's decision. She approached the case before her on the basis that Judge Plumptre had made an adverse credibility finding on the issue of marriage of convenience. That was fully justified in line of what was said by Judge Plumptre at [31] of the 2018 decision.

11. Whilst the judge did not expressly refer to Rosa, we are satisfied that the exercise she then conducted was wholly consistent with the Court of Appeal's judgment, with particular reference to the very passage

set out in the Respondent's grounds of appeal. Paragraph 41 of Rosa states as follows:

> "41. I accept that the tribunal's language was loose. It may be useful to contrast a marriage of convenience with a "genuine" marriage (indeed, Underhill LJ treated them as antonyms at paragraph 6 of his judgment in *Agho*), but the focus in relation to a marriage of convenience should be on the intention of the parties at the time the marriage was entered into, whereas the question whether a marriage is "subsisting" looks to whether the marital relationship is a continuing one. I am satisfied, however, that the tribunal understood that the ultimate question was whether it was a marriage of convenience, not whether the marriage was subsisting, and that its findings provided a proper basis for the conclusion it reached that the marriage was one of convenience. The tribunal was correct to look at the evidence concerning the relationship between the appellant and her husband after the marriage itself (both before, during and after the husband's period of imprisonment), since that was capable of casting light on the intention of the parties at the time of the marriage. The tribunal's finding that "it is a marriage of convenience and always has been" (paragraph 26) covered the position at the time of the marriage. The wording suggests that the tribunal had in mind the possibility that a marriage of convenience might turn into a genuine marriage in the course of time, but the finding that it had always been a marriage of convenience makes it unnecessary to consider that potentially interesting issue in the present case."
>
> [Emphasis added]

12. This passage makes it clear that the judge was entitled to look at evidence which post-dated the marriage and which was potentially relevant to the intentions of the parties as at the date of the marriage itself, that being the crucial point in time. The evidence relating to the divorce and the relationship which re-formed thereafter, together with the documentary evidence referred to at [18] and the combined evidence of the witnesses (which we note was not challenged by the Respondent at the hearing) was all pertinent to the approach undertaken by the judge, one which Rosa confirmed is permissible. It rather seems to us as though, at least in part, the grounds of appeal assert that the judge was in fact wrong to do what Rosa expressly permitted her to do.

13. The judge was entitled to regard the body of evidence before her as credible; indeed there has been no challenge to the evidence or the findings made thereon.

14. In terms of the Devaseelan point, the passage cited in the grounds is misconceived because it is apparent to us that the evidence of greater significance in the judge's mind was that which *post-dated* Judge Plumptre's decision. It was simply not a question of applying "the greatest circumspection" to the evidence in question. The judge was aware of past drug use and such like. We are satisfied that she conducted a balanced and lawful exercise in terms of the assessment of the evidence. Ultimately, there was no legal misdirection.

15. The judge then at [21] brought all matters together, reaffirmed that the starting point had indeed been Judge Plumptre's decision, but stated a conclusion which was open to her, namely that the Appellant's marriage with KM had not been a marriage of convenience "at any time". That last phrase is important because it clearly covers the inception of the marriage, that being the critical point in time.

16. In light of the foregoing, there are no errors of law in the judge's decision.

Anonymity

17. We make no anonymity direction.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal shall stand.

The Secretary of State's appeal to the Upper Tribunal is dismissed.

H Norton-Taylor

Judge of the Upper Tribunal

Immigration and Asylum Chamber

Dated: 13 March 2023