Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/33121/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 August 2017	**On 11 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MR MOHAMMED IRFAN JAMIL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Hawkins of counsel
For the Respondent: Mr S Walker, a Home Office presenting officer

DECISION AND REASONS

Details of the Appellant

1. The appellant is a citizen of Pakistan who was born on 11th November 1981.

The Appellant's Immigration History and Background to present Appeal

2. The appellant entered the UK on 25 August 2006, having been granted entry clearance as a student. On 2 November 2007, the appellant sought and was granted leave to remain in the UK until 31 July 2009. On 2 February 2009, however, the appellant was refused further post-study leave to remain. On 1 June 2010, the appellant was issued with a residence card as the family member of a national exercising free movement rights in the UK in accordance with the Immigration (EEA) Regulations 2006 (the 2006 Regulations).

3. On 12 March 2015, the appellant sought permanent residence in the UK as confirmation of his retained right of residence following his divorce from EEA national, Ms Paukstite, a Lithuanian national. On 8 October 2015, the respondent refused the application under Regulation 15 (1) (f) of the 2006 Regulations because the appellant had not established that his former spouse, an EEA national, had continuously exercised free movement rights up to the point of their divorce and the appellant, being employed, self-employed or self-sufficient since his divorce, therefore fell within that regulation. Furthermore, the respondent did not accept the marriage to Ms Paukstite was a genuine one, believing it to be one of convenience entered into solely for the purposes of facilitating the appellant's leave to remain in the UK.

4. On 19 October 2015, the appellant appealed the respondent's refusal to the First-tier Tribunal (FTT). Judge of First–tier Tribunal Swaniker (the Immigration Judge) did not find the appellant's account to have been credible and concluded that the marriage between the appellant and Ms Paukstite was indeed a marriage of convenience.

5. On 30 June 2017 I heard submissions in the Upper Tribunal at an error of law hearing. Following submissions by both representatives, I decided that there was a material error of law in the decision of the FTT in that the reasoning of that tribunal could not be allowed to stand. The finding that the sponsor had committed "perjury" appeared to be a "leap too far" and therefore it was appropriate to hear fresh evidence from the appellant as to the nature of the appellant's relationship with Ms Paukstite. I therefore directed a further hearing on 31 August 2017 at which the appellant was to supply an updated witness evidence and any other material he considered relevant to the issue before the Upper Tribunal. A full set of directions was served with that decision, which was promulgated on 12 July 2017.

The resumed hearing

6. At the resumed hearing, Mr Hawkins represented the appellant and Mr S Walker represented the respondent. There was initial concern by both parties' representatives as to the lack of a "PNC report". However, Mr Hawkins pointed out that there was reason to believe it had been produced before the First-tier Tribunal. Mr Hawkins continued to criticise the respondent for her preparation of the case, indicating that information,

for example, in relation to Ms Paukstite's conviction for offences under the Perjury Act 1911, was lacking.

7. Mr Walker pointed out that Mr Singh, the respondent's representative before the Upper Tribunal at the end of June, indicated that the respondent's decision in this case was maintained.

8. Mr Hawkins took me to a new bundle of documents served on the Tribunal on or about 17 August 2017. I noted that this contained a substantial number of documents. He also said that since the last hearing there had been a further decision in relation to EEA rights in the case of **Sadovska [2017] UKSC 54**. He said that paragraph 28 of that decision made it clear that the burden rested on the respondent to establish that the relationship relied on by a person claiming retained rights of residence under the 2006 Regulations rested respondent, not on the appellant. It was for the respondent to establish that the marriage was one "of convenience". Later in the submissions I tried to establish the correct definition of "marriage of convenience" but, although the parties were unable to refer me to any statutory definition, Article 1 of the EC Council Directive, on which the 2006 Regulations had been based (97/C 382/01), is quoted in paragraph 10 of **Rosa [2016] EWCA Civ 14**. That Directive had defined a "marriage of convenience" as:

> "… a marriage concluded between a national of a Member state or a third –country national legally resident in a member state entered into with the sole aim of circumventing the rules on entry and residence of third country nationals and obtaining for the third country national a residence permit…"

9. The appellant gave oral evidence before the Upper Tribunal. He confirmed that his most recent witness statement (dated 16 August 2017) was true to the best of his knowledge and belief.

