Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07335/2017

THE IMMIGRATION ACTS

Heard at: Field House
On: 2 August 2019

Decision & Reasons Promulgated
On: 15th August 2019

Before

UPPER TRIBUNAL JUDGE KEBEDE
UPPER TRIBUNAL JUDGE MARTIN

Between

NADEEM AKBAR GILL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Iqbal, instructed by Rainbow Solicitors LLP
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal is linked to another appeal, EA/03221/2018, to the extent that the decisions in both appeals relate to the same appellant and were both heard, together, before First-tier Tribunal Judge Callow on 9 November 2018. This appeal relates to the first of the respondent's decisions, dated 17 August 2017, to remove the appellant from the UK under the Immigration (European Economic Area) Regulations 2016 in accordance with section 10 of the Immigration and Asylum Act 1999, by virtue of regulations 23(6)(a)

and 32(2), and pursuant to regulation 36 of the Regulations. EA/03221/2018 relates to a subsequent decision of the respondent, dated 12 April 2018, to refuse to issue the appellant with an EEA residence card as the former family member of an EEA national who had retained a right of residence in the UK upon divorce. For reasons which are apparent from the decisions we have made, we have issued separate decisions for each appeal. Both should, however, be read together.

2. The appellant is a national of Pakistan born on 10 June 1982. He arrived in the UK on 5 October 2010 with leave to enter as a Tier 4 student migrant valid until 22 February 2012. He was granted further leave to remain until 10 April 2015 on the same basis, but that leave was subsequently curtailed to expire on 27 September 2014. The appellant met his EEA sponsor, [GV], a Hungarian national, in February 2013 and they were married on 21 February 2014. On 11 April 2014 the appellant applied for an EEA residence card as the family member (spouse) of an EEA national. His application was refused on 18 July 2014 on the basis that he was not the family member of an EEA national, since he had entered into a marriage of convenience. That decision was based upon the outcome of a visit to the appellant's given address by immigration officers which concluded that neither the appellant nor his spouse had ever resided there.

3. The appellant appealed against that decision. His appeal was heard on 11 February 2015 before First-tier Tribunal Judge O'Garro. Neither the appellant nor his spouse attended to give oral evidence but they provided written statements, in which the appellant claimed to have moved to another address with his spouse shortly after making his application, in June 2014, and had forgotten to inform the respondent of his change of address. He produced evidence of their residence at both addresses. The judge accepted, from that evidence, that the appellant and his spouse had been living together at the former address in February and March 2014 and at the new address since at least 4 July 2014. The judge concluded on the basis of that evidence that the appellant's marriage was genuine and she allowed the appeal.

4. There is no evidence before us to show that the respondent sought to appeal that decision and a residence card was issued to the appellant on 5 March 2015, valid for five years until 5 March 2020.

5. On 17 August 2017 a visit was made by immigration officers to the appellant's home. The notes of that visit have been produced. The immigration officers noted no evidence of the EEA national's presence in the property. They noted that the appellant was sharing a room with another male and there was no evidence of any female clothing or belongings in the room. The immigration officers considered that messages on the appellant's mobile telephone from his wife were not affectionate and did not appear to be messages between partners but gave the impression of an arrangement. The appellant claimed that his wife had gone to Hungary for a visit and was due back on 22 August 2017 and that they were still together. The immigration officers considered there to be no satisfactory evidence of a subsisting relationship. They arrested

the appellant and took him into detention. The appellant was served with removal papers under section 10 of the 1999 Act on the basis that he did not have, or had ceased to have, a right to reside under the 2016 Regulations.

6. The notice of liability to removal served on the appellant confirmed that removal was considered on the basis that he was:

> "A) by virtue of regulations 23(6)(a) and 32(2) a person in respect of whom removal directions may be given in accordance with section 10 of the Immigration and Asylum Act 1999 as:
>
> > a person who does not have or who has ceased to have a right to reside under the Immigration (European Economic Area) Regulations 2016."

7. The "Specific Statement of Reasons" given in the notice of liability to removal served on the appellant stated as follows:

> "You are specifically considered a person who has engaged in conduct which appears to be intended to circumvent the requirement to be a qualified person, because you were granted leave on the basis of a relationship with an EU national, when encountered you were unable to give a credible account of any subsisting relationship with the claimed partner. You also failed to give satisfactory evidence of the claimed relationship or the absence of your partner."

