Upper Tribunal (Immigration and Asylum Chamber) Appeal Number: EA/03750/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 February 2022	**On 27 April 2022**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

REFAIL HAJDARI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr L Youssefian, instructed by Queens Court Law
For the Respondent: Mr T Melvin, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is an Albanian national who was born on 21 January 1987. He appeals, with permission granted by the First-tier Tribunal ("FtT") against FtT Judge Sharma's decision to dismiss his appeal against the respondent's refusal of his application for an EEA residence card.

Background

2. The appellant states that he arrived in the United Kingdom clandestinely in December 2015. He made no application to regularise his position until 8 April 2019, when he applied for a residence card as the spouse of an EEA national. The appellant and his then advisers completed the 100-page EEA (FM) application form in order to make

that application. He gave his name, date of birth and address. He stated that he was married to a Romanian national named Ancuta Kasandra Dinca who was born on 4 November 1996. They had met in early 2018 and a relationship had developed in March that year. They had started living together in August 2018. They had no children together, but she had a child who lived with her mother in Romania. They had married in Birmingham on 29 March 2019She was working at a car wash in Leicester. Copies of identity documents and evidence of employment was provided with the application.

3. The appellant and his wife underwent interviews with an official in Liverpool on 1 July 2019. The appellant answered 482 questions. Ms Dinca answered 317 questions.

4. On 19 July 2019, the respondent issued a decision on the appellant's application for a residence card. She stated that she was satisfied, as a result of the answers given at interview, that the marriage was one of convenience. The application was therefore refused because the definition of a spouse in the Immigration (EEA) Regulations 2016 did not include a party to a marriage of convenience.

The Proceedings on Appeal

5. The appellant appealed to the FtT. His appeal was heard and dismissed by Judge Obhi. That decision was the subject of an appeal to the Upper Tribunal. That appeal was allowed by Judge Mandalia in May 2021. Judge Mandalia directed that there should be a de novo hearing in the FtT before a judge other than Judge Obhi.

6. So it was that the appeal came before FtT Judge Sharma (as he then was) on 19 July 2021. The appellant was represented by counsel (not Mr Youssefian), the respondent by a Presenting Officer (not Mr Melvin). The judge received extensive documentary evidence. He heard oral evidence from the appellant, the sponsor, the sponsor's sister and two friends of the couple. He heard submissions from the advocates before reserving his decision.

7. In his reserved decision, the judge found that 'the parties' intention at the time of the marriage was to gain an immigration advantage and that it is not a genuine marriage': [44]. That conclusion came at the end of a decision in which the judge had set out the history of the matter: [1]-[5]; detailed the evidence given at the hearing: [6]-20]; summarised the submissions made by the advocates: [21]-[29]; directed himself as to the law: [30]-[34]; and explained the reasons which led him to the ultimate conclusion that the marriage was one of convenience: [35]-[44]. In order to set the grounds of appeal in their proper context, it is necessary to reproduce the judge's reasoning in those paragraphs in full:

> [35] The issue here then is whether or not the respondent can prove that the marriage is not genuine.
>
> [36] There are a number of matters that in my view either assist the appellant or take matters no further either way. I

do not agree with the respondent that any of the other matters (save the lack of detail about the proposal of marriage to which I shall return later) raised in the refusal letter are of themselves sufficient to justify the conclusion that the marriage is one of convenience. Taking account of the detailed statements addressing the issues raised, there are reasonable explanations for the 'discrepancies'. For instance, I do not find it incredible that the sponsor gave a different date of entry to the United Kingdom to the appellant. She referred to it being December but was not sure of the year. That is not surprising of itself.

[37] Indeed, there are some matters in the interview which suggest that in fact there is (or at least was) a genuine relationship between the parties. The reference by both, for instance, to the sponsor's desire to go on holiday to Spain is a striking example.

[38] However, there are matters arising at the hearing that lead me to the conclusion that this marriage is not genuine.

