Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02174/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 November 2019	**On 19 November 2019**

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MR AMARILDO ISUFAJ
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

DECISION ON THE RE-HEARING OF THE APPEAL

1. The appellant, Amarildo Isufaj, is a citizen of Albania, born on 21 February 1993. He appeals against a decision of the respondent dated 4 February 2017 to refuse to admit him to the United Kingdom as the family member of an EEA national, on the grounds that he was a party to a marriage of convenience ("the refusal notice").

2. In a reported decision promulgated on 12 August 2019, a panel of the Upper Tribunal (Mr Justice Lane, President, Upper Tribunal Judge Gill) found that a decision of the First-tier Tribunal promulgated on 22 November 2017 involved the making of an error of law, and set it aside, directing that the matter be reheard in the Upper Tribunal: see Isufaj (PTA decisions/reasons; EEA reg. 37 appeals) [2019] UKUT 283 (IAC). The First-tier Tribunal had dismissed the appellant's appeal against the refusal notice as it was not satisfied that the appellant had demonstrated that the marriage was not one of convenience. That was an error because it reversed the burden of proof.

3. Isufaj (PTA decisions/reasons; EEA reg. 37 appeals) was reported for reasons connected to the grant of permission to appeal from the First-tier Tribunal to the Upper Tribunal, and a jurisdictional issue relating to whether the appellant's appeal against his refusal of admission could be continued while he was in the United Kingdom. It may be found in the **Annex** to this decision.

Factual background

4. The appellant previously entered the United Kingdom clandestinely, and later claimed asylum after being arrested for suspected cannabis cultivation and the theft of a car. He was found to have in his possession a false Italian identity document, a Lloyds Bank Visa card and a Construction Industry Scheme card in the name of another person. He was never charged with any offences but was served with removal papers as a person without leave. His claim for asylum was refused and certified as "clearly unfounded". The appellant was removed to Albania in early November 2016.

5. On 28 December 2016, the appellant married Diana Miksa, a citizen of Lithuania born 26 May 1992 ("the sponsor"), in Lithuania. On 4 February 2017, they attempted to enter the United Kingdom at Luton Airport, in reliance on their ability to do so as the citizen of an EEA state and her husband respectively. They were interviewed, separately, by immigration officers, and entry to each was refused on the grounds that their marriage was one of convenience. The respondent was concerned that there were a number of discrepancies across the answers each provided to questions put to them. Coupled with the appellant's poor immigration history, and his apparent motive to evade immigration control, the respondent concluded that the relationship between the two was one of convenience. They were both subsequently refused admission at Calais in June 2017, although those decisions are not under challenge in these proceedings. The sponsor has since been admitted to the United Kingdom to visit family here, travelling without the appellant, although she claims to have encountered difficulties at the border. The pair now live in Malta. The appellant works as a chef and the sponsor works as a sales assistant in a shopping centre.

6. It is the appellant's case that he has been in a genuine relationship with the sponsor since September 2012, when they met in Italy. The appellant was on holiday, and the sponsor had been working there. They began cohabiting five months later, in February 2013, in Rome. They lived there until August 2015. It was around this time that the appellant claims to have entered the United Kingdom clandestinely. He maintains that throughout this period, he was in a genuine relationship with the sponsor. The sponsor joined him here in December 2015, staying until around June or July 2016. The appellant was arrested by Immigration Enforcement officers on 21 July 2016 and was removed to Albania in November. He claims to have remained in Albania for around two weeks, before joining the sponsor in Lithuania. The couple married around a month later, on 28 December 2016.

Legal framework

7. Although the refusal notice purported to refuse to admit the appellant under the Immigration (European Economic Area) Regulations 2006, those Regulations had been revoked three days earlier, and replaced by the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). As such, our analysis will be under the 2016 Regulations; nothing turns on the respondent's incorrect citation of the 2006 Regulations.

8. The 2016 Regulations confer a right of entry on EEA nationals and their non-EEA family members: see regulation 11. Admission can be refused to those who do not meet the definition of "family member" on the grounds that they are a party to a marriage of convenience, and also on specific grounds of public policy, public security or public health (regulation 23(1)), and on the basis that their admission would lead to the misuse of a right to reside (regulations 23(3) and 26).

9. "Family member" is defined by regulation 7(1)(a) to include the spouse of an EEA national. A "spouse" does not include a party to a "marriage of convenience" (see regulation 2(1)). Regulation 2(1) also states:

> "'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…"

The key issue to be identified when considering whether a marriage is one of convenience is the purpose for which the marriage was entered, at the time it was contracted. Was the sole purpose (as in the predominant

purpose, rather than the unique or exclusive purpose: see Recital (28) to Directive 2004/38/EC, see also the European Commission's Handbook on addressing the issues of alleged marriages of convenience, 24 September 2014, (COM (2014) 604 final), at page 9, and Sadovksa v Secretary of State for the Home Department [2017] UKSC 54 at [29], per Lady Hale PSC) in order to enjoy free movement rights to which the individual would not otherwise be entitled? The intention of the parties at the time of the marriage is relevant. Their knowledge about each other, or the extent to which the marriage is genuine and subsisting at the date of assessment are not determinative, although are likely to be relevant evidential factors to consider when looking back at the purposes for which the marriage was entered into.

