Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01754/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 October 2018	**On 3 December 2018**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

HAMAYUN RAQEEB
(NO ANONYMITY ORDER)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Victor-Mazelli instructed by Legal Chambers Solicitors
For the Respondent: Mr S Walker, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the respondent on 30 January 2018 to refuse him an EEA residence card as the spouse of the sponsor, pursuant to the Immigration (European Economic Area) Regulations 2016. The appellant is a Pakistani citizen. The sponsor is a Polish citizen and therefore an EEA national.

2. The respondent considers that the marriage entered into between the parties was a marriage of convenience when contracted: if that is correct

then the appellant is not the sponsor's spouse for the purposes of the EEA Regulations and is not entitled to a residence card on that basis.

Background

3. The appellant came to the United Kingdom in February 2010 as a Tier 4 (General) Student, with a student visa valid until 28 October 2013. The sponsor came to the United Kingdom on 8 January 2013 on a visit to two Polish friends. She met the appellant almost immediately.

4. In March 2013 the appellant proposed marriage, and in July 2013 the parties began to live together. On 5 October 2013 the parties married at Gretna Green accompanied by a group of friends.

5. On 28 October 2013, the last day of his Tier 4 (General) leave, the appellant applied for a residence card as the spouse of an EEA national exercising Treaty rights in the United Kingdom. That application was refused on 2 April 2014 and he appealed to the First-tier Tribunal.

6. The appeal was heard and dismissed by First-tier Judge O'Brien on 1 April 2015.

The 2015 decision

7. In the 2015 decision dismissing the appellant's previous appeal, Judge O'Brien set out the evidence given by the appellant and sponsor followed by consideration of the provisions of Regulation 14(1), 14(2), 6(1)(b) and (c) and 7(1)(a) of the 2006 Regulations and crucially for this application the definition of "spouse" at Regulation 2(1), which does not include a party to a marriage of convenience.

8. The First-tier Judge considered the evidence, both documentary and oral, and concluded that the evidence before him was lacking in credibility and that the marriage was a marriage of convenience.

9. The appellant did not appeal immediately. He appealed six months out of time. No explanation for the delay was provided and there were no special circumstances. The application was not admitted. First-tier Judge Frankish, when refusing permission, said that even if the application had been timely, there was nothing in the grounds identifying any properly arguable reason to challenge the First-tier Tribunal's findings of fact and credibility, and in particular, the finding that he had entered into a marriage of convenience.

10. Permission to appeal was refused on 20 April 2015. That was the end of the 2014 application.

The 2017 application

11. In 2017 the applicant made another application for a residence card as the sponsor's spouse.

12. The respondent's letter of refusal set out the reasons why the initial refusal had been given, but also considered new evidence of the relationship including photographs, bank statements, credit card statements, phone bills, dental cards, voting registration and so forth. After considering all the evidence the respondent reached the following conclusion:-

> "The Capital One credit card statements, Lloyds bank statements, EE mobile phone bill, Geek Squad, Smile dental card letter, marbles statement, Tesco clubcard credit card statement, Redoute statement, NHS European Health Insurance card letter, registration letter and the undated Barclays letter are all in single names and show no joint financial commitments. Again given that you claim to have been in a relationship since 2012 this department would expect to see a joint council tax bill, joint bank statements or savings accounts and joint utility bills covering several years.
>
> At best the evidence supplied shows cohabiting.
>
> Based on the information detailed in the marriage interview and the evidence supplied in this and previous applications, we have reasonable grounds to suspect that the marriage undertaken on 05 October 2013 to Agnieszka Magdalena Jurek is one of convenience for the sole purpose of you obtaining an immigration advantage. Therefore your application for a residence card to confirm you are a family member of an European Economic Area (EEA) or Swiss national exercising Treaty rights in the UK has been refused."