[39] Firstly, setting aside the sponsor's sister's account of their mother's access to her own bank card, I note that the appellant's and the sponsor's accounts of why that card is used in Birmingham only after February 2021 is quite different. I take the view that the sponsor has been living in Birmingham since that time. There are of course the wage slips up to April 2021 but I give those little weight given that there has been no satisfactory explanation given about why those were still issued when the sponsor was purportedly out of the country.

[40] Second, there are the discrepancies in the accounts given about the identity of Alex Boana and the days that the sponsor visits Birmingham. Despite Mr Dhanji's valiant attempt to persuade me that this is not significant, it plainly matters. It shows the lack of knowledge that the appellant has about the sponsor.

[41] Finally, the fact of the lack of any WhatsApp messages before me that go past November 2020 is significant. Whilst Mr Dhanji's point about the lack of a direct question about the loss of a telephone is a good one, the point here to my mind is that there is no difficulty experienced by the sponsor sister in continuing to contact the appellant throughout her time away by WhatsApp. The account given by the appellant about not being able to continue with WhatsApp is not true.

[42] I find that the WhatsApp messages have been concocted for the purpose of this hearing. I do not accept that the explanation about the October 2020 grocery message. The appellant did not refer to any initial intention to return to the United Kingdom. There was none. The message is a slip up in the fabrication.

> [43] I have taken note of the various supporting letters and that of Mr Sadiki. I give little weight to the letters. That evidence in the letters is unreliable given my finding about the willingness to fabricate evidence. Mr Sadiki has added little in his evidence. He is a friend of the appellant and is trying to help him. He may well have seen the appellant with the sponsor as he states but that does not mean that the marriage is genuine. In light of the above, I find that the parties' intention at the time of the marriage was to gain an immigration advantage and that it is not a genuine marriage. There is cogent evidence to suggest that they have been in a relationship in the past bracket such as the reference in their interviews to a proposed holiday in Spain bracket but that, in my view, has led to a marriage of convenience. That is why there are differences in the interviews about who suggested marriage and why both are vague about what occurred.

The Appeal to the Upper Tribunal

8. The grounds of appeal were helpfully summarised by their author in the following way:

(i) The judge misapplied the law on the operation of the burden of proof in marriage of convenience cases;

(ii) The judge misapplied the law by failing, in practice, to address the issue of the appellant's intentions at the time of the marriage;

(iii) The judge failed to identify any evidence before him about the appellant's and sponsor's intentions at the time they married to justify his finding that theirs was a marriage of convenience; and

(iv) The judge failed to give sufficiently cogent reasons for his conclusion that the appellant's and sponsor's marriage was one of convenience.

9. Judge Gibbs considered these grounds to be arguable. She noted that she intended no limitation on the grant of permission.

10. In submissions before me, Mr Youssefian accepted that the judge had set out the law correctly at [33] of his decision. As submitted in the first ground, however, the judge had not applied the law correctly. It was initially for the Secretary of State to establish that there was a reasonable basis for suspecting that the marriage was one of convenience. Whilst there might have been a basis for such suspicion at the time of the interview, the judge had accepted at [36] that there were reasonable explanations for the discrepancies identified by the respondent. That, Mr Youssefian submitted, was the end of the matter. The explanations given had 'extinguished' the original basis for suspicion and there was no remaining case for the appellant to answer.

11. As regards the second, third and fourth grounds, Mr Youssefian took them together. The central criticism was that the judge had accepted

that there were some cogent evidence which suggested that the relationship was (or had been) a genuine one. Whilst he had noted these matters, which went to the intentions of the parties at the time of the marriage, he had then gone on to consider other matters which post-dated the marriage. That was an error of approach because the focus should have been solely on the intentions at the time of the marriage. Indeed, Mr Youssefian submitted that there was no rational or reasoned connection between that period in time and some of the difficulties particularised by the judge.