8. That was followed by a Decision to Remove in accordance with section 10 of the 1999 Act, which applied by virtue of regulations 26(6)(a) and 32(2) of the EEA Regulations, dated 17 August 2017, the first decision under appeal.

9. Subsequent to that decision, which had the effect of curtailing the appellant's right of residence under the EEA Regulations, the appellant made a further application for a residence card under the EEA Regulations on the basis of the same relationship, on 11 September 2017, by which time he had been released on bail. In that application he stated that he was separated from his sponsor and that divorce proceedings were being pursued. He produced a petition for divorce dated 4 September 2017. The application was refused on 11 December 2017, on the basis that he had failed to provide a valid ID card or passport for his sponsor and that his application could not be considered as one for a retained right of residence as there was no decree absolute. The decision was not an appealable one.

10. The appellant then made an application on 23 January 2018 for a residence card on the basis of retained rights upon divorce, following the issue of a decree absolute on 5 January 2018. That application was refused by the respondent in a decision dated 12 April 2018, which is the second decision under appeal in the case of EA/03221/2018. In that decision the respondent noted that the evidence demonstrated that the appellant's marriage had lasted over three years and that he and the EEA national sponsor had both lived in the UK for at least one year during their marriage. The respondent was also satisfied that the appellant had continued to exercise treaty rights as an EEA national since the date of the divorce. However the respondent considered that

the appellant had not provided adequate evidence that his EEA national former spouse was a qualified person or had a right of permanent residence on the date of the termination of the marriage. The respondent considered that he could only be satisfied, from the evidence produced, that the sponsor was exercising treaty rights from 1 April 2014 to 19 August 2017 but not on the date of divorce on 5 January 2018. The respondent made it clear that the genuineness of the former relationship had not been considered, given that the application failed on the first basis, but noting that the appellant had an outstanding appeal in regard to the genuineness of the former relationship.

11. The appellant appealed against both decisions and, as stated above, the appeals were linked and heard together before Judge Callow in the First-tier Tribunal on 9 November 2018.

12. Judge Callow considered the appeals on the basis that it was apparent, from the respondent's decision, based upon the immigration officers' note, that the respondent believed the appellant's marriage to be one of convenience. The judge noted from the appellant's statement that he was claiming to have separated from his wife on 15 July 2017 and that that was the reason why she was not present at the immigration officers' visit in August 2017. The judge rejected that claim and concluded, from the evidence in the immigration officers' note, that the marriage was one of convenience and that the appellant had ceased to have a right to reside under the Regulations. The judge did not consider it necessary to address the second decision, given his finding that the marriage was one of convenience. He dismissed both appeals.

13. The appellant sought permission to appeal to the Upper Tribunal in regard to both appeals on the basis that it was not open to the judge to find that the marriage was one of convenience. The grounds assert that the respondent had only stated that the marriage was not subsisting on 17 August 2017 and there had been no consideration by the judge of the appellant's intentions at the time of the marriage.

14. Permission was refused in the First-tier Tribunal but was subsequently granted in the Upper Tribunal on 20 March 2019 by Judge Chalkley.

The matter then came before us. We made some initial observations before hearing from the parties in relation to both appeals. As each raises different issues, we address in this decision only the matters related to the appeal against the removal decision of 17 August 2017.

15. We put it to Mr Bramble that we could not see how he was able to defend the respondent's decision of 17 August 2017. The decision had been made with reference to regulation 23(6)(a) on the basis that "*that person does not have or ceases to have a right to reside under these Regulations*". The reason given for the decision was that it was not accepted that the appellant's relationship was subsisting, but that was not a requirement of the EEA Regulations. The relevant issue under the Regulations was whether the marriage, when entered into, had been one of convenience at that time, and the Tribunal had

previously found that it was not. Mr Iqbal confirmed that that was the appellant's case in the appeal before us.

