IAC-AH-KRL/FH-CK-V2

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/00919/2020**

THE IMMIGRATION ACTS

Heard at Field House Via Skype for Business	**Decision & Reasons Promulgated**
On 17 March 2021	**On 14 June 2021**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

M B A N
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Metzer QC, instructed by Sterling Lawyers Limited
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Canada. He appealed to the First-tier Tribunal against the respondent's decision of 13 January 2020 refusing his application for a residence card in accordance with the Immigration (European Economic Area) Regulations 2016. An anonymity order has been made in this case and that order is maintained.

2. The facts of this case are not without complexity. After the breakdown of an earlier marriage, in 2004, the appellant formed a relationship with another Canadian national with whom he had three children. His case was that he lived with the

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mother of the children until 2012. He began a relationship with his EEA spouse, the sponsor, in 2013 after the breakdown of the previous relationship. The appellant and the sponsor were married on 3 April 2014 and the appellant's EEA residence card was issued on 21 February 2015. At this time the respondent accepted that the marriage was genuine.

3. The appellant's evidence was that he found it difficult to live apart from his children and the children also had difficulties. The children and their mother stayed with the appellant and the sponsor over the summer of 2015 and, on the appellant's case, it was agreed between the three adults that it would be better for the children to have the support of both parents and that the sponsor would also care for the children as their stepmother.

4. The sponsor's evidence was that she found the appellant's frequent visits to Canada difficult and she separated from him for some two months from February 2016 and there was a further period of separation in early 2017, at a time when the children and their mother had arrived in the United Kingdom for the first time. The children had come to the United Kingdom with their mother in February 2017, returned to Canada and re-entered the United Kingdom in September 2017 with the intention of staying permanently. The children's residence permits were granted in March 2018 and the mother was granted further leave to remain on human rights grounds in September 2018. This application was supported by the sponsor.

5. In January 2017 the appellant had rented a property at Sovereign Mews for the children and their mother and they moved into that property as soon as they entered the United Kingdom. The appellant lived at Sovereign Mews during the period of separation from the sponsor.

6. In December 2018 the sponsor visited Slovakia her home country and the appellant invited the children and their mother to celebrate New Year's Eve. On his evidence he and the mother had a one night stand and their fourth child was conceived. The sponsor found the situation difficult but decided to forgive the appellant and accepted the fourth child as her stepson.

7. The respondent, as noted above, initially accepted that the marriage was genuine. However subsequent concerns have led her to revise that view. Hence the refusal which led to the appeal. The documentation submitted with the appellant's application for a permanent residence card, dated 7 October 2019, indicated to the respondent that the appellant's primary residence was Sovereign Mews, rather than with the sponsor at her address at Bounds Green Road. The application also included a letter explaining that there was a separate house for the appellant's children at Sovereign Mews. The 2019 application also included an application for the appellant's fourth child. The respondent noted that the mother of this child was not the appellant's wife but the mother of the appellant's three other children. She also noted that the sponsor had been claiming benefits as a single person. She also considered there to be a contradiction between her records showing that in interview the children's mother in 2015 claimed the relationship with the appellant had ended

in 2014 while the appellant said it had ended in 2012 and his relationship with the sponsor began in 2013.

8. A further complication which the judge had to deal with and appears to have managed particularly well, was the fact that the appellant, his wife and the mother of his children are all profoundly deaf and there had to be a face to face hearing with two British sign language interpreters.

9. The judge reminded herself at various points in her decision, for example at paragraphs 27, 31, 61 and 62 that the burden of proving that the marriage was one of convenience was on the respondent. She considered the evidence under a number of headings, first the tenancy at Bounds Green Road, second the council tax documentation, third the benefit claims, fourth Sovereign Mews, fifth holidays, sixth other evidence, seventh birth of the appellant's fourth child. She made a number of adverse findings and concluded that the Secretary of State had discharged the burden on her.

10. In his grounds of appeal, which he adopted in the course of his submissions, Mr Metzer QC argued first that the judge had reversed the burden of proof, for example at paragraph 33, not accepting that the sponsor had moved into the Bounds Green Road with the appellant when he secured the tenancy on 16 January 2015, finding that the appellant and sponsor were claiming benefits as single occupants from April 2016, not accepting that the appellant and the sponsor would have been advised to claim benefits separately in respect of Bounds Green Road and Sovereign Mews, finding the appellant lived at Sovereign Mews and in particular, at paragraph 60, not accepting the appellant's claim that the fourth child was conceived as a result of a one night stand. The fact that the judge said she had assessed the evidence holistically did not assist. The burden was on the respondent and the judge should have applied that throughout to her assessment of the evidence.

