



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/07915/2017

THE IMMIGRATION ACTS

**Heard at Birmingham
On 29 August 2019**

**Decision & Reasons Promulgated
On 5 September 2019**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

UMLISH SINDHU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Pipe, Counsel

For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. In a decision sent on 30 April 2019, I concluded that decision of First-tier Tribunal ('FTT') Judge Burns, sent on 26 November 2018, contains errors of law. I now re-make the decision.

Background

2. The appellant is a citizen of Pakistan. He married a citizen of the Czech Republic ('the sponsor') on 5 November 2013. After making an application for a residence card on 1 January 2014, the appellant and the sponsor were invited to interviews on 23 May 2014. The initial

application for a residence card and all such subsequent applications based on that marriage have been unsuccessful.

3. Judge Burns' decision has been set aside but there have been two previous FTT decisions: a decision by Judge Butler dated 21 May 2015 and a decision by Judge Anthony dated 14 March 2017. Both judges dismissed the appellant's respective appeals, finding that the respondent had displaced the burden of demonstrating that the appellant's marriage was one of convenience.

Hearing

4. At the beginning of the hearing before me, the parties agreed with the matters set out below.
 - (i) The primary issue in dispute is whether notwithstanding the two previous un-appealed FTT decisions, the marriage is one of convenience. In the alternative, I must determine whether the parties are in a durable relationship (albeit it would be for the respondent to exercise his discretion).
 - (ii) It is not necessary to determine whether the parties have been exercising Treaty rights at the material time because the respondent no longer disputes the positive findings in this regard.
 - (iii) The findings of fact contained in the decisions made by Judge Butler and Judge Anthony are the appropriate starting point for my own findings. The previous findings were made closer to the key issue in dispute - the parties' intentions as at the date of their marriage - and for this reason those findings must be carefully considered with appropriate deference - see Devaseelan v SSHD [2002] UKIAT 00702. Those findings can be summarised as follows:
 - a. There are significant discrepancies between the answers given by the appellant and those given by the sponsor at their respective marriage interviews.
 - b. Little reliance could be placed on an undated document from the school providing the appellant as an emergency contact number for the sponsor's child ('C').
 - c. Little weight was attached to photographs of the appellant, the sponsor before Judge Anthony as these were not provided to Judge Butler.
 - d. A joint council tax bill addressed to the appellant and the sponsor demonstrate that they live at the same address. The sponsor gives the appellant money for her share in the household bills by transferring money from her account to his. Although the couple live together, their relationship is not genuine and the marriage is one of convenience.

- (iv) I must however make my own findings of fact having considered the above matters together with all the evidence available to me, as contained in the consolidated bundle, considered holistically. This includes the following:
- a. All the answers provided at the marriage interview, both consistent and inconsistent – see the respondent’s policy regarding the holistic approach to marriage interviews in the Home Office’s guidance dated 18 February 2019 and the summary of the consistencies in the skeleton argument prepared on behalf of the appellant.
 - b. The explanations for inconsistencies as set out in the parties’ witness statements.
 - c. The updated evidence from C’s school.
- (v) The burden of proof of establishing that the marriage is one of convenience falls on the respondent; the respondent must therefore displace the burden upon her of establishing that the predominant purpose of the marriage is in order to circumvent the relevant rules - see Sadovska v SSHD [2017] UKSC 54.
- (vi) The respondent maintains that the marriage is one of convenience but Mr Mills explained that this could be determined by me on the extensive documentary evidence available. He did not wish to cross-examine the appellant or the sponsor. The 2014s interviews provided good grounds for considering the marriage to be one of convenience.
5. I did not hear evidence from the sponsor or the appellant for the reasons I have set out above. After hearing briefly from Mr Mills and then from Mr Pipe, who took me to detailed evidence in the consolidated bundle, I reserved my decision.

Legal framework

6. The relevant legal framework is not in dispute and for this reasons is merely summarised. In order to be a spouse of a family member of an EEA citizen, the relevant person does not include a party to a marriage of convenience - see Regulation 2 of the Immigration (EEA) Regulations 2016 (‘the 2016 Regulations’). The 2016 Regulations do not define a marriage of convenience. That, however, is set out within the overarching Article 1 of EC Council Resolution 97/C382/01 of 4 December 1997. That Article defines a marriage of convenience as follows:

“A marriage concluded between a national of a member state or 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 the member state”.

7. It is well-known that the burden of proof of establishing that a marriage is one of convenience rests on the Secretary of State – see Sadovska (supra) and Rosa v SSHD [2016] EWCA Civ 14. At [24] of Rosa Richards LJ said that in his judgment the legal burden lies on the Secretary of State to prove that an otherwise valid marriage is a marriage of convenience so as to justify the refusal of an application for a residence card under the EEA Regulations. Pausing there, we know that if the Secretary of State displaces the legal burden the evidential burden then rests on the person who is alleging that the marriage is not one of convenience.
8. At [41] of Rosa Richards LJ also said this:

“It may be useful to contrast a marriage of convenience with a genuine marriage, indeed Underhill LJ treated them as antonyms at paragraph 6 of his judgment in Agho, but the focus in relation to a marriage of convenience should be on the intention of the parties at the time the marriage was entered into, whereas the question whether a marriage is subsisting looks to whether the marital relationship is a continuing one”.
9. Although the focus remains on the intentions of the parties at the time of the marriage, it remains relevant to consider the couple’s post-marriage circumstances, as these are capable of shedding light on their intentions at the time of the marriage.

