Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04215/2019

THE IMMIGRATION ACTS

Heard at Manchester via Skype	**Decision & Reasons Promulgated**
On 22 December 2020	**On 11 January 2021**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

NASEER AZAM
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Rashid instructed by Mamoon Solicitors.
For the Respondent: Mr Tan Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Jepson ('the Judge') promulgated on the 11 November 2019 in which the appellants appeal was dismissed.

Background

2. The appellant is a citizen of Pakistan born on 1 June 1989 whose application for a residence permit was refused by the Secretary of State on 19 July 2019.
3. Having considered the documentary and oral evidence given by both the appellant and his wife, the Judge sets out findings of fact from [29] of the decision under challenge.
4. At [32] the Judge writes "*The key (and perhaps only) question is whether this marriage is one of convenience, designed to afford Mr Azam an immigration advantage."* The Judge found it was.
5. The appellant sought permission to appeal on grounds that, in themselves, would have been unlikely to have led to a grant of permission, although permission to appeal to the Upper Tribunal was granted by another judge of the First-tier Tribunal in the following terms:

> 3. The grounds completely miss the central point and do not address the fact that legal validity is only one part of the matter, if the marriage has been entered into for the Appellant to gain entry to the UK then that is a valid reason to refuse to issue a residence card. More surprisingly the grounds do not refer to the case of Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC) and the burden of proof shifting to the Respondent to show at a marriage is one of convenience. I could find no reference in the decision either to the burden having reversed and the only citation of a burden and standard of proof appears in paragraph 7 with a reminder at paragraph 29 but that is only of the standard position.

Error of law

6. The Immigration (European Economic Area) Regulations 2016 ('the regulations') define a marriage of convenience as follows: "marriage of convenience" includes 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."
7. It is not disputed that in Rosa [2016] EWCA Civ 14 it was held that the legal burden was on the Secretary of State for the Home Department to prove that an otherwise valid marriage was a marriage of convenience so as to justify the refusal of a residence card under the EEA Regulations. The legal burden of proof in relation to marriage lay on the Secretary of State, but if she adduced evidence capable of pointing to the conclusion that the marriage was one of convenience, the evidential burden shifted to the applicant (paras 24 – 27).

8. In Agho [2015] EWCA Civ 1198 it was held that where an applicant sought an EEA residence card on the basis that he was married to an EEA national, he simply had to produce his marriage certificate and his spouse's passport. As a matter of principle, a spouse established a prima facie case that he was the family member of an EEA national by providing the marriage certificate and his sponsor's passport. The legal burden was on the Secretary of State to show that any marriage thus proved was a marriage of convenience and that burden was not discharged merely by showing 'reasonable suspicion'. The evidential burden might shift to the applicant by proof of facts that justified the inference that the marriage was not genuine. The facts giving rise to the inference included a failure to answer a request for documentary proof of the genuineness of the marriage where grounds for suspicion had been raised: Papajorgji (EEA spouse – marriage of convenience) [2012] UKUT 38 (IAC) considered (para 13).
9. That the burden of proof is on the respondent is now put beyond doubt by Sadovska [2017] UKSC 54 an appeal from the First Division of the Inner House of the Court of Session, see [28] – [30].
10. It is not disputed that there is no specific reference in the Judge's decision to any of the above cases or to the fact the evidential burden is reversed. That there is no such reference is not however, of itself, material. What it does create is the need to consider what the Judge said to ascertain whether there is any material error in this decision.
11. At [7] the Judge wrote *"The burden of proof is to the higher standard - the balance of probabilities. It is for the Appellant to show he fulfils the requirements of the EEA Regulations".* As a generic self-direction this is correct as the burden is upon the appellant to prove he is married. That burden was however discharged on the basis of the material provided.
12. At [29] the Judge writes *"I remind myself of the burden, and standard of proof. All of the evidence, written and oral, has been considered with care".* Judges of the First-tier Tribunal receive extensive training in relation to the correct burden and standard of proof to be applied and as the Court of Appeal have reminded us it is permissible to assume that a Judge will have applied the same unless it is shown to the contrary.
13. The submission by Mr Rashid that he would have adopted a different approach before the Judge may be so, but that does not establish material legal error as he was not the advocate before the Judge and it is not made out any procedural unfairness arises in the Judge not taking into account evidence, or submissions that were made, or adopting a structurally flawed assessment.
14. The starting point has to be the decision under challenge, the refusal letter dated 19 July 2019 the relevant text of which reads:

> Your application has been considered under regulation(s): 7 & 2 of the Immigration (European Economic Area) Regulations 2016.
>
> We have determined that you have not provided adequate evidence to show that you qualify for a right to reside as the family member of your EEA sponsor.

