IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002363
First-tier Tribunal No:
EA/50851/2021
IA/05179/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 12 April 2023

Before

UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE MALIK KC

Between

Mr Nertil Turshilla
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: *Mr A Stedman*, instructed by Briton Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

Heard at Field House on 16 January 2023

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which were given orally at the end of the hearing on 16th January 2023.

2. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Rodger (the 'FtT'), promulgated on 25th February 2022, by which she dismissed his appeal against the respondent's refusal on 26th March 2021 of his application for a family permit under the Immigration (EEA) Regulations 2016, as the partner, and later spouse of his EEA (Romanian) sponsor. The respondent had refused the application on the basis that the appellant had not provided adequate evidence that he was the partner of his sponsor and that he had a durable relationship with her. The respondent had taken issue with the limited documentary evidence provided in joint names, which were a single joint council tax bill and tenancy

agreement, both of which were very recent. The respondent did, however, accept that the sponsor was exercising treaty rights. The issue was whether the appellant was in a durable relationship with his sponsor as claimed, or, as the FtT later considered, with the respondent's consent, whether the appellant met the requirements of regulation 7 of the 2016 Regulations.

The FtT's decision

3. The FtT did not regard the appellant and his sponsor as credible or honest witnesses (§18). She identified what she regarded as numerous inconsistencies in the witnesses' evidence. Moreover, at §19, she considered that as the appellant had not married his sponsor until after the Brexit implementation date and after the respondent's initial decision to refuse a family permit, the appellant could not succeed under reg. 7. The appellant's inability to marry was not because of Covid restrictions or the lack of availability of marriage dates. Moreover, the fact that the respondent had consented to the reg. 7 issue being considered as a new matter did not deprive the FtT from considering whether there was a durable partnership. Whether the marriage was one of convenience could not have been raised in the refusal letter as the couple had not married until after that decision. At the date of the respondent's decision, the relationship was, in the FtT's view, one of convenience.

The grounds of appeal and grant of permission

4. The appellant lodged grounds of appeal which are essentially as follows.

5. First, the FtT had erred in concluding that the appellant could not meet reg. 7 of the 2016 Regulations, as he was not married until after 31st December 2020. The consequence of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 was that, provided that the appellant had applied under the 2016 Regulations before 31st December 2020, all powers and rights under the Regulations would be preserved until appeal rights were finally exhausted, as per the authority of Geci (EEA Regs; transitional provisions; appeal rights) [2021] UKUT 285 (IAC). Of note, the appellant had applied under the 2016 Regulations on 31st December 2020. There was no requirement for the parties to have been married by then, but solely that a valid application needed to have been made as per reg. 8, when read in conjunction with Section 3(4) of the relevant saving provisions. Although the appellant had applied for a residence card under reg. 8(4) on 31st December 2020, which the respondent refused on 26th March 2021, the appellant had since married and should be granted a residence card, as he had made an application under reg. 8, which was preserved by Schedule 3 of the savings provisions.

6. Second, the FtT had erred in considering the issue of whether the relationship was one of convenience when the issue had never been raised in the refusal decision. The FtT should at least have offered the appellant an adjournment, as per §27 of Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038(IAC). Moreover, the burden had been on the respondent to show that the marriage was one of convenience.

7. First-tier Tribunal Judge Komorowski granted permission on 8th April 2022. The grant of permission was not limited in its scope.

The hearing before us

8. We start by considering an purported oral application made under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 in relation to adducing further evidence. We mention this because in the grounds of appeal, at §16, the grounds of appeal had stated:

> "A will seek permission to adduce witness statements under Rule 14(2) of the FtT (IAC) Rules. A will file a notice under Rule 15(2A) of the Upper Tribunal Procedure Rules upon permission being granted."

9. On Friday, 13th January 2023, nearly a year later, Briton Solicitors, acting for the appellant, sent an email to this Tribunal, attaching various files which were said to include witness statements. We queried with Mr Stedman, acting for the appellant, whether there had in fact been a Rule 15(2A) application, upon permission being granted. He said that he did not believe so. We reminded ourselves of the principles of Ladd v Marshall [1954] EWCA Civ 1, as to whether the evidence could not have been obtained with due diligence for use at the FtT hearing; whether that evidence would have had an important influence, (although it need not be decisive); and whether the evidence was apparently credible.