12. Mr Youssefian acknowledged that the judge had alighted at [42] on what he had described as a 'slip up in the fabrication', which was a reference to Whatsapp messages sent by the sponsor to the appellant about grocery shopping whilst she was in Romania for the foreseeable future. In that respect and others, however, the judge had misdirected himself in law in failing to direct himself in accordance with the principle in R v Lucas [1981] QB 720 that the significance of lies would vary from case to case: MA (Somalia) v SSHD [2010] UKSC 49; [2011] 2 All ER 65, at [33]. Such a direction was necessary, Mr Youssefian submitted, even if there was no alternative explanation proffered for the apparent lie. That was especially so in light of the fact that many of the interview answers tallied as between appellant and sponsor and there was supporting evidence suggesting cohabitation. There were clear difficulties with the judge's decision, which fell to be set aside.

13. Mr Melvin relied on his written submissions and submitted that what the appellant sought to do was to rewrite the law on cases such as this. The judge had clearly adhered to the staged assessment prescribed by cases such as Agho v SSHD [2015] EWCA Civ 1198; [2016] INLR 411 and there was nothing wrong in law with his decision. Various reasons had been given by the judge for finding that the marriage was one of convenience, one of which was the difficulties with the proposal of marriage. The judge had clearly taken a range of matters in the chronology into account in reaching the conclusion he had reached at [44]. His self-direction on the law, at [34], that "evidence of the parties' relationship since the marriage (up to the date of hearing) is relevant as that is capable of casting light upon their intentions at the time of the marriage' was impeccable. The judge had not been asked to apply a Lucas direction to the faked WhatsApp messages and it was difficult to see how these lies struck at anything other than the genuineness of the relationship. The judge had been entitled to reject the evidence given by the appellant and the witnesses for the reasons he had given.

14. In reply, Mr Youssefian submitted that there had to be a proper mechanism for addressing whether the respondent had a 'reasonable suspicion'. Where that suspicion was fully addressed or was unfounded, the entire basis for the respondent's decision fell away and could no longer be relied upon. Mr Melvin's submissions had overlooked the fact that the judge had seemingly accepted that there was a genuine relationship in the past. The judge had clearly erred in light of that finding in blurring the lines of his enquiry beyond the time that the marriage was contracted.

15. I reserved my decision at the conclusion of the submissions.

Legal Framework

16. By regulation 18(1) of the Immigration (EEA) Regulations 2016, the Secretary of State was required to issue a residence card to the family member of a qualified person upon production of a valid passport and proof that the applicant is such a family member. By regulation 7(1)(a) of the 2016 Regulations, family member was defined so as to include a spouse or civil partner. But, by regulation 2, the term 'spouse' did not include a party to a marriage of convenience. The same regulations defined a marriage of convenience as one which was entered into for the purpose of using the Regulations (etc) as a means to circumvent the Immigration Rules or other relevant provisions of the Regulations. These regulations were revoked by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 but continue to have effect for the purpose of this appeal.

17. The incidence of the burden and standard of proof in such cases has been considered in a number of well-known decisions. The leading authority is Sadovska & Anor v SSHD [2017] UKSC 54; [2017] 1 CMLR 37. From the Court of Appeal, there is Agho v SSHD [2015] EWCA Civ 1198; [2016] INLR 411 and Rosa v SSHD [2016] EWCA Civ 14; [2016] 2 CMLR 15. From the Upper Tribunal, there is Papajorgji (EEA Spouse: Marriage of Convenience: Greece) [2012] UKUT 38 (IAC); [2012] Imm AR 447. Amongst other matters, to which it will be necessary to return below, it is well established that the burden is on the Home Secretary to show that the predominant purpose of the marriage was to gain an immigration advantage.

Analysis

18. I am not persuaded that the First-tier Tribunal erred in law in dismissing this appeal. The reasons that I have reached that conclusion are as follows.

Ground One

19. The first ground is based on what was said by Blake J, giving the decision of the Upper Tribunal, at [27] of Papajorgji:

> [27] First, there is no burden on the claimant in an application for a family permit to establish that she was not party to a marriage of convenience unless the circumstances known to the decision maker give reasonable ground for suspecting that this was the case. Absent such a basis for suspicion the application should be granted without more on production of the documents set out in Article 10 of the Directive. Where there is such suspicion the matter requires further investigation and the claimant should be invited to respond to the basis of suspicion by producing evidential material to dispel it.