You have provided your validity identity document, 1xPak passport BP1854793/C8783271 and a valid identity document 1xRou passport 057251661, for your EEA or Swiss national sponsor Andreea Irina Cotea.

Have also provided a Cypriot marriage certificate as evidence of your relationship to your sponsor Andreea Irina Cotea which shows your marriage was solemnised at the Municipality of Nicosia, Cyprus on 21 August 2018.

You have stated on your application form that you first met your EEA sponsor in March 2018 and your relationship began 21 August 2018, and that you started living together as a couple on 19 May 2018. Also stated on you application form you have told this department that your date of marriage was 19 June 2018, according to the official marriage document you have provided states date of marriage 21 August 2018.

Whilst travelling with your EEA sponsor you where both stopped by Irish Immigration Officials at Belfast Stena docks and invited to attend a marriage interview.

The interview, which took place on 08 April 2019 had highlighted a number of inconsistencies in you and your EEA sponsor's answers.

You stated you had travelled via Dublin and had intended to stay there and where only visiting the UK for 2 days. When asked you intended to travel you stated you were going to the "famous" city of Glasgow. However when asked what you were going to see you were unable to say, you then admitted to not knowing anything about Glasgow. Subsequently your EEA sponsor stated you were going to Manchester or London.

When asked why you were splitting up your trip, you stated you could not explain why. You were asked why you had told Irish immigration you were staying in Ireland for 17 days however left within 24 hours you could not explain this either. You and you EEA sponsor were interviewed subsequently regarding details of your wedding, spouses family members, job, hobbies and how you met. The majority of your answers did not match with regards to details of your wedding in terms of guests, where your reception was and make up of guests. You also provided incorrect information regarding your EEA sponsor's family. You also stated that you crossed the land border by coach on 3 April 2019.

Based on the information detailed in the marriage interview and the inconsistencies on your application form, this department has reasonable grounds to suspect that the marriage/civil partnership undertaken on 21 August 2018 to Andreea Irena Cotea is one of convenience for the sole purpose of you obtaining an immigration advantage.

You have provided a Residence card date of issue 27 March 2019 which was issued in Cyprus however it has been noted that you were not issued entry clearance prior to your entry to the United Kingdom. Although not mandatory, it is advisable for spouses/partners of EEA nationals to obtain an EEA Family Permit before entry to the United Kingdom. This allows the spouse/partner of an EEA national to have their legal entry to UK facilitated free of charge. When a non-EEA spouse/partner follows this route, they have the opportunity to demonstrate a genuine and substantive relationship prior to their entry to the country.

Also you have not provided adequate evidence to prove that you are the dependent direct family member and EEA or Swiss national.

You have not provided this department with evidence to show that you are currently living with your EEA or Swiss national partner.

As such department would expect you would be able to provide a wider variety of documentation confirming your joint residency together for the duration as claimed. This department would expect that you would be able to provide evidence which confirms joint finance and commitments to your EEA sponsor.

Based on the information detailed, the Secretary of State has sufficient evidence to believe that the marriage is one of convenience for the sole purpose of you remaining here in the United Kingdom. Kevin the other evidence that you have supplied in support to your application.

