Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00390/2019

THE IMMIGRATION ACTS

Heard at North Shields (Kings Court)	**Decision & Reasons Promulgated**
On 17 January 2020	**On 29 January 2020**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

EMILJAN DODA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Timson instructed by Cohesion Legal Services
For the Respondent: Ms Pettersen, Senior Presenting Officer

DECISION AND REASONS

1. The appellant who is a citizen of Albania, born 1989, has been granted permission to appeal the decision of First-tier Tribunal Judge Fisher. For reasons given in his decision promulgated on 9 August 2019, he dismissed the appeal by the appellant against the Secretary of State's decision dated 11 January 2019 refusing to issue a residence card as confirmation of a right of residence under European Community law as the spouse of an EEA national exercising treaty rights in the United Kingdom.

2. In essence the Secretary of State refused the application because although adequate evidence had been provided to show that his sponsor (Ms Ionas, a national of Romania) was currently exercising treaty rights in the United Kingdom, no further consideration was given to the documentation relating to the marriage as it was considered this was one of convenience for the sole purpose of obtaining an immigration advantage.

3. Judge Fisher heard evidence from the appellant, his wife and two witnesses and summarised the issue before him at [24] as follows:

> "24. The sole issue in this appeal was whether the marriage between the Appellant and Ms Ionas was a marriage of convenience. Mr Stainthorpe accepted that there was some form of relationship in that they were living together, under the same roof, and he acknowledged that they may have spent time together in Italy. There was no issue that the sponsor was exercising Treaty rights in the UK. I have taken in to account that there were some areas of consistency in the evidence given by the Appellant and Ms Ionas before me. There was also a number of photographs of them together in different places."

4. After directing himself in relation to the authorities in *Papajorgji (EEA spouse – marriage of convenience) Greece* [2012] UKUT 00038 (IAC) and *Rosa v SSHD* [2016] EWCA Civ 14, the judge gave reasons why he was satisfied that the Secretary of State had proved on the balance of probabilities that this was a marriage of convenience.

5. Those reasons are set out at [27] to [36] of the decision as follows:

> "27. The Appellant and his wife were interviewed in connection with his application in Liverpool on 12 December 2018. There were said to be a number of discrepancies between the answers which they gave about their movements on 10 December 2018, only two days prior to the interview. In addition, although they agreed that they had received some financial assistance from the Appellant's sister and her husband, they were said to have been inconsistent on the use to which that sum (€5,000) had been put. Reference was also made to an interview in February 2018, at the time of one of the previous applications, when there were said to be discrepancies in their description of their wedding.
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> 28. At question 26, of the December 2012 interview, Ms Ionas was asked:
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> "*So, when you first came here to live in June of July 2017, who did you live with?*"
>
> Her answer is recorded as:
>
> "*The first time I came here, I went to live in [inaudible] in Newcastle with a friend and my husband.*"
>
> 29. She confirmed that information in the next question and, at question 33, explained that, after a while, her husband had decided to go away to Italy as he could not find work in the UK, hindered by his lack of documents, and that she then decided to go away, although she gave an account of travelling between Italy and the UK.
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> 30. The sponsor sought to explain this before me on the basis that she was confused and frightened during this interview. In her statement, she

alleged that the officer had been aggressive and threatening. However, at question 201, she was asked to sign the record if she had understood all of the questions and was happy with the manner in which she had been interviewed. She did so, and raised no issues at the time. I do not believe that she was confused during the interview, as the Appellant suggested, because her answers make it perfectly clear that he was in the UK in 2017.

31. On the topic of entry to the UK in 2018, there were further discrepancies. The Appellant never mentioned that his wife was also in the car in which he arrived, as she said. I can see no reason why she should have lied about that. He was unable to tell Mr Stainthorpe where he was reconciled with her in Newcastle. He may not have known the city well, but he ought to have been able to provide some description of the place where they met if he were telling the truth. It is clear to me that the reason for his inability to say where they met was because she was with him in the car, hence the lack of any need to reconcile. His suggestion that his entry with a friend happened by chance and that it was unplanned was, frankly, fanciful. These factors have an adverse effect on the credibility and reliability of the Appellant and his wife.

32. I have considered the possibility that the Appellant simply did not wish to admit to his presence in the UK in 2017, or to implicate his wife in the process by which he arrived in 2018, and that their marriage is not one of convenience, but I have discounted that for the following reasons.

