Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00111/2019

THE IMMIGRATION ACTS

Heard remotely at Field House
On 1 July 2020 *via Skype for Business*

Decision & Reasons Promulgated
On 28 July 2020

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

KEVIN MARGJONI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S. Mustafa, Counsel, instructed by Briton Solicitors
For the Respondent: Mr J. Anderson, Counsel, instructed by the Government Legal Department

This has been a remote hearing which has not been objected to by the parties. The form of hearing was V (all parties save for the judge participating remotely). A face to face hearing was not held because it was not practicable, and all issues could be determined on paper.

The documents that I was referred to are a letter from the Secretary of State dated 30 June 2020 applying to withdraw from the appeal, and a costs application from the appellant, which was a page long, the contents of which I have recorded. The order made is described at the end of these reasons.

DECISION AND REASONS (V)

1. The full details of the decision under challenge and the procedural history to this matter are set out in my error of law decision, promulgated on 13 November 2019. That decision may be found in the **Annex** to this decision.

2. In summary, this is a substantive appeal against a decision of the respondent dated 18 December 2018 to refuse to grant the appellant, a citizen of Albania, a permanent residence card in respect of his former marriage to an Italian citizen. The error of law decision is essential reading *before* reading the remainder of this disposal decision.

3. By a letter dated 30 June 2020, the respondent applied, pursuant to rule 17(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008, to withdraw her case in this appeal, inviting me to allow the appellant's appeal. The respondent stated that she had taken the decision to withdraw her case in light of the grounds of appeal, the evidence submitted, and "material changes since the date of the decision under appeal". The letter conceded that the impugned decision of the respondent under consideration in the appeal featured two errors of law. The letter added that the appellant would be issued with a permanent residence card, provided he was able to provide the necessary supporting documents, or a further decision would be issued.

4. The qualitative role of the Tribunal in considering whether to consent to withdrawals, pursuant to rule 17(2), is limited to ensuring that the withdrawing party understands the implications of withdrawal and has taken an informed decision: see Anwar (rule 17(1): withdrawal of appeal) [2019] UKUT 125 (IAC). Mr Anderson confirmed that the decision was taken by following consideration of the matter by the Secretary of State's officials. The respondent is legally represented and has the resources and expertise to understand the implications of her decision. I consent to the withdrawal. I see no reason not to do so.

5. In light of the respondent's concession, I allow this appeal.

COSTS APPLICATION

6. The appellant has applied for costs of £4,542, arising from what he contends to have been the respondent's unreasonable conduct of the appeal.

7. The power for the Upper Tribunal to make a costs award against a party may be found in section 29 of the Tribunals, Courts and Enforcement Act 2007, read with rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008. In particular, rule 10(3) provides, where relevant:

> "…the Upper Tribunal may not make an order in respect of costs or expenses except –
>
> […]
>
> (d) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings…"

8. Mr Mustafa submits that, by conceding that the impugned decision featured an error of law, the respondent acted unreasonably by defending these proceedings.

9. I reject that submission.

10. In my error of law decision, I identified various issues that the appellant would have to address by way of further evidence at a resumed hearing, in order to determine the substantive issues under consideration in the appeal. At [65] to [67] of my error of law decision, I said:

> "[65] Drawing the above analysis together, it is clear that there are a range of factors which will need to be considered in order to determine whether the purported marriage celebrated by the appellant and the sponsor was valid.
>
> [66] This matter will be relisted before the Upper Tribunal for a fact-finding hearing to consider the facts surrounding the marriage, in light of the considerations outlined in this decision.
>
> [67] I permit the appellant to adduce such further evidence concerning the ceremony, his intentions and that of the sponsor, as necessary in order to enable sufficient findings of fact to be made in order to determine whether the marriage was sufficiently within the terms of the MA 1949 to benefit from the "knowingly or wilfully" caveat, and whether it may be valid on any other basis."

11. The appellant served a revised bundle of evidence, seeking to address the above points, on 19 June 2020. The bundle featured a witness statement from the appellant dated 14 June 2020.

12. Under the circumstances, it was entirely reasonable for the respondent to maintain her opposition to the appeal until she had sight of the additional evidence.

13. Although the respondent has now conceded that the original decision letter featured an error of law on two discreet bases, it is noteworthy that the appellant did not advance his appeal on those bases. An early issue in the case was whether the appellant's marriage, which took place in the Albanian Embassy in London, was governed by Albanian law, or English law. Mr Mustafa pursued the rather fanciful submission that the marriage should be treated as though having taken place in Albania. He also contended that the publication of a collated list of approved premises for the purposes of the Marriage Act 1949 on www.gov.uk on 23 November 2012 somehow conferred on marriages at unapproved premises before that date, such as the appellant's marriage ceremony at the Albanian Embassy, validity they would not otherwise enjoy, with no focus on the "knowingly and wilfully" matter identified at heart of my error of law decision. That too was a fanciful submission.

