Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04896/2019

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
Remotely by Skype for Business	
On 5 November 2020	**On 17 November 2020**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

HAMZA SHAUKAT

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Chohan, instructed by Albus Law Solicitors
For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

The appellant is a citizen of Pakistan who was born on 29 December 1988.

On 5 July 2011, the appellant married an EU national, Linda Dimanta, who is a Latvian citizen. On 3 July 2012, the appellant was granted a residence card as a family member (a spouse) of an EU national exercising treaty rights in the UK.

On 13 December 2017, the appellant made an application for a permanent residence card, based upon five years' continuous residence in the UK in accordance with EU law as the spouse of an EU national exercising treaty rights. That application was refused by the Secretary of State on 22 March 2018 on the basis that the appellant had failed to provide a valid passport or ID card as confirmation of his spouse's identity. Following a judicial review claim, which was withdrawn following a consent order dated 1 July 2019, the Secretary of State reconsidered the appellant's application for a permanent residence card.

On 23 August 2019, the Secretary of State refused the appellant's application under reg 15 of the Immigration (EEA) Regulations 2016 (SI 2016/1052 as amended) (the "EEA Regulations"). The Secretary of State concluded that the appellant's marriage to Linda Dimanta was a "marriage of convenience" and, as a result, it was not established that he was a "spouse", and thus a "family member", of an EEA national as defined in reg 7 read with reg 2(1) of the EEA Regulations.

The Appeal

The appellant appealed to the First-tier Tribunal. The appeal was heard by Judge N M K Lawrence on 12 November 2019. Having determined that the appellant had a right of appeal, and that is not now in issue, the judge went on to dismiss the appellant's appeal on the basis that the judge was also satisfied that the appellant was a party to a "marriage of convenience" and so it was not established that he was a "family member" of an EU national exercising treaty rights and could not establish the five years' continuous residence in accordance with the EEA Regulations in order to establish a permanent right of residence.

The appellant sought permission to appeal on two grounds. First, the appellant contended that the judge had wrongly placed the burden of establishing that his marriage was, in effect, not a "marriage of convenience" upon the appellant. Secondly, the respondent had not provided the appellant with a copy of his 'marriage interview' which was unfair as the appellant had had no opportunity to examine the evidence in advance of the hearing.

On 20 April 2020, the First-tier Tribunal (Judge E M Simpson) granted the appellant permission to appeal on both grounds.

As a result of the COVID-19 crisis, on 1 July 2020, the Upper Tribunal (UTJ Bruce) issued directions expressing the provisional view that the issues of whether the First-tier Tribunal had erred in law and, if so, whether the decision should be set aside should be determined without a hearing. Both parties were invited to make submissions both on the merits of the appeal and whether or not a hearing was required.

On 20 July 2020, the Secretary of State filed submissions in response seeking to uphold the judge's decision on the basis that the judge had correctly placed the burden of proof upon the Secretary of State to establish that the

appellant's relationship was a "marriage of convenience" and on the basis that there had been no procedural unfairness. The Secretary of State indicated in a covering email that she had no objection to the error of law hearing being conducted remotely.

Further directions were issued by the Upper Tribunal (UTJ Owens) on 29 September 2020 directing that the error of law hearing be listed for a remote hearing. It would appear that the appellant's representatives had made no submissions in response to UTJ Bruce's earlier directions.

As a consequence the appeal was listed before me on 5 November 2020 at the Cardiff Civil Justice Centre. I was present in court whilst Mr Chohan, who represented the appellant, and Ms Rushforth, who represented the respondent, joined the hearing via Skype for Business.

The Submissions

On behalf of the appellant, Mr Chohan relied upon the grounds of appeal.

First, he submitted that the judge had wrongly placed the burden of proof in respect of whether the appellant's marriage was a "marriage of convenience" upon the appellant. He submitted that at para 10 of his determination, Judge Lawrence had stated that the legal burden of proof "from start to finish" was upon the appellant. Mr Chohan acknowledged that in para 11 the judge had directed himself in accordance with the leading case of Sadovska & Anor v SSHD [2017] UKSC 54 and the Court of Appeal's decision in Rosa v SSHD [2016] EWCA Civ 14 that the legal burden was upon the Secretary of State and that the evidential burden was initially upon the Secretary of State but shifted to the appellant if there was evidence capable of reaching the conclusion that the marriage was one of convenience. However, Mr Chohan submitted that the judge had not, in fact, applied that approach. He referred me to para 21 of the judge's determination where, having set out some of the evidence concerning the circumstances of the appellant and his spouse, the judge said that the "appellant bears the legal burden of proof and the standard is on a balance of probabilities". That was a legal error, Mr Chohan submitted.

