Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04682/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 October 2018	**On 21 November 2018**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MR MILAN MANDAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – WARSAW

Respondent

Representation:
For the Appellant: Mr R Bartram, Legal Representative
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh, born in 1982 who, on 27 January 2017 applied for an EEA family permit as the spouse of an EEA national, a Romanian citizen.

2. That application was refused in a decision dated 11 April 2017 on the basis that the appellant's marriage was one of convenience. His appeal came before First-tier Tribunal Judge Beg ("the FtJ") on 9 July 2018. She dismissed the appeal. Permission to appeal against her decision having been granted, the appeal came before me.

3. At the hearing before the FtJ, evidence was given by the appellant's wife, Renata-Elisabeta Mandal, and her sister. The FtJ's decision includes a detailed summary of their evidence. It is not suggested that that summary of the oral evidence and of aspects of the witness statements is in any way inaccurate.

4. In her conclusions she referred to the fact that an earlier application for an EEA residence card made by the appellant whilst he was in the UK was refused on the basis that the marriage between him and his wife was one of convenience. She referred at [10] to the refusal decision in this case, noting that the appellant and his wife were interviewed by the Home Office in connection with that earlier application following which it was decided that the marriage was one of convenience. She also noted that the appellant had not appealed that decision, and that he had been detained on 21 November 2014 and removed from the UK the following month.

5. In the same paragraph she referred to a copy of the interview record that took place in connection with that earlier application for a residence card. She noted that the appellant's legal representative did not ask for an adjournment of the hearing (as a result of the late service of the interview record). She noted the submission made on behalf of the appellant to the effect that events had now moved on since that interview.

6. At [14] the FtJ said that the discrepancies in the answers given by the appellant and his wife in that interview were highlighted in the interview transcript and referred to in the instant refusal and the Entry Clearance Manager's review. She found that those discrepancies discharged the initial burden of proof on the respondent (justifying the reasonable suspicion that the marriage was one of convenience).

7. At [15] the FtJ said that she took into account that the appellant and his wife now have a child born in 2016 and the refusal decision did not challenge paternity. She noted the evidence that the appellant's wife stayed for three months in Bangladesh with the appellant and his family and that following that visit she returned to Romania to live and work there. The appellant joined her in August 2015 and according to the evidence has remained living in Romania since then. She referred to the fact that the appellant's wife returned to the UK a week before the hearing to attend the hearing itself, and that it was said that she would return to live in Romania after the hearing.

8. As to the issue of the discrepancies in the interviews, she noted at [16] that the appellant's wife in her witness statement said that the answers she gave in the marriage interview "may have been incorrect because the couple did not get engaged until a year later and that they were 'in the early days of knowing each other'". In fact, what the appellant's wife said in her witness statement in that context was in relation to the "early days" of their relationship, before their marriage.

9. The FtJ went on to refer to an answer given by the appellant's sister, recorded at [8] of her decision. That evidence was to the effect that the appellant told her (the sister) that he was at college but the college had been suspended and he then told her that

"they will need to apply like a married couple". The FtJ said at [17] that that answer alluded to the appellant's intention to make a marriage application with an EEA national to remain in the United Kingdom because his college had been suspended and he was in this country on a student visa.

10. She also said that she bore in mind that the appellant did not appeal the earlier Home Office decision (which concluded that the marriage was one of convenience), and she said that she took into account the appellant's wife's explanation for the discrepancies as set out in her witness statement. However, she then concluded that on a balance of probabilities and "taking the evidence as a whole" she found that the marriage between the appellant and his wife "at the date of the marriage" was a marriage of convenience.

11. Immediately after expressing that conclusion she referred to the appellant having been removed from the UK and his wife having visited him in Bangladesh, that the appellant went to Romania to live with his wife in 2015 and that they have a child together. In the next paragraph she said as follows:

> "I find that a marriage which started off as a marriage of convenience and later became a genuine marriage cannot meet the Rules (sic)".

She then referred to the decision in *Rosa v Secretary of State for the Home Department* [2016] EWCA Civ 14 to the effect that in relation to the marriage of convenience issue the focus should be on the intention of the parties at the time the marriage was entered into. She had quoted from that decision earlier.

12. Then, referring to reg 2 of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"), she said that even if she accepted that the marriage was now genuine, it could not meet reg 2.

13. Lastly, with reference to reg 12(a) she said that the appellant's wife did not give evidence that she intended to travel to the UK with the appellant within six months of the date of the application or that she would join him in the UK and that she would thus be an EEA national residing in the UK in accordance with the EEA Regulations on arrival. She went on to state that even if she accepted that the appellant's wife intended to travel to the UK within six months of the date of the application with the appellant, for the reasons already given the appellant did not meet the EEA Regulations.

