Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/03991/2021
UI-2022-000544 - EA/50127/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th May 2022	**On 8th July 2022**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

MARKO SHYTI
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Steadman, of Counsel, instructed by SMA Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Albania born in December 1988. He arrived in the UK for the first time in 2009 or 2010. He was convicted of possession of a false identity document, and was removed on two occasions. Then in February 2016, following a criminal conviction for possession of class A drugs with intent to supply and a two year prison

sentence, a deportation order was signed against him, and he was deported in March 2016. The appellant re-entered the UK in breach of the deportation order, and in 2019 made an application for a residence card as the spouse of an EEA national, namely Elefthena Vgeri, a Greek citizen born in 1997.

2. This application was refused on the basis that the marriage was one of convenience. The appellant did not appeal this decision. He made a new application for an EEA residence card again as the spouse of the same EEA national on 29th October 2020, which was again refused on 15th January 2021. The only issues in the appeal against this refusal were whether the marriage was genuine or a marriage of convenience, and whether the sponsor was exercising Treaty rights in the UK. The respondent did not argue that there was a public interest in the appellant's deportation. His appeal against the decision to was dismissed by First-tier Tribunal Judge Beg in a determination promulgated on the 23rd February 2022.

3. Permission to appeal was granted by Judge of the First-tier Tribunal LK Gibbs on 24th March 2022 primarily on the basis that it was arguable that the First-tier judge had erred in law in the assessment of the evidence going to the sponsor's pregnancy and work and reached a conclusion through an unfair process that was irrational.

4. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so to decide whether the error was material and whether the decision of the First-tier Tribunal and any findings of that Tribunal should be set aside.

5. At the start of the hearing it was agreed by both representatives that the first ground of appeal was made out and there was a factually irrational finding by the First-tier Tribunal at paragraph 56 of the decision that the sponsor had not been pregnant. The medical evidence of her having a positive HCG and having hypernesis gravidarum, supported by the evidence of the sponsor at interview, could only rationally lead to a conclusion that the sponsor had been pregnant and then sadly miscarried. I informed the parties that I accepted that this was an irrational factual finding and thus an error of law. The questions that then arose were whether the other errors of law argued for by the appellant were made out, and whether ultimately this error and any others were material to the outcome of the appeal.

Submissions – Error of Law

6. In the grounds of appeal and in submissions from Mr Steadman the appellant submits, in summary, in relation to the other grounds of appeal as follows.

7. In the second ground of appeal, it is argued, that the conclusion with respect to a ministry of internal affairs document was procedurally unfair and irrational. This document, it is argued, shows that the sponsor travelled to Albania, albeit using the Greek spelling of her

name, to get married. It was irrational not to give it weight as the respondent did not dispute its validity. It was not made clear to the appellant that this document was doubted, and if it had been then evidence could have been adduced that the Albanian authorities do not routinely stamp Albanian and EU passports.

8. Thirdly, it is argued, that inadequate reasons are given for finding that the sponsor did not properly explain why she did not provide details of the appellant's employment at the interview given the plausible explanation that she put forward that she was afraid that he would get into trouble if she told the authorities.

9. Fourthly, it is argued, the decision that the sponsor was not in employment, and therefore not exercising EU Treaty rights, was irrational. It was irrational to find that the appellant would have put money into the sponsor's account, and further this finding is contaminated by the fact that the marriage was unlawfully found to be one of convenience for the above reasons. The fact that the sponsor is working for the appellant's brother, it is argued, is an indication of the genuineness of the relationship.

10. In the Rule 24 notice and in submissions from Mr Walker for the respondent it is submitted, in summary, as follows. As indicated above it is accepted that the first ground of appeal is made out. It is submitted that adequate reasons were given for finding the appellant and the sponsor were not credible witnesses, and there was sufficient engagement with the other documentary evidence and rational reasons were given for finding the marriage is one of convenience, and that the sponsor was not a qualified person in EU law.

Conclusions – Error of Law

11. The First-tier Tribunal properly identifies that the burden of proof is on the respondent to show that the marriage is one of convenience at paragraph 29 of the decision. There is no challenge to the legal directions and test applied when assessing whether the marriage is one of convenience.

12. As set out above I have found in relation to the first ground of appeal that the First-tier Tribunal Judge made an irrational finding of fact that the sponsor had not been pregnant in light of the evidence before her. The only rational finding that could have been made on the evidence was that the sponsor had been pregnant and sadly miscarried.

