Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00114/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 January 2018	**On 21 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MR UKTAM NURITDINOV
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs C Taroni of Counsel, instructed by Richmond Chambers
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Uzbekistan born on 29 December 1989. On 6 May 2015 the appellant made an application for a residence card as confirmation of a right to reside in the UK under European Community law as the spouse of an EEA national exercising treaty rights.

2. The appellant married the sponsor, Viktorija Mudosaite, a Lithuanian national born on 15 March 1992, on 26 September 2013 in the UK. The appellant was issued with a residence card on the basis of his marriage to

the sponsor which was valid from 20 January 2014 until 20 January 2019. The residence card took the form of a vignette in the appellant's previous passport. On 6 May 2015 the appellant made an application for a further residence card on the same basis, i.e. his marriage to the sponsor. The application was made within the validity period of the previous residence card because of the expiry and need to renew his passport on which it was documented.

The appeal to the First-tier Tribunal

3. On 15 December 2015 the Secretary of State refused to issue the appellant with a residence card. The appellant appealed against that decision to the First-tier Tribunal.

4. In a decision promulgated on 26 April 2017 First-tier Tribunal Judge M A Khan dismissed the appellant's appeal. The Tribunal found that the appellant had failed to provide good reasons for his failure to attend two interviews, on 23 October 2015 and 26 November 2015. The Tribunal found that the appellant had entered into a marriage of convenience with an EEA national in order to obtain a residence card under the EEA Regulations 2006.

5. The appellant applied for permission to appeal against the First-tier Tribunal's decision and on 6 November 2017 First-tier Tribunal Judge Ford granted the appellant permission to appeal.

The hearing before the Upper Tribunal

6. The grounds for permission to appeal in brief set out that the First-tier Tribunal Judge applied the wrong provision because Regulation 20(b) does not apply to the appellant and that there is in fact no Regulation 20(b) under the EEA Regulations. It is submitted that this provision applies only to applications in relation to derivative rights of residence, not applicable to a spouse. The second ground of appeal sets out that the judge failed to consider the reasons for not attending the interview, which was due to a debilitating eye condition, and failed to apply the correct test in accordance with Regulation 22(4) of the EEA Regulations. A third ground of appeal is that the First-tier Tribunal Judge failed to consider the issue of marriage of convenience appropriately and failed to consider the evidence that the appellant was previously granted a residence card, the appellant attended the hearing with his sponsor, they gave mostly consistent answers in examination, and that the relationship continued from 2013.

7. At the hearing the appellant's representative indicated that the appellant was no longer relying on the ground of appeal that Regulation 20B was incorrectly considered by the First-tier Tribunal. In oral submissions Mrs Taroni relied upon her skeleton argument, which she amplified in the course of the hearing. She submitted that the First-tier Tribunal Judge had misdirected himself for the following reasons:

(i) The First-tier Tribunal Judge misdirected himself as to the burden of proof in allegations of marriage of convenience and examined the durability of the appellant and the sponsor's relationship. She submitted that, as set out in the case of **Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC)** the Upper Tribunal made it clear that there is no burden on the claimant in an application for a residence document to establish that they are not a party to a marriage of convenience unless the circumstances give reasonable grounds for suspecting that this was the case.

(ii) There is no requirement for any corroborating evidence with regard to the appellant and the sponsor's marriage. Family members do not need to satisfy the conditions in Regulation 8 of the 2006 Regulations. The spouse of an EEA national is not required to prove he is in a durable relationship with an EEA national. The judge erred by considering the durability of the relationship.

(iii) The lack of joint utility bills or bank statements is neither a requirement for an application for a residence card as the family member of an EEA national nor indicative that the marriage was entered into for the sole or predominant purpose of circumventing domestic immigration laws. Spouses are not even required to be cohabiting to be family members in accordance with the judgment in **C-267/83 - Diatta v Land Berlin**.

(iv) In this case it was only the subsistence of the relationship that was erroneously disputed and not the cohabitation. There is no requirement for specified evidence and adverse inferences cannot be drawn from its absence. The dispute as to the subsistence of the relationship was raised on the basis of nothing other than the absence of documents in the joint names of the appellant and the sponsor despite the fact that documents were submitted confirming that they continue to live together.

8. It was submitted that if the only reason for the refusal was the failure to attend the interviews the respondents acted in breach of Regulation 20(B)(5). It was only the purported failure of the appellant to submit specified evidence indicating his marriage or relationship as subsisting that was the sole reason to invoke Regulation 20B and seek verification of his eligibility. The appellant had submitted a valid marriage certificate and documents proving his cohabiting with the sponsor. The appellant had previously been issued with a residence card on the basis of his marriage to the sponsor a little more than a year before the present application. The appellant and the sponsor both speak Russian and are of similar ages. Documents in joint names would have added nothing to his application and are not required by law. His invitation to attend an interview under Regulation 20B was systematic and thus unlawful. The reason for refusal disclosed no reasonable grounds for suspecting the appellant's marriage is one of convenience and therefore the respondent acted unlawfully in refusing to issue the residence card. The judge did not consider whether or not this evidence was reasonable and therefore erred in consideration

of the appellant's case applying an incorrect burden of proof as in the absence of a reasonable suspicion there was not an evidential burden on the appellant to address those suspicions.

