Upper Tribunal

(Immigration and Asylum Chamber) **Appeal number: EA/06822/2019 (V)**

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC	**Decision & Reasons Promulgated**
On 14 October 2020	**On 22 October 2020**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

MUHAMMAD NASIR

(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the appellant: Mr J Dhanji of counsel, instructed by SMA Solicitors

For the Respondent: Mr A Tan, Senior Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote

hearing. At the conclusion of the hearing I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a Pakistani national with date of birth given as 19.5.85, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 21.2.20, dismissing his appeal against the decision of the Secretary of State, dated 27.11.19, to refuse his application made on 31.7.19 for an EEA Residence Card as the family member of his sponsoring spouse, a Polish citizen exercising Treaty rights in the UK, pursuant to Regulation 7 of the Immigration (EEA) Regulations 2016.

2. The application was refused under Regulation 2, on the basis of a marriage interview conducted on 7.2.14, which highlighted such inconsistencies so that the respondent concluded that the marriage was one of convenience, not covered by the Regulations.

3. In fact this is the appellant's third appeal against refusal. He previously appealed the respondent's refusal to grant a Residence Card but that appeal was dismissed by the First-tier Tribunal in 2015 (Judge Morris). Further similar applications made in 2015, 2016 and 2017 were all refused. A 2018 refused application was again appealed to the First-tier Tribunal but the appeal dismissed in April 2019 (Judge Mill). A further application made in June 2019 was also rejected.

4. In consideration of his most recent application, made in July 2019, the respondent again concluded that the marriage was entered into for the predominant purpose of securing an immigration advantage (residence rights) and, therefore, declined to issue the requested Residence Card. It is this last refusal decision which was the subject of the appeal to the First-tier Tribunal (Judge Louveaux) and now to the Upper Tribunal.

5. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions made to me and the grounds of application for permission to appeal to the Upper Tribunal.

6. In summary, the grounds assert that the sole issue was whether the marriage was one of convenience but that the judge failed to properly resolve the issue of cohabitation and the involvement of the appellant in the life of the sponsor's child.

7. Permission to appeal was refused by the First-tier Tribunal on 13.6.20. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Pitt granted permission on 7.8.20, considering it arguable that "*the acceptance that there was extensive evidence of cohabitation including school documents showing the appellant was considered to be a de facto parent to the sponsor's child should have led the First-tier Tribunal to assess whether there was a current genuine relationship that met the EEA Regulations notwithstanding earlier findings by the Tribunal that the couple were in a marriage of convenience.*"

8. In his submissions to me, Mr Dhaji argued that having made positive findings in the appellant's favour at [27] to [29] of the decision, the First-tier Tribunal Judge should have reconsidered all of the documentary evidence including that which was before the previous First-tier Tribunal Judges, and that his failure to do so was a material error of law.

9. In response, Mr Tan submitted that from looking at [24] to [26] of the decision it was evidently difficult for Judge Louveaux to distinguish what documents had been put before the previous judges and which was new. Mr Tan pointed out that [27] and [28] did not comprise findings in the appellant's favour, merely recitation of the evidence. Mr Tan accepted that at [29] the judge did make finding favourable to the appellant that he and the sponsor may be cohabiting and that he had some involvement in taking and bringing the sponsor's son to school each day. However, Mr Tan submitted that the issue of cohabitation does not establish a subsisting relationship, or that the marriage was not entered into for an immigration advantage. He conceded that it "may shine reflective light" on the intentions of the parties to the marriage at its inception but the judge took that into account before concluding that it was a marriage of convenience.

10. Looking at the impugned decision for myself, I can see that at [29] of the decision, the First-tier Tribunal Judge was prepared to accept from the evidence that the appellant and his sponsor were cohabiting and that there was some evidence which lent support to the claim that they are in a genuine and subsisting relationship. However, the judge found the evidence insufficient to demonstrate that they were in fact in a genuine and subsisting relationship, and, observing that even now they were unable to give a consistent account of their relationship, concluded that the marriage was one of convenience.