14. It was not until my error of law decision identified defects in the respondent's decision concerning the "knowingly and wilfully" requirement in section 49 of the Marriage Act 1949 that the appellant – eventually – provided evidence concerning his state of mind for the purposes of section 49, which has led the respondent to withdraw her case in these proceedings. This he did on 19 June 2020. By considering and responding to that evidence in advance of the hearing before me, the respondent was doing no more than could be expected of any responsible litigant, namely keeping her position under review.

15. Accordingly, I do not consider that the respondent acted unreasonably in defending these proceedings. As such, the criteria for making a costs award in favour of the appellant are not met, and this application for costs against the respondent is dismissed.

16. I make no order as to costs.

Notice of Decision

The appeal against the respondent's decision of 18 December 2018 is allowed.

The appellant's application for costs against the respondent is refused.

I make no fee award. Had the appellant collated the evidence he belatedly provided on 19 June 2020 at a much earlier point, the need for these proceedings to be brought could have been avoided altogether.

No anonymity direction is made.

Signed *Stephen H Smith* Date 15 July 2020

Upper Tribunal Judge Stephen Smith

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00111/2019

THE IMMIGRATION ACTS

Heard at Field House
On 26 September 2019

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

KEVIN MARGJONI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S. Mustafa, Counsel, instructed by Briton Solicitors
For the Respondent: Mr L. Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS ON ERROR OF LAW

17. This case concerns (i) whether a marriage conducted in the premises of a diplomatic mission located in the United Kingdom according to the law of the sending State is valid under the law of England and Wales; and (ii) the application of the principle of the presumption of marriage. These points go to whether the appellant is entitled to a right to reside under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") on the basis that he was at the material times the family member of an EEA national.

Factual background

18. The appellant, Kevin Margjoni, is a citizen of Albania, born 20 February 1977. On 18 June 2012, he married Marika Rossi, an Italian citizen ("the sponsor"), in a ceremony apparently conducted in accordance with Albanian law, in the Albanian Embassy in London. The marriage was subsequently registered with the Albanian authorities and was later recognised by the Commune of Verona.

19. On 22 March 2013, the respondent issued the appellant with a residence card as the "family member of an EEA national", valid until 22 March 2018, in respect of his marriage to the sponsor. On 20 July 2018, the appellant applied for a permanent residence card, on the basis that he had accrued five years' continuous residence in accordance with the 2016 Regulations. On 8 November 2018, the parties obtained a legal separation of their marriage before the Ordinary Court of Verona.

20. On 18 December 2018, the respondent refused the appellant's application for a permanent residence card, on the basis that his marriage to the sponsor was not valid. The Albanian Embassy was not on a list of "approved premises" for the purposes of section 26(1)(bb) of the Marriage Act 1949. In addition, the respondent considered the parties' (unmarried) relationship to be one of convenience. This is the decision which was the subject of the appeal before the First-tier Tribunal and is the underlying decision under consideration in this appeal.

21. In a decision and reasons promulgated on 3 April 2019, First-tier Tribunal Judge Hussain dismissed the appeal. The judge agreed with the respondent that the marriage was not valid, as the Embassy was not an "approved premises" for the purposes of the MA 1949. The judge also accepted the respondent's case that the marriage was one of convenience; the parties had been invited to attend marriage interviews with the respondent, twice, and had failed to do so, each time. That was sufficient, held the judge, to discharge the burden upon the respondent to demonstrate that the relationship was one of convenience.

22. Upper Tribunal Judge O'Callaghan granted permission to appeal on the basis that it was arguable that the judge had not adequately considered the impact of the Italian authorities' acceptance of the validity of the marriage, and that he failed properly to consider the relevant evidential burden of proof applicable to the identification of marriages of convenience.

23. The matter was first listed before me on 31 July 2019. Mr Mustafa proposed to focus his submissions on that occasion on the validity of the appellant's marriage under Albanian law, which, in his submission, was the *lex loci celebrationis* applicable to the marriage ceremony. In light of Mr Mustafa's proposed submissions, I adjourned the proceedings, with the directions that each party was address the following questions:

> 1. Do the requirements of Marriage Act 1949 to approve premises for marriages apply to ceremonies conducted in foreign states' diplomatic premises in the United Kingdom?

2. For the purposes of the *lex loci celebrationis* doctrine, in view of the location of the ceremony in the Albanian embassy, which country did the marriage take place in and which legal regime governed it?

The parties complied with my directions, each serving a skeleton argument.

LEGAL FRAMEWORK

The 2016 Regulations

24. Regulation 15 of the 2016 Regulations governs acquisition of the right of permanent residence. Where relevant, it provides:

> "**15 Permanent right of residence**
>
> (1) The following persons shall acquire the right to reside in the United Kingdom permanently –
>
> […]
>
> (b) a family member of an EEA national who has not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these regulations for a continuous period of five years…"

25. Regulation 19(2) provides that the Secretary of State must issue a person who is not an EEA national who has the right of permanent residence under regulation 15 with a permanent residence card no later than six months after an application is received, upon the production of (a) a valid passport; and (b) proof that the person has a right of permanent residence.

