Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/08581/2016

THE IMMIGRATION ACTS

Heard at Field House
Decision sent to parties
On 8th October 2018 **On**
15th October 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

RAJAH [A]

[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms F Allen, Counsel instructed by Polpitiya & Co solicitors

For the respondent: Mr D Clarke, a Senior Home Office Presenting Officer

DECISION AND REASONS

Decision and reasons

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 1 July 2016 to refuse him a permanent right of residence pursuant to Regulation 15(1)(b) of the Immigration (European Economic Area) Regulations 2006. The appellant is a citizen of Pakistan.

Background

2. The appellant was a lawful visitor to the United Kingdom from 2001, on a frequent basis. In 2005, he married his first wife in Pakistan. On 3 February 2006, the couple applied to come to the United Kingdom for their honeymoon. The appellant was given a 5-year multi-entry visa, but his wife received only a 6-month visa and returned to Pakistan when it expired. In October 2006 and June 2008, the couple had children together. The parentage of the younger child is not disputed: it is the appellant's child, born following a second visit she made to the United Kingdom, with the elder child, in February 2007. Again, the wife returned to Pakistan at the end of her visit.

3. In July 2007, the appellant served notice of intention to divorce his wife on her in Pakistan. The divorce was finalised in October 2007. The relationship must have continued to some extent, given that their younger child was born in June 2008 and therefore, probably, conceived in September/October 2007.

4. In the meantime, in August 2006, the appellant had met the sponsor who became his second wife. In January 2009, he proposed to the sponsor and they were interviewed for a certificate of authorisation to marry, which was issued on 14 December 2009, the respondent then being satisfied that the proposed marriage was genuine. They married on 6 November 2009 and on 15 September 2010, the appellant successfully applied for an EEA residence card as the sponsor's spouse.

5. In 2013, the appellant's first wife and children came to the United Kingdom, the first wife as a student, and the children as her dependants. Her student visa was extended to 30 December 2016, but then curtailed in December 2015 due to revocation of the College's sponsor licence. The first wife applied for leave to remain on human rights grounds, saying that it had always been her intention to settle in the United Kingdom. The appellant's case is that he does not see his first wife, but does see his two children about once a month, and telephones also to speak to them. If he sees the children in London, then the first wife brings them. He told the First-tier Tribunal that he did not know his first wife's immigration status or that of his children.

6. In January 2016, the appellant applied for a permanent right of residence as his sponsor wife's spouse. Immigration officers visited the sponsor at home on 8 June 2016, finding no sign of the appellant there, except a bottle of aftershave. The respondent refused a permanent residence on the basis that the marriage between the appellant and the sponsor was a marriage of convenience.

7. The evidence about the sponsor's marital status was that she threw the appellant out in 2012, but the First-tier Judge found that she did not tell HMRC that she was a single person until 2016. The sponsor had a miscarriage in 2017. The appellant produced letters from friends, and a witness statement from the sponsor's young daughter from an earlier relationship. The child was present and willing to give evidence to the First-tier Tribunal, but was not called as the Presenting Officer said he did not wish to cross-examine her. Her evidence must therefore be taken to be accepted.

8. There were also photographs from the wedding ceremony and photographs, receipts and travel documents from various family holidays taken by the appellant and sponsor. The First-tier Judge accepted that they holidayed together for 3 days in Venice in August 2013, for 3 days in Zurich in March 2015, and for 2 days in southern Spain in July 2015.

First-tier Tribunal decision

9. The First-tier Judge considered all the evidence, finding that the appellant and sponsor's accounts diverged on a number of material matters and concluded that the marriage was a sham, and always intended to be so by the appellant. The First-tier Judge found that the sponsor's involvement with the marriage was genuine, but that the appellant 'frequently stayed away from the property and did just enough to keep the marriage alive in order to acquire his permanent status' including the three brief holidays of which credible evidence had been produced.