Burden and standard of proof

10. Where the respondent alleges that a marriage is one of convenience, the legal burden rests on her to demonstrate that the marriage falls into that category: see Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038(IAC), Agho v Secretary of State for the Home Department [2015] EWCA Civ 1198 at, e.g., [13], and Sadovska v Secretary of State for the Home Department at, e.g., [28]. The legal burden is not discharged merely by demonstrating there to be a "reasonable suspicion" that the marriage is not genuine, although if the respondent does provide such grounds, the appellant will be expected to respond to the allegation: see Rosa v Secretary of State for the Home Department [2016] EWCA Civ 14 at [24] to [27] . In those circumstances, the initial evidential burden borne by the respondent shifts to the appellant to provide an "innocent explanation". If the appellant provides an "innocent explanation", the effect will be to return the evidential pendulum to the respondent to refute the claimed innocent explanation. Throughout, the legal burden rests on the Secretary of State; the basic rule is this: "he who asserts must prove" (Sadovska at [28], per Lady Hale). There is only one standard of proof, and that is the civil standard: the balance of probabilities.

Documentary evidence

11. The appellant provided two bundles featuring his statement and that of the sponsor, statements from supporting witnesses, documents relating to the sponsor's employment history in this country, their marriage certificate and their birth certificates. We also had the benefit of detailed written submissions prepared for the First-tier Tribunal hearing by Ms Masood, counsel previously instructed by the appellant.

12. The respondent's bundle consisted primarily of the refusal notice issued at the border, plus the written submissions relied on by the respondent before the First-tier Tribunal, and helpful written submissions prepared by Mr Melvin for the hearing before us.

The hearing

13. As with the earlier hearing, the appellant represented himself. The respondent granted the appellant temporary admission on that occasion, and for the re-making hearing, in order for him to present his case in person. We are grateful to Mr Melvin for the steps he took to facilitate the appellant's admission, pursuant to directions issued by the President ahead of the error of law hearing, and ahead of this remaking decision hearing.

14. The appellant and sponsor gave evidence, and participated in the proceedings, through an Albanian and Italian interpreter respectively. At the outset, we ensured that each were able to understand and communicate through their interpreters. Although the sponsor is Lithuanian, she explained that, as she had lived in Italy for a number of years, she was more comfortable speaking in Italian than Lithuanian, especially when describing matters relating to her relationship with the appellant, which was formed in Italy, and – on the appellant's case – had subsisted in Italy longer than anywhere else.

15. We took the appellant and sponsor through their written statements (which appear to have been prepared with the benefit of legal assistance, consistent with the appellant being legally represented before the First-tier Tribunal), providing them with the opportunity to expand upon their evidence orally. They were cross-examined extensively by Mr Melvin.

16. Full notes of the oral evidence and submissions may be found on the Tribunal's file. We will outline the salient aspects of the oral evidence and the submissions, to the extent necessary to give reasons for our findings.

Discussion

17. We reached the following findings of fact, having considered the entirety of the evidence in the case, and the submissions, in the round.

18. The decision refusing admission to the appellant gave on a brief explanation of why the marriage was thought to be one of convenience, which did not feature any detail. It stated:

> "From the interview notes I am satisfied that due to the inconsistencies that have transpired regarding your relationship with each other that your marriage with [the sponsor] is not genuine or subsisting. Your answers in interview do not commensurate [sic] with a person that knows about their wedding and relationship with their wife and your account is different than the one she gave."

The refusal notice continued to state that the actions of the appellant, "represent a genuine threat to one of the fundamental interests of society." It is not clear why the "fundamental interests of society", a concept which is relevant only to decisions taken on grounds of public policy, public security and public health under regulation 27 of the 2016 Regulations, was cited in the decision.

19. In isolation, the refusal notice would be unlikely to satisfy the initial evidential burden to which the respondent is subject. However, the materials provided for the purposes of these proceedings feature the interview notes and file notes generated at the airport in relation to the appellant and the sponsor when they were refused admission. We consider that these documents provide additional detail which, on balance, demonstrate that the respondent has satisfied the evidential burden for the purposes of demonstrating there to be a marriage of convenience. In relation to the appellant, he could not remember where he met the sponsor, nor could he remember when he proposed to her. He could not remember her favourite food. A search of his baggage revealed a number of bank statements and financial documents attested by a Notary Public. A transaction for €2000 featured in his bank statements from November 2016, the month before his marriage took place. The appellant had only recently been removed from the United Kingdom, having entered unlawfully, and had made an asylum claim which had been certified as "clearly unfounded." Thus, the appellant had every incentive to enter into a marriage of convenience and had been unsure when asked about essential and basic features of his relationship with his wife upon being questioned.

