Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/08909/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reason Promulgated**
On 1 October 2018	**On 9 October 2018**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

KHURRAM SHAHZAD
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Shah, of 786 Law Associates
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a Pakistani national born on 3 May 1977. He challenges the determination of First-tier Tribunal Judge Malcolm, promulgated on 1 February 2018, dismissing his appeal against the respondent's refusal to issue him a residence card as the spouse of an EEA (Polish) national.

2. Permission to appeal against the determination of the First-tier Tribunal was refused by Judge Doyle on 30 May 2018 but granted on renewal by Judge Storey on 6 August 2018. Judge Storey considered that it was arguable that the judge erred in raising the issue of whether the marriage was one of convenience because this had not been relied on by the respondent. He also considered it arguable that the judge had failed to identify what additional documentary evidence he required to be satisfied that the appellant's wife was exercising treaty rights in the UK. The matter then came before me on 1 October 2018.

The Hearing

3. The appellant and his wife were present at the hearing when I heard submissions from the parties. A full note is set out in my Record of Proceedings.

4. Mr Shah begun his submissions by arguing that the respondent had not raised the issue of the relationship and so the judge had been wrong to determine it. When I pointed out to him that it had been raised by the Home Office Presenting Officer at the hearing before the First-tier Tribunal, he agreed. He also confirmed that he had represented the appellant at that hearing and had not raised any objection to the matter being raised. When asked whether his submission was that the judge should not have made findings on the issue, he conceded that the judge was required to deal with it. He chose not to pursue that ground but to amend it. He then maintained that although the judge had been entitled to consider the matter, his findings on the evidence were flawed as he had not given due weight to the evidence before him. He maintained that the appellant and sponsor had been living together since 2011. they had since married. If the respondent had an issue with the claim, he should have arranged a visit to the appellant's house. It was inconvenient for the appellant and sponsor to travel to Liverpool due to the distance and the expense. Mr Shah relied on the judgment in Sadovska [2017] UKSC 54 where the court held that the Tribunal had placed too much weight on the interview without considering all the other evidence. Mr Shah submitted that in the present case, too much weight had been placed on the fact that the appellant and sponsor had not attended an interview.

5. Mr Shah submitted that with respect to the issue of whether the sponsor was exercising treaty rights, there had been a bundle of 300 pages. This included unaudited accounts, bank statements and invoices of self employment. He questioned what else the sponsor could have provided. He maintained that the reference to £70,000 in earnings by the judge was an error by the interpreter (I note that the grounds maintain the sponsor said she earned £17,000 not £70,000). He submitted that the judge had also been wrong to place weight on the adverse findings made by three previous Tribunals as those appeals were in respect of different applications.

6. Mr Shah submitted that the judge gave no explanation for why he did not consider it determinative that the couple had been given permission to marry. He questioned why the sponsor would still be with the appellant if the marriage had been a sham. He submitted that they were together because this was a genuine relationship and they wanted to raise a family. He submitted that the appeal had been ongoing since 2016 and should now be allowed outright.

7. In response, Ms Everett submitted that there was no error of law. She argued that the issue of the marriage had been raised at the hearing and there had been no objections raised. There had been cross examination on the matter and the judge was bound to make findings on whether or not the marriage was genuine. It was clear that the judge had been aware that the previous determinations related to different issues but was entitled to take account of the credibility issues raised which had not been explained.

8. With respect to the issue of the sponsor's earnings, different evidence had been given and the difficulty for the judge was that he had not been given a clear picture due to the contradictory evidence. In any event, Ms Everett submitted that this point was immaterial if the judge's findings on the relationship were upheld.

9. Mr Shah replied. He submitted that too much weight had been given by the judge to the previous determinations. The appeal should be allowed outright due to the evidence adduced on both the issue of the marriage and the sponsor's work.

10. That completed submissions. At the conclusion of the hearing, I reserved my determination which I now give with reasons.

Discussion and Conclusions

11. I have considered all the evidence before me and have had regard to the submissions made.

12. It is now accepted by Mr Shah that the judge did not err in determining the issue of whether or not the relationship was genuine. The matter was raised by the Presenting Officer at the hearing before the First-tier Tribunal and there was no objection raised by the appellant's representative. Cross examination took place on the issue. Clearly, therefore, the judge was required to consider the matter and it would have been an error of law had he not done so. What is now argued instead, by way of an amendment to the grounds, is that the judge's findings on the marriage were flawed. It is maintained that he did not give due weight to the other evidence of the relationship, that he placed too much emphasis on the failure of the appellant

and the sponsor to attend an interview and that he considered previous determinations when they related to other types of applications. I now consider the judge's findings on the marriage and relationship.

13. The judge set out all the evidence considered at paragraph 4 of the determination. He also set out the oral evidence of the appellant and all the witnesses. In assessing the evidence as a whole, he took account of the previous determinations as they formed part of the appellant's background. He was entitled to do so following Deevaseelan [2002] UKIAT 000702. He was well aware that the three determinations related to a student application and to two EEA applications as an extended family member (at 111) and I see no merit in the argument that he erred in taking these determinations into account or that he placed undue weight on them. The discrepancies arising at previous hearings with respect to the relationship between the appellant and the sponsor are relevant to the claim that the same relationship is ongoing, albeit a marriage has since taken place.