20. The submission made in ground one, to which Mr Youssefian devoted much of his oral advocacy, is that the judge misdirected himself in law when he progressed beyond [36] and [37] of his analysis. Mr Youssefian submitted that the judge had concluded by that stage in his decision that the Secretary of State's suspicions about the marriage had been answered by the appellant and that that was the end of the matter; given that the original suspicions had been addressed by the appellant, the judge was obliged to conclude that the marriage was not one of convenience.

21. This ground of appeal fails for two reasons. The first, and most obvious, is that the judge *did not* conclude that the appellant had fully addressed the respondent's original concerns. So much is clear from the opening two sentences of [36] of the judge's decision. With the exception of one point, the judge was satisfied that the appellant had addressed the respondent's concerns but he was not satisfied that the appellant and the sponsor had been able to explain 'the lack of detail about the proposal of marriage'. This was a reference to one of the eight matters which had been held against the appellant by the respondent. At the top of page four of the respondent's decision, she had noted that the appellant and the sponsor had each recalled surprisingly little in their interviews about the proposal of marriage. The appellant had been unable initially to recall who had proposed marriage. He then thought that it was he who had proposed but he was unable to recall when or where that had taken place. The sponsor had said that the appellant proposed marriage about one month before they had moved in together but she had also been unable to recall where the proposal had taken place.

22. This was not a case, therefore, in which the judge had concluded that all of the reasons given by the respondent for concluding that this was a marriage of convenience had been addressed by the appellant. Even if Mr Youssefian's approach to the law is correct (and I do not think that it is), this is not a case in which the judge would have been correct to find that the appellant had 'no case to answer', as Mr Youssefian put it at one stage in his submissions. Even if the majority of the points in the refusal letter had been addressed, there was still one concern which had not been, and it was a fundamental point to which the judge returned at the end of his decision.

23. In any event, the submission fails for a second reason. In order to explain that reason, it is necessary to return for a moment to the authorities. Papajorgji was principally concerned with the approach which was to be adopted by an Entry Clearance Officer or Manager. What was said about the burden of proof before the Tribunal, at [33]-[38] of the Upper Tribunal's decision, was *obiter* and expressed in rather cautious language as a result. Nor did that precise issue arise for decision in Agho v SSHD, as Underhill LJ made clear at [13] of his judgment (with which Vos and Moroe-Bick LJJ agreed).

24. The issue did arise in Rosa v SSHD. Having set out what was said on the point in Papajorgji and Agho, Richards LJ rejected the Secretary of State's submission that the legal burden lay on an applicant to show that their marriage was not one of convenience. At [24], he held that

"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." At [29], Richards LJ returned to the decisions of the Tribunal in Papajorgji and IS (Serbia) [2008] UKAIT 31. He found the reasoning in the latter to be 'seriously confused' and resolved the conflict between the two decisions by observing as follows:

> The result that I think the tribunal must have intended is achieved if the legal burden of proof lies on the Secretary of State throughout but the evidential burden can shift, as explained in *Papajorgji*. In my judgment, that is the correct analysis.

25. I accept, therefore, that marriage of convenience cases, in common with those in which deception is alleged, fall to be considered in accordance with the approach discussed in cases such as SSHD v Shehzad & Chowdhury [2016] EWCA Civ 615 and Majumder & Qadir v SSHD [2016] EWCA Civ 1167. The respondent bears an initial evidential burden of furnishing evidence of a reasonable suspicion that the marriage is one of convenience. The evidential burden then shifts to the appellant to raise an innocent explanation. Assuming that each party raises such a case on the evidence, it is for the Tribunal to decide whether the respondent has established to the civil standard that the marriage is one of convenience. My conclusion in this regard accords with the judge's self-direction at [33].

26. Whilst it is important to ensure that this approach is followed, it is also important to recognise the way in which evidence is adduced before the Tribunal. A judge who makes a decision in a case such as this does not consider a list of charges and a corresponding schedule of evidence which is designed to meet each specific charge. Instead, the respondent sets out in the decision under challenge a series of reasons which have caused her to conclude that the marriage is one of convenience and the appellant provides evidence, usually in written *and* oral form, which counters the case against him and provides evidence which is said to establish that the relationship is not (and was not) one of convenience.