26. "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". Regulation 2(1) defines a "marriage of convenience" to include:

> "…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…"

27. Regulation 22 of the 2016 Regulations makes provision for the Secretary of State to verify whether certain persons enjoy a right to reside under the Regulations. It provides, where relevant:

> "(1) This regulation applies where the Secretary of State—

(a) has reasonable doubt as to whether a person ("A") has a right to reside or a derivative right to reside; or

(b) wants to verify the eligibility of a person ("A") to apply for an EEA family permit or documentation issued under Part 3.

(2) Where this regulation applies, the Secretary of State may invite A to—

(a) provide evidence to support the existence of a right to reside or a derivative right to reside (as the case may be), or to support an application for an EEA family permit or documentation under this Part; or

(b) attend an interview with the Secretary of State.

(3) If A purports to have a right to reside on the basis of a relationship with another person ("B"), (including, where B is a British citizen, through having lived with B in another EEA State), the Secretary of State may invite B to—

(a) provide information about their relationship or residence in another EEA State; or

(b) attend an interview with the Secretary of State.

(4) If without good reason A or B (as the case may be)—

(a) fails to provide the information requested;

(b) on at least two occasions, fails to attend an interview if so invited;

the Secretary of State may draw any factual inferences about A's entitlement to a right to reside as appear appropriate in the circumstances.

(5) The Secretary of State may decide following the drawing of an inference under paragraph (4) that A does not have or ceases to have a right to reside.

(6) But the Secretary of State must not decide that A does not have or ceases to have a right to reside on the sole basis that A failed to comply with this regulation."

Approved Premises – the Marriage Act 1949

28. The Marriage Act 1949 ("the MA 1949") governs marriages in England. It imposes certain procedural and substantive requirements which must be met in order for parties to a marriage conducted in England to be regarded as valid, for example relating to the superintending official, the presence of witnesses, access of the public to the ceremony etc. Among those requirements is the necessity for a marriage to be conducted in a location permitted by the Act. Certain premises may be "approved premises" for the conduct of marriages: see section 26(1)(bb). Section 46A of the regime enables the Secretary of State to make regulations as to the "approved premises" regime: see the Marriages and Civil Partnerships (Approved Premises) Regulations 2005. Those Regulations enable local authorities to approve premises where marriages may be celebrated, provided certain criteria are met.

Regulation 10 makes provision for a register of approved premises to be maintained by each local authority granting approval. There is also a consolidated list of approved premises available on the gov.uk website.

29. Section 49 of the MA 1949 provides that certain marriages under the Act will be void for non-compliance with the essential formalities of the Act, in certain circumstances. It provides, with emphasis added:

> "If any persons **knowingly and wilfully** intermarry under the provisions of this Part of this Act—
>
> […]
>
> (ee) in the case of a marriage purporting to be in pursuance of section 26(1)(bb) of this Act, on any premises that at the time the marriage is solemnized are not approved premises;
>
> …the marriage shall be void."

Burden and standard of proof

30. It is for the appellant to demonstrate that he meets the criteria in regulations 15 and 19 of the 2016 Regulations to the balance of probabilities standard. In the first instance, he does not have to demonstrate that the marriage or relationship was not one of convenience, but it is necessary for him to establish that the marriage was valid, in order to have accrued residence rights in his own capacity pursuant to it.

31. Where an appellant has established that he or she is a party to a valid marriage, the legal burden rests with the respondent to establish that it is a marriage of convenience. See Rosa v Secretary of State for the Home Department [2016] EWCA Civ 14 at [24], where the Court of Appeal said, with emphasis added:

> "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"

The reference to an "otherwise valid marriage" conveys the expectation – consistent with the burden of proof to which applicants under the 2016 Regulations are subject – that it is for an applicant to demonstrate that a marriage is valid. Having done so, it will be for the respondent to demonstrate that the marriage (despite its formal validity) was one of convenience.

32. For further details concerning marriages of convenience, 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 [2017] UKSC 54 at, e.g., [28]. Throughout, the respondent bears the legal burden of demonstrating that the marriage is one of convenience. The burden is not discharged merely by demonstrating that there is a "reasonable suspicion" that the marriage is one of

convenience, although if the respondent does so, the appellant will be expected to respond to the allegation: see Rosa at [24] to [27]. In those circumstances, the evidential burden shifts to the appellant. The basic rule is this: "he who asserts must prove" (Sadovska at [28], per Lady Hale).