14. The judge noted that the evidence before him gave rise to contradictions over when the couple began cohabiting, the relationship between the appellant and the landlord and the occupants of the accommodation allegedly occupied by the appellant and the sponsor (at 98-99). The evidence of the appellant and sponsor at a previous hearing on these very issues and the findings made are therefore directly relevant and the judge was entitled to have regard to them. The marriage of itself does not resolve them.

15. Mr Shah also argued that the judge erred in stating that marriage was not determinative of the issue but of course that was a fair approach (at 104). If marriage in itself was determinative, then there would never be any issue of a marriage of convenience in any application or appeal. Marriage is a relevant factor but it is not the only one. Where there are so many other serious inconsistencies, as there are here, and where there were also inconsistencies at previous hearings which remain unresolved, the judge was entitled to take the view that the marriage in itself did not establish a genuine and subsisting relationship.

16. The judge was also entitled to take account of the fact that the appellant and sponsor declined to attend two interviews. Whilst the appellant previously claimed through his representatives that it would take five hours to get to Liverpool from London and sought a change of venue because they were working, it was accepted by his representative that in fact the train from London was a three hour journey; it was now argued, however, that the tickets were too expensive. The judge considered the failure to attend either interview was a point against the appellant and he was fully entitled to take that view (at 105 and 115). Once the appellant had been told his application for a change of venue had been rejected, he should have attended the second interview particularly if he wanted to prove his case. There is no authority for

Mr Shah's submission that the respondent should have come to the appellant's house instead nor does the determination indicate that undue weight was put on this point as Mr Shah argued.

17. The judge also noted that there were language problems between the appellant and sponsor (at 107). Certainly, at the earlier hearing, the sponsor could not even understand basic English and as she did not speak Urdu and indeed did not even know what the language was called and used an acquaintance as an interpreter, concerns arose as to the genuineness of the relationship.

18. Discrepancies over the different faiths of the appellant and sponsor and their intentions as to children were also relied on (at 108).

19. The judge took account of the evidence of the other witnesses (at 100 and 109). He noted that the appellant's mother-in-law only spoke Polish and had never visited the couple at their alleged home so could give no direct evidence as to their living arrangements. It should also be noted that the witness statements given by the sponsor's parents are practically identical and contain the same grammatical errors. In fact, the statements of the appellant and sponsor are also almost identical and also contain the same mistakes. This does not suggest that they were actually individually prepared each witness.

20. For all these reasons, the judge properly concluded that the marriage was one of convenience and the submissions made in an attempt to challenge that conclusion fail to establish that he erred in any way in reaching that conclusion. On that basis alone, the appeal cannot succeed.

21. Nevertheless, I now turn to the second issue; whether the sponsor is a qualified person. The judge was presented with unsatisfactory and contradictory evidence and, as Ms Everett submitted, could not be clear of the true situation. I accept that it is possible that the interpreter misheard the figure of £17,000 as £70,000 but what is strange is that Mr Shah did not seek to clarify that in the re-examination of the sponsor. In any case, there was no documentary evidence to support either sum. Indeed, the sponsor's own documentary evidence for the previous tax year showed earnings of far less and it was not explained how she had increased her income by such a substantial margin. Serious difficulties arose with her evidence in the hearing in 2012 when she could not say where she went to work, could not describe her place of work, could not name her boss, could not explain the errors with the pay slips and could not explain why the address of the business she allegedly worked for did not exist and the closest address was a residential property. The judge in this instance, however, does not appear to take those matters into account which further undermines Mr Shah's submission that undue weight was placed on the previous determinations.

22. The judge considered the documentary evidence but found it unsatisfactory (at 117). It has to be said that almost all the invoices in the appellant's bundle are of such poor quality as to be illegible (at 119) and there is no schedule drawn up to show that payments received accord with the deposits into the sponsor's bank account. Many of the dates on the invoices, where legible, have been visibly altered by hand. The judge noted there was no evidence to support the oral evidence of the sponsor's claimed self employment earnings (at 118-119). It was therefore open to the judge, on that unsatisfactory evidence, to conclude that the appellant had failed to establish that the sponsor was a qualified person.

23. The judge found that the appellant had tried every possible way to remain. His credibility must be assessed in the context of all the evidence, past and present. Previous Tribunals have found that neither he nor his sponsor are witnesses of truth. The appellant in fact initially sought to remain as a student using falsified documents from the Cambridge College of Learning. He then sought to rely on his relationship with the sponsor whom he failed to mention as part of his initial application. The relationship was not accepted as genuine by two different judges. Even now the difficulties persist. The judge's conclusions are sustainable and no errors have been identified.

Decision

24. The First-tier Tribunal did not make any errors of law and the decision to dismiss the appeal stands.

Anonymity

25. I have not been asked to make an anonymity order and see no reason to do so.

Signed

Upper Tribunal Judge

Date: 3 October 2018