Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/05447/2019**

THE IMMIGRATION ACTS

Heard at : Field House
On : 15 April 2021

Decision & Reasons Promulgated
On : 27 April 2021

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

VALTER SHPANI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Eaton, instructed by Rashid & Rashid Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a national of Albania born on 12 March 1985, appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse to issue him with a residence card under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"), as the family member (spouse) of an EEA national exercising treaty rights in the UK.

2. The appellant entered the UK in 2007 using a false Italian identity card. Following his conviction for various offences in 2009 and 2010 he was deported from the UK, but he re-entered the UK in breach of the deportation order and was encountered and detained on

26 June 2012. He made a claim for asylum which was refused and he then left the UK on 10 August 2012. The appellant returned to the UK, on a flight from Stockholm, in November 2012 in a false identity and using a Polish identity card. He was returned to Stockholm the following day, but he came back to the UK and next came to the attention of the UK authorities on 21 January 2014 when he applied for an EEA residence card as the unmarried partner of a Lithuanian national, Jurate Muraskiene.

3. The appellant's application for an EEA residence card was refused on 6 August 2014 on the basis that the requirements of Regulation 8(5) were not met as his relationship was not considered by the respondent to be a durable one. The application was also refused under Regulation 17(4)(b) on the basis that the respondent considered the appellant's continued presence in the UK posed a genuine, present and sufficiently serious threat to the fundamental interests of society. Following an appeal against that decision, by which time the appellant had married Ms Muraskiene, on 25 October 2014, the First-tier Tribunal concluded, in a decision promulgated on 12 March 2015, that the appellant had entered into a marriage of convenience and that the requirements of the EEA Regulations were therefore not met. The appeal was dismissed on that basis.

4. The appellant submitted a further residence card application on 22 May 2015 which was refused on 18 March 2016 and re-considered and refused again on 8 November 2016. An appeal against that decision was dismissed on 16 December 2016 on the grounds that there was no valid appeal. A further residence card application, made on 7 March 2018, was rejected, and another application made on 3 July 2018 was refused without a right of appeal on 12 February 2019.

5. The appellant then made another application for an EEA residence card on 30 April 2019, again on the basis of his marriage to Ms Muraskiene. The respondent maintained the decision that the marriage was one of convenience and that there was no genuine and durable relationship. In so doing the respondent relied upon statements from immigration officers who had been present during a visit from the Financial Investigation Unit to the appellant's home on 22 August 2017 in relation to a matter unrelated to his marriage and accorded little weight to a supporting statement from the appellant's former solicitor. The respondent considered that the appellant was not a "family member" of an EEA national, owing to his marriage being one of convenience, and as such he did not qualify to have his criminal conduct considered under the protection of public policy in Regulations 24 and 27.

6. The appellant's appeal against that decision was heard by First-tier Tribunal Judge Louveaux on 5 December 2019. The appellant and his wife gave oral evidence at the hearing, as did his wife's sister, brother and 15-year-old son. The sponsor's brother was also in attendance, having travelled from Lithuania, but he was unable to give evidence owing to the lack of an interpreter. Judge Louveaux found that the previous Tribunal was justified, in its decision of 12 March 2015, in concluding that the appellant's marriage was one of convenience, in light of the inconsistencies in the evidence at the time which had still not been adequately explained by the appellant, and therefore saw no reason to depart from the findings of that Tribunal. Judge Louveaux found, however, that the evidence

before him strongly suggested that the appellant and the sponsor were currently in a durable relationship. Nevertheless, following the findings of the Court of Appeal in Rosa v Secretary of State for the Home Department [2016] EWCA Civ 14, that the focus was on the intention of the parties at the time of the marriage, the judge considered that he was unable to go behind the findings of the previous Tribunal and therefore dismissed the appeal on that basis.

7. Judge Louveaux's decision was set aside by Upper Tribunal Judge Gill in a decision made without a hearing, under Rule 34 of the Procedure Rules, on the basis that he had misdirected himself in relation to the findings in Rosa and in relation to the Devaseelan principles. The judge had failed to take into account his own positive assessment of the credibility of the witnesses before him in deciding whether or not to depart from the previous Tribunal's finding that the marriage was a marriage of convenience at the time it was entered into and had misdirected himself in thinking that Devaseelan precluded him from departing from the findings of the previous Tribunal. UTJ Gill considered that she was unable to preserve any of the findings made by Judge Louveaux and she concluded that the decision ought to be re-made in its entirety, albeit in the Upper Tribunal and not by way of a remittal to the First-tier Tribunal.