33. By analogy, the same process applies to allegations that an unmarried partner was in a relationship of convenience.

DISCUSSION

Relationship of convenience

34. I will deal first with the relationship of convenience point. Although the refusal letter had not accepted the purported marriage between the appellant and the sponsor to have been valid, it nevertheless addressed whether the relationship between the two had been one of convenience.

35. It is not necessary to resolve the validity of the marriage point in order to dispose of this issue, which can be dealt with shortly, as Mr Tarlow realistically accepted at the hearing. Regulation 22(3)(a) enables the Secretary of State to invite a person to an interview where that person seeks to rely on a relationship – any relationship – with another person in order to establish a right to reside, where the Secretary of State has reasonable doubt about whether the individual has a right to reside, or wants to verify the eligibility of the individual to apply for documentation under Part 3 of the 2016 Regulations.

36. The operative wording of the refusal letter was as follows:

> "To enable the Secretary of State to fully consider your application, you and your EEA or Swiss national unmarried partner, Marika Rossi, were invited to attend an interview on 15 July 2018 or 4 July 2018.
>
> As you have failed to attend an interview on at least two occasions, the Secretary of State may draw factual inferences about your rights to reside in the UK. You have failed to provide evidence to support your reasons to be unable to attend the interviews.
>
> Based on the above information and the failure to attend the marriage into the on two separate occasions, we have inferred that there are reasonable grounds to suspect that your relationship is one of convenience for the sole purpose of you obtaining an immigration advantage. You are therefore considered as a former unmarried partner of an EEA national."

37. As may be seen from the above extract, the sole basis upon which the respondent purported to be able to treat the relationship between the appellant and the sponsor as one of convenience was the failure of the parties to attend the marriage interviews. The refusal letter does not outline the basis upon which the respondent's concerns led to the invitations to the marriage interviews being issued in the first place, nor does it provide any other basis setting out what the concerns

of the respondent were concerning whether the relationship was one of convenience.

38. I consider this approach to fall foul of regulation 22(6) of the 2016 Regulations, which prohibits the respondent from deciding that an individual is in a marriage of convenience "on the sole basis that A failed to comply with this regulation." The sole basis upon which the respondent purported to treat the relationship as being one of convenience was the failure to attend the interviews, or for failing to provide reasons for not attending the interviews, which is essentially the same objection. As such, the respondent misapplied regulation 22(4) and (5). It was not open to her to decide that the appellant and sponsor were in a marriage of convenience in the absence of any additional material demonstrating that there were reasonable grounds for suspicion.

39. Addressed pursuant to the evidential pendulum outlined in paragraphs 31 and 32, above, (applied by analogy to any "relationship" of convenience under the 2016 Regulations), it follows that the respondent has not established the presence of reasonable grounds for suspicion. There was no basis upon which the appellant could properly have been expected to respond to the respondent's concerns, and the evidential pendulum did not swing to him. The respondent has not discharged the legal burden she bears of demonstrating that the relationship was one of convenience.

40. It follows, therefore, that this aspect of Judge Hussain's decision involved the making of an error of law. The impact of that error on the outcome of the appeal in large part turns on whether there was a valid marriage between the appellant and the sponsor. This is because it is only if the appellant was validly married to the sponsor that he will be defined as a "family member" for the purposes of accruing the right of permanent residence in his own capacity.

Validity of the marriage: Marriage Act 1949

41. The next question to resolve is whether the marriage was valid for the purposes of the appellant satisfying the definition of "family member" in regulation 7 of the 2016 Regulations.

42. The judge summarised the respondent's reasoning concerning the validity of the marriage in these terms, at [4]:

> "All marriages that take place in the United Kingdom to be recognised as valid must be carried out in accordance with the requirements of the Marriage Act 1949. For a marriage in an embassy, or other diplomatic premises to be valid, the location must be approved and appear in the approved premises list. The Albanian embassy was not on such a list."

43. At [11], the judge accepted the respondent's analysis that the marriage was not valid:

> "The Tribunal is of the opinion that the appellant's marriage is not recognised as a valid one in English law because it does not conform with the requirements of the Marriage Act 1949, for the reasons given by the Secretary of State."

44. It is common ground that the Albanian embassy is not an "approved premises" for the purposes of section 26(1)(bb) of the MA 1949 for a marriage conducted under that Act. The essential question arising from that fact is what is the impact of that deficiency on the validity of the marriage?

Lex loci celebrationis

45. Mr Mustafa's primary submission is that, as the marriage had taken place in the Albanian Embassy, it was subject to Albanian law. It had been registered with the Albanian authorities and was not subject to the jurisdiction of the law of England and Wales, he submitted. The unique diplomatic status of the embassy means that the *lex loci celebrationis* is Albanian law, and there could be no dispute, he submits, that the marriage is valid on that basis. On that basis, any non-compliance with the MA 1949 was immaterial.