33. The Appellant said that his wife was unemployed in Italy when they decided to come to the UK, although he said that she was occasionally acting as a waitress. However, she said that she was working in the fields at that time. In a genuine relationship, I would have expected consistency on which a fundamental issue as the employment circumstances of the parties.

34. The evidence of the Appellant and his spouse was that they had purchased a vehicle together. I have considered whether this may be evidence of a genuine marital relationship, but there was no satisfactory evidence before me to show joint funds being used for it. In addition, it is perfectly possible for two individuals to make a joint purchase without their relationship being anything other than a marriage of convenience. The Appellant told Mr Stainthorpe that they had not purchased anything else of significance together, but his wife said that they had chosen a television together. Again, if the relationship were subsisting, I am satisfied that he would have recalled events such as that.

35. Another highly significant feature of the evidence related to the sponsor's recent visit to Italy. The Appellant said that she had only visited her mother. She spoke of a family issue. In a genuine relationship, couples share such matters and discuss them. Ms Ionas said that she had spent time with her mother, her brother and the Appellant's sister and her husband. I can only conclude that there cannot have been any discussion as to how the sponsor had spent a substantial time outside the UK from the answer given by the Appellant. I find it incredible that he did not apparently know that his wife had visited his sister, if that were true. I am satisfied that these are not cultural issues, as Mr Lawson suggested, but

rather that they were evidence of a lack of communication between the parties as their husband and wife relationship is not genuine.

36. I have considered the evidence of the witnesses, both those who gave oral evidence and those whose account was provided in written form. I found Mrs Lane and Mrs Disani somewhat vague. It was clear to me that Mrs Disani did not know a great deal about the parties, given her answers in cross examination. Furthermore, I had a distinct advantage over them, and the other witnesses whose evidence I had been tendered in statement form, in that I had the documentary interview records, as well as hearing the oral evidence of the Appellant and Ms Ionas. I reject Mr Lawson's submission that in discounting the evidence of the witnesses, I would have to find that they were attempting to deceive the Tribunal. On the contrary, I accept that they were doing their best to assist, but I conclude that they have been deceived, just as the Appellant and Ms Ionas have attempted to deceive the UK immigration authorities and, indeed, this Tribunal."

6. In granting permission to appeal, First-tier Tribunal Judge Simpson observed that the decision arguably disclosed:

> "a lack of cogency of reasoning accompanying the findings & conclusions that the respondent had shown a marriage of convenience' i.e. a marriage contracted for the sole/predominant/decisive purpose of securing residence rights in the light of the respondent's concessions that there had been 'some kind of relationship' between the parties and that they had lived together previously in Italy, and the judge's acknowledgement of "some" consistencies in the parties' evidence (24), a lack otherwise of consistency in their evidence invariably concerning their respective recollections forming the focus of concern arguably not an uncommon feature of many a marriage or durable relationship, of which lack of consistency arguably undue weight was attached."

7. The grounds of challenge that led to the grant of decision cited the potential material errors of law referred to in *R (Iran) & Ors v SSHD* [2005] EWCA Civ 982 and argued under the heading "Perverse and irrational findings, Sham Marriage" that the finding that the couple had a sham marriage was not one that was properly open to the Tribunal in the light of the concessions made. This was with reference to the Presenting Officer having reportedly conceded there was "some kind of relationship between the appellant and sponsor". The concession was also made that they had lived together in Italy. After reference to the Tribunal decision in *Papajorgji (EEA spouse – marriage of convenience) Greece* [2012] UKUT 00038 (IAC), the grounds continue:

> "Given that the FTTJ finds that the appellant and the sponsor lived together under the same roof the finding that the marriage was entered into for the sole purpose of circumventing the immigration rules is not sustainable. Regardless of the concerns of the FTTJ it is more likely than not that the marriages goes beyond the sole purpose of circumventing immigration rules, particularly as they has [sic] lived together in Italy as had been conceded.
>
> The manner in which the FTTJ comes to his conclusions is one that is not open to him on the balance of probabilities. Given that the sole issue was whether the marriage was a sham it is submitted that the decision is fatally flawed."

8. Mr Timson sought at the outset of the hearing to amend the grounds to argue inadequate reasons by the judge with reference to his assessment of the evidence of the witnesses and not confined to that aspect. He referred to the grant of permission by the First-tier Tribunal which in his submission expanded the grounds of challenge. This was opposed by Ms Pettersen who contended that the grounds were based on alleged perverse and irrational findings.