Secondly, Mr Chohan submitted that the proceedings were unfair because the appellant had not been provided with a record of the marriage interview upon which the Secretary of State, both in her decision letter and before the judge, relied. He also pointed out that the respondent had not provided the judge with the documents which had been submitted with the appellant's application and which were relevant to the issue of the nature of the appellant's marriage which was for the judge to determine. He submitted that the judge had been wrong to state, in para 16, that there had not been "any evidence of [] cohabitation; any photographs; tenancy agreements and the like." Mr Chohan submitted that relevant documents had been submitted with the application and, although these documents were not now available in these proceedings, Mr Chohan referred me to the marriage certificate of the appellant and sponsor (at page 35 of the appellant's bundle) which showed an address for the sponsor in London ("61 Pentire Road, London E17 4BY") which was the address at which

the appellant claimed he lived with the sponsor after their marriage. Mr Chohan submitted that the judge needed to see the full interview in order to assess the matters relied upon by the respondent, both in the decision letter and at the hearing, in context.

On behalf of the Secretary of State, Ms Rushforth accepted that the judge had been wrong in para 10 to state that the legal burden of proof was "from start to finish" upon the appellant. However, she relied upon para 11 where the judge had correctly directed himself in accordance with Sadovska and Rosa. She submitted that, in considering the evidence in the paragraphs up to para 21, the judge correctly concluded that the Secretary of State met the evidential burden and that from para 21 onwards the judge had found that the appellant had not rebutted that evidential burden and, as a result, the Secretary of State had established that the relationship was a "marriage of convenience".

Secondly, as regards the appellant's marriage interview, Ms Rushforth accepted, in response to a question from me, that it was usual to disclose this interview. She submitted, however, that in this appeal the judge had refused the Presenting Officer's request to rely upon the transcript and had restricted the Presenting Officer to cross-examining the appellant on the issues that were raised in the refusal decision. She pointed out that, at para 15, the judge noted that the appellant, in his evidence, accepted what was said in the decision letter based upon the marriage interview. Ms Rushforth was unable to 'shed any light' on the issue of why the appellant's documents, submitted with the application, were not in the respondent's bundle. She pointed out, however, that these documents were the appellant's and he could have provided copies of them himself.

Ms Rushforth accepted that rule 21(1)(c) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604) required the Secretary of State to provide the Tribunal with "any record of an interview with the appellant in relation to the decision being appealed" and that applied to the appellant's marriage interview. However, she submitted that it was the judge who prevented the Presenting Officer from providing the Tribunal with the interview when he refused to allow the Presenting Officer to cross-examine on its contents beyond those referred to in the decision letter.

Ms Rushforth invited me to dismiss the appeal.

Discussion

Before the judge, the appellant's case was that he was entitled to a permanent residence card under reg 15(1)(a) as a "family member of an EEA national" who has resided in the UK with the EEA national in accordance with the EEA Regulations for a continuous period of five years.

It was not in dispute that the appellant married the sponsor on 5 July 2016. The appellant also accepted that he and his wife had separated, although the precise date was in issue. In his evidence, the appellant variously said that they separated in 2014, 2015 and 2016. Of course, the fact that the appellant

and his wife had separated would not prevent him acquiring a permanent right of residence provided that both she and he continued to live in the UK and during the required five year period, she was exercising treaty rights. The issue was rather whether, under the EEA Regulations, the sponsor was not his "spouse", and so a "family member", because their marriage was a "marriage of convenience" (see reg 2(1) defining "spouse" as not including "a party to a marriage of convenience").

The first ground of appeal contends that the judge wrongly placed the burden of proof upon the appellant to establish the negative, that he was not in a "marriage of convenience". It is clear from the case law that the legal burden of proof that a marriage is a marriage of convenience lies upon the Secretary of State to establish on a balance of probabilities (see Sadovska & Another and Rosa). There is an evidential burden upon the Secretary of State to raise a reasonable suspicion that the marriage is one of convenience, namely one where the predominant purpose of contracting the marriage was for one of the parties to gain an immigration advantage. Thereafter, if that is the case, the evidential burden shifts to the individual.