46. In a skeleton argument prepared for these proceedings, Mr Tarlow relied on Radwan v Radwan [1973] Fam 24 to resist this submission. Radwan concerned the recognition of a *talaq* administered pursuant to Egyptian law in the Egyptian consulate in London, for the purposes of the law of England and Wales. Had the *talaq* been issued in Egypt, the *lex loci celebrationis* would have been Egyptian law, and the *talaq* would have been recognised in this jurisdiction. English law made no provision for the recognition of a *talaq* administered in England.

47. Following an extensive survey of the authorities and academic writings concerning the status of diplomatic premises, Mr Justice Cumming-Bruce held at [31] that:

> "In all of [the authorities] I find a consensus of opinion that there is no valid foundation for the proposition, or alleged rule, that diplomatic premises are to be regarded as outside the territory of the receiving State."

48. My attention has not been drawn to anything that demonstrates that the position has changed since Radwan. On the contrary, the position has been reinforced.

49. Mr Tarlow relied on Dukali v Lamrani v HM Attorney General [2012] EWHC 1748 (Fam). In January 2002, a joint British-Moroccan wife married her Moroccan husband pursuant to a Moroccan civil ceremony of marriage conducted at the Moroccan Consulate in London. The ceremony was performed by a qualified Moroccan *Udul*, or *Adoul* (a notary). There was no compliance or purported compliance with any of the requirements of the English Marriage Acts 1949 to 1994. The ceremony was followed by wedding parties in London, a honeymoon abroad, and subsequent cohabitation, with the "marriage" lasting for an effective duration of around 7 and a half years. At all material times, the parties lived in London.

50. It was common ground that the marriage had been conducted correctly so far as Moroccan law was concerned, and the marriage was registered in, and recognised

by, Morocco. The marriage broke down and the parties obtained a divorce pursuant to judicial proceedings in Morocco, in June 2011. The issues in the case concerned whether the wife was entitled to financial relief from the husband under English law. In turn, that issue was to be determined by reference to whether the marriage in the Consulate was valid under, and recognised by, the law of England and Wales.

51. At [23] and [24], Mr Justice Holman rejected the notion that the validity of the marriage fell to be determined by anything other than English law, even though it had been conducted in the Moroccan Consulate:

> "23. It thus seems that, in 2002, both these parties were under the impression or belief that their ceremony of marriage was of legal effect in both Morocco and England, and that that belief was fully shared by the staff of the Consulate within which the marriage took place. It has, however, been established that the Moroccan Consulate in London is not, and never has been, registered or approved by the General Register Office or the local authority as a place or venue for a marriage and is not an approved or registered building under the Marriage Acts 1949 to 1994. Although the Moroccan Consulate rely on the Vienna Convention for their opinion and belief that the marriage is "valid under English law", **it is now too firmly established to admit of any argument (and none was suggested or addressed to me) but that, for the purpose of marriage or divorce, the premises of a consulate are part of the territory of the receiving State and not of the sending State. This was firmly established by the case of Radwan v Radwan [1973] Fam 24 which has been invariably followed and applied without question ever since.**
>
> 24. In short, this was a marriage that was contracted wholly in England, even although within the premises of the Moroccan Consulate. No rule is more firmly established in this area of English private international law than that formal validity is governed by the law of the place where a marriage is contracted, *viz* in this case England." (Emphasis added)

52. As may be seen from the added emphasis, above, the Radwan approach was held by the High Court to remain good law. The Consulate was in London, not Morocco, and that is where the marriage took place. The validity of the purported marriage fell to be determined by English law, rather than Moroccan law. The marriage was held to be a "non-marriage", as it had not complied with, nor was it recognised by, domestic law.

53. Nothing in the authorities relied upon by Mr Mustafa permits or requires a departure from the Radwan approach.

54. Mr Mustafa highlighted the Hague Convention on the Celebration and Recognition of the Validity of Marriages, 14 March 1978. Article 9 provides,

> "A marriage celebrated by a diplomatic agent or consular official in accordance with his law shall similarly be considered valid in all Contracting States, provided that the celebration is not prohibited by the State of celebration."

This is of no assistance to the appellant. There is no suggestion that the United Kingdom is a party to this treaty, still less that it has been ratified and incorporated into domestic law.

55. Contemporary diplomatic practice confirms this approach. For example, in *Satow's Diplomatic Practice,* 7th edition (Oxford University Press, 2016) at [13.8] the position is summarised as follows:

> "…it is now everywhere accepted that it does not mean that the diplomat is not legally present in the receiving State or that the embassy is deemed to be foreign territory. Marriage, or crimes, occurring on diplomatic mission premises are regarded in law as taking place in the territory of the receiving State…"

56. In light of the above, I reach the following findings. Marriages conducted in diplomatic premises located in the United Kingdom take place in the territory of the United Kingdom. Their validity is to be determined by reference to the law of the United Kingdom jurisdiction within which the diplomatic premises is located. For the Albanian Embassy in London, the *lex loci celebrationis* to determine the validity of the marriage is the law of England and Wales.