The Grounds and Submissions

14. The grounds only raise two issues. Firstly, complaint is made about the FtJ's assessment of the comment made by the appellant's sister-in-law about needing to apply (to remain) as a married couple following the suspension of his college's licence. It is argued that that was not a sufficient basis from which to conclude that the marriage was one of convenience. It is said in the grounds that there are many factors that may affect the timing of a marriage in a relationship and that taken at

face value the appellant's sister-in-law's evidence does not go so far as to demonstrate a marriage of convenience.

15. The second issue raised in the grounds is in terms of the FtJ having said that even if the marriage was a genuine one, if it started off as a marriage of convenience it could not meet the EEA Regulations. The grounds contend that the decision in *Rosa* which the FtJ relied on for that conclusion, does not actually say as much.

16. I should point out that neither the grounds nor submissions before me raised any issue in relation to the FtJ's consideration of the burden of proof and similarly no submissions were made in reliance on the decision in *Sadovska v Secretary of State for the Home Department* [2017] UKSC 54.

17. In his submissions, Mr Bartram relied on the grounds, submitting that a marriage of convenience is where the sole purpose is to avoid immigration control. A circumstance where, for example, a college closes down, is simply a situation that may bring a marriage forward. It was reiterated that the appellant's wife went to Bangladesh with him and they have a child together. It was submitted that the only issue was the comment made by the appellant's sister-in-law about the appellant having said that they needed to apply like a married couple. That was not sufficient to establish that the marriage was one of convenience.

18. In response to an enquiry from me, Mr Bartram further submitted that the FtJ did (in effect) find that the marriage between the appellant and his wife was presently a genuine and subsisting one.

19. In his submissions Mr Tarlow indicated that he had some sympathy with the arguments advanced on behalf of the appellant. However, he had no instructions from the Entry Clearance Officer and thus had no further submissions to make, other than to invite me to dismiss the appeal.

Assessment and Conclusions

20. I have considered the FtJ's decision very carefully. Having done so, I do not agree that the only issue, or reason given by the FtJ for concluding that the marriage was (at its inception) a marriage of convenience was because of the remark made by the appellant's sister-in-law concerning what the appellant had told her about needing to make a marriage application because his college had closed down. Certainly, that was one feature of the FtJ's assessment but not the only feature.

21. She referred to the fact that the previous application for a residence card was refused on the basis that it was at that time assessed that the marriage was one of convenience. She also referred to the fact that there were discrepancies in the interviews that took place with the appellant and his wife. According to the appellant's wife's witness statement that interview was in November 2014. They married on 28 July 2014. In any event, it is clear from the FtJ's decision that she took into account the discrepancies between them but also said that she took into account the appellant's wife's explanation for those discrepancies. Furthermore, she noted

that there was no appeal against that decision. Although she did not refer in her decision to the appellant's wife's explanation in her witness statement for there having been no appeal (she did not know that they could appeal), it is a matter that the FtJ was entitled to take into account in her assessment of whether the marriage was "when it was entered into" a marriage of convenience.

22. It is not suggested on behalf of the appellant that there was any evidence that the FtJ failed to take into account; the argument simply being that it was not sufficient for the FtJ to conclude that the marriage was one of convenience solely on the basis of the appellant's sister-in-law's comment (to which I have referred). As I say however, that was not the only basis upon which the FtJ made her decision. For completeness, I should say that I have for myself considered the interviews of the appellant and his wife that were conducted in November 2014 and it is clear that there are significant discrepancies in their answers. It was not submitted on behalf of the appellant either before the FtJ or before me that the decision at that time that the marriage was one of convenience was not justified on the basis of what was said in the interview. I note that in submissions before the FtJ it was said on behalf of the appellant that events had "now moved on" since that interview.

23. In relation to the issue of whether a marriage that started off as a marriage of convenience but later became a genuine marriage, falls foul of reg 2, I am satisfied that the FtJ was entitled to rely on the decision in *Rosa* to support her conclusion that such circumstances are caught by reg 2. In *Rosa* at [41] the Court said as follows:

> "41. I accept that the tribunal's language was loose. It may be useful to contrast a marriage of convenience with a "genuine" marriage (indeed, Underhill LJ treated them as antonyms at paragraph 6 of his judgment in *Agho*), but the focus in relation to a marriage of convenience should be on the intention of the parties at the time the marriage was entered into, whereas the question whether a marriage is "subsisting" looks to whether the marital relationship is a continuing one. I am satisfied, however, that the tribunal understood that the ultimate question was whether it was a marriage of convenience, not whether the marriage was subsisting, and that its findings provided a proper basis for the conclusion it reached that the marriage was one of convenience. The tribunal was correct to look at the evidence concerning the relationship between the appellant and her husband after the marriage itself (both before, during and after the husband's period of imprisonment), since that was capable of casting light on the intention of the parties at the time of the marriage. The tribunal's finding that "it is a marriage of convenience and always has been" (paragraph 26) covered the position at the time of the marriage. The wording suggests that the tribunal had in mind the possibility that a marriage of convenience might turn into a genuine marriage in the course of time, but the finding that it had always been a marriage of convenience makes it unnecessary to consider that potentially interesting issue in the present case."