20. As such, the evidential burden transfers to the appellant to provide an innocent explanation to the respondent's allegations that the marriage is one of convenience.

21. We recall that the test whether a marriage is one of convenience relates to the intentions of the parties, at the time they entered into the marriage. Whether a relationship is, at the present time, genuine and subsisting is a different, but often intrinsically linked, issue.

22. We have no hesitation in finding that the appellant and sponsor are presently in a genuine and subsisting relationship. We note that, at the very least, there has been a degree of longevity and persistence to their contemporary relationship. The initial refusal of entry took place in February 2017. The sponsor attended the original appeal before the First-tier Tribunal, on 3 November 2017; that hearing took place in the absence of the appellant, as he was not in the country at the time. They both attended the error of law hearing on 17 May 2019, and the remaking hearing before us. Their relationship has persisted for at least the time since their initial refusal of admission until now, which is a period of over two and a half years. The appellant and sponsor gave consistent evidence about their current living arrangements and occupations in Malta, and each spoke of the frustration experienced by the other arising from the situation in which they now find themselves. The sponsor said in her evidence that if the relationship between the two were not, and had never been, genuine, she would not have stuck with him for this length of time.

23. The appellant's bundle features an extensive range of photographs of the appellant and sponsor clearly captured on a number of different occasions, over a significant period of time, in the company of many different

individuals. Some are holiday photographs taken in beach or coastal locations, others are during winter weather when the appellant and sponsor are wearing warm clothing, along with other visible but apparently unconnected individuals in the background of photographs taken in public places. Other images are "selfies" taken within the parameters of ordinary life; from the passenger seat of a car, in restaurants with friends, with old and young family, on sofas, travelling on coaches, celebrating with friends, and in other activities of daily life. Although the images are not dated, the appellant and sponsor accept that they all post-date the wedding. It is clear that the images were taken over a period of time due to the changing weather and surroundings in the images. The slightly differing appearances of the appellant and sponsor from one batch of images to another (for example, the appellant wears an established beard in some images, and appears simply recently unshaven in others) underline the different occasions on which the images are taken. While we are mindful of the risk of attempting to infer too much from the demeanour of those who feature in the images, we do ascribe some significance to the fact that, of the many different people – of all ages – who feature in the images, none has the appearance of feigning participation, or having otherwise staged the image.

24. We make these observations having had the benefit of seeing both the appellant and sponsor give oral evidence. We will return to analyse the content of their answers concerning the disputed issues shortly, but as far as their evidence related to their current relationship, it was consistent and credible. For example, the sponsor spoke with unhesitating spontaneity about their current life together in Malta, and the frustration they have experienced as a couple arising from the disruption triggered by the respondent's decision over 30 months ago. The sponsor spoke in moving terms of the impact of her own subsequent difficulties at the border, even upon admission to this country in the absence of the appellant, to see her family. We have no reason to doubt the sincerity of her account of the distress she experiences upon seeking admission to the United Kingdom, having been flagged by the respondent at the border. The genuineness with which the sponsor spoke of those experiences equalled that with which she spoke of the frustration she and the appellant have experienced following the respondent's decision. Taken together, these aspects of the evidence of the sponsor and the appellant combine to lead to the conclusion that it is more likely than not that the appellant and sponsor are presently in a genuine relationship.

25. Of course, the issue for our consideration is not whether at the present time the parties are in a genuine and subsisting relationship of marriage. We must consider whether the purposes for which the parties entered the marriage in the first place was for the sole or predominant purpose of avoiding the requirements of immigration control to which the appellant would otherwise be subject. It is entirely possible that a couple who entered a relationship of marriage for reasons of convenience, intending for the sole or predominant purpose of the union to be the evasion of immigration controls, could later develop genuine love and affection for

one another, such that their relationship evolves and becomes a genuine by-product of an initially sham relationship. It is our task to ascertain whether the appellant and the sponsor fall into that category (for the relationship clearly is currently genuine), or whether the sole or predominant purpose of their marriage was not for the appellant to acquire a right to reside in this country in circumstances in which he would not otherwise be entitled to enjoy one, but was for reasons of love, affection and commitment from the outset.

26. In cross examination, the appellant and sponsor gave largely consistent accounts of the circumstances of their separate arrival in this country, and their subsequent cohabitation. The sponsor was able accurately to describe the appellant's work in Italy between 2012 to 2015, namely in the construction industry. They both described living together in Bromley upon their initial cohabitation in this country. They gave consistent accounts of when the initially began to speak about getting married, and why they want to do so. They described their lives together in Malta in consistent terms.

27. However, the following features of the appellant's proffered innocent explanation give rise to some credibility concerns with his account as a whole, which we take into account.