57. The judge was, therefore, correct to analyse the validity of the marriage through the lens of domestic law; it is on that same basis that I must examine his approach, in order to ascertain whether it involved the making of an error of law.

Approved premises list

58. Mr Mustafa submits that the approved premises regime cannot apply to marriages conducted before 23 November 2012. That was the date upon which the current list of all approved premises was published on www.gov.uk. As such, he submits, at the time this marriage was celebrated, 18 June 2012, the current restrictive requirements of the "approved premises" regime were not in force. A marriage in an unapproved premises cannot be void under section 49(ee) on this basis, submits Mr Mustafa, with the result that the judge erred in law.

59. This submission is misconceived. The consolidated list of premises, published on gov.uk on 23 November 2012, had no legal effect whatsoever. It was simply a consolidated list, collating the individual approvals granted by local authorities pursuant to the approved premises regime. The approved premises regime was created by the Marriage Act 1994, and commenced for all purposes by 1 April 1995. There can be no suggestion that marriage in an unapproved premises, prior to the publication of the list, was not subject to the statutory approved premises requirement contained in the 1949 Act. The ability to get married in an approved premises has existed since 1 April 1995. The fact that the current consolidated list of all approved premises was not published online until 23 November 2012 cannot, therefore, cure a defect in a marriage which took place before that date in premises which are not approved.

60. No error of law arose on this basis.

Knowingly or wilfully

61. Section 49 of the MA 1949 provides that marriages are void if "any persons *knowingly or wilfully*" marry "under the provisions of this Part of this Act" in breach of the provisions. An innocent mistake which meant that an essential formality was overlooked does not render a marriage void. A deliberate breach of the conditions of the 1949 Act would render the marriage void. The effect of section 49 can be to "save" a marriage celebrated otherwise than in conformity with the requirements of the 1949 Act, provided the mistake was innocent.

62. In order to obtain the benefit of the "knowingly or wilfully" caveat in section 49, it is necessary for the parties to have sought to bring their ceremony within the provisions of the Act in the first place: the marriage must be "under the provisions of this Part of this Act". The section 49 protections are mirrored by section 11(a)(iii) of the Matrimonial Causes Act 1973, which provides that a marriage shall be void where the parties, "have intermarried *in disregard* of certain requirements as to the formation of marriage." The term "in disregard" correlates to the "knowingly or wilfully" requirement of section 49 of the 1949 Act; it requires the parties (i) to have known what the requirements of the Act were; and (ii) to have married in defiance of those requirements.

63. It appears that the "knowingly or wilfully" requirement for a marriage to be void was included to reflect, in part, the established doctrines concerning the presumption of the validity of marriages.

64. The legislative origins of the "knowingly and wilfully" requirement were traced in MA v JA v HM Attorney General [2012] EWHC 2219 (Fam) to the Marriage Act 1823; the insertion of the caveat was described at [44] as lying in the desire to alleviate the previously harsh effects of non-compliance with the requisite formalities. The facts of the case involved an Islamic marriage conducted otherwise than in accordance with the MA 1949. The court had to determine whether the Islamic marriage ceremony conducted by the parties resulted in a marriage which was "sufficiently within" the MA 1949 such that it was entitled to legal recognition as a valid marriage (see [82]), whether it was a marriage which was a void marriage (which would bring some advantageous consequences under the Matrimonial Causes Act 1973), or whether it resulted in a "marriage" that was of no effect whatsoever under English law. The relationship had not broken down. The parties sought a declaration pursuant to section 55(a) of the Family Law Act 1986 that their marriage was a valid marriage at its inception. By the time of the proceedings, they had cohabited as man and wife for around 10 years.

65. Mr Justice Moylan, as he then was, observed,

> "The circumstances in which a marriage was void were expressly restricted no doubt in part because of the presumption in favour of finding that a marriage had been validly created."

The court found that the ceremony had created a marriage which was entitled to be recognised as valid under English law; see [78], below.

66. Returning to the present matter, at no point in the refusal letter did the respondent consider whether the appellant "knowingly or wilfully" married in breach of the requirement to marry in an approved premises. Neither did the judge. The assumption in the refusal letter, and in the decision of the judge below, is that non-compliance with the requirement to be married in an "approved premises" *automatically* leads to the conclusion that the marriage is not valid. That is incorrect. By overlooking the requirement that the marriage be contracted "*knowingly and wilfully*" in breach of the provisions of the MA 1949, the judge made an error of law.