The 2018 First-tier Tribunal decision

13. The appellant appealed to the First-tier Tribunal. The First-tier Judge took the 2015 First-tier Tribunal decision as her *Devaseelan* starting point as she was entitled, and indeed required to do.

14. At [30]-[31] the Judge found that the respondent had shown reasonable grounds for suspecting that the marriage was one of convenience. At [32], she recognised that "The burden therefore shifts to the appellant to prove on the balance of probabilities that his marriage is not a sham".

15. The bundle of documents produced for the First-tier Tribunal was not complete. It did not include a copy of the 2014 decision of Judge O'Brien nor of the refusal of permission to appeal. The Home Office Presenting Officer provided a copy of the decision to the First-tier Judge at the hearing. Counsel for the appellant apparently told the Judge that it was the fault of the appellant's previous legal advisers that no appeal had been attempted in 2015, but in fact, the position was as already set out, that an application was made, but permission was refused.

16. The Judge considered the oral and documentary evidence before her, and concluded as follows:-

> "45. For the reasons I stated I do not consider the appellant to be a credible witness. His evidence was vague, he was inconsistent in

> his own evidence and there were inconsistencies of the evidence of Miss Yurek on the same issues. Given my rejection of the evidence of the appellant and Ms Yurek but having carefully reviewed the entirety of the evidence before me I do not accept on the balance of probabilities that the appellant has … established that his marriage to Miss Yurek was not one of convenience. On this basis, I find that the appellant is not a family member of Miss Yurek and accordingly he is not entitled to a residence card as the family member of an EEA national exercising their Treaty rights in the UK.
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> 46. Mr Shrestha conceded at commencement that if his claim failed on this basis in the Article 8 claim would fail likewise (sic). I accept that the article 8 claim fails."

The appeal was dismissed. The appellant appealed to the Upper Tribunal.

Permission to appeal

17. The appellant in his grounds of appeal argued that it was not open to the First-tier Judge to find that the marriage was one of convenience; that the finding that the appellant and sponsor now lived together meant that the marriage could not be one of convenience; that the First-tier Judge had erred in dismissing the appeal under Regulation 8 and Article 8 outside the Immigration Rules and the 2016 Regulations 2016; that the appeal should have been allowed under Article 8 ECHR; and finally:-

> "The learned Judge refers to the case of *Devaseelan* [2002] UKIAT 00702. However, that case is only a starting point, which is not binding on the second Tribunal. The second Tribunal can depart from the previous decision, where the circumstances surrounding the first appeal were such that it would be right for the second Tribunal to look at the matter as if the first determination had never been made. It is submitted that the learned judge has failed to do just that."

Submissions

18. I heard oral submissions from Ms Victor-Mazelli for the appellant, who asserted (incorrectly as it turned out) that the appellant had not appealed the 2014 decision by First-tier Judge O'Brien. She nevertheless sought to persuade me that the First-tier Judge in 2018 erred in proceeding directly to the consideration of whether the appellant and sponsor had proved that this marriage was genuine and subsisting without making a sustainable decision that the respondent had shown reasonable grounds to suspect that the marriage was one of convenience.

19. Ms Victor-Mazelli relied on the decision of the Supreme Court in *Sadovska and another v Secretary of State for the Home Department (Scotland)* [2017] UKSC 54. Ms Victor-Mazelli asserted that the 2014 decision was no more than the *Devaseelan* starting point and that there was new evidence before the First-tier Tribunal in the 2018 decision which could have justified going behind the 2014 decision and making a finding that the

marriage when contracted in 2013 was a genuine marriage and not a marriage of convenience.

20. I did not find it necessary to call on Mr Walker for submissions for the respondent.

Analysis

21. The difficulty which the appellant has in this appeal is that of the *Devaseelan* starting point in 2015, which found as a fact that the marriage was one of convenience and that the appellant and sponsor are not credible witnesses. It is striking that the appellant chose not to include that decision in the bundle for the First-tier Tribunal nor, having changed representatives, does it appear that he made his new solicitors aware of the contents of that decision. If that were not the case, their instructions to Counsel that the decision was not appealed would be nonsensical.