10. We also bore in mind the Court of Appeal authority of Kabir v SSHD EWCA Civ [2019] 1162, and in particular §23 onwards. While Ladd v Marshall may be our starting point, (and there remains flexibility), as the Court confirmed in Kabir, there nevertheless needs be a proper application. There has not been in this case. We have not been taken to the substance of the additional evidence and there has been no explanation for why it could not have been adduced at an earlier stage before the FtT. The respondent had been clear that it did not accept that the relationship was a durable one. We are also not satisfied that the additional evidence would have had an important influence on either of the two issues in respect of which permission has been granted, namely: (1) the law preventing reliance on a marriage which post-dated the specified date; and (2) whether it was permissible to consider an issue not addressed in the refusal decision, and whether the FtT ought to have adjourned the hearing. We do not refuse an application under Rule 15(2), as no proper application has been made.

11. At the beginning of the hearing, we also discussed with the representatives the authority of Elais (fairness and extended family members) [2022] UKUT 00300 IAC. We do not repeat here the full circumstances of that case, except to say that that they appeared to be similar to the facts of the appellant's case. There had been an application as a durable partner and the question was then whether the FtT was entitled to consider the question of a later marriage. The Upper Tribunal had given guidance at headnote (3):

> "3. Where:
>
> a. an application for a residence card as the durable partner was made, as in the case here, before the end of the "implementation period", and
>
> b. the putative durable partners marry after the end of the implementation period,

> in any appeal against the refusal of the application, the post-implementation period marriage is not capable of amounting to a "new matter" for the purposes of an appeal under the 2016 Regulations and is, at its highest, simply further evidence as to the existence and durability of the claimed relationship between the appellant and the EEA sponsor.
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> 4. Where such an appellant relies on a post-implementation period marriage to demonstrate the durability of the relationship upon which an application for a residence card as a durable partner was based, whether that marriage is genuine and subsisting may be a relevant issue for the tribunal to determine. The established EU law jurisprudence concerning marriages of convenience does not apply to that assessment."

12. We also bear in mind paras [50] and [51] of Elais:

> "50. … The judge dealt with the limits on the tribunal's jurisdiction correctly. By definition, it could not have been a breach of the EU Treaties, as applied by the EU withdrawal agreement, to refuse to grant an application for a residence card as a family member on the grounds of a marriage that did not take place until after the implementation period came to an end, when Union law no longer applied to the parties to the marriage. The appellant was outside the personal scope of the rights of residence conferred on "family members" by Part 2 of the EU withdrawal agreement, since he had not resided in the UK under Union law prior to the end of the implementation period: see Article 10(1)(e)(i) of the EU withdrawal agreement. The highest quality of residence the appellant can hope to attain under the EU withdrawal agreement is the facilitation of his residence as a durable partner, pursuant to Article 10(2) to (4). This is because he applied for his residence to be facilitated in that capacity before the end of the implementation period: Article 10(3).
>
> 51. It follows that the judge correctly recognised that the marriage "route", as he put it, was no longer available to the appellant."

13. The two issues in Elais were whether the appellant was the sponsor's partner, and whether he was in a durable relationship with his partner. The applicable law was not EU law, rather it was the 2016 Regulations, and the burden of proof was not on the Secretary of State, but was on the appellant to show that there was a partnership and that it was durable.

The appellant's submissions

14. We turn first to the appellant's submissions. We do not recite ether party's submissions in detail and only refer to them where necessary to resolve and explain, where we have not accepted them, our reasons for doing so.

15. In relation to ground (1), and the issue of whether the FtT had erred in deciding that the appellant could not rely on the fact of the marriage itself under reg. 7, while Mr Stedman made no formal concession, he no longer pursued that ground with any vigour. We conclude that he was right not to do so. The FtT did not err in law on the grounds pursued, because, as Elais makes clear, an appeal under

reg. 7 could not succeed where the marriage took place after the specified date (see paras [50] and [51] of Elais).

16. We then turn to ground (2) and the precise basis on which it was put. It was that the respondent had never challenged the relationship in the refusal decision, so that it was procedurally unfair for the FtT to raise the issue and making findings on it, without at least considering whether to adjourn the hearing, as per §27 of the authority of Papajorgji (EEA spouse - marriage of convenience) [2012] UKUT 38. Mr Stedman accepted that no adjournment application was made at the hearing.