10. The decision concluded:

> "30. I find that the appellant was still in a relationship with his first wife at the time he served her with divorce papers, as their child was born 11 months later. I find that he did not tell the sponsor she was in the United Kingdom because he did not want her to know. I find that he did not have clothes, toiletries or papers at the [sponsor's home] in June 2016 because he was not living there, and I find he did the bare minimum to keep this relationship going in order to be able to successfully apply in January 2016 for permanent residence. I find, on the balance of probabilities, that this is why he took two very brief trips in 2015 which are so well documented.
>
> 31. The evidence of [the sponsor having] a miscarriage in 2017 is not evidence that the appellant was the father of the unborn child and so I attach little weight to it. I have already found a large number of inconsistencies and untruths in the evidence of both parties. When looking at the factors in *Papajorgi* I find that the inconsistencies lead me to find that

this is a marriage of convenience entered into at the time for the purpose of the appellant gaining immigration status. …"

11. The Judge dismissed the appeal. The appellant appealed to the Upper Tribunal.

Permission to appeal

12. Permission to appeal was granted on the basis that the First-tier Judge erred in failing to give weight to the step-daughter's evidence, and also in concluding that the sponsor had not miscarried his child, an issue which had not been put to the sponsor or the appellant in evidence at the hearing.

Rule 24 Reply

13. There was no Rule 24 Reply.

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

Upper Tribunal hearing

15. For the appellant, Ms Allen argued that the First-tier Judge's decision related to the state of the marriage at a much later date than that of the marriage; there had been a marriage interview, just after the parties contracted their marriage, and the Secretary of State had then been satisfied that the marriage was genuine.

16. The burden of proof was on the respondent, not the appellant and sponsor, to show that the marriage was not genuine and the respondent had not discharged that burden. It was not open to the Judge to decide the parentage of the sponsor's miscarried child without giving the parties an opportunity to respond to such a serious allegation. The decision of the First-tier Tribunal was bad for lack of procedural fairness and should be set aside.

17. For the respondent, Mr Clarke argued that the step-daughter's evidence did not advance the appellant's case; the Judge had been entitled to find that the appellant was duped at the date of the marriage. Nor was it relevant whether the miscarried child was the child of the appellant and sponsor; that would have made no difference.

18. There was a discrepancy between the appellant and sponsor as to whether he was home when the immigration officers visited: he said he was not, but she said that he was. The Judge had found both of them to be unreliable witnesses. The step-daughter's witness statement was mentioned in the decision and the Upper Tribunal should not conclude that it had not been taken into account.

The step-daughter's witness statement

19. The uncontested evidence of the appellant's step-daughter was set out in her witness statement of 14 November 2017. She was then 17 years old. She said she had known the appellant since she was 6 years old, in 2006, when her mother met her at the school gate with a man who was then introduced as a friend. She described him as 'very pervasive'. Meetings between the step-daughter, her mother, and the appellant continued. The appellant would drop her off at the weekends to her Explorlearning tuition and her Stagecoach theatrical classes for children.

20. She remembered a day out in 2008 in the school holidays, and trips to parks and restaurants. In 2012, her cousins visited from Uzbekistan and the appellant took all the children out every other weekend to Dragons Den, Shrek's Adventure, Woburn Safari Park, Thorpe Park, Chessington World of Adventures, and many more places. The best memories of her childhood were of the appellant and her cousins.

21. The sponsor had married at 17 in Germany but the marriage had not gone well. She had 'faced many troubles' and now suffered a major mood disorder. The step-daughter said that there had been matrimonial difficulties between the appellant and sponsor. They argued, and sometimes her mother did not allow the appellant to come to the house, so that the step-daughter's studies would not be affected by their arguments.

22. The statement concluded:

> "However, I can confirm that [the appellant] has always been living with us and he is the kindest human being I have ever met in my life, and despite their differences, [the appellant] and my mother loves each other a lot."

23. Having opted not to cross-examine on that statement, the respondent must be taken to have accepted it.

Discussion

24. The first question is whether proper consideration of the step-daughter's statement might have made a difference to the outcome of the appeal. I am satisfied that it might have done, and that therefore the omission to take it properly into account is a material error.

25. The second question is whether the Judge's conclusion that the sponsor's pregnancy might not have been the appellant's child is material; again, I am satisfied that it was, as it contributed to his overall disbelief that the marriage was still subsisting.

26. The First-tier Tribunal decision must be set aside. I have considered whether I can remake the decision on the basis of the evidence before me and the findings of the First-tier Judge. I consider that it is possible to do so.