Findings of fact

10. The respondent’s reasons for contending that the parties’ marriage is one of convenience is firmly predicated upon their responses at the marriage interviews (which took place on 23 May 2014), as are the previous judges’ findings, which I must use as a starting point. I therefore begin by considering the marriage interviews. There has been a dispute in the past regarding the extent of the transcripts available to the previous judges. I have therefore considered for myself the responses to the questions asked.
11. I acknowledge that the transcripts contain several inconsistent responses regarding significant issues including: how the couple met; the proposal; the engagement and subsequent marriage; important events in their relationship such as birthday, Christmas and Valentine’s day celebrations. The appellant and the sponsor have provided detailed explanations for these in witness statements prepared in November 2018. Although there has been considerable delay in providing these explanations, the full transcripts were only sent by the respondent on 14 August 2018. The DVD recording was sent on 1 November 2018.
12. I accept that the appellant and sponsor have been able to clarify and explain a number of concerns previously held, in a plausible manner – see for example the explanation provided regarding the language

used to communicate and the difference in approach to what constituted an engagement party. There are also a number of inconsistencies that are minor in nature – see for example when the Christmas presents were opened and the reference to ‘Asda’ as a generic way of describing the shopping centre that the rings were bought from.

13. There have however been areas where the parties have clearly had considerable time to reflect and have provided explanations with a view to enhancing credibility or consistency – see for example the appellant’s belated explanation that they had a disagreement regarding the sponsor’s birthday celebrations. I also note the text message from the appellant to the sponsor giving their address. I note their explanations in their statements. I find it very difficult to accept that the sponsor would have forgotten her own address. However I note that it has not been disputed that they resided together at the time and have done so for a lengthy period.
14. Although some inconsistencies have been credibly explained, others have not, and as Judge Butler found, these inconsistencies tend to undermine the credibility of the evidence that the parties intentions were genuine when they married each other. However, the previous judges did not consider these issues of concern alongside all the consistent responses at the interviews. I accept that there are many issues of substance in relation to which the parties provided consistent answers. These include answers of a sensitive or intimate nature that go beyond the respondent’s claim that the parties are no more than housemates – for example they were both able to explain references to the sponsor attending a medical clinic. These also include details regarding, inter alia religion, religious practices and C. These are set out in Mr Pipe’s skeleton at [17]. Mr Mills acknowledged these are consistent answers that I must consider in the round.
15. I also bear in mind that that the respondent permitted the marriage to take place a few days after preliminary interviews conducted by an immigration officer on 1 November 2013. This demonstrated that a friend believed the parties to be together. This is of limited relevance but does complete the background before the marriage itself.
16. Mr Mills accepted that evidence post-dating the marriage itself can inform the intention of the parties at the time of the marriage and it is appropriate for me to take such evidence into account. None of these matters are determinative. I have considered them in the round together with the nature and extent of the consistencies and inconsistencies in the marriage interviews.
 - (i) I note that the parties have maintained the genuineness of their marriage for a lengthy period of over five years. This may simply demonstrate a determination to maintain a lie. On the other hand, the parties have demonstrated over many years a

determination to demonstrate that their marriage was genuinely entered into and that they are in a genuine relationship.

- (ii) It is not disputed that the parties have cohabited for the entirety of that period. This is evidenced from the council tax bills. As such it is unsurprising that the 30 pages of photographs before me show the couple together and with C in various places and various times. The photographic evidence shows intervening devotion between the couple and as a family unit with C. These of course might be manufactured poses in response to Judge Butler's concern that the photographs available at that hearing did not include any family life with C. However the photographs depicting family life must be considered alongside the documentary evidence from the school, to which I turn next.
- (iii) C's school has provided a letter dated 30 April 2019, on headed notepaper signed by the Head Teacher, to confirm that the appellant, who is described as C's step-dad has been the second point of contact since C was entered onto the school's system on 23 June 2014. This timeline is broadly consistent with the evidence regarding C's education in the marriage interviews. I note that there is other information in the bundle of evidence to confirm that as at 19 March 2018 C's grandmother was named as third point of contact. If the appellant and the sponsor were only flatmates, it is unlikely that the appellant would have been second point of contact over the grandmother. The evidence from the school is credible and important. This can be contrasted with the school evidence before Judge Anthony. The letter contained no date and did not state when family members were added as points of contact.
- (iv) I also note that during the process of formally sorting out an 'Individual Voluntary Arrangement' the appellant declared the sponsor's income and named C as a dependent.

Conclusion

17. When the evidence is considered holistically, I am satisfied that there is sufficient evidence to justify a departure from the findings of fact made by the previous judges. I have found the particularisation of consistencies within the interviews and the school letter dating the appellant to be the step-dad and second point of contact back to 2014, to be particularly helpful. The parties have also been able to put forward explanations for inconsistent responses at the interviews (albeit to a limited degree). There remain concerning issues regarding the parties' responses within their marriage interviews. However, when the evidence is considered as a whole, the respondent has not displaced the burden of establishing that the marriage is one of convenience.

Decision

18. I re-make the decision by allowing the appellant's appeal.

Signed *UTJ Plimmer*

Date

Upper Tribunal Judge Plimmer

29 August 2019