28. Plainly, the appellant has a poor immigration history. He was cross-examined about his asylum claim, which was based upon a fear of his family and his claimed fear at the hands of those who had, in his words, trafficked him to the United Kingdom in order to produce cannabis. We accept the submissions of Mr Melvin that the appellant lacks credibility, although, for reasons we shall outline, this is only in certain respects. The appellant claimed to the respondent that he had a well-founded fear of being persecuted in Albania on account of threats made by his family. Not only has the appellant been able to return to Albania without experiencing any of the difficulties he previously represented to the respondent he would face, but it is clear from the narrative that he has presented as part of these proceedings that part of his earlier asylum claim was fabricated. Indeed, he accepted as much in cross-examination. He accepted that he falsely stated in his asylum claim that he arrived here in 2012. By contrast, he now maintains before us that in 2012 he moved to Italy, and commenced his relationship with the sponsor, before entering this country clandestinely in 2015.

29. Although there is extensive photographic and text-message evidence of the current, or contemporary, relationship between the appellant and the sponsor, there is no documentary or photographic evidence of their relationship prior to their marriage. That is striking; it appears from the range of different situations and occasions upon which the photographs which feature in the bundle were taken, that the appellant and the sponsor are a couple who, like many others, document their relationship by means of regular photographs and selfies. That there are no such images from earlier stages in their claimed relationship presents some concerns.

30. Both the appellant and sponsor were asked about the absence of such evidence in cross-examination. The answers they provided were not consistent. The appellant said that they did take photographs of the pre-marriage stages of their relationship, but they were all held digitally, and they were deleted following an argument between the two. The appellant's evidence in this respect did feature a degree of credibility when he said that, as a couple, they had had their difficulties, and that accordingly they had destroyed the photographs they had previously taken of themselves. It was at about that time that the appellant came to this country.

31. By contrast, the sponsor said that she had changed her telephone, on which all the images were stored, a number of times. Earlier handsets had broken, she said. This had been before her images were stored on the cloud. She had changed handsets "ten times". In cross-examination, she initially said that she had not argued with the appellant, and that they had not had a period of separation. There had been no reason for her to delete the images herself. She later accepted that they *did* argue ("*Of course we argue, everybody argues...*"). Mr Melvin submits that these discrepancies give rise to significant concerns as to the claimed purposes for which the parties entered their marriage in December 2016. We will return to this issue.

32. There is no documentary evidence arising from the claimed three years of cohabitation in Italy. The appellant and sponsor each said that they had not retained any paperwork from this period, adding that it was some time ago. We bear in mind the relative youth of the appellant and sponsor at this stage; each would have been in their early 20s, starting life together, in different countries to their own, in a haphazard fashion. Although there is superficial force in Mr Melvin's submission that the absence of documentary evidence is evidence of the absence of a genuine relationship, we accept the explanation provided by the appellant and sponsor that they did not retain any paperwork from this era, as they did not know they would have to. We bear in mind that the description of life together in Rome was in a rented room in shared accommodation, and are realistic about the extent to which any documents could be expected to be generated from such arrangements, still less the prospect of such documents being available for scrutiny, in a different country, some four to seven years later.

33. The appellant's bank statements revealed a payment of €2000 into his bank account, in cash, in his local branch in Albania, on 7 November 2016. The payment slips required the appellant to specify the "source of funds", which the appellant stated was "*EMIGRACIONI*". Mr Melvin contends that that means "emigration"in Albanian, and the appellant has not sought to ascribe a different meaning to the word. Mr Melvin submits that the "source of funds" could also be taken to mean the "purpose of funds", with the effect that, at the very time the appellant proposed to the sponsor, a large cash deposit was made into his account, with a description which bore some resemblance to matters of migration. It was,

therefore, payment for the marriage of convenience, submits Mr Melvin. In cross-examination, the appellant explained that this transaction was related to the costs that he would need to meet in order to move to Lithuania, where he was to marry the sponsor. Both said in their evidence that, although the proposal did not take place until late November 2016, marriage is something they had been talking about for some time and was therefore a subject of some familiarity between them.

34. We accept that large cash deposits of this magnitude shortly before a claimed marriage of convenience could give rise to the suggestion that a transaction was being made in order to "pay" for the marriage. However, there is a flaw in this submission on the facts of this case. It is the respondent's case that the *appellant* was the one to gain from a marriage of convenience, rather than the sponsor. There is no evidence of this transaction being used to make a payment to the sponsor, such that we may regard it as "payment" for the marriage. As set out in a skeleton argument prepared by the appellant's previous counsel, Ms Masood, there are a number of reasons why the appellant may have chosen to record the source of funds in this way. The source of funds could have been from the work he did, albeit illegally, whilst living in this country. The appellant's own account in cross-examination was that the deposit was for the purposes of his then forthcoming move to Lithuania, and the subsequent marriage.

35. We consider that a more straightforward explanation is possible. Getting married and moving country is an expensive business; many legitimate couples will have a range of transactions going through their bank accounts during this time of their lives; even against the background of the remaining concerns highlighted by the respondent, we do not consider that this feature of the evidence militates one way or the other in relation to whether the marriage was one of convenience.