11. There is no burden on the appellant at the outset to demonstrate that the marriage is one of convenience; that legal burden is on the respondent. However, where there is reasonable suspicion that the marriage is one of convenience, the evidential burden shifts to the appellant to demonstrate that it is not one of convenience. It should be borne in mind that the legal burden remains throughout on the respondent. I am satisfied that the marriage interview inconsistencies were sufficient to give rise to a reasonable suspicion that the marriage is one of convenience.

12. In Rosa [2016] EWCA Civ it was held that the focus in relation to a marriage of convenience ought to be on the intention of the parties at the time the marriage was entered into, whereas the question of whether a marriage was subsisting looked to whether the marital relationship was a continuing one. Nonetheless, the First-tier Tribunal had been correct to look at the evidence concerning the relationship between the Claimant and the Sponsor after the marriage itself, since that was capable of casting light on their intention at the time of marriage.

13. In Sadovska v SSHD [2017] UKSC 54, the Supreme Court held that the objective

to obtain the right of entry and residence must be the predominant purpose for the marriage to be one of convenience and a marriage could not be considered to be a marriage of convenience simply because it brought an immigration advantage. *"Should the tribunal conclude that Mr Malik was delighted to find an EU national with whom he could form a relationship and who was willing to marry him, that does not necessarily mean that their marriage was a "marriage of convenience" still less that Ms Sadovska was abusing her rights in entering into it*".

14. Pursuant to the Devaseelan principle, the judge was required to take as the starting point the findings of the two previous Tribunal appeal decisions from 2015 and 2018, both of which found the marriage to be one of convenience. The judge acknowledged that further evidence, not put before the previous Tribunal hearings, was now available, and confirmed that this had been taken into account.

15. I agree with Mr Tan's submission that it was difficult for the judge to work out what was the new evidence. The greater relevance of this point is that it is clear that the judge had read the previous decisions and gave as careful consideration to the evidence as he could. I do not accept the implication of Mr Dhanji's submission that the judge ignored any part of the evidence, and I am satisfied that it was all taken into account. However, the judge gave reasons for not departing from the findings of the previous judges. I do not accept the premise that having found that the appellant and the sponsor were now cohabiting and that he was involved in taking the child to school opened the door to setting aside the previous findings of two independent judges that the marriage entered into was one of convenience. What the judge had to do was to consider whether the evidence now available justified departing from those previous findings. In this regard evidence of cohabitation is not equivalent to the marriage being genuine and not a marriage of convenience when entered into.

16. Judge Louveaux noted at [31] that not only had a previous judge found that the appellant and the sponsor had given inconsistent evidence in the marriage interview as to when they began to cohabit, but that they also gave inconsistent evidence on that same issue in this latest appeal hearing. They were inconsistent as to when their relationship had begun that they began to cohabit. At [32] the judge made allowance for the fact that they were being asked to recall dates from several years ago but concluded it was reasonable to expect them to recall when the moved in together. The judge pointed out that they were inconsistent at the hearing even though they had both signed witness statements as recently as 12.2.20, about a week before the hearing, in which statements they provided the date as to when they began to cohabit. The judge concluded that it should not have been difficult for the sponsor to place in time when they began to cohabit by reference to when their relationship began and when they married.

17. At [33] of the decision the judge was unconvinced by the sponsor's vagueness as to what the appellant was studying when he moved in with her. Ultimately, at [34] of the decision, the judge concluded that the appellant and the sponsor were unable to provide a consistent account of their relationship.

18. Considering the decision as a whole, I am satisfied that the finding made were open to the judge on the evidence and for which cogent reasoning has been provided. It is clear that whilst the judge was obliged to start with the findings from the two previous appeal decisions, the more recent evidence was also taken into account, including positive findings in the appellant's favour. The judge correctly took into account the evidence of continuing cohabitation, which tends to support the claim that the relationship was subsisting and that the marriage was not one of convenience. However, the real issue was the intention of the parties at the inception of the marriage. The judge was unable to reconcile the continuing discrepancies between the appellant and the respondent, concluding that this was a marriage of convenience.

19. In the circumstances and for the reasons set out above, I find no material error of law in the decision of the First-tier Tribunal so that it must be set aside.

Decision

The appeal of the appellant to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

I make no order for costs.

I make no anonymity direction.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 14 October 2020