11. The second ground, which Mr Metzer acknowledged was one that had a high threshold, was the argument that the judge's decision was infected by perversity in that she had not considered any period but that subsequent to the marriage, rather than being required to assess the evidence as a whole. She had rejected the submission that the only relevant period was that prior to the marriage and considered that her task was to consider the totality of the evidence, but she had not done so and she had effectively limited herself to the post-marriage evidence.

12. It was also argued on the appellant's behalf that she had come to findings of fact contrary to evidence that had not been challenged. The respondent had not challenged the evidence of the three witnesses who had attended court, nevertheless the judge had taken that evidence into account in finding against the appellant on points of credibility in concluding that it did not follow that the marriage was genuine. She expressed the view that the witness statements were difficult in that they contradicted evidence of the appellant but did not put those alleged contradictions to the appellant who was therefore denied the opportunity to provide clarification. She said at paragraph 59 that no live evidence had been heard on the issue of the "one night stand" and yet there had been live evidence in that the

adoption of witness statement evidence into the record was live evidence. This appeared to be a matter to which the judge had attached especial weight. This was contrary to the guidance in authorities such as AM [2015] UKUT 00656 (IAC) with regard to the conduct required for there to be a fair hearing.

13. In her submissions Ms Cunha relied on the response of 2 November 2020 and developed points made there. She argued that the judge had not made findings on the genuineness of the marriage until as late as paragraph 60. What she had said for example at paragraph 33 where she found the sponsor did not move into Bounds Green Road with the appellant when he secured the tenancy on 16 January 2015 was not a finding but a statement of evidence. Greater clarity might have assisted as had been acknowledged in the response, but the matter was to be looked at holistically. With regard to paragraph 60 and the finding about the claimed one night stand the judge might have erred in not taking into account evidence of what happened on 31 December 2019 but it was clear law that the judge was assessing credibility as a whole and relying on the lack of supporting evidence. She had considered the evidence concerning the situation prior to the marriage at paragraphs 28 and 29 even if she had made no findings on it. She possibly needed to be more careful with regard to the assertion she had made about the one night stand given the witness statements concerning that but was nevertheless entitled to make the finding when approaching the evidence as a whole.

14. It was clear that disbelief did not have to be suspended just because something was said consistently. The decision was clearly reasoned.

15. Ground 2 properly acknowledged the high threshold where perversity was alleged. It was argued that the challenge was simply a matter of disagreement. The judge had assessed the evidence as to how the relationship existed and the contradictions in respect of the relationship with the ex-wife and that these were points raised in the refusal letter.

16. With regard to ground 3 it might be that on the face of it the judge did not accept the one night stand and probably should not have stated that conclusion without reasons. Live evidence had been given to explain what happened but that had to be taken as part of the evidence as a whole and there were a lot of contradictions. However, there were the issues of the two different addresses, the bases for the income support applications. Taken as a whole it was understandable why the judge concluded as she did.

17. With respect to what the judge said at paragraph 56, if evidence was being challenged in a witness statement then the opportunity should be given to provide a challenge and it was assumed that the contradictions were not put to the witnesses since there was no record that that had been done. Considered as a whole this only affected part of the evidence and would not lead to a different outcome, though it was accepted the Tribunal might not agree.

18. By way of reply Mr Metzer argued that in effect it had been accepted on behalf of the respondent that there were errors of law in the judge's decision and he asked that the

appeal be allowed. It was common ground between him and Ms Cunha that if the Tribunal were with him then the matter would need to be reconsidered in full in the First-tier Tribunal.

19. I reserved my decision.

20. As regards ground 1 I consider on balance that the judge did not err as contended or at all. She had to assess the evidence as she went along and she was conscious as she regularly reminded herself of the fact of the burden being on the respondent and she brought the evidence together in concluding as she did that the burden had not been satisfied bearing in mind the various findings she had made on that evidence.

21. However I do consider that there is merit in grounds 2 and 3. In effect the judge only considered the evidence of the situation after the marriage. The consideration at paragraphs 28 to 31 is almost exclusively concerned with post-marriage evidence and all the consideration thereafter is also in that regard. Clearly since the respondent's case was that the marriage was one of convenience when entered into on 3 April 2014 it was necessary to consider the evidence contemporaneous with and prior to the marriage. The judge did not do so and I consider that that amounted to an error of law.

22. I also agree that the judge erred with regard to her failure to put her concerns about matters of live evidence to the appellant. She clearly attached significant weight to the one night stand issue on which the evidence had been consistent and did not put her concerns to the parties who were therefore denied the opportunity to address the concerns she had. That goes to the fairness of the hearing. Accordingly I find that the judge did err in law as contended for at grounds 2 and 3. The extent of reconsideration that will have to be done is such that there will have to be a full rehearing of this matter and that will have to be in the First-tier Tribunal at Hatton Cross before a judge other than Judge Moon.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 7 April 2021

Upper Tribunal Judge Allen