67. The question then arises as to whether the error of law was such that I need to set the decision aside.

68. It is not clear from the evidence that was before the First-tier Tribunal as to whether the appellant was "knowingly or wilfully" marrying in unapproved premises. His statement speaks of the marriage "being registered with the Council in Albania", but provides no further detail of whether he considered that he was marrying in conformity with, or otherwise in accordance with, English law. His statement is silent as to why he chose to marry in the embassy, rather than elsewhere. As such, it is not possible to ascertain from the material before the Upper Tribunal whether the appellant "knowingly or wilfully" married in defiance of the approved premises regime. It will be necessary for the matter to be reheard in the Upper Tribunal to consider the intentions of the appellant and the sponsor, and whether they knowingly and wilfully married in disregard of the requirements of the Act.

69. Other considerations are likely to be relevant to the question of the validity of the marriage, which will also have to be considered at the resumed rehearing. I have set some of these out below, in order highlight the issues upon which the Tribunal will have to make findings of fact.

Presumption of marriage

70. There have been a number of authorities in the family courts concerning when a ceremony, ritual or other form of purported marriage is sufficient to be regarded as a marriage under the MA 1949, and, by contrast, when the same was of no effect at all.

71. Even where there is non-compliance with the requirements of the MA 1949, certain presumptions of marriage may be engaged. There is a presumption of marriage that follows from a ceremony followed by cohabitation: see Mahadervan v Mahadervan [1964] P 233, per Sir Jocelyn Simon P. (as he then was), at 244.

72. There is also a presumption from cohabitation, which is described at [3.154] of *Rayden & Jackson on Relationship Breakdown, Finances and Children* (September 2019, LexisNexis) in these terms:

> "Where there is no positive evidence of any marriage having taken place, where parties have cohabited for such a length of time and in such circumstances so as to have acquired the reputation of being spouses, a lawful marriage may be presumed to exist."

73. The presumption is an evidential one and may be rebutted, particularly through evidence of non-compliance with the requirements of the MA 1949. There comes a point where the non-compliance, whether inadvertent or deliberate, is so significant, where the ingredients of the ceremony of marriage were so far removed from the essential requirements of the legislative framework, or where the parties' intention was not even to purport to marry under the MA 1949 that the marriage is, in legal terms, a "non-marriage".

74. The question has been considered in a long line of authorities. I will highlight a selection below.

75. In R v Bham [1966] 1 QB 159, the Court of Criminal Appeal allowed an appeal against a conviction for the offence of solemnising a marriage other than in a licenced building. The defendant had conducted an Islamic marriage ceremony, creating a potentially polygamous marriage. The ceremony was conducted in a private house after the parties were informed by the superintendent registrar that it would not be possible for them to marry under the MA 1949, as it was not clear whether the "husband" was already married. The court held that the MA 1949 was of no application to a ceremony which did not purport to be a marriage of the kind allowed under English law, and quashed the conviction. At [168], the court held:

> "It does not seem to the court that the provisions of the Act have any relevance or application to a ceremony which is not and does not purport to be a marriage of the kind allowed by English domestic law."

76. The decision in Bham has been followed in a number of cases. In AM v. AM [2001] 2 FLR 6, Mr Justice Hughes (as he then was) considered the validity or otherwise of an Islamic marriage in which both parties knew that the man was already married. He considered the reasoning in Bham to be of equal application to cases concerning potential declarations of nullity. At [58], he said:

> "In England a marriage can only be effected under the Marriage Acts, either according to the rites of the Church of England (Part II of the 1949 Act) or under certificate of the Superintendent Registrar (Part III). **A marriage which purports to be conducted under these Acts may nevertheless be void for want of formality.** Not every breach of the required formalities has this effect, but some do. They are set out in ss 25 and 49 of the 1949 Act. **But unless a marriage purports to be of the kind contemplated by the Marriage Acts, it is not, I hold, a marriage for the purposes of s 11 of the Matrimonial Causes Act 1973.** No doubt it is possible to envisage cases where the question whether a particular ceremony or other event does or does not purport to be a marriage of the kind contemplated by the Marriage Acts is a fine one." (Emphasis added)

Earlier in [58], Hughes J had observed that no distinction lay in the fact that Bham concerned the MA 1949, rather than the Matrimonial Causes Act 1973:

> "Although [Bham] was strictly a decision upon the Marriage Act 1949 rather than upon the Matrimonial Causes Act 1973, I am satisfied that the reasoning must apply to the latter and to the present case".

77. In MA v JA v HM Attorney General at [85], the court agreed with previous authorities that:

> "it is neither possible nor sensible to set out a definitive test for determining whether a ceremony results in a 'non-marriage' or results in a marriage potentially valid within the 1949 Act…"

The court recalled Collett v Collett [1968] P 482, a case concerning the validity of a marriage conducted in the British Embassy in Prague in 1948. The ceremony had been hastily arranged to take place during a temporary break during repeated periods of the bride's detention and interrogation by the Communist authorities, between which she was seemingly permitted some form of temporary release. None of the notice requirements of English law concerning the validity of the marriage had been met, and the marriage had not been registered under the domestic legislation then in force. At 491F, Mr Justice Ormrod observed that:

> "The general tendency has been to preserve marriages where the ceremonial aspects were in order rather than to invalidate them for failure to comply with the statutory provisions leading up to the ceremony."