24. There, the court clearly took the view that the focus in relation to a marriage of convenience should be on the intention of the parties at the time the marriage was entered into. That was different from the question of whether the marriage was "subsisting". Although it could be said that that view was *obiter* because of what the

court said in the last sentence of [41], I would respectfully agree with the conclusion that the focus should be on the parties' intentions at the time the marriage was entered into. This, it seems to me, is consistent with the EEA Regulations at reg 2 that states that a spouse does not include a party to a marriage of convenience. Earlier in reg 2 it states that:

> "'Marriage of convenience' includes a marriage entered into for the purpose of using these Regulations, or any other right conferred by the EU Treaties, as a means to circumvent -
>
> (a) immigration rules applying to non-EEA nationals (such as any applicable requirement under the 1971 Act to have leave to enter or remain in the United Kingdom); or
>
> (b) any other criteria that the party to the marriage of convenience would otherwise have to meet in order to enjoy a right to reside under these Regulations or the EU Treaties".

25. Thus, the phrase 'marriage of convenience' is stated as including a marriage that was entered into for certain purposes. The phraseology makes it plain that it is the time that the marriage was entered into which is relevant. Reg 2 is not expressed in the present tense, such as for example stating that a marriage of convenience is one that 'exists' to circumvent Immigration Rules, or such like. It was not suggested on behalf of the appellant before me, or indeed before the FtJ, that the EEA Regulations in this respect do not accurately transpose the Citizens' Directive (2004/38/EC). Furthermore, no other authority was referred to on behalf of the appellant which suggests an alternative conclusion. *Sadovska* does not deal with that issue.

26. In these circumstances, I am not satisfied that there is any error of law in the FtJ's conclusion that the marriage is a marriage of convenience (per reg 2).

27. I agree with Mr Bartram that the FtJ did, implicitly at least, accept that the relationship was now a genuine and subsisting one. It seems to me that that is evident from her having said at [18] that a marriage which started off as a marriage of convenience and later became a genuine marriage could not meet the EEA Regulations. Otherwise, there would have been no need for her to consider the decision in *Rosa*. Furthermore, the evidence before her could be said to have supported a conclusion that the marriage was now a genuine and subsisting one. I do not consider that there is any significance in the FtJ saying that the appellant's wife said in evidence that the appellant lived alone in one room, apparently in Romania, when the other oral evidence from her and her sister was to the effect that they were now living together. It seems likely that this was an error in the FtJ's understanding of the evidence and certainly she did not suggest that the evidence indicated anything other than that they were living together, and not that the appellant was living alone.

28. Nevertheless, for the reasons I have given, even though the FtJ found that the marriage was presently a genuine and subsisting one, she was correct to conclude that the appellant's marriage fell foul of reg 2.

29. I note what is said in the grounds about it being a matter of common sense that it could not be said that for the couple to succeed under the EEA Regulations in these circumstances they would have to terminate the marriage by divorce and then remarry.

30. However, it is plain that reg 2, consistent with the Citizens' Directive in this respect, is concerned to avoid abuse of rights. If a marriage was one of convenience, thus entered into, for example, to avoid compliance with Immigration Rules, the answer for the appellant in circumstances such as these would be to make a Rules-based application and/or to rely on Article 8 in an application. Article 8 was not relied on either before the FtJ or before me.

31. It was not raised as an issue in submissions before me, although I did canvass the matter with Mr Bartram, the fact that the FtJ said that the appellant could not otherwise meet the requirements of the Rules in terms of reg 12(a) because there was no evidence that the appellant's wife intended to travel to the UK within six months of the date of the application. In this however, it seems to me that she erred because she did not make reference to the appellant's application form in which it was clear from the answers to questions 20 and 21 that he planned to arrive in the UK on 1 March 2017. The application was made on 27 January 2017. In answer to question 54 of the application he said that his spouse would be travelling with him, as he did at question 129 and 142. There is evidence therefore, of the intention of the appellant's spouse to travel to the UK within six months of the date of the application and that she would reside in the UK in accordance with the Regulations. The FtJ referred to her witness statement saying that she would obtain part-time work. However, the error in this respect is not material because it does not relate to the FtJ's primary finding that the marriage was one of convenience.

32. Accordingly, there being no material error of law in the FtJ's decision, her decision to dismiss the appeal must therefore stand.

Decision

33. The decision of the First-tier Tribunal did not involve the making of a material error of law. Its decision to dismiss the appeal therefore stands.

Upper Tribunal Judge Kopieczek 19/11/18