In his determination, Judge Lawrence made conflicting self-directions on the burden of proof. As Ms Rushforth accepted, the judge wrongly placed the burden of proof "from start to finish" on the appellant in para 10 of his determination. Likewise, at para 21, having set out some of the appellant's evidence in cross-examination the judge said this:

> "The respondent has set out his decision in clear terms that the appellant's marriage to Ms Dimanta is one of convenience. *The appellant bears the legal burden of proof and the standard is on a balance of probabilities*". (my emphasis)

Both of those are incorrect self-directions.

However, in para 11 the judge correctly directed himself in accordance with Sadovska & Another and Rosa, that the legal burden of proof is on the Secretary of State and that that burden lies with the Secretary of State throughout although the evidential burden shifts to the appellant if there is a reasonable suspicion (and so the Secretary of State discharges the evidential burden upon her) that the marriage is one of convenience.

It is difficult to understand how Judge Lawrence could set out in such close proximity contradictory statements as to the burden of proof. Whilst of course, the burden of proof was upon the appellant to establish that he was entitled to a permanent residence card, that burden did not include establishing the negative, namely that he was not in a marriage of convenience.

However, when Judge Lawrence's determination is read as a whole, despite these disparate statements of the burden of proof, it is plain that he correctly applied the burden of proof in fact.

At paras 12 – 20, the judge set out the evidence concerning the appellant's relationship with the sponsor. This included conflicting evidence from the

appellant as to when he and the sponsor had separated – whether it was in 2014, 2015 or 2016 (see paras 12 – 14). The judge also set out evidence concerning the appellant's suspicion that the sponsor and a Mr Bilal were in a relationship (see para 15). The judge then noted that there was not "any evidence of [] cohabitation; any photographs; tenancy agreements and the like" and that his and Ms Dimanta's joint bank account were closed in 2012 or 2013 (see para 16 – 17). The judge then referred to the appellant's evidence that, again he and Ms Dimanta had separated and that "we have a Decree Nisi in June 2019" but that that had not been provided (see paras 18 and 19).

Then at paras 20–24, the judge reached his conclusions as follows:

> "20. The respondent bears the evidential burden of proving his assertion that the appellant's marriage to Ms Dimanta is one of convenience. This is clearly set out in his 23 August 2019 Decision. The respondent appears to base this decision on three points. The lack of evidence of cohabitation. This is based on observations made by the Officers when they attended the appellant's home address on 26 September 2017. In cross-examination the appellant accepted this. The appellant informed the offices (*sic*) that he had separated from Ms Dimanta. He gave two different dates. In cross-examination he accepted he gave two different dates. In cross-examination he gave a third. As I have indicated I do not find it credible that a person would or could be confused on this momentous issue unless he or she provides cogent evidence of some recognised vulnerability. None has been adduced.
>
> 21. In cross-examination Ms Arif [asked] the appellant if he had any evidence that he had a relationship with Ms Dimanta. He asked Ms Arif what evidence she was asking for. The appellant is represented by two lawyers. One a firm of 'solicitors', Albus Law and the other is Mr Magsood who appeared to represent him at the hearing. The respondent has set out his decision in clear terms that the appellant's marriage to Ms Dimanta is one of convenience. The appellant bears the legal burden of proof and the standard is on a balance of probabilities. The appellant, having been notified the nature of the respondent's case, has failed to address it, even though he has solicitors acting for him. It is incongruous that he should tell Ms Arif that he does not understand what evidence he should provide in support of his claim that his marriage to Ms Dimanta is not a marriage of convenience. Relationships do not exist in a vacuum. The relationship is said to have been conducted here in the UK and not in some remote part of the world devoid of access to any means of communication.
>
> 22. It appears to me that the respondent has demonstrated, on balance, that the appellant's marriage to Ms Dimanta is one of convenience. In my view, the appellant's contradictory dates as to when the couple separated is indicative of non-committal attitude to this marriage. Secondly, he has provided no evidence of the relationship, except the fact of the marriage. The appellant has failed to rebut the respondent's assertion on balance.