27. The inevitable consequence of that is that the judge's enquiry is likely to take place on a broader canvass than the enquiry which was conducted by the Secretary of State. The judge is presented with more evidence than was before the Secretary of State and it might be that further difficulties arise as a result of that evidence. A judge who directs himself properly to the law does not confine or attempt to confine his enquiry to the matters which were raised by the respondent. The Tribunal must instead form its own view of the facts from the evidence presented to it, as Lady Hale explained at [28] of Sadovska v SSHD.

28. The consequence of that approach, in many cases, is that the appellant will not only answer the concerns expressed by the respondent; he or she will go on to provide evidence which lays bare the falsity of the suggestion that the relationship was one of convenience. In other

cases, the appellant will succeed in addressing some or all of the concerns expressed by the respondent but the evidence before the Tribunal will cause the appellant further difficulties which might suffice, in themselves, to discharge the burden upon the respondent of establishing that the marriage of is one of convenience. An extreme example might assist to demonstrate this point.

29. An EEA national and her third country national spouse seek to enter the UK. The third country national is refused entry because he has given the wrong first name for his spouse. The official considers the marriage to be one of convenience for this reason, and this reason alone. On appeal against the decision, however, the appellant adduces evidence from the sponsor's mother and family that she is not known by the name on her passport but by her a nickname; the same nickname which was given by the appellant to the official.

30. In order to confirm her identity before the judge, however, the sponsor is asked to produce her passport. She does so, and the document clearly shows that she has spent most of her time outside of the United Kingdom. Neither she nor the appellant can explain why that is so, when their witness statements suggest that they have cohabited consistently in the UK. The sponsor's mother is asked about this and states, frankly, that the sponsor has only re-entered the UK to give evidence in the appeal because she has been paid, from the outset, to pretend that she is in a relationship with the appellant.

31. On the basis of the approach which is suggested by Mr Youssefian, the judge in the hypothetical example I have given above would have to shut his mind to the difficulty presented by the passport and the even more formidable difficulty presented by the sponsor's mother. The single 'charge' presented by the respondent would have been answered by the appellant, and no further enquiry on the part of the Tribunal would be required. That submission is misconceived, in my judgment, because a judge is required to consider, on the basis of all of the evidence before them, whether there is evidence of fraud; whether there is evidence in support of an innocent explanation; and, ultimately, whether the respondent has discharged the legal burden upon her. In making those assessments, the judge is not confined to the issues identified in the refusal letter or the specific evidence which was adduced in response to those issues.

32. This was a case in which further concerns, and significant concerns, were generated by the evidence adduced by the appellant on appeal. As the judge found at [36], he was successful in addressing almost all of the concerns raised by the respondent, with the exception of the difficulties about the marriage proposal. The judge considered that further doubts about the relationship arose, however, for a number of reasons which were rooted in the other evidence. He considered that the sponsor had more likely than not been living in Birmingham since February 2021 and not in Leicester, as was suggested by the appellant and the sponsor: [39], referring to evidence recorded at [8]-[9] in particular. The sponsor had said that Alex Boana was her cousin, whereas the appellant had said that he was someone she worked with: [40], referring to evidence recorded at [8] and [12]. And there were

fundamental difficulties with the WhatsApp messages. The messages stopped suddenly in November 2020 and there was an exchange about grocery shopping in the middle of a period whilst the sponsor was out of the country: [41]-[42], referring to evidence recorded at [10], [13] and [15]. It was in accordance with the approach required by the authorities for the judge to take those matters into account; he was not confined to considering only the matters in the refusal letter.

Grounds Two, Three and Four

33. These grounds of appeal were dealt with under a single sub-heading in the notice of appeal and were similarly grouped together by Mr Youssefian. I shall adopt the same approach.