10. When cross-examined by Mr Walker, the appellant accepted that he and his wife had not enjoyed a honeymoon together but had gone for a meal with friends and the sponsor's mother. He had undergone a Muslim marriage to the sponsor at which he had met his mother in law on 8th October 2009, presumably for the first time. The formal civil ceremony had been on 2 December 2009 and the sponsor had spent the following day (3 December 2009) with the appellant. He was asked how that evidence was consistent with his sponsor's conviction for knowingly/wilfully causing to be made a false statement for the purposes of entry in the marriage register. This involved her entering a bogus marriage on 3 December 2009, i.e. the day the appellant and the sponsor were supposed to have been together. It was put to the appellant that his wife had gone to prison for those offences. There was some debate over the date the sponsor had gone to prison and come out of prison, but it seemed to be broadly agreed that she could not have been released before April or May 2012. It was put to the appellant that it was curious to say the least that he was in Pakistan until April 2012, at a time when his wife is supposed to have been

convicted of the offence of perjury. The appellant accepted that he and his wife had not had children together but when he had met her she had lived with her mother in "Yarmouth", by which, it subsequently transpired, he meant Great Yarmouth. His wife had a son called R and a daughter called E, whom she saw every two or three weeks after they had been married. He admitted that his wife had found it difficult to converse with his relations given the language difficulties. The appellant said that although his wife to be had lived in Great Yarmouth when they had first gone out together, they have been able to sustain their relationship and marriage. The appellant confirmed his wife had been living in Great Yarmouth when they had met. This had been around March 2008. He said they had "just hooked up together". The appellant said he had found out about the sponsor's children after the first (religious) marriage service, which appears to have been on 3 August 2009.

11. There was no re-examination.

12. The respondent relied on the reasons for refusal and said that the evidence given was wholly unconvincing. The Tribunal was invited to find this appellant had entered into a false marriage solely for the purposes of facilitating his leave to remain in the UK. It was of note that the day after the marriage the sponsor had been convicted of entering a fake marriage on 3 December 2009. At that time, she was supposed to be married to the appellant. It was most unlikely that she would be committing an offence the day after they had married if she was in a long-term relationship with the appellant. In the respondent's view, the sponsor was either a "bigamist" or the marriage to the appellant was solely one of convenience. It was it was also described as being wholly unconvincing that the appellant had been in Pakistan at the time of his wife was supposed to be in prison in 2012. That was at a time when the marriage was supposed to be subsisting. Respondent had concluded the information supplied could not be relied upon in any way. No information had been given to the respondent as to the whereabouts of the sponsor. There are a number of inconsistencies in the evidence as to what her employment was and so forth. Mr Walker relied on the reasons for refusal in full.

13. Mr Hawkins submitted that his client had been required to face an allegation that had not been properly particularised. A close examination of the documents did not reveal a marriage of convenience. The appellant had been accused of this but inadequate particulars had been supplied. For example, the Tribunal had not been supplied with the PNC record. At this point, however, Mr Hawkins accepted that it was handed in at the First-tier Tribunal. He also accepted that the appellant's evidence had been that, following his civil ceremony of marriage with the sponsor on 2 December 2009, the appellant had spent "the day with his new wife". This was at a time when Ms Paukstite was supposed to be committing a criminal offence. Indeed, this was an offence which the sponsor was sentenced to a term of imprisonment for. Nevertheless, the appellant submitted the respondent had failed to discharge the burden of proving that this was a marriage of convenience. I was referred to the correct test

upon asking. I was advised by Mr Hawkins that the test was set out in the case of **Rosa** [2016] EWCA Civ 14. At this point I was taken to paragraph 16 of the decision of the First-tier Tribunal. There, the Immigration Judge dealt there with a meeting which had been conducted with the sponsor at HMP Peterborough. The record, which is included in the appellant's bundle, was dated 14 April 1979. The sponsor is a citizen of Lithuania. The Immigration Judge went on to describe the PNC record of conviction and found it to be "an unassailable document". The Immigration Judge had gone on to accept the credibility of the PNC Record and Mr Pullman, her representative, had confirmed a willingness to go ahead with the hearing notwithstanding this document. It indicated that on 10 January 2012 the sponsor was convicted under the Perjury Act 1911 of knowingly or wilfully causing a false statement to be made with a view to making an entry onto the Marriage Register. The offences were said to have been committed on 1 August 2009 and 3 December 2009. The sponsor was given a custodial sentence for that offence, it being considered a serious offence. Whilst accepting these facts, it was not accepted that the Tribunal was entitled to draw the inference that the appellant's account was untruthful. I was reminded that the divorce petition was presented on 16 April 2015 (see C 1 of the respondent's bundle).

14. The other basis for refusal was that it was alleged that the sponsor was not exercising Treaty rights up to April 2015, when the divorce petition was presented. The appellant's representative accepted that payslips are available after February 2015 and the gap is therefore a short one. It did not count for the purposes of the 2000 Regulations. I was referred to paragraph 10 of the appellant's large bundle prepared for the hearing.

15. At the end of the hearing I reserved my decision as to whether, having set aside the First-tier Tribunal's decision, it was appropriate to remake the decision and, if so, whether to reach a different conclusion than the FTT. If I were to reach a different conclusion than the FTT it would follow that the respondent's decision to refuse to issue a permanent resident card would have been wrong.