> 23. The third basis is Ms Dimanta's relationship with Mr Bilal. In cross-examination the appellant accepted that the contents of the 23 August 2019 Decision. He accepted that he himself had suspicion Ms Dimanta was in a relationship with Mr Bilal whilst they shared the same address. I find that the respondent has raised the issue of commitment to this marriage, on balance. I next turn to assess whether the appellant has rebutted it, on balance.
>
> 24. I find the appellant's oral evidence is that he suspected that Ms Dimanta was in a relationship with another man when he was entitled to expect her total commitment is indicative of his knowledge that it was a marriage of convenience. He did not challenge her, never mind Mr Bilal. It matters not whether she treated the marriage as one of convenience or the appellant did. A marriage, in the context of EU Freedom of Movement laws, is one of convenience when one party has more than one relationship at the same time and the other suspicious of such does not challenge that party. The appellant's acquiescence demonstrates he considered it to be one of convenience."

As a result of, in para 25 the judge dismissed the appellant's appeal.

Despite what the judge said in para 10 and in para 21, at para 20 he recognised that the respondent had an evidential burden of proof placed upon her to establish that the marriage was a "marriage of convenience". The judge then addressed the issue of whether the appellant had countered that evidential burden. At para 22, the judge stated, properly reflecting the burden of proof, that "the respondent has demonstrated, on balance, that the appellant's marriage to Ms Dimanta is one of convenience." Despite the judge's misstatements, it is clear that in the end he correctly followed his detailed (correct) self-direction in para 11 that the legal burden of proof on the single issue of whether the marriage was a "marriage of convenience" was upon the Secretary of State, who bore the initial evidential burden, that burden had (in the judge's view) been discharged on the evidence and that the appellant had not rebutted that such that the respondent had discharged the legal burden "on balance" on this issue.

Read as a whole, therefore, I am not persuaded that the judge wrongly placed the burden of proof upon the appellant on the issue of whether his marriage was a "marriage of convenience".

Turning now to the second ground of appeal, it is clear that the appellant's marriage interview was not served upon the Tribunal or the appellant prior to the hearing. In fact, as I understood Mr Chohan's instructions, the appellant has never seen his marriage interview. Further, the documents which the appellant sent with his application in July 2017 and November 2017 (see covering letters at pages 61 and 31 respectively in the bundle) do not appear to have been sent by the respondent as part of her bundle. These documents, on the face of it, included material relevant to the appellant's claim that, until the marriage broke down and he and his spouse separated, they had lived together.

Ms Rushforth accepted that it was usual for the marriage interview and the documents sent with an individual's application to be included in the respondent's bundle. She was unable to assist me on why that had not been the case in this appeal. It may be, as was suggested during the course of submissions, that the documents (perhaps including the interview) were not included with the initial decision letter and bundle sent to the Tribunal and appellant in March 2018 as the respondent refused that application, not on its merits as such, but because the appellant had not provided (as was said to be required) a valid passport or ID card for his spouse. When the reconsideration decision was taken on 23 August 2019, following the judicial review proceedings, the respondent's bundle sent to the appellant and Tribunal under cover of 1 November 2019 overlooked that the documents had not previously been provided and only provided the decision letter, papers relating to the judicial review and the appellant's notice of appeal to the First-tier Tribunal.

As regards the marriage interview, the First-tier Tribunal's Rules undoubtedly imposed an obligation upon the Secretary of State to send that interview to the First-tier Tribunal, along with a number of other documents. Rule 24(1), so far as relevant, provides as follows:

> "(1) Except in appeals to which rule 23 applies [i.e. entry clearance appeals], when a respondent is provided with a copy of a notice of appeal, the respondent must provide the Tribunal with –
>
> ....
>
> (c) any record of an interview with the appellant in relation to the decision being appealed;
>
> (d) any other unpublished document which is referred to in a document mentioned in sub-paragraph (a) [i.e. the notice of decision or decision letter] or relied upon by the respondent; …"

Rule 24(3) sets out that the documents must be provided within 28 days of the date on which the Tribunal sent to the respondent a copy of the notice of appeal.

The obligation arises prior to the hearing. I do not accept Ms Rushforth's submission that, as matter unfolded before Judge Lawrence, his decision not to allow the Presenting Officer to cross-examine on matters raised in the interview that were not raised in the decision letter, precluded the respondent from complying with that duty.

That said, however, the consequence of not complying with that obligation rests, in my judgment, upon an assessment of whether it resulted in unfairness to the appellant. That is also the issue in relation to the failure to enclose in the respondent's bundle the documents which accompanied his application.

