THE IMMIGRATION ACTS

Case No: UI-2022-002332
Appeal Number: EA/14119/2021

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Heard at Field House **Decision & Reasons Promulgated**
On 13 September 2022 **On 13 November 2022**

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

EGZON PONARI
Respondent

Representation:
For the Appellant: Miss A Ahmed, Senior Home Office Presenting Officer
For the Respondent: Mr E Pipi, Counsel, instructed by Devine Solicitors

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals, with the permission of First-tier Tribunal Judge L S Bulpitt, against First-tier Tribunal ("FtT") Judge Beg's decision to allow Mr Ponari's appeal against the refusal of his application for a residence card as a direct family member of an EEA national under regulation 7 of the Immigration (European Economic Area) Regulations 2016 (hereafter "the EEA Regulations").

2. To avoid confusion, we will refer to the parties as they were before the FtT: Mr Ponari as the appellant, the Secretary of State as the respondent.

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Background

3. The appellant is an Albanian national who was born on 22 January 1986. He entered the United Kingdom illegally on a date unknown from the papers before us.

4. In April 2019 he met and commenced a relationship with a Latvian national, Jana Jastrzembska ("JJ"). They began living together in June 2019 and married on 11 January 2020. The marriage certificate records that both were "single" at the time of marriage.

5. On 14 January 2020, the appellant applied for a residence card as a family member of an EEA national under the EEA Regulations. That application was refused by the respondent on 12 August 2020. The reasons for refusal were that the respondent was not satisfied that the appellant's marriage to JJ was valid. She relied on the appellant's admission during a police interview on 5 July 2017, that he was married to Mihane Selica who at the time was living in France. As there was no evidence the appellant's marriage to Ms Selica had been dissolved, the respondent was not satisfied that the appellant was free to marry JJ. Accordingly, she concluded that the appellant had not established that he is a family member of an EEA national and thereby refused the application.

The Appeal to the First-tier Tribunal

6. The appellant appealed to FtT. The matter came before Judge Beg on 7 February 2022. The appellant was represented by counsel, Mr Pipi (as he is before us). The respondent was unrepresented. Judge Beg had before her a core bundle from the respondent and the appellant respectively. She also had a copy of the respondent's summary note of the police interview in 2017. The judge heard evidence from the appellant and Ms Selica. The judge summarised their written and oral testimony as follows:

> "8. The appellant stated in his witness statement dated 7 July 2021 that he met the sponsor in London in April 2019 and that they married on 11 January 2020. At paragraph 7 he stated that he was never married to Mihane Selica. At paragraph 8 he stated that when he was interviewed Stoke Newington police station he was assisted by an Albanian interpreter and there was a misunderstanding between him the interpreter due to dialect issues (sic). In evidence he said that he is from the north of Albania and the interpreter was from the south.
>
> 9. In evidence the appellant said that he met Ms Selica in 2016 in France. He said he was in a relationship with her for a little more than a year. He said they lived together for three to four months. He said the interview with the police at Stoke Newington police station occurred in July 2021. Ms Selica in her evidence said that she met the appellant in Tirana in 2015. She said that she had a relationship with him which ended in 2017 or 2018. She said he was just a boyfriend and that they did not live together.
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> 10. In answer to Mr Pipi, Ms Selica confirmed that she met the appellant in Albania. She said they started a relationship in France when they became close. However she later said that she had feelings for him in Tirana but when he got to France they became

> distant and were no longer close and therefore they decided just to be friends. She said they did not live together but he owned his own home and she used to visit him. She also said that her family sponsored him to France as a visitor although she did not tell her family exactly what he was to her."

7. The judge found that neither the appellant nor Ms Selica were credible witnesses due to the inconsistencies in their evidence. The judge at [11]-[13] set out the inconsistencies and then summarised the respondent's note of the police interview at [14]-[16]. Against the backdrop of all that evidence the judge stated thus:

> "17. I find that the appellant and Ms Selica met in Albania**. I find that they were either married or in a durable relationship in Albania**. I find that that is the reason why the appellant was sponsored by Ms Selica's family to travel to France. I find that they were aware of the serious nature of the relationship. In the police interview the appellant stated that he went to France via plane using his own passport. **I find that the couple lived together and were still in a relationship in 2017 at the date of the police interview.** I find that Ms Selica was aware of the police interview.
>
> 18. **I find that the respondent has not produced the question-and-answer transcript of the police interview itself.** There is therefore no additional evidence about whether the appellant stated in the interview that he had difficulties understanding the interpreter or that his reference to his wife was misunderstood. **There is no additional documentary evidence before me that the appellant was previously married to Ms Selica.** Nor is there documentary evidence from France that the appellant was a dependent upon Ms Selica's asylum application."
>
> [our emphasis]

8. In her omnibus conclusion at [20] the judge stated that as the respondent had not provided the "additional documentary evidence" referred to at [18], she not been established that the appellant was previously married to Ms Selica. She thus allowed the appeal.