36. We also recall the initial discrepancies, outlined in paragraph 19, above, in the interviews conducted with the appellant and the sponsor at the airport. Although we were satisfied, for the purposes of the initial evidential burden being discharged, that those discrepancies, combined with the clear incentive the appellant had to enter a marriage of convenience, were sufficient to prompt an explanation from the appellant, we consider that the discrepancies were at the less significant end of the scale. The respondent's case was not set out in any detail in the refusal notice, and the detail provided in the contemporaneous notes made by the respondent's officials is light. The appellant struggled to remember the proposal, but the other details he could not provide – his wife's favourite food, for example – are not the sort of omissions which lead to the conclusion that this was a marriage of convenience.

37. We return to the issue of the differing accounts provided of the absence of photographs of the relationship prior to the ceremony of marriage. For the reasons we have already set out, the answers provided by the appellant and sponsor on this point featured some inconsistencies. On

conventional credibility grounds, this discrepancy could, in principle, give rise to credibility concerns with the entirety of the evidence of both parties to the marriage. It is also significant that the discrepancy arose in relation to the explanation for the absence of what many would consider to be essential features of a relationship which was to lead to a genuine marriage.

38. We have concerns about the appellant's poor immigration history and previous deployment of a false asylum claim. He has readily accepted that he worked in the "grey economy" in Italy. He accepted in cross-examination that, shortly after his arrival here, he obtained false ID documentation and a fraudulent bank card. We have significant concerns about his credibility on that account. We take these into account.

39. Against that background, we also remind ourselves that the rich tapestry of life with which the Tribunal is familiar features relationships, living arrangements, life decisions and family life that to some may seem odd or chaotic, but to others, to be normal. We must also bear in mind that the parties to a genuine marriage, seeking to defend their union, may seek to gloss over difficulties in their relationship, or otherwise present an unrealistically blemish-free picture of an at times difficult relationship. It is trite law that witnesses whose evidence is based on a truthful core may exaggerate or overlook certain aspects of the truth, out of an understandable but wrong desire to ensure the best possible treatment of their case.

40. We consider it more likely than not that the sponsor sought to minimise the past difficulties in their relationship in her evidence. Her explanation for not having cloud-based storage for previously lost images is plausible. Her evidence was that she did not put photos of her boyfriend – as the appellant then was – on social media. However, we doubt that, in the time period under consideration, she had utilised *ten* smartphone handsets, one breaking after another, in light of the conflicting but realistic account given by the appellant. She may have been overstating matters at this stage. She may have simply meant "a lot", or even more than one or two. We accept, however, that her computer, which also stored images, was stolen; this aspect of her evidence was not challenged in cross-examination. We consider the truth on the photographs point to be located in a combination of her evidence and the appellant's.

41. Bearing in mind the fact that the appellant and sponsor are – and have been for some time – in a genuine relationship, we consider the appellant's suggestion that they experienced relationship difficulties to be credible. Something must have happened for him to have decided to leave Italy and enter the United Kingdom clandestinely during the currency of the relationship. The sponsor's initial evidence that they had never experienced difficulties was difficult to accept. Indeed, she later corrected herself, accepting that they had had some arguments. We accept the appellant's evidence that photographs from earlier in their relationship were deleted due to difficulties they experienced at the time,

and we accept the sponsor's evidence that the images were not stored on the cloud at that point.

42. Drawing this analysis together, we return to our core task, namely determining whether the parties to the marriage have provided the required "innocent explanation" to deflect the evidential pendulum which has swung to them. We accept their explanation. The sponsor's determination and sincerity as the wife of the appellant was apparent at the hearing. There was no indication, of the sort with which we are sadly familiar from our experience in the Tribunal, of a reluctant partner, or someone living a lie. Over the course of an hour's cross-examination, she provided consistent, forthright responses to all questions asked. When she could not remember the answer to a question, which was infrequent, she said so. On one occasion, she could not remember whether she had returned to Italy or Lithuania in July 2016. Little turns on that distinction, as the appellant had been arrested in this country by that point, and the couple were subject to enforced separation at the time.

43. We readily accept that the way in which the appellant and sponsor have conducted their relationship may seem at odds with the approach that many may take. Their lives have had a chaotic dimension. The appellant has engaged in activity – his false asylum claim, his possession of false documents – which calls into question his credibility. He has much to gain from a marriage of convenience. However, we consider that the current, genuine, relationship between the appellant and sponsor provides a lens through which their intention upon entering their marriage may be ascertained, when taken with the remainder of the evidence in the case. We consider it to be highly unlikely that the appellant and sponsor would have established and maintained the relationship they currently enjoy if the sole or predominant purpose of their union was initially to provide the appellant a means by which he could avoid being subject to the requirements of immigration control.