8. The matter then came before me, for a face-to-face hearing. There were two further significant developments since the previous hearing. Firstly, Mr Tufan was in possession of two emails from Ms Muraskiene, sent to the Home Office, in which she stated on 17 February 2021 that she and the appellant were no longer together, that he had left the country and that she was looking to proceed with a divorce as soon as possible, and a second email dated 15 March 2021 in which she stated that they remained together, that she had just been angry at the time following an argument and that she very much wanted to continue their life together as a family. Secondly, evidence was produced to show that the appellant had left the UK and travelled to Turkey and had then returned to the UK via Dublin after being refused re-entry to the UK.

9. Mr Tufan asked the appellant and his wife questions to clarify both matters. The appellant explained that his father had been very ill, with coronavirus, and had been taken to Turkey for emergency medical treatment. The appellant said that he had managed to obtain a new Albanian passport from the embassy in the UK and had used that to travel to Albania and Turkey, leaving the UK on 22 November 2020 and returning to the UK by travelling to Kosovo and taking a flight to Istanbul and then a flight to Dublin and entering the UK on 6 April 2021 after being issued with a three month visa in Dublin to join his EU wife. The appellant's wife explained that she had sent the first email when she was very distressed after an argument and that she had just broken down as a result of the stress of the whole situation, with his father being ill and her mother being ill, and coronavirus making travelling difficult, but she had calmed down after her son had talked to her.

10. The appellant's sister and sister-in-law gave evidence after the appellant and his wife. His wife's brother was available to give evidence remotely from Lithuania but in the event it was not necessary to hear from him because Mr Tufan, whilst noting the

inconsistencies in the evidence before the previous Tribunal, was nevertheless satisfied that the relationship was genuine and subsisting and that the marriage was not one of convenience.

11. Mr Tufan made submissions, however, on Regulation 24(7), Regulation 25(b) and (c) and Regulation 27(8) and Schedule 1, in relation to public policy grounds and the fundamental interests of society, in light of the appellant's adverse immigration history and complete disregard for immigration control. He submitted that the appellant fell within those provisions as a result of his personal conduct. He referred in particular to the appellant's recent conduct in leaving the UK and then returning via Ireland in order to circumvent the requirements of the immigration rules.

12. In response, Mr Eaton submitted that the references to public policy under those Regulations in the refusal decision were only on the basis of the marriage being considered as one of convenience. The matters raised by Mr Tufan were completely new points. In any event the appellant had only recently left the UK and returned on one occasion, because of his father's ill-health. It could not be said that he was acting unlawfully when he did that because he had always been entitled to a residence card in light of his genuine relationship with his EEA national wife. A residence card was only declaratory and he had not needed one in order to come and go.

Consideration and findings

13. As UTJ Gill stated in her decision of 15 July 2020 at [42], there was only one factual issue in the appeal, namely whether the appellant's marriage to the sponsor was a marriage of convenience. Having considered all the evidence and heard from the witnesses, Mr Tufan conceded that the marriage was not, and had never been, one of convenience and that the appellant's relationship with the sponsor was genuine and subsisting. I am entirely in agreement with that concession. There clearly were some relevant credibility concerns in the appeal before the First-tier Tribunal in March 2015 and the judge was entitled to conclude on the evidence available at that time that the marriage was one of convenience. However, in the light of the evidence produced before Judge Louveaux and his positive credibility findings, and given the evidence before me, all of which strongly suggested that the marriage had been entered into for genuine reasons, Mr Tufan's concession was properly made.

14. With regard to Mr Tufan's submissions in relation to public policy matters, I cannot agree that the references in the refusal decision to Regulations 24 and 27 were such that a decision had been made in that regard on the basis of the appellant's adverse immigration history. The decision was made entirely on the basis of the marriage being one of convenience and the references to Regulations 24 and 27 were made in that context and not on the basis of a conclusion in the alternative. I accept that the matter of the appellant's departure from the UK and his return through Dublin were recent events of which Mr Tufan only became fully aware at the hearing, but I find merit in Mr Eaton's submission that the appellant was in fact entitled to travel in and out of the UK on the basis of his now accepted genuine marriage to his EEA national wife. The absence of a residence card was

not relevant since a residence card was only of declaratory effect. Whether or not the respondent now issues a residence card to the appellant is a matter for her. For the purposes of the appeal before me, however, I find that the appellant has satisfied the requirements of the EEA Regulations as to his entitlement to residence on the basis of being the family member of an EEA national.

15. The appeal is therefore allowed on that basis.

DECISION

16. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law and has been set aside. I re-make the decision by allowing the appellant's appeal under the EEA Regulations 2016.

Signed *S Kebede*
Upper Tribunal Judge Kebede Dated: 15 April 2021