Remaking the decision

27. I am guided in my approach to marriages of convenience by the judgment of Lord Justice Richards, with whom Lord Justice Moore-Bick and Lord Justice Floyd agreed, in *Rosa v Secretary of State for the Home Department* [2016] EWCA Civ 14 that the definition of a marriage of convenience, as set out by the House of Lords in *R (Baiai) v Secretary of State for the Home Department (Nos 1 and 2)* [2008] UKHL 53 can properly be derived from Article 1 of EC Council Resolution 97/ C382/01 of 4 December 1997 as:

> "a marriage concluded between a national of a Member State or a third-country national legally resident in a Member State and a third-country national, with the sole aim of circumventing the rules on entry and residence of third-country nationals and obtaining for the third-country national a residence permit or authority to reside in a Member State."

The First-tier Judge accepted that the sponsor wife, at least, intended a genuine marriage. The respondent also accepted that the marriage was genuine at the date of the marriage interview.

28. The appellant's former wife did not come to the United Kingdom until later, and the fact that he sees his children (including the daughter born to them after the divorce) is not necessarily suggestive of any more than that they have a civilised relationship, in the interests of the children.

29. I consider whether the marriage when contracted was genuine, with regard to the guidance given in *Papajorgji* (EEA spouse - marriage of convenience) Greece [2012] UKUT 38 (IAC), approved in *Rosa,* the Upper Tribunal gave the following guidance:

> *i) There is no burden at the outset of an application on a claimant to demonstrate that a marriage to an EEA national is not one of convenience.*
>
> *ii) IS (marriages of convenience) Serbia [2008] UKAIT 31 establishes only that there is an evidential burden on the claimant to address evidence justifying reasonable suspicion that the marriage is entered into for the predominant purpose of securing residence rights.*
>
> *iii) The guidance of the EU Commission is noted and appended.*

30. The European Union Commission guidance has both positive and negative indicative criteria. The positive criteria suggested are that the third country spouse would have no problem obtaining a right of residence in his own capacity, or has already lawfully resided in the European Union citizen's Member State; that the couple were in a relationship for a long time; that they had a common domicile or household for a long time; that they have a mortgage or other long-term financial commitment together; or that the marriage has lasted for a long time.

31. In relation to these criteria, this couple met in 2006 and had a relationship before their marriage. The appellant already had a 5-year visa for the United Kingdom and had no obvious need for the assistance of the sponsor

to obtain a right of residence, as he had been coming and going since 2001. There is no suggestion that the marriage has ended, although it has not been without difficulty, and there is the uncontested evidence of the appellant's step-daughter about the way in which the appellant became part of her life and the good times they enjoyed together. There was also the accepted evidence of three family holidays over the years.

32. The negative criteria are that the couple had not met before their marriage; that they are inconsistent about the circumstances of their first meeting or other important personal information concerning them; that they have no common language, that money changed hands (other than a dowry) when the marriage was contracted; that one or both of the spouses had previously entered into a marriage of convenience or other form of abuse or fraud to acquire a right of residence; that family life developed only after the expulsion order was adopted; or that the couple divorced shortly after the a permanent right of residence had been granted.

33. This couple were consistent about the circumstances of their first meeting, though not about where he was on the night of the Immigration Officers' visit. They have a common language and it is not suggested that the sponsor was paid to marry him. Nor is it suggested that either of the parties has a previous history of fraud, abuse or marriage of convenience. There is no expulsion order, and their marriage and family life, such as it is, has developed over the past 16 years.

34. The evidence relied upon by the respondent comes to this, that in 2016, the appellant had few possessions at the sponsor's house. That is not probative of his intention in 2009 and 2010, and it is accepted that her intentions were genuine throughout. On the balance of probabilities, and having regard to all the accepted evidence, I am not satisfied that the respondent discharged the burden of showing that this marriage, when contracted, was contracted for the sole purpose of allowing the appellant to remain in the United Kingdom.

35. It is not necessary for the appellant to show that the marriage was a successful one: as long as it was not a marriage of convenience, and the sponsor continued to exercise Treaty rights in the United Kingdom, that is sufficient. Even if (of which there is no evidence) the miscarried child in 2017 was not the appellant's child, if the marriage was not one of convenience when contracted and the parties remained married, the appellant was in the United Kingdom in accordance with the Rules and accruing time towards a permanent right of residence.

36. This appeal is therefore allowed.

DECISION

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

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by allowing the appeal.

Date: 9 October 2018 Signed Judith AJC Gleeson Upper Tribunal Judge Gleeson