Discussion

16. It is unfortunate that before the Upper Tribunal there was less than complete clarity as to the dates of the sponsor' s criminal convictions for marriage offences contrary to the Perjury Act 1911. In particular, the respondent has been unable to produce the PNC Report referred to in paragraph 16 – 18 of the decision of the FTT. Realistically, Mr Hawkins accepted that the "PNC" document had been handed in at the First-tier Tribunal. That document clearly had the dates of the offences, although there was a discrepancy as to the date Ms Paukstite was convicted of those offences. However, Mr Hawkins criticised the respondent for her lack of attention to detail and this is a submission I find has been properly made.

17. Following the hearing in June, I decided that there had been a material error of law in that the reasoning of the First-tier Tribunal had been flawed. I set out the chronology leading to the sponsor's conviction for perjury. I directed the further hearing, which took place at the end of August 2017, partly to examine the circumstances leading to that conviction. I allowed the appellant an opportunity to present "fresh evidence …as to the nature of the marriage between himself and the EEA national …".

18. Having now heard that evidence, I am satisfied that the respondent has discharged the burden of establishing that the relationship between the appellant and respondent was not a genuine and lasting one but had been entered as a "marriage of convenience". My reasons for that conclusion are as follows:

    (i) As I have stated above, the dates of the alleged offences are not disputed and these include a conviction for an offence on 3 December 2009. This was one day after appellant and Ms Paukstite underwent a civil marriage ceremony on 2 December 2009. According to the appellant, Ms Paukstite and he are said to have spent the day after their civil marriage ceremony together. I am unconvinced that the appellant would have been able to spend the day with his wife when she was committing an offence under the Perjury Act 2011.

    (ii) I agree with the Immigration Judge that the appellant's trip to Pakistan in 2012 was implausible. On one version of the facts, this happened to "coincide" with the period of sponsor' s imprisonment for 30 weeks for the offences described and therefore provided a convenient explanation for his absence during these events.

    (iii) Whilst the Immigration Judge did not clearly define a marriage of "convenience", having now been referred the correct definition by Mr Hawkins, the appellant's relationship sponsor fell within that category in that it was entered with the sole aim of circumventing the entry and residence of a non-EEA national.

    (iv) Apart from the fact that the evidence pointed to a very short period of cohabitation between the parties, the fact that they had diverse cultural backgrounds and a possible difficulty communicating, there was also a lack of any evidence of a cultural or other assimilation between them. More significantly, the appellant displayed a lack of knowledge of his wife, who apparently had two children by another man. Surprisingly, the first time the appellant claims to have heard of this was when he read the refusal letter (see paragraph 10 of the FTT's decision). When questioned about this at HMP Peterborough on 8th June 2012 (at D 1), the sponsor stated that she had a partner called R K, who was born March 1975 and with whom she had two children. She did not mention the appellant during that interview.

(v) The appellant's relationship with the sponsor was on any view brief, in that the parties separated in 2012. There was later a divorce petition, which was made nisi in February 2015 and absolute in April 2015. Sadly, it is not unusual to encounter very short relationships, but what is unusual here is the lack of any evidence of cohabitation during their relationship.

19. The second issue related to the sponsor's status in the UK. There was some confusion as to the nature of the sponsor's employment. There were also a number less important points requiring clarification. As I have decided that the marriage between the appellant and the sponsor was one of convenience, and therefore is not one which entitles him to a right of residence or retained rights of residence under the 2006 Regulations, it is not necessary to go on to decide whether or not the sponsor was exercising Treaty Rights. However, the fact is that the sponsor was convicted on 10 January 2012 or 28 May 2012 (see the respondent's reasons for refusal letter dated 8 October 2015) under the Perjury Act 1911 of the offences described above tends to undermine the credibility of any evidence she gave both as to her relationship and as to her employment. The conviction was of, effectively, participating in a marriage of convenience. It is noteworthy that the appellant failed to refer to the sponsor's relationship with R K, who was born March 1975. Mr K has two children. The sponsor, when interviewed, did not make any reference to the appellant. She may have been committing the offence of bigamy but it is unnecessary to consider this further in the light of my conclusions above.

20. The appellant was unable to say much about the sponsor's personal financial circumstances. However, it does appear from the document from HMP Peterborough, that the appellant's then partner was relentless in her deception. The respondent accepted, however, that she was a Lithuanian national born on 14 April 1979. I doubt there was sufficient reliable evidence to show that the sponsor was in fact exercising Treaty Rights in the UK.

21. The respondent accepted that this is not a straightforward case. However, the ordinary civil standard of proof applied. I am satisfied that the respondent has discharged the burden of showing that this was not a genuine marriage but rather was one of convenience.

Notice of Decision

The appeal under the EEA regulations is dismissed.

No anonymity direction is made.

Signed Date 9 October 2017

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 9 October 2017

Deputy Upper Tribunal Judge Hanbury