9. I refused the application. It was open to the granting judge to comment on the ground of challenge, but that commentary cannot be taken as an expansion of that ground or the intervention of a new ground unless this is specifically stated. All Judge Simpson appeared to be saying is that inconsistency of evidence regarding respect of recollections was arguably not an uncommon feature. This must be read in the context of a challenge made on the basis of perversity and irrationality. The opportunity for the appellant to amend the grounds arose on the grant of permission if on reflection it was considered the grounds pleaded were inadequate. This has not happened. Rigour is required in the approach to these appeals and I did not receive a satisfactory explanation why an application to amend was only made at the outset of the hearing despite Mr Timson's urging on the point. Even if I were persuaded to grant an amendment I am not persuaded that a ground based on inadequate reasons would on the face of it be sustainable. The judge's assessment of the evidence of the two witnesses at paragraph [36] needs to be read in the context of his summary of the additional witnesses' evidence set out in paragraphs [16] to [21 and it can be readily understood by reference to paragraph [36] why the judge considered the evidence of Ms Lane and Disani to be somewhat vague. A satisfactory explanation is given why he reached a different conclusion from that urged by the witnesses.

10. A further reason for refusing the grant of permission was because as observed by Ms Pettersen, the grounds of challenge were settled by the appellant's legally qualified representatives. This was not a case where grounds drafted by an appellant in person missed an obvious and perhaps *Robinson* obvious point.

11. In the course of subsequent submissions Mr Timson maintained his attack on the quality of the judge's decision. He accepted that all the evidence had been considered but returned to the point that no direct findings had been made on the evidence of the additional witnesses. He readily acknowledged that even if a couple were in a relationship, it could nevertheless be accepted that a marriage could still be a marriage of convenience. Nevertheless, he maintained that the judge's analysis of the relationship was flawed and he suggested that no reasonable judge would take the approach taken by Judge Fisher by reference to the witnesses. He maintained his attack based on no reasonable judge would reach Judge Fisher's conclusion without a finding on the relevant evidence.

12. By way of response Ms Pettersen contended that the additional witness evidence was in similar form (referring to the mistakes that had been made by the parties to the interview). Even if it could be said Judge Fisher had failed to set out the detail of the reasons why he found the witnesses' evidence to be vague, the judge had explained why he had not accepted the evidence of the appellant and sponsor. The judge was clearly aware of all the evidence.

13. By way of response and with candour, Mr Timson reiterated that even if there were a relationship it might still be a marriage of convenience. He also accepted that the evidential burden could shift to the appellant however it was incumbent upon the judge to make a finding on the evidence. This was "not too much to ask".

14. Having regard to the decision as a whole and the evident care with which Judge Fisher set out the evidence before him, including the testimony of the appellant, sponsor and the two additional witnesses, I am satisfied that Judge Fisher's conclusions were rationally open to him on the evidence, that his conclusions were adequately explained and there was no basis on which it can be said that his findings were irrational or perverse.

15. I have cited above Judge Fisher's reasoning from [27] to [36]. Earlier in the decision between [3] and [21] the judge set out in detail the evidence. This included at [5] a record of the appellant's testimony under cross-examination that he had arrived in the United Kingdom in October 2015, left in January 2016 and not returned until March 2018 and not 2017. This was a key point as it was the sponsor's evidence in interview that they had been together for a period in the United Kingdom in 2017. The judge records at [9] that the appellant was challenged in relation to the sponsor's evidence on this aspect. His answer that the sponsor may have got things mixed up was clearly at odds with her evidence revealed in the detailed interview.

16. The issue over the parties' movements in 2017 prior to their engagement and ultimate marriage in February 2018 were not matters of concern raised in the refusal letter, as in the interviews both parties appeared to have accepted they were together for a period of time in 2017 in the United Kingdom.

17. Judge Fisher correctly directed himself as to the approach as to the burden of proof. In my judgment he was rationally entitled to give weight to the points of concern raised by the respondent and to look at the way in which the appellant sought to discharge the evidential burden that had shifted to him having regard to the evidence given at the hearing. It is clear from a reading of the records of interview that the parties had not been able to give a consistent account of their movements and events two days prior to that interview or of the application of a significant sum of £5,000 assistance which they had been provided with.

18. As accepted by Mr Timson, the judge did not overlook any of the evidence. His findings were open to him on what he saw and heard and in my judgment his decision is without material error. I dismiss this appeal.

Signed Date 23 January 2020

UTJ Dawson
Upper Tribunal Judge Dawson