44. We accept, therefore, that the appellant has provided an innocent explanation to the respondent's case that he is in a marriage of convenience. That has the effect of swinging the evidential pendulum back to the respondent. Mr Melvin's submissions in response sought to rely on the same materials relied upon in order to substantiate his case that this is a marriage of convenience, and what was revealed in cross-examination. For the reasons we have set out above, we do not accept that the respondent's case is capable of refuting the appellant's innocent explanation to the extent that we are bound to find that the marriage was one of convenience. We have paid particular regard to the position and evidence of the sponsor. We do not accept that she is knowingly a party to a marriage of convenience, notwithstanding the clear incentive the appellant had to enter into such a union. The mere fact that the appellant stood to gain much from the marriage in immigration terms is insufficient: see Sadovska at [29]:

> "…it is not enough that the marriage may bring incidental immigration and other benefits if this is not its predominant purpose."

45. It is necessary for the respondent, in the discharge of her legal burden, to demonstrate that both parties to the marriage entered it for the sole, or predominant, purpose of evading immigration control. As Lady Hale noted in Sadovska, also at [29]:

> "…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."

It has been no part of the respondent's case that the appellant has deceived the sponsor. Indeed, they were both initially refused admission to the United Kingdom, and the sponsor has spoken of the continued difficulties she experiences at the border, having been flagged as a potential party to a marriage of convenience by the respondent's systems. It is our task to consider the case as advanced by the respondent, and not to substitute alternative theories of the factual matrix, such as the potential for the appellant to have deceived the sponsor.

Conclusion

46. In light of the above analysis, therefore, the respondent has not discharged the legal burden upon her of demonstrating that the marriage was one of convenience. It follows that the exclusionary definition of the term "spouse" in regulation 2(1) of the 2016 Regulations does not exclude the appellant from being categorised as a "spouse", for he is not a party to a marriage of convenience. It also follows that the sponsor was not a party to a marriage of convenience, either.

47. For those reasons, the respondent's decision to refuse to admit the appellant on the basis that he was a party to a marriage of convenience was unlawful. This appeal is allowed.

Notice of Decision

This appeal is allowed under the Immigration (European Economic Area) Regulations 2016.

No anonymity direction is made.

Signed *Stephen H Smith* Date 14 November 2019

Upper Tribunal Judge Stephen Smith

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award. The respondent discharged the initial evidential burden to demonstrate that the marriage was one of convenience. The respondent's initial decision was entirely within the range of decisions properly open to the respondent to take, on the basis of the material before her.

Signed *Stephen H Smith* Date 14 November 2019

Upper Tribunal Judge Stephen Smith

Annex – Error of Law Decision

Upper Tribunal
(Immigration and Asylum Chamber)

Isufaj (PTA decisions/reasons; EEA reg. 37 appeals) [2019] UKUT 00283 (IAC)

THE IMMIGRATION ACTS

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On 17 May 2019 **Further submissions** **made on 31 May 2019**	.....

Before

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Respondent

Representation:

For the Appellant: in person, accompanied by the sponsor
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

(1) Judges deciding applications for permission to appeal should ensure that, as a general matter, there is no apparent contradiction between the decision on the application and what is said in the "reasons for decision" section of the document that records the decision and the reasons for it.

As was said in Safi and others (permission to appeal decisions) [2018] UKUT 388 (IAC), a decision on a permission application must be capable of being understood by the Tribunal's administrative staff, the parties and by the court or tribunal to which the appeal lies. In the event of such an apparent contradiction or other uncertainty, the parties can expect the Upper Tribunal to treat the decision as the crucial element.

(2) Although regulation 37(1) of the Immigration (European Economic Area) Regulations 2016 provides that a person may not appeal under regulation 36 whilst he or she is in the United Kingdom, where the decision in question falls within regulation 37(1)(a) to (g), once the appeal is instituted by a person who is then outside the United Kingdom, there is no statutory prohibition on the appeal continuing if the person concerned thereafter is physically present in the United Kingdom. It will, however, be for the Secretary of State to decide whether to give that person temporary admission for the purpose of attending an appeal hearing, since regulation 41 does not apply to such cases.

DECISION ON ERROR OF LAW AND SETTING ASIDE OF THE DECISION OF THE FIRST-TIER TRIBUNAL

1. The appellant is a citizen of Albania, born in 1993, who having been refused asylum in the United Kingdom in 2016, was removed to Albania later that year.

2. The appellant attempted to enter the United Kingdom on 4 February 2017, in the company of his wife, the sponsor, who is a citizen of Lithuania. Both the appellant and his wife were refused admission on the basis that the Immigration Officer was satisfied that their marriage was a marriage of convenience and that refusal of entry was appropriate on the grounds of public policy and public security.

3. The notice of decision, given to the appellant, told him that he had a right of appeal under regulation 36 of the Immigration (European Economic Area) Regulations 2016 against the decision but that, pursuant to regulation 37(1)(a), he could exercise that right "only after you have left the United Kingdom".