<u>The Appeal to the Upper Tribunal</u>

9. In her grounds of appeal to the Upper Tribunal, the respondent submitted that the judge had erred in law in concluding that the appellant was free to marry JJ. The respondent submitted that in view of the judge's finding that the appellant and Ms Selica were not credible witnesses and, given her finding that they were married and remained in contact, her conclusion that the respondent had not established that they were married was perverse or irrational.

10. At the outset of the hearing we asked Miss Ahmed whether she had a copy of the full interview transcript as we had only seen a summary of that transcript in the documentation before us. Miss Ahmed confirmed that the full transcript was not available and we were somewhat surprised to learn that neither representative had seen a copy of the respondent's summary note of interview which was before the FtT. We adjourned briefly to provide copies to the representatives following which we heard their respective submissions.

11. Miss Ahmed on behalf of the respondent relied on the grounds of appeal. She submitted that the judge's findings were perverse and/or irrational. She submitted that no reasonable judge, having found the appellant and Ms Selica were married, could have concluded that the appellant was free to marry JJ. She submitted that "the overriding issue was one of credibility" and the judge made a number of adverse credibility findings. She submitted that there was no evidence the marriage had been dissolved and the appellant's declaration that he was "single" at the time of marriage to JJ was untrue. Further, Miss Ahmed submitted that the judge had erred in her failure to make findings on the appellant's explanation that the interpreter misunderstood him.

12. We then heard submissions from Mr Pipi on behalf of the appellant. He submitted that the judge's findings were not irrational. The judge was not assisted by the respondent's failure to adduce the full interview transcript or indeed by her absence at the hearing. He submitted that the judge was required to make a decision on the evidence before her, and whilst she rejected the evidence of the appellant and Ms Selica, it was for the respondent to prove the allegation. Mr Pipi submitted that the judge was entitled to conclude as she did and he reminded us that the respondent was requiring the judge to make a finding of bigamy on the absence of evidence.

13. In reply, Miss Ahmed submitted that the judge's conclusions were contradictory and she queried why the judge sought to question the appellant on the issue if she was satisfied that the respondent had not discharged the burden upon her. Miss Ahmed recognised that it was open to the judge to accept some of the evidence and reject others, but she submitted that there was a "real tension" between the judge's findings that could not be sustained.

14. We reserved our decision.

<u>Discussion</u>

15. After careful consideration, we conclude that there are no material errors of law in the judge's decision. The judge's conclusion that the appellant was free to marry JJ has not been shown to be perverse or irrational and is one that is sustainable.

16. Before we consider the import of the respondent's grounds of appeal in more detail we make some general observations.

17. The appellant's case was that he was entitled to a residence card under regulation 7 of the EEA Regulations as a family member of an EEA national. It was not in dispute that the appellant and JJ married on 11 January 2020. We do not agree with Miss Ahmed that the "overriding issue was one of credibility". The issue was whether, under the EEA Regulations, the appellant was the "spouse" of the EEA national, and so a direct "family member" as a consequence of the marriage. Specifically, the point in issue taken by the respondent was the validity of the said marriage. The respondent did not in her refusal expressly assert that the appellant had been dishonest or had otherwise engaged in any unlawful wrongdoing. She simply took the

view that the appellant had not “provided adequate evidence to show”, that he was entitled to a residence card as a family member of the EEA national. Nonetheless, there is some force in Mr Pipi’s observation that the underlying tenure of the respondent’s refusal inferred that the appellant’s marriage to the EEA national was bigamous. Whilst such an allegation is a serious one, that allegation was not expressly raised by the respondent, and the judge was thus not required to address it.

18. The factual issue the judge was required to determine was whether the appellant was married to Ms Selica and thus, in the absence of a divorce, was not free to marry JJ. The respondent contended that he was not and relied on the appellant’s admission at interview that he was married to Ms Selica. The appellant’s case was that he was never married to Ms Selica and that his responses at interview were misunderstood by the interpreter. In her endeavours, the judge was clearly not assisted by the absence of the respondent’s representative and more so by her failure (which is continuing) to adduce into evidence a full copy of the interview transcript. Whilst we note that Mr Pipi referred to the respondent’s failure before the judge (at [14]), no unfairness point appears to have been taken by the appellant (see: Miah (interviewer’s comments: disclosure: fairness) [2014] UKUT 00515 (IAC)). That may well have been a futile argument in this case, as a summary of the interview transcript was before the judge, and the respondent’s failure to provide a full copy of it did not preclude the judge from taking into account the points raised from it by the respondent. We do not understand Miah to state the contrary.

