Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: **EA/01859/2020**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 April 2020	**On 14 April 2021**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

K A W (PAKISTAN)
[ANONYMITY ORDER MADE]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Ahmad Bader, Counsel instructed by Abbott Solicitors
For the respondent: Mr Tony Melvin, a Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity order

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) The Tribunal has ORDERED that no one shall publish or reveal the name or address of K A W who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of him or of any member of his family in connection with these proceedings.

Any failure to comply with this direction could give rise to contempt of court proceedings.

Decision and reasons

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 13 February 2020 to refuse to issue him an EEA residence card pursuant to the Immigration (European Economic Area) Regulations 2016. The appellant is a citizen of Pakistan and his claimed spouse is a citizen of the Czech Republic.

2. The appellant, who is a Muslim man from Pakistan, came to the United Kingdom with a work permit, which was due to expire on 31 March 2013. On 14 January 2013, he entered into an Islamic marriage with his Czech wife, who is a Christian. On 25 May 2013, his application for an EEA residence card as her spouse, based on the Islamic marriage was refused, both because it was not a marriage recognised in United Kingdom, and thus EEA, law, and because the relationship was not accepted as durable. After further submissions from the appellant, the respondent agreed to reconsider her decision.

3. In May 2013, very soon after the civil wedding the appellant's spouse conceived a child with another man and the couple separated for a time. Her child was born in March 2014. The couple then failed to attend three marriage interviews, the first on 5 November 2014 (they did not respond to the invitation) and the second on 19 November 2014, which was cancelled at short notice on medical grounds. The appellant remained in the United Kingdom without leave.

4. On Sunday 22 March 2015, immigration officers conducted a home visit. The appellant's wife and her child were not at home and there was very little trace of the wife in the shared bedroom, or in the house. Two other bedrooms were sublet to male friends of the appellant. The appellant told the immigration officers that his wife had travelled to the Czech Republic two days earlier, to visit her sick mother. The appellant's mobile phone showed no recent contact between the parties. There were a few items of female clothing and a photograph of the couple in a wardrobe: the photograph was at the back of the wardrobe, with its face turned to the wall.

5. On 25 March 2014, based on all the above matters, the respondent refused the application. The appellant exercised an in-country right of appeal and on 21 May 2018, following an appeal to the Upper Tribunal, the appellant's appeal was remitted to the First-tier Tribunal for rehearing.

6. The couple are now living at the same address and the appellant's stepchild lives there too. The appellant and his wife have no children of their own.

Refusal letter

7. The appellant's spouse is said to be exercising Treaty rights in the United Kingdom. The respondent did not consider that the appellant was entitled

to be treated as her EEA spouse as she found the marriage to have been one of convenience.

8. The appellant appealed to the First-tier Tribunal.

First-tier Tribunal decision

9. The appeal has now been heard three times in the First-tier Tribunal. There have been two previous determinations of this appeal, the first by First-tier Judge Graham, and the second by First-tier Judge Ford. The following facts were preserved when the decision of First-tier Judge Ford was overturned and remitted for rehearing, by First-tier Judge Juss:

   (i) That the appellant had limited knowledge of his wife's childcare arrangements;

   (ii) That there had been little, if any, contact since she left the family home when the immigration officers visited there; and

   (iii) The lack of credibility of the evidence of two witnesses who attested to the genuineness of the marriage when contracted.

10. First-tier Judge Juss heard oral evidence from the appellant and from his wife. No other witnesses gave oral evidence at the hearing. The couple's evidence, which had in the past been significantly inconsistent, was now word perfect, but on mundane and predictable points. Nothing in their evidence this time engaged with the discrepancies identified by Judge Ford in the earlier oral evidence.

11. Judge Juss noted that the appellant's wife had not brought her witness statement with her, and that the copy which her solicitor was able to produce ended at paragraph 13 and was incomplete. Nevertheless, she adopted, signed and dated the witness statement at the hearing and said that she had nothing further to add after paragraph 13.

12. At [17], the judge stated that he had given careful consideration to the documentary evidence and the submissions at the hearing. He set out the test for whether a marriage was a 'marriage of convenience' as defined in the EEA Regulations. At [22], he set out accurately the test and the shifting burden of proof, reminding himself that, if the appellant produces evidence of a genuine marriage, that finally the Secretary of State bears the burden of proving a marriage of convenience. His self-direction is unassailably correct.