16. We gave Mr Bramble some time to consider our observations. He accepted that Judge Callow had erred in law by failing to bring the findings of the previous Tribunal into play in regard to the marriage not being one of convenience, but he submitted that the case should be remitted to the First-tier Tribunal for the decision to be re-made. His response to our view of the respondent's removal decision itself was that the decision was based on a misuse of rights. Although he agreed that the reasons given differed from a conclusion of a marriage of convenience, he submitted that the reasons stated as much indirectly and that the inference had to be that the refusal was made on the basis of the marriage being one of convenience. We did not agree with Mr Bramble and we proceeded to make a decision setting aside Judge Callow's decision and re-making the decision by allowing the appeal. Our reasons, as we explained to Mr Bramble, are as follows.

The relevant legal provisions

17. So far as is relevant, the EEA Regulations 2016 state as follows:

> **"Exclusion and removal from the United Kingdom**
>
> **23.**—
>
> (6) Subject to paragraphs (7) and (8), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if—
>
> (a) that person does not have or ceases to have a right to reside under these Regulations;
>
> (b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27; or
>
> (c) the Secretary of State has decided that the person's removal is justified on grounds of misuse of rights under regulation 26(3)."
>
> **"Misuse of a right to reside**
>
> **26.**—
>
> (3) The Secretary of State may take an EEA decision on the grounds of misuse of rights where there are reasonable grounds to suspect the misuse of a right to reside and it is proportionate to do so. "
>
> **"Person subject to removal**
>
> **32.**—
>
> (2) Where a decision is taken to remove a person under regulation 23(6)(a) or (c), the person is to be treated as if the person were a person to whom section 10(1) of the 1999 Act applies, and section 10 of that Act (removal of certain persons unlawfully in the United Kingdom) is to apply accordingly."

Findings and reasons

18. Whilst the notice of immigration decision dated 17 August 2017 giving rise to the appeal refers to regulations 23(6)(a)/23(6)(c) pursuant to regulation 26(3) and 32(2) of the EEA Regulations as alternatives, the notice of liability to removal makes it absolutely clear that the decision was made under 23(6)(a) of the Regulations (ceasing to have a right to reside) and not 23(6)(c) (misuse of rights). Therefore we cannot accept Mr Bramble's suggestion that this was a misuse of rights decision.

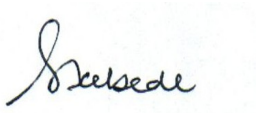
19. Neither can we accept his suggestion that the inference of the decision is that the refusal was based on the appellant's marriage being one of convenience, when the wording of the decision is clearly focussed on the question of a subsisting relationship. We do not dispute that the respondent was entitled to have concerns about the appellant's relationship given the apparently inconsistent evidence about his wife's whereabouts and his living arrangements. However the decision was made on the basis of the appellant's current circumstances, with no reference to the marriage initially entered into having been one of convenience. Had the decision been one made under the immigration rules the question of the subsisting nature of the relationship would of course have been entirely relevant to the appellant's eligibility for continued leave to remain in the UK. However that was not a relevant consideration under the EEA Regulations, where the appellant was entitled to continue to reside in the UK whatever the state of his relationship, provided that he was still married to his EEA national sponsor and that the marriage itself had not been one of convenience when entered into. It may be that the respondent has proper reasons for concluding that the marriage was one of convenience, and that the previous decision of Judge O'Garro based on the evidence before her has been displaced by further evidence relating to the marriage at the time it was entered into, but that was not the case before the judge, it was not provided as the basis for the removal decision and it cannot simply be inferred from the reasons given in the removal decision.

20. Accordingly it seems to us that the respondent's decision was not one which was correctly and lawfully made under the EEA Regulations and that the decision is simply unsustainable and indefensible. Judge Callow erred in law by considering it to be one lawfully made under the EEA Regulations and by considering that a decision, that the marriage was one of convenience, was open to him to make, when it clearly was not.

21. For all these reasons we set aside Judge Callow's decision and re-make the decision by allowing the appellant's appeal on the basis that the respondent's decision was not in accordance with the EEA Regulations 2016.

DECISION

22. The making of the decision of the First-tier Tribunal involved an error on a point of law. We set aside the decision and allow the appellant's appeal under the EEA Regulations 2016.

Signed:  Dated: 5 August 2019

Upper Tribunal Judge Kebede