78. In MA, the High Court concluded that the ceremony did create a valid marriage: it had been conducted in the presence of an authorised person; the parties thought that they were contracting a marriage valid under English law; even though the officiating Imam knew that the ceremony was not valid under English law, he had assumed the parties shared his knowledge and had not discussed it with them; the ceremony took place in a registered building; the ceremony was of a kind that would produce a valid marriage, and the parties did not "knowingly and wilfully" intermarry in disregard of the requirements of the MA 1949.

79. In Akhter v Khan [2018] EWFC 54, the Family Court was concerned with an Islamic marriage conducted otherwise than in accordance with the requirements of the MA 1949. The marriage took place in London. The parties intended to conduct a civil ceremony to secure legal recognition of the marriage, but never did. They cohabited for 18 years as man and wife and had four children. The prospect of divorce prompted the question as to whether the parties were ever formally married in the first place. If the marriage was void, the parties would be entitled to a decree of nullity and enjoy the accompanying ability to obtain relief. By contrast, if the status of the relationship was not such that it may even regarded as a marriage, even a void marriage, it is a non-marriage, and would bring with it no entitlement to relief.

80. Mr Justice Williams summarised the relevant principles as follows, at [92]:

> "The starting point in relation to the interpretation and application of section 11 of the Matrimonial Causes Act 1973 must therefore be the net result of the series of cases considered by Moylan J (as he then was) in MA v JA (above).
>
> a. Unless a marriage purports to be of the kind contemplated by the marriage acts it will not be within section 11
>
> b. What brings a ceremony within the scope of the act or at what stage the cumulative effect of the failures is to take the ceremony wholly outside the scope of the 1949 Act has to be approached on a case by case basis (see for instance K v K [2016] EWHC 3380, [2017] 2 FLR 1055).
>
> c. The court should take account of the various factors and features mentioned above including particularly, but not exhaustively: (a) whether the ceremony or event set out or purported to be a lawful marriage; (b) whether it bore all or enough of the hallmarks of marriage; (c) whether the three key participants (most especially the officiating official) believed, intended and understood the ceremony as giving rise to the status of lawful marriage."

Williams J additionally outlined a range of further factors to be considered, in order to read the relevant primary legislation compatibly with the European Convention on Human Rights. At [94], he said:

> "Incorporating those considerations into the starting point leads me to conclude that the approach should be somewhat more flexible in particular to reflect the Article 8 rights of the parties and the children.
>
> a. Unless a marriage purports to be of the kind contemplated by the Marriage Act 1949 it will not be within section 11. What brings a ceremony within the scope of the Act or at what stage the cumulative effect of the failures is to take the ceremony wholly outside the scope of the 1949 Act has to be approached on a case by case basis. When considering the question of a marriage the court should be able to take a holistic view of a process rather than a single ceremony
>
> b. The court should take account of the various factors and features mentioned above including particularly, but not exhaustively: (a) whether the ceremony or event set out or purported to be a lawful marriage including whether the parties had agreed that the necessary legal formalities would be undertaken; (b) whether it bore all or enough of the hallmarks of marriage including whether it was in public, whether it was witnessed whether promises were made; (c) whether the three key participants (most especially the officiating official) believed, intended and understood the ceremony as giving rise to the status of lawful marriage (d) whether the failure to complete all the legal formalities was a joint decision or due to the failure of one party to complete them."

On the facts of the case, the marriage was held to be void, entitling the wife to a decree of nullity, and the consequential relief that would follow.

Conclusion

81. Drawing the above analysis together, it is clear that there are a range of factors which will need to be considered in order to determine whether the purported marriage celebrated by the appellant and the sponsor was valid.

82. This matter will be relisted before the Upper Tribunal for a fact-finding hearing to consider the facts surrounding the marriage, in light of the considerations outlined in this decision.

83. I permit the appellant to adduce such further evidence concerning the ceremony, his intentions and that of the sponsor, as necessary in order to enable sufficient findings of fact to be made in order to determine whether the marriage was sufficiently within the terms of the MA 1949 to benefit from the "knowingly or wilfully" caveat, and whether it may be valid on any other basis.

Notice of Decision

The decision of Judge Hussain involved the making of an error of law and is set aside.

The matter will be reheard in the Upper Tribunal in order to determine whether the marriage between the appellant and sponsor was valid under English law.

DIRECTIONS

1. Within 28 days of the resumed hearing date, the appellant must serve any witness statements or further evidence he seeks to rely upon in order to enable the necessary findings of fact to be reached in line with the considerations outlined in this decision.
2. Both parties are to serve skeleton arguments within 14 days of the resumed hearing date.

No anonymity direction is made.

Signed *Stephen H Smith* Date 8 November 2019

Upper Tribunal Judge Stephen Smith