13. At [24], the judge reminded himself of Mr Lay's submission that post-decision evidence, and evidence of the role played by the appellant in his stepson's life, meant that the appeal must be allowed. At [25] he set out the 'marriage of convenience' test again and held that he was not satisfied that the intention of the parties at the time of the marriage was to live together as man and wife. At [26], he said that he had taken into account the oral evidence given, but that the parties' knowledge of domestic

arrangements in the house where they and others lived was not evidence of their intentions at the time of the marriage.

14. The judge's core reasoning is at [27] - [29]. At [27] he acknowledged that it was always possible for a relationship to change and become genuine following a marriage of convenience, but that did not make it an EEA marriage: it was the intention at the outset that counted. Nor, on the facts, was he satisfied that such a change had occurred here.

15. The passage which is in dispute in these proceedings begins at [28]:

> "28. Fourth, the appellant cannot succeed as a matter of law. It is well-known that the burden of proof of establishing that a marriage is one of convenience rests on the Secretary of State, see *Rosa v Secretary of State for the Home Department* [2016] EWCA Civ 14 and *Sadovska v Secretary of State for the Home Department* [2017] UKSC 54. Once the Secretary of State displaces the legal burden, the evidential burden then rests on the person who is alleging that the marriage is not one of convenience. These propositions are distilled from the decision of the Supreme Court in *Sadovska,* where the parties were not married, but at [32] the court indicated that if the non-European Union national produced evidence of the relationship, it was for the Secretary of State to show that the relationship was not genuine. I find that in the latest refusal letter this has indeed been done. In *Sadovska,* the court was clear that 'It must be permissible for the state to take steps to prevent sham marriages, although it is also incumbent on the state to show that the marriage would indeed be a sham'. And at [29], the court explained that
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> > "29. For this purpose, "marriage of convenience" is a term of art. Although it is defined in the Directive and the 2009 Communication as a marriage the sole purpose of which is to gain rights of entry to and residence in the European Union, the 2014 Handbook suggests a more flexible approach, in which this must be the predominant purpose. It is not enough that the marriage may bring incidental immigration and other benefits if this is not its predominant purpose. Furthermore, except in cases of deceit by the non-EU national, this must be the purpose of them both. Clearly, a non-EU national may be guilty of abuse when the EU national is not, because she believes that it is a genuine relationship."

16. The First-tier Judge dismissed the appeal and the appellant appealed to the Upper Tribunal.

Permission to appeal

17. There were three grounds of appeal, settled by Counsel Mr Taimour Lay on the appellant's behalf:

(i) that the First-tier Judge had not applied correctly the legal test for establishing a marriage of convenience, failing to consider the totality of the evidence as part of consideration of the respondent's ultimate burden;
(ii) that the judge's finding was perverse, given his finding that the appellant and his wife had cohabited for seven years, and

(iii) that there had been a failure to have regard to, and reach, findings on material evidence.

18. The evidence in question comprised a number of written statements of support: two were from the witnesses who had been found to lack credibility when cross-examined previously, and three were from new witnesses. None of these witnesses attended the hearing before Judge Juss.

19. First-tier Judge Fisher granted permission to appeal:

> "…3.It may be that the allegation of perversity [in ground 2] is little more than a disagreement with the conclusions reached. However, whilst the judge correctly identified the shifting burden of proof in cases of this nature, it is arguable that he erred in applying it, particularly at paragraph 28 of his decision, where he appears to suggest that the respondent had discharged the burden in the decision letter, rather than considering the evidence in totality.
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> 4. For that reason, it is arguable that the judge erred in law. Although I have reservations about the second and third grounds raised, I grant permission on all grounds as it appears to me that they are arguably linked to the first."

Rule 24 Reply

20. On 6 January 2021, the respondent filed a Rule 24 Reply:

> "5. It is submitted that the FtT judge, after recording the submissions made on behalf of both parties, begins his findings from paragraph 17 of the determination firstly addressing the caselaw and directing himself to the burden of proof and the legal position.
> 6. Having correctly directed himself at length and setting out the relevant caselaw the judge begins his conclusions from 23 of the decision.
> 7. The judge firstly reminds himself of the starting point in this appeal that being the previously dismissed decision of the FtT in 2018.
> 8. It is submitted that the judge has considered the new evidence produced (p24-27) and draws conclusions at p28/29.
> 9. It is submitted that the language used by the judge might have been clearer but it is crystal clear to any reader that the judge has considered the evidence in its totality if the decision is read holistically.
> 10. It is submitted that the "sentence" apparently relied up to show error is not material to this appeal given the careful assessment of all of the evidence and self-direction to the law concerning marriages of convenience.
> 11. This is nothing more than a lengthy semantic argument without merit if the FtT decision is considered in its entirety.
> 12. It is submitted that the decision is not one that is perverse as the findings have all been rationally explained by the FtT."

21. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

22. At the hearing today, the appellant attended in the office of his solicitor, Mr Mohammed Islam. Mr Bader, who represented the appellant, confirmed that they were the only ones in the room and that it was a quiet private space. Mr Bader attended separately.

23. Mr Bader submitted that the consistency of the evidence of the appellant and sponsor was sufficient to shift the burden back to the respondent to establish that the appellant's marriage was not genuine when entered into in 2013. He relied on the witness statements from the two witnesses previously found to lack credibility, and additional witnesses. He argued that it had not been open to the judge to make the finding that the marriage was one of convenience, on the evidence before him.

24. I did not call on Mr Melvin, who appeared for the Home Office.

Analysis

25. The definition of an EEA marriage, which excludes a marriage of convenience is a term of art, specific to the EEA Regulations. Becoming an EEA spouse at the date of decision conferred on the non-European Union spouse freedom of movement to live in any EEA state in which the spouse was exercising her EEA free movement rights. As stated in *Sadovska* at [35], 'It must be permissible for the state to take steps to prevent sham marriages, although it is also incumbent on the state to show that the marriage would indeed be a sham'.

26. The question is whether it was open to the judge, as a matter of law, to find as a fact that these parties, who had contracted both an Islamic marriage and a civil marriage in 2013, did not both have the intention at the date of the civil marriage to enter into a genuine marriage. These parties contend that their relationship is genuine and subsisting now, but even if that is right, it does not assist the Tribunal in determining whether it was a marriage of convenience when contracted in 2013. If it was, then by definition, the appellant is not an EEA spouse and cannot have the benefits which would accrue to him by reason of that status.

27. In this case, there was a significant quantity of evidence around the time of the civil marriage, in particular, to indicate that the marriage was a marriage of convenience. The Islamic marriage took place in haste, just as the appellant's work permit was expiring. His wife left him very soon after the civil ceremony and almost immediately became pregnant with another man's child. They failed to attend their marriage interview on three occasions, and when immigration officers made a visit to the house, the appellant's spouse was not there and the other two bedrooms were occupied by friends of his. His mobile phone showed no recent contact between the parties. The wife has not been able to produce evidence of her mother's illness in the Czech Republic at that time, nor of the illness of the uncle in Leicester who should have accompanied her to visit her mother.

28. The only evidence upon which Mr Bader relied to the contrary at the hearing was the untested set of brief witness statements from a number of witnesses who were not brought before the First-tier Tribunal for their evidence to be tested. The accounts of two of them had previously been found to lack credibility. The others gave evidence which the judge was entitled to view as bearing little weight in relation to the intentions of the parties when the civil wedding was contracted.

29. The question whether a marriage when entered into is one of convenience is a question of fact for the First-tier Judge. I remind myself of the narrow circumstances in which it is appropriate to interfere with a finding of fact by a First-tier Judge who has heard the parties give oral evidence: see *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296 and *R (Iran) & Others v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [90] in the judgment of Lord Justice Brooke, with whom Lord Justice Chadwick and Lord Justice Maurice Kay agreed.

30. That standard is not reached here and it is not proper for me to interfere with this finding of fact, made by the fact-finding judge on the evidence before him. I am satisfied that there was no perversity in the judge's finding that this was a marriage of convenience, and that no material evidence was overlooked.

31. It is right that the judge says at [28], referring to the third stage of proof, that the evidence in the refusal letter was sufficient. Had that phrase stood alone, without consideration of the evidence as a whole, the appellant might have been able to argue that the judge had misunderstood the three stage nature of the test, but given the thoroughness with which he set it out elsewhere, that is unarguable. The judge's phrasing may be unfortunate, but there was more than sufficient evidence on which he could and did conclude that the respondent had established that at the date of contracting the marriage in July 2013, these parties did not intend to become a genuine couple but rather, to facilitate the appellant's access to EEA rights to which he was not entitled.

32. Taking an holistic view of the First-tier Judge's reasoning, it is proper, intelligible and adequate to support his conclusions as to fact and credibility. I uphold the First-tier Judge's decision and decline to interfere with his finding that this was a marriage of convenience.

DECISION

33. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law
I do not set aside the decision but order that it shall stand.

Signed Judith AJC Gleeson Date: 9 April 2020

Upper Tribunal Judge Gleeson