22. The second judge, applying the *Devaseelan* guidance, may not relitigate the question whether this is a marriage of convenience unless there is new evidence relating to the basis on which the 2013 marriage was contracted at Gretna Green, on 5 October 2013.

23. The new evidence which is produced does not relate to the date of the marriage in 2013 but to the cohabitation which the parties say has taken place since then. Evidence of subsequent cohabitation and/or devotion cannot assist the appellant since the question of a marriage of convenience is decided on the basis of the parties' intentions when the marriage was contracted. The First-tier Judge in 2018 was entitled, therefore, to take that point quite shortly and did so.

24. Ms Victor-Mazelli referred me to many paragraphs in *Sadovska,* but not to [29]-[30], which contain the *ratio decidendi*. In her opinion at [29]-[30], Lady Hale, the Supreme Court President, with whom Lord Neuberger, Lord Kerr, Lord Clarke and Lord Reed JSCs agreed, said this:-

> "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.
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> 30. In the case of a person exercising EU law rights, the Tribunal must also be satisfied that the removal would be a proportionate response to the abuse of rights established. So it would be one thing to find that the proposed marriage had been shown to be one of convenience, and therefore that it was right to prevent it,

> but quite another thing to find that expelling Ms Sadovska from the country where she had lived and worked for so long and had other family members living was a proportionate response to that."

25. The First-tier Judge in 2018 took the approach set out in *Sadovska*; she looked first to see whether the respondent had a proper reason for considering this to be a marriage of convenience which, in this case, among other things, was the challenged but undisturbed decision of the First-tier Tribunal in 2015 that it was a marriage of convenience, coupled with the lack of any new evidence about the circumstances surrounding the marriage, or at least any new reliable evidence. The Judge's finding that the burden of proof had shifted to the appellant is unarguably sound on that basis.

26. The First-tier Judge in 2018 therefore proceeded to consider whether the appellant had proved, on the balance of probabilities, that this was not a marriage of convenience when contracted. The appellant and sponsor had been found to lack credibility as witnesses by First-tier Judge O'Brien in 2014, and also failed to impress Judge Solly as credible witnesses.

27. Judge Solly held that the appellant had not rebutted the presumption that the marriage was one of convenience. The judge considered the evidence advanced in rebuttal of the marriage of convenience finding, including further oral evidence from the appellant and sponsor. She was not satisfied to the standard of balance of probabilities that the appellant had shown that marriage was not one of convenience. She was unarguably entitled so to conclude, for the reasons she gave in the decision.

28. I turn therefore to the question of Article 8 ECHR. The judgment in the Court of Appeal of Lord Justice Sales, with whom Lord Justice Beatson and the Senior President of Tribunals, Lord Justice Ryder agreed, in *Amirteymour v The Secretary of State for the Home Department* [2017] EWCA Civ 353, confirmed that an appeal under Regulation 26(1) of the EEA Regulations did not import a right of appeal under Article 8 ECHR with reference to section 82(1) of the Nationality, Immigration and Asylum Act 2002 (as amended). If the appellant wishes to pursue a human rights appeal, a separate paid application for leave to remain on that basis must be made.

29. There has been no removal decision to date (unless something else has been omitted from the bundles before the Upper Tribunal): if a removal decision is made, it will be open to the applicant to make an Article 8 ECHR application for leave to remain or such interim relief as is appropriate. If this marriage, originally contracted as a marriage of convenience, has become a genuine and subsisting relationship, it remains open to the appellant make an application under Article 8 for leave to remain on family and private life grounds, but that is not this application.

30. This appeal is accordingly dismissed.

Conclusions

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

I do not set aside the decision. The decision of the First-tier Tribunal stands.

Signed: Judith A J C Gleeson Date: 28 November 2018

Upper Tribunal Judge Gleeson