34. The gravamen of the complaint in grounds two and three is that the judge's temporal focus was incorrect. It is submitted by Mr Youssefian that although the judge directed himself, at [34], to focus on the intentions of the parties at the time of the marriage, he failed to do so. Mr Youssefian supports that argument by reference to the fact that each of the points taken by the judge at [39]-[42] relate to periods significantly after the wedding.

35. This submission is based on a misreading of the judge's decision. Whilst it is correct to note that each of the points taken at [39]-[42] do not relate directly to the time of the wedding ceremony, this was not a case in which the judge failed to focus on the correct point in time. His concerns about the relationship were not based solely on later events. As I have noted above, he was also concerned about the discrepant answers given by the appellant and the sponsor about the proposal of marriage. That point had not, he found, been satisfactorily addressed by the evidence in front of him. His process of reasoning could not be clearer. He took account of the problems he considered at [39]-[42] and he linked that to the concern he had previously expressed about the proposal of marriage. Taking all of the evidence into account, he concluded at [44] that the intention of the parties at the time of the union was to gain an immigration advantage. In so concluding, the judge took account of matters pre-dating *and* post-dating the marriage and concluded that it was one of convenience. He did not err in reaching that conclusion.

36. The final point taken by Mr Youssefian takes remarks made by the judge at [37] and [44] as its focus. He notes that the judge considered there to be 'cogent evidence to suggest that [the appellant and the sponsor] have been in a relationship in the past'. The submission is that insufficient reasons were given by the judge for concluding that the relationship had not matured into a marriage in March 2019. I do not accept that submission. As I have explained above, the judge was at pains to take account of all of the evidence in this case. He took account, correctly, of the evidence which militated in favour of the appellant and he was prepared to accept that there had been a relationship between the appellant and the sponsor in the past. Taking into consideration the difficulties about the proposal of marriage and the discrepancies concerning subsequent parts of the chronology, however, the judge concluded that the predominant purpose of the marriage was to secure an immigration advantage. The reasons given

were entirely adequate, in my judgment, as the appellant can be under no illusions about the basis upon which the respondent discharged the burden upon her.

37. Mr Youssefian also made a submission that the judge failed to give himself a Lucas direction. This point is nowhere to be found in the grounds of appeal which were prepared by trial counsel and cannot realistically be 'read into' those grounds. The point is in any event unmeritorious. The case presented by the appellant and his counsel before the FtT was straightforwardly that no lies had been told. There was seemingly no recognition on the part of trial counsel about the obvious difficulty caused by the WhatsApp message which was sent on 9 October 2020. On that date, there was an exchange between the appellant and the sponsor in which the sponsor asked the appellant "What do you want me to buy from the shop" and sent a photo of a supermarket. The appellant responded, stating that 'We need everything sweet heart' and then listed cheese, tomato, cucumber, pepper and bread, and added that she should 'Buy some fruit as well'. The difficulty with this, however, was that the sponsor was in Romania between September 2020 and February 2021: [9] of the judge's decision refers.

38. The response to this formidable problem at trial was not to suggest that there might have been other reasons for this obvious lie, and the judge was not asked to bear in mind the principle in Lucas, as applied in this context by MA (Somalia) and, more recently, Uddin v SSHD [2020] EWCA Civ 338; [2020] 1 WLR 1562. No alternative explanation for the lie was suggested and it is not easy to discern what explanation there might have been. On the judge's finding, which was certainly open to him, the WhatsApp exchange was a 'slip up in the fabrication' and the only rational conclusion, in light of the falsification of these exchanges and the other manifest difficulties with the evidence, was that the appellant and the sponsor had conspired to misrepresent the reality of their relationship. These were not peripheral matters. The judge did not err in failing to direct himself in accordance with Lucas but, in any event, the insertion of that additional consideration could only rationally have resulted in the same conclusion.

39. In the circumstances, I consider that the First-tier Tribunal did not err in law in concluding that the appellant's marriage had been contracted for the predominant purpose of securing an immigration advantage. The appeal to the Upper Tribunal will accordingly be dismissed.

Notice of Decision

The appeal to the Upper Tribunal is dismissed. The decision of the FtT dismissing the appeal shall stand.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal

Immigration and Asylum Chamber

4 April 2022