19. Seized with the evidence put before her, the judge was required to undertake an independent judicial adjudication of the issues. She did so clearly with an understanding that the burden assigned by law was on the respondent to prove her assertion that the appellant was married to Ms Selica even though she did not expressly say so in her decision; she only referred to the applicable standard of proof. There is no dispute before us that the burden of proof was on the respondent to prove her assertion and that the judge’s application of the law in that regard was correct (see: Sadovska & Anor v Secretary of State for the Home Department (Scotland) (Rev 1) [2017] UKSC 54 and DK & RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 IAC.

20. We have borne all of the above in mind in our consideration of the respondent’s grounds, which is a perversity/irrationality challenge. Miss Ahmed rightly accepts that the threshold for such a challenge is high, and we are satisfied that, whilst the judge’s decision could have been clearer, her findings do not reach the high threshold of perversity/irrationality for the following reasons.

21. It is appreciably clear that the judge was satisfied that the appellant and Ms Selica were in a relationship at the time of the police interview in 2017: [17]. The respondent’s grounds of appeal (and Miss Ahmed’s submissions before us) focus primarily on what she considers is the judge’s finding regarding the status of that relationship, i.e. that they were married. That, as Miss Ahmed confirmed, was the respondent’s

case and not, as she accepted is wrongly asserted in the grounds of appeal, that the couple were in a durable relationship. When the decision is viewed, as the respondent does, through this mono lens, it does appear, at a glance, as Miss Ahmed contended, that there is a "real tension" between the judge's findings on the one hand about the status of the relationship and her conclusion that the appellant was free to marry JJ. However, in our judgement, the respondent's reading of the decision is too narrow and misconceived, and not entirely faithful to what the judge expressed at [17] or indeed elsewhere.

22. We consider that when the decision is viewed through a wider lens it is clear that the judge was not making a definitive finding of marriage at [17]. She in fact made an alternative finding and found that "they were either married or in a durable relationship in Albania". These alternative findings are not reflected in the grounds of appeal, which Miss Ahmed properly recognised before us. Had the alternative finding not been made, we consider there would be some force in the respondent's submissions, but as it stands, we see no contradiction in the judge's findings at [17] and her subsequent findings at [18] that could on any sensible view be categorised as perverse.

23. It is clear at [17]-[18] the judge was considering the wider view. On the one hand she factored into the balance her conclusions about the relationship and the appellant's statements at interview and, on the other, addressed the deficiencies in the respondent's case by identifying the "additional documentary evidence" that the respondent had not put before her, in particular, any documentary evidence that the appellant was married to Ms Selica and any evidence from France that he was dependent on her asylum application. The respondent does not challenge these findings or indeed the judge's approach. It seems clear to us that when the decision is read as a whole, rather than in isolation, the judge took the view that her findings about the relationship, the credibility of the appellant and Ms Selica and his responses at interview were simply not sufficient to discharge the burden of proof on the respondent. It is apparent to us that that is the approach she took at [20] in stating:

> "In conclusion, in taking the evidence in the round, I find that whilst the appellant and Ms Selica are not credible or reliable witnesses, the respondent has not provided additional documentary evidence, referred to above, to demonstrate on a balance of probabilities that the appellant was previously married to Ms Selica and did not divorce her before marrying the sponsor…"

24. We consider that she was entitled to find that the assertion had not been proved in the circumstances. That might not have been the conclusion that we would have reached but it was open to the judge and cannot be said to be wrong in principle.

25. The fact the judge made no specific finding on whether she accepted or rejected the appellant's explanation that he was misunderstood at interview takes the respondent's case no further. It was not material to the outcome. What was material was the absence of the "additional documentary evidence" as a consequence of which the

judge concluded that the respondent had not proved her assertion [20].

26. We take into account the restraint with which appellate courts and tribunals should exercise in reviewing such findings. The principles have been summarised at length in many authorities. A recent summary of the appellate approach to first instance findings of fact may be found in Volpi v Volpi [2022] EWCA Civ 464 at [2] to [5], recalling, amongst others, the approach taken in Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5 at [114]. It is not necessary to recount that guidance here, but we have adhered to it.

27. In summary, although the respondent submits that the judge reached findings that cannot fairly stand, standing back and reading the decision as a whole, it is in our judgement clear that in reaching her decision, the judge considered all the evidence before her in the round, and reached findings and conclusions that were open to her on the evidence. The findings reached cannot be said to be perverse, irrational or findings that were not supported by the evidence. The grounds of appeal in the end amount to a disagreement with the findings and conclusions reached by the FtT.

28. It follows that in our judgment, there is no material error of law in the decision of Judge Beg, and we dismiss the appeal.

Notice of Decision

The Secretary of State's appeal is dismissed. The decision of the FtT to allow the appeal shall stand.

No anonymity direction is made.

R.BAGRAL

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 September 2022