4. The appellant did so. His appeal was heard at Taylor House on 3 November 2017 by a First-tier Tribunal Judge who, in a decision promulgated on 22 November 2017, dismissed it. At the hearing, the judge heard oral evidence from the sponsor. The appellant remained outside the United Kingdom.

5. Ms Masood of Counsel drafted grounds of application for permission to appeal to the Upper Tribunal against the judge's decision. Ground 1 contended that the judge had wrongly treated the appellant as bearing the burden of showing that his marriage to the sponsor was not one of convenience. It is trite law that, although there can be a shifting of the

evidential burden, the legal burden lies throughout on the respondent to show that the marriage in question is a marriage of convenience (and, thus, not a relationship that affords a non-EU party to that marriage any relevant rights under EU law).

6. There was, plainly, great force in ground 1. As Ms Masood pointed out, at paragraph 52 of his decision, the judge said:-

> "On the evidence before me the Appellant has fallen far short of showing that, on balance his marriage to the sponsor was genuine."

7. That incorrect articulation of the burden of proof governed the way in which the judge approached the oral and documentary evidence. So far as the documentary evidence was concerned, the judge said:-

> "49. There is no documentary evidence that the couple cohabited in Rome. Indeed, one of the striking things about this case is the lack of evidence about the relationship in general, including communications, photographs and the sorts of things one would expect to see where a relationship has apparently been ongoing for 4 or 5 years."

8. In her grounds, Ms Masood pointed out that the materials before the judge included over 100 photographs of the couple taken in various locations at various times, including on their wedding day and with various family members, such as the sponsor's son; and written evidence, such as booking documentation, showing that the sponsor had visited the appellant in Albania a number of times in 2017. The grounds submitted that none of that evidence was challenged by the respondent.

9. Unsurprisingly, First-tier Tribunal Judge Grimmett granted permission on Ms Masood's grounds. Judge Grimmett's decision, dated 26 April 2018, stated in terms "The application is granted".

10. Paragraph 1 of Judge Grimmett's "Reasons for decision", however, noted that the application was fourteen days out of time and that there was no explanation for the delay. Judge Grimmett said that, as a result "I do not extend time".

11. Paragraph 2 of the reasons went on to state that: "It is arguable that the Judge erred in requiring the appellant to show that there was a genuine marriage when the initial burden was on the respondent to show it was a marriage of convenience".

12. When the appellant's appeal came before Deputy Upper Tribunal Judge Renton at Field House on 2 July 2018, Ms Masood appeared on behalf of the appellant. Deputy Judge Renton took what he regarded as a jurisdictional point on the decision produced by Judge Grimmett. Having heard submissions from Ms Masood and Ms Pal, the Home Office Presenting Officer, Deputy Judge Renton found as follows:-

> "4. My decision is that there is no valid appeal before me. Although Judge Grimmett eventually granted leave to appeal, the first decision was

> that the application for leave to appeal was made out of time and that there was no reason for her to extend time. This is the first decision in the grant and therefore in my view takes precedence. What the Judge subsequently decided in paragraph 2 of the grant is therefore irrelevant. I took the view that it was not for me to overturn in some way the decision of Judge Grimmett not to extend time. I decided not to consider a possible review under Rules 34 and 35 of the Tribunal Procedure Rules 2014 as there would be no compliance with Rule 35(3). I found it significant that Judge Grimmett had not decided to review the decision in the appeal under the provisions of Rule 34."

13. Having reached that conclusion, Deputy Upper Tribunal Judge Renton held that there was "No valid appeal before against the decision of the First-tier Tribunal which is therefore not set aside".

14. Ms Masood applied on behalf of the appellant for permission to appeal to the Court of Appeal against Deputy Judge Renton's decision. In that application, she drew a distinction between what Judge Grimmett had said was her "decision" and what she had expressed as her "reasons for decision".

15. Upon receiving the application for permission to appeal to the Court of Appeal, Upper Tribunal Judge Gill considered (as she was permitted to do by rule 45(1) of the Tribunal Procedure (Upper Tribunal) Rules 2018) whether to undertake a review of Deputy Upper Tribunal Judge Renton's decision. Upper Tribunal Judge Gill decided to do so. She noted that the Upper Tribunal decision in Safi and Others (Permission to appeal decisions) [2018] UKUT 00388 (IAC) had been reported. The headnote of Safi and Others reads as follows:-

> "(1) It is essential for a judge who is granting permission to appeal only on limited grounds to say so, in terms, in the section of the standard form document that contains the decision, as opposed to the reasons for the decision.
>
> (2) It is likely to be only in very exceptional circumstances that the Upper Tribunal will be persuaded to entertain a submission that a decision which, on its face, grants permission to appeal without express limitation is to be construed as anything other than a grant of permission on all of the grounds accompanying the application for permission, regardless of what might be said in the reasons for decision section of the document."