15. These issues are clearly capable of pointing to the conclusion that the marriage was one of convenience.
16. The Judge took careful note of both the appellant's and respondent's cases and I find no merit in the suggestion the Judge erred in the structure of the determination. The fact the Judge set out the appellant's evidence between [10 – 23] and the respondents between [24 - 28] does not mean an incorrect burden was applied. I was referred to no authority that suggests otherwise.
17. The Judge was not satisfied that anything other than "little weight" could be placed upon the transcript of the marriage interview for the reasons set out at [33 – 34] but that does not mean that no weight was placed upon the same.
18. The Judge recorded concerns with the evidence specifically at [39] where it is written: "*The Appellants account of events in Ireland makes little sense. He described arriving on 5th April, and staying for a week. When it was pointed out in cross examination that could not possibly be right given the marriage interview took place the following day, the account changed - staying for a week after being refused travel. Only then did the couple visit the Appellant's friend"* which the Judge did not find fitted with the suggestion the appellant came to Ireland to see that person.
19. The Judge also expresses concern about the method in which the appellant and sponsor left Cyprus indicating one would have expected to see some sort of contingency plans if the couple were to return to Cyprus, of which there was no evidence [43].
20. At [44 -49] the Judge writes:

    44. Given Mr Azam seems to have just abruptly left his job there, how would they have survived? That suggests strongly to me that settlement in the UK was the plan from the outset. I note the assertion by Mr Azam in court that the couple had a return booked to Cyprus for 20th April. Although not necessarily central to the case, Ms Cotea made no mention of that. One might have reasonably expected to see evidence of that return ticket

    45. It equally seemed strange that (on Ms Cotea's account in court) the couple went directly on arrival to Belfast. The intention was, as she claimed, to sightsee in Ireland before going to England, why was that part suddenly skipped? The strong inference to be drawn is that sight seeing was never on the cards. If that is right, why go to Ireland at all? I am not persuaded by the explanation the couple chose to go by ferry rather than a plain because Ms Cotea was tired of flying.

    46. It is surprising that (as described previously) two conflicting dates are provided within the residence permit application form. Contrary to the

Respondent's submissions, these dates do not both relate to the marriage. Rather, it is variously said that the relationship began on 21 August 2018 and the marriage occurred on 19th June of the same year. Clearly, both cannot be right.

47. When asked about that in court, the Appellant claimed he had not completed the relevant paperwork. No explanation as given as to why might have done this, and on what basis. Why would two contradictory dates be stated on the same form? Neither is in fact correct - wedding was 21st August. Whilst it might be the forms were completed on the Appellant's behalf (although there is no evidence to show that), Mr Azam has signed the form to confirm the answers given are accurate.

48. Compounding this is the assertion within the grounds of appeal that the difference in date is a "typo". If the relationship were genuine, it would be expected a person would know the date and so spot any error within the paperwork immediately.

49. Putting things in stark terms, I do not believe the account(s) given by the Appellant and Ms Cotea. Even disregarding the marriage interview, there are several manifest discrepancies here that to my mind cannot be explained by human error or fading memory. These are too numerous and to fundamental to ignore.

21. Leading to the Judge finding at [50] *"On that basis, I find this is a Marriage of convenience, designed solely to gain an immigration advantage. The Appellant does not come close to satisfying me that he fulfils the EEA Regulations. For that reason, this appeal is refused".*
22. The submission the respondent had failed to discharge the evidential burden upon her as a result of the Judge placing little weight upon the marriage interview is without merit in establishing material legal error. The refusal relied on more than the discrepancies that arose from the marriage interview as noted above. The evidence was capable of pointing to the conclusion that the marriage was one of convenience as a result of which the burden passed to the appellant. The appellant was given the opportunity to explain the discrepancies that arose which were identified by the decision-maker but failed to provide a satisfactory explanation for the same. The Judge was, on the evidence, entitled to conclude that it had been established this is a marriage of convenience designed solely to gain an immigration advantage.
23. It is not made out the Judge reversed the burden of proof on the basis that he started from the premise the appellant had to prove the marriage was not a marriage of convenience. There is nothing in the wording of the determination that suggests this was the Judge's mindset.
24. Although not mentioning the case law above or specifically setting out the test in the decision, no legal error material to the decision to dismiss the appeal is made out as it can be inferred the correct test was in the Judge's mind and was applied.
25. The answer to the question whether the appellant's marriage is a marriage of convenience was clear-cut on the evidence, including that elicited through cross-examination, and does not turn solely on the question of whether the Judge had set out in the decision the accepted

legal test. As Mr Rashid accepted, it would be a difficult submission for him to make that the Judge should not have taken into account and consider the oral evidence that had been given.

Decision

26. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

27. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……
Upper Tribunal Judge Hanson

Dated the 29 December 2020