Of course, in relation to both the interview and the appellant's documents, it could be argued – and Ms Rushforth did so argue – that the appellant knew what was in the interview and the documents were his and he could have provided copies. That is an argument which is not without some merit. Certainly as regards the documents submitted with the application, given that

the appellant was legally represented, one might have expected those representatives to provide any documents that the appellant had already submitted but now wished to rely upon before the judge at the hearing. If it became plain that those documents were not available, it would have been open to the legal representatives to seek an adjournment in order that they could obtain those documents (whether from the appellant or by the respondent providing them to the appellant's representatives and the Tribunal). That does not appear to have been the stance taken by the appellant's legal representatives at the hearing. It is difficult to see, as a result, how the proceedings were unfair to the appellant on this basis.

However, that argument cannot be made good, in my judgment, in relation to the appellant's marriage interview. As Ms Rushforth accepted, and it is also my experience in EEA cases, where a marriage interview takes place and there is an assertion by the Secretary of State that a marriage is one of convenience, the marriage interview is disclosed to the appellant. Of course, at least in theory, the appellant knows what is in that interview since he was present and the evidence is his. Although that would not be the case where there was also an interview with his spouse. However, that argument only goes so far.

First, it presupposes that the appellant is able to recall all that was said and is able to provide his representatives and, if appropriate, the Tribunal with further evidence as to what he said. That may place an unrealistic expectation upon an individual's powers of recall.

Secondly, in this appeal, the marriage interview took place on 26 September 2017. The appeal hearing was on 12 November 2019 which was over two years later. Whilst the appellant might well have been asked to recall contents of the marriage interview earlier, its importance at the hearing arose two years later. It would be unrealistic, in my judgment, to expect the appellant to recall what was asked of him in detail and what his replies were in detail. It is no answer to that point that the respondent was, as a result of the judge's ruling set out in para 7 of his determination, restricted to cross-examining on material from the marriage interview which was relied upon in the decision letter and which, during the course of the hearing, the appellant accepted had been said.

Both the appellant's representatives and the Tribunal needed, as a matter of fairness, to consider the appellant's answers at that interview (said to be adverse to him) in the context of the whole of the interview. As has been said, "[i]n law context is everything" (see R v SSHD, ex parte Daly [2001] UKHL 26 at [28] per Lord Steyn). There may have been exculpatory evidence which the judge was unaware of in the interview. The underlying fairness in disclosure of the interview record to the Tribunal (and of course to the appellant who must usually be provide with the same documents) is reflected in rule 24(1)(c). It is also reflected in the common practice to disclose a marriage interview in a case of the present kind.

In the recent decision of Nimo (appeals: duty of disclosure) [2020] UKUT 0088 (IAC), the UT stated that there was no obligation upon the respondent to disclose advice or recommendations from the officers who carried out the

marriage interview. However, the decision was premised on the normal situation pertaining, namely that both the appellant and judge had "verbatim records of the interviews" with the appellant and his spouse (see [27]).

In my judgment, it was unfair not to disclose to the appellant his marriage interview in this appeal. What, if anything, the appellant's representatives could have made of what was said in that interview in the appellant's favour is of course, dependent on its contents. The opportunity to make an assessment of that evidence was the very matter of which the appellant was unfairly deprived. Consequently, whilst the judge was, I have no doubt, seeking to ensure fairness to the appellant by denying the Presenting Officer's application to introduce the transcript of the interview, in fact that resulted in unfairness to the appellant as the appellant was denied an opportunity (through his legal representatives) to consider what was being said against him in that document (including matters that might have been favourable to him in that interview) and address the judge on those matters.

For these reasons, I am satisfied that, in dismissing the appellant's appeal, the First-tier Tribunal materially erred in law. Its decision cannot stand and is set aside.

Decision

The decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of a material error of law and the decision is set aside.

Both representatives agreed that if the appellant succeeded in his appeal then the appeal should be remitted to the First-tier Tribunal for a *de novo* rehearing.

Having regard to the nature of the legal error and the nature of fact-finding required, and also having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge N M K Lawrence.

Given the error of law, the respondent should serve upon the appellant and Tribunal a record of his marriage interview which took place on 26 September 2017 no later than 14 days before the re-listed hearing before the FtT.

Signed

Andrew Grubb

Judge of the Upper Tribunal
10 November 2020