16. Judge Gill considered that, if Deputy Upper Tribunal Judge Renton had had the benefit of the judgment in Safi and Others, he might have appreciated, by analogy with the reasoning in that case, the significance of the fact that the section of the standard form document that contained the decision of Judge Grimmett stated "The application is granted" as opposed to "Extension of time is refused".

17. Accordingly, Upper Tribunal Judge Gill decided to set aside the decision of Deputy Upper Tribunal Judge Renton, pursuant to rule 46 of the Upper

Tribunal Rules. In so doing, Upper Tribunal Judge Gill made it plain that the significance of the distinction between the "decision" and the "reasons for decision" sections in the standard form document does not merely provide an answer to the problem that faced the Upper Tribunal in Safi and Others of whether a grant of permission is general or restricted, but that it is the general means whereby the significance of other deficiencies in the "reasons" part of the document ought to be addressed. In the present case, what Judge Grimmett said about extending time had to be read in the light of the main or overarching decision that, "**In the matter of an application for permission to appeal** … **The application is granted".** Her decision was to grant permission to appeal. Since that meant time had to be extended, paragraph 1 of the "**REASONS FOR DECISION**" section of the document had to be construed in that light.

18. Judges deciding applications for permission to appeal should therefore ensure that, as a general matter, there is no apparent contradiction between the decision on the application and what is said in the "reasons for decision" section of the document. As was said in Safi and others, a decision on a permission application must be capable of being understood by the Tribunal's administrative staff, the parties and by the court or tribunal to which the appeal lies. In the event of such an apparent contradiction or other uncertainty, the parties can expect the Upper Tribunal to treat the decision as the crucial element.

19. As a result of Upper Tribunal Judge Gill's "set-aside" decision, the appellant's appeal was listed for hearing on 17 May 2019. At that hearing, the appellant appeared in person, accompanied by the sponsor. The appellant had, apparently, entered the United Kingdom shortly beforehand, with the aim of attending the hearing. He had been detained by the respondent but then released on temporary admission, with directions being set for his removal, shortly after the hearing, to Malta, which is where the appellant and the sponsor are currently living.

20. The Upper Tribunal invited submissions from the parties on whether the appellant could pursue his appeal from within the United Kingdom, having instituted the appeal whilst outside it. Written submissions on this matter were received from Mr Deller, Senior Home Office Presenting Officer, dated 31 May 2019. No submissions have been received from the appellant.

21. Mr Deller states that the respondent's position is that no prohibition on pursuing such an appeal can be derived from the 2016 Regulations. Schedule 2 to the Regulations does not import, for an appeal under regulation 36 (Appeal rights), any provision of section 92 or 104 of the Nationality, Immigration and Asylum Act 2002, which determines the place from which an appeal under section 82(1) of the 2002 Act may be brought or continued. Accordingly, the respondent submits that there is no legislative bar to the appellant's appeal continuing if the appellant is physically present in the United Kingdom whilst the appeal is pending.

22. We see no basis for taking issue with Mr Deller's submissions on this matter. Provided that the appeal is instituted when the appellant is outside the United Kingdom, his subsequent presence in the United Kingdom does not cause the appeal to lapse or otherwise become ineffective.

23. We would, however, emphasise that the present appeal is not an appeal under the 2016 Regulations against a decision to remove the appellant under regulation 23(6)(b). As a result, the appellant does not have a right to require the respondent under regulation 41 to admit him temporarily to the United Kingdom in order to make submissions in person in his appeal (except where such appearance may cause "serious troubles to public policy or public security": regulation 41(3)). In an appeal of the kind with which we are concerned, it is for the Secretary of State to decide whether to grant temporary admission.

24. Regrettably, on 17 May 2019, no Albanian interpreter was available to enable the appellant to speak to us in his native language. His knowledge of English was extremely limited. The sponsor was able to communicate with the appellant in Italian and, to some extent, to communicate to the Tribunal what the appellant was attempting to say. However, as the First-tier Tribunal Judge noted when the sponsor gave evidence before him, the sponsor's own knowledge of English is somewhat limited (albeit better than that of the appellant).

25. In the circumstances, we indicated that, subject to the jurisdictional issue, we would decide whether there was an error of law in the decision of the First-tier Tribunal, such that that decision should be set aside.

26. For the reasons we have given, we are fully satisfied that there is such an error in the decision. The First-tier Tribunal Judge wrongly placed the burden of proof on the appellant and, as a result, his analysis of the evidence and findings thereon cannot stand. The First-tier Tribunal Judge also ignored a wealth of material that was before him, including extensive photographic evidence.

27. We accordingly set aside the decision of the First-tier Tribunal. We shall re-make the decision in the Upper Tribunal. To that end, the respondent has indicated that she would be prepared to grant the appellant temporary admission for the purposes of attending the resumed hearing.

Signed Date

The Hon. Mr Justice Lane
President of the Upper Tribunal

Immigration and Asylum Chamber