17. While the grounds of appeal had also referred to Sadovska v SSHD [2017] UKSC 54, as authority for the proposition that the respondent bears the burden of proof in relation to a marriage of convenience, Mr Stedman accepted the burden was on the appellant to prove a that he was in a durable relationship.

18. Mr Stedman added that in terms of procedural unfairness, there may be cases where the fact of a marriage may be neutral. This might be because a judge considered the durability of a relationship, in isolation from a later marriage. This itself may be an error. However, here, the FtT had erred in drawing adverse inferences from her conclusions on the marriage being one of convenience, as undermining the claimed durability of the pre-marriage relationship. That was an error when the FtT had considered the issue of her own motion at the hearing and had not adjourned the hearing.

The respondent's submissions

19. Ms Cunha points out that it was the appellant who had asked the FtT to consider the fact of his later marriage. That is unarguably the case, as the appellant raised the reg. 7 issue as a new matter, to which the respondent consented. The FtT did not consider the marriage and the pre-marital relationship in isolation from one another. Moreover, there was no procedural error in doing so, as the appellant was not, and could not have been, caught by surprise. The 'review' document, sent by the respondent before the FtT hearing to the appellant and the FtT (as is standard in FtT proceedings) had made clear that the respondent had concerns about the photographic evidence said to prove the pre-marital relationship. As §15 of the FtT decision records, Mr O'Monoghan, appearing for the respondent, had raised concerns around the couple's credibility at the FtT hearing.

Discussion and conclusions

20. We have already explained why ground (1) discloses no error of law. The FtT did not err in rejecting the reg. 7 appeal. Indeed, the reg. 7 appeal could not have succeeded, on the basis of the analysis in Elais, which has not been challenged. The FtT ought not to have entertained a reg. 7 claim at all, but that error is not one that means we should set aside her decision.

21. In relation to ground (2), we accept that it was appropriate for the FtT to have considered the later marriage as relevant to the durability of the pre-marriage relationship. That was permissible, as per Elais, and the appellant relied on his marriage as supportive of the durability of his relationship at the earlier stage, as well as under reg. 7. In doing so, we accept Ms Cunha's submission that the appellant was not taken by surprise, when the FtT evaluated the genuineness of that relationship. Before the hearing, the respondent had raised queries in the

review document. The respondent's representative reiterated concerns at the hearing, rather than the FtT considering the matter of her own initiative. The challenge that the issue of the marriage being one of convenience was not mentioned in the refusal letter ignores the circumstance that the marriage post-dated the decision, and it was the appellant who raised the issue of the marriage.

22. Finally, we accept Ms Cunha's submission that the FtT did not consider the pre-marriage relationship and the marriage in isolation, nor could she be expected to. While we do not recite the analysis and conclusions in full, we mention in particular a passage at §22:

> "… In any event, I am not satisfied that the appellant was or is in a durable relationship with the EEA sponsor. Whilst a marriage has taken place I have real concerns about the nature of the marriage and relationship and I am not satisfied that it was a genuine relationship rather than a relationship/marriage entered into for immigration purposes. It was submitted during final submissions that the relationship was durable in November 2020. I disagree. Whilst there is no definition of durable relationship I am satisfied that the appellant and EEA sponsor had not met face to face until the sponsor's arrival in the UK in November 2020, before which point they had allegedly made the decision to live together and the appellant had found them a flat together…."

23. The FtT went on to reiterate at §23, the evidence she had considered of a tenancy agreement, and her conclusion at §24 that she did not accept the evidence as persuading her that the relationship was a durable one, either at the time of the application, or since.

24. In summary, the issue of the marriage was not considered in isolation. The FtT considered the facts as pertaining at the time of the actual application itself, which predated the marriage. She identified the concerns raised by the respondent. She then went on to consider, as she was invited to, what weight, if any, to attach to the later marriage. She did draw adverse inferences from the fact of the marriage, but in circumstances where she had been invited to consider that marriage and the appellant's credibility was in issue. The appellant, who was professionally represented before the FtT, made no application to adjourn the hearing. The FtT did not err procedurally in considering the issue and in not adjourning the hearing of her own initiative.

Decision on error of law

25. We conclude that there are no errors of law in the FtT's decision, such that it should be set aside. Therefore the appellant's challenge fails and the FtT's decision shall stand.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law, such that it should be set aside. The decision of the First-tier Tribunal stands.

No anonymity direction is made.

Signed J Keith Date: 22nd February 2023

Upper Tribunal Judge Keith