9. With regard to Regulation 20B non-attendance at the interviews does not discharge the burden on the respondent to demonstrate that there are reasonable suspicions that the marriage was one of convenience. If the respondent has not satisfied the evidential/initial burden that there are suspicions that this was a marriage of convenience then 20B is not relevant. The judge failed to consider appropriately and apply Regulation 20B(5) and (6).

10. Mrs Taroni submitted that the judge failed to adequately assess the evidence regarding the failure of the appellant to attend the two interviews. The judge found that the appellant had provided no evidence that he was unfit to attend the two interviews. This is irrational on the basis of the evidence that was before the judge. The January 2016 medical evidence confirmed his diagnosis with vitreous floaters. Evidence was submitted in October 2015 of a referral for an appointment and therefore this was corroborative that he was suffering from that condition in October and November. In any event, it is submitted that the invitations to the appellant and the sponsor to attend interviews were in breach of Regulation 20B(5) and (6) and the decision should not have been solely dependent on their failure to attend the interview even in the absence of good reasons.

11. The judge failed to consider and reach conclusions on the issue of whether the marriage was one of convenience. It is submitted that the judge failed to consider that the respondent's grounds for suspecting that the appellant and the sponsor's marriage was one of convenience were unreasonable. No further grounds were raised at the hearing and no evidence was adduced to support the suspicion. The judge made no positive findings but merely tested the appellant and the sponsor's evidence. The judge failed to consider the length of the appellant and sponsor's marriage and the fact that it had previously been recognised as genuine. The application for the residence card from 20 January 2014 following his marriage to the sponsor was made prior to the expiry of his leave as a Tier 4 Student, which was granted until 28 February 2015. It was evident that he applied for his initial residence card by reason of his marriage to the sponsor, not to regularise his stay because that was not required at that time.

12. It was submitted that the appellant and the sponsor's evidence was entirely consistent as is evident from the Record of Proceedings. Their evidence regarding the mundane details of the day was entirely consistent. The judge has not set out where their evidence was inconsistent and has not referred to any specific findings on where their evidence diverged.

13. Mr Walker acknowledged that the appellant had been in contact with the Home Office and had given reasons and evidence that he had attended hospital as to why he was unable to attend the interviews. He accepted that this validated why he did not attend. He accepted that this amounted to an error of law by the judge in failing to consider properly that evidence. He accepted that the utility bills showed the name of both the appellant and the sponsor at both of the addresses that they had cohabited in. Mr Walker conceded that there were material errors of law by the judge in this case.

14. In light of the concession by the Home Office's representative I do not intend to go through in any detail the decision of the First-tier Tribunal other than to indicate that I accept Mrs Taroni's submissions that the judge erred in the approach to this appeal overall. The judge did not consider adequately the evidence that was before him and proceeded erroneously on the basis that the evidence was sufficient to give rise to a suspicion that this was a marriage of convenience without considering the EEA Regulations and what the requirements were for the appellant when making the application. This then led to the further error in considering Regulation 20B and its application in this case. The decision of the First-tier Tribunal contained a material error of law. I set aside that decision pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

Re-making the decision

15. I proceeded to remake the decision on the papers before me. In the bundle of documents submitted with the appellant's application there are a number of documents that adequately demonstrate that both the appellant and the sponsor lived together at [ ] Great Cambridge Road from 2013 to 2014. Some of those documents were in joint names and some were in single names but demonstrating they were both living at that address. There are then documents in joint names showing the appellant and the sponsor residing at [ ] Mare Street. The sole reason that the respondent raised a suspicion that the appellant and the sponsor were not in a subsisting relationship was a lack of joint documents. The appellant was not required to provide such evidence, however, the evidence was provided set out both long-term cohabitation from 2013 and that that cohabitation continued when both parties moved residency to a new address and there were further documents in joint names at the new address. Therefore it is clear that the appellant's marriage was not a marriage of convenience.

16. I accept the submission that if the marriage is not one of convenience Regulation 20B, i.e. verification that the right is genuine, does not arise. In any event, in this case, as conceded by the Home Office, good reasons were given for failure to attend the interviews and therefore Regulation 20B(4) does not apply so as to enable the Secretary of State to draw factual inferences about the appellant's entitlement to a right of residence.

17. The appeal of the appellant against the respondent's decision is allowed

Notice of Decision

The appellant's appeal against the respondent's decision is allowed.

No anonymity direction is made.

Signed P M Ramshaw Date 13 February 2018

Deputy Upper Tribunal Judge Ramshaw