13. In relation to the second ground of appeal I do not find that the First-tier Tribunal erred in law. The First-tier Tribunal had evidence from the respondent that the sponsor had last travelled to Albania in September 2009, and thus had not travelled to her wedding ceremony in 2019. The appellant clearly understood this was an issue relevant to the appeal and produced a document which purported to come from the Ministry of Internal Affairs in Albania which stated that she exited Albania on 12th July 2019, the day after the claimed wedding ceremony. At paragraphs

46-51 of the decision the First-tier Tribunal considers this evidence and determines the issue as to whether the sponsor travelled to Albania in 2019 to marry the appellant. The First-tier Tribunal Judge prefers the evidence of the respondent for a number of reasons: firstly because there are no passport stamps which corroborate travel in the sponsor's passport; secondly because the Ministry of Internal Affairs document was obtained by the appellant (and thus not by solicitors for instance); thirdly because there is no evidence going to why the sponsor has not provided evidence of flight tickets or the purchase of such; fourthly because there is no photographic evidence of the wedding ceremony or photographic evidence showing the couple to have been in Albania; fifthly because on the account of the appellant and sponsor no family bar one sister of the appellant are said to have attended (the sponsor's mother and brother and the appellant's parents, four brothers and one further sister could potentially have attended but did not). It is for the appellant, in this instance together with his solicitors as he is represented, to present his case and put forward the evidence in support of it. The issue was dealt with in a procedurally fair way: the appellant knew that it was disputed that his marriage was genuine. It was up to him to provide evidence in support of his contention that the sponsor had travelled to Albania and married him in a genuine ceremony, and indeed he did so. The First-tier Tribunal Judge considered and weighed the evidence before her as she was obliged to do. I find she gives unarguably adequate and rational reasons for her conclusion that she does not give weight to the document which purports to come from the Ministry of Internal Affairs in Albania in the context of all of the evidence before her on the issue.

14. With respect to the third ground the First-tier Tribunal Judge engages with the explanation for the sponsor not being able to give details of the appellant's work put forward by counsel at the hearing, namely that the sponsor may not have wanted to provide details of the appellant's work at her marriage interview as he was working illegally and she may not have wanted to get him into trouble, at paragraph 36 of the decision. It was rationally open to the First-tier Tribunal to find that this was not a convincing explanation for her providing no details as she had given evidence that she was aware that he was illegally in the UK and had entered in breach of a deportation order. The First-tier Tribunal rationally finds that it was reasonable to expect a couple to have some knowledge of each other's work and education. I find no error of law on the basis of this ground.

15. As a result I have found only one error of law, the irrational finding with respect to concluding that the sponsor had not been pregnant and miscarried, going to the conclusion that the appellant is in a marriage of convenience with his sponsor. The other findings on this issue include: that the sponsor had not shown on the balance of probabilities that she travelled to the wedding in Albania as claimed for the reasons and lack of evidence cited above at paragraph 13 of my decision with respect to the trip to Albania and marriage; that the sponsor had no knowledge of

the appellant's work which I find to be a rational finding above at paragraph 14; the appellant did not know about the sponsor's past work in Greece or her level of education; that neither the sponsor nor the appellant said that the previous tenant of their property was the appellant's brother when asked if relatives had lived previous in the flat when this was clear from the documentation submitted by the appellant; there were discrepancies with respect to the payment of rent and the deposit on the property between the evidence of the appellant and sponsor; that neither appellant nor sponsor could give details of local streets near to their claimed marital home; that the sponsor's bank statements went to a different address for a time after she claimed to have moved to the marital home; the sponsor did not know the dates when she travelled to Albania to marry and did not explain that she only stayed two days because of her employment; the sponsor could not give details of the airline or travel agent used for her flight to Albania for her marriage or say how much the tickets had cost; and the dates the sponsor and appellant give for her entry and exit from Albania are not consistent with the document they had produced from the Ministry of Internal Affairs in Albania.

16. Whilst a pregnancy would normally be indicative of a genuine marriage I find in the context of these valid findings of the First-tier Tribunal, which go to fundamental issues including the very fact of the sponsor's attendance at the claimed wedding, knowledge of each other's day to day lives in terms of work and education; and their cohabitation at the claimed marital home the error with respect of failing to find that the sponsor had been pregnant is not material in concluding that the marriage was one of convenience.

17. The fourth ground goes to the second issue in the appeal: whether the sponsor is exercising Treaty rights in the UK. If she is not exercising Treaty rights the appeal cannot succeed whatever the conclusions with respect to the marriage. I find that the First-tier Tribunal considers all the material evidence going to whether the sponsor is working at paragraph 60 of the decision. I find that as it was properly concluded, for the reasons set out above, that this is a marriage of convenience, the conclusion that the sponsor has not shown she is working as the only evidence of that work comes from the appellant's brother's payslips and payments into her bank account, which it would have been the appellant's interest to arrange, was one which was rationally open to the First-tier Tribunal Judge. She also correctly observes there is no external evidence, such as a P60 from HMRC for instance, to corroborate the claimed employment. I find that the First-tier Tribunal does not err in law with respect to this finding, and as such the decision of the First-tier Tribunal contains no material error of law.

Decision:

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

2. I uphold the decision of the First-tier Tribunal dismissing the appeal.

Signed: Fiona Lindsley Date: 17th May 2022
Upper Tribunal Judge Lindsley