Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/00143/2020 ('V')**

THE IMMIGRATION ACTS

Heard at Field House
And via Skype for Business
On 19th March 2021

Decision & Reasons Promulgated
On 01 April 2021

Before

UPPER TRIBUNAL JUDGE KEITH

Between

MR BUJAR GASHI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Ms N Bustani, Counsel, instructed by Maxwell Solicitors
For the respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 19th March 2021.

2. Both representatives and I attended the hearing via Skype, while the hearing was also open to attend at Field House. The parties did not object to attending via Skype and I was satisfied that the representatives were able to participate in the hearing.

3. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Trevaskis (the 'FtT'), promulgated on 2nd March 2020, by which he dismissed the appellant's appeal against the respondent's decision on 12th December 2019 to refuse to issue him a Residence Card as the EEA family member (spouse) of an EEA (Romanian) national, Ms Herinean (the 'sponsor'), under the Immigration (EEA) Regulations 2016.

4. In essence, the appellant's claims involved the single issue: whether, for the purposes of regulation 2 of the 2016 Regulations, the appellant's marriage to the sponsor was a "marriage of convenience," in the sense of having been entered into for the purpose of using the EEA Regulations in order to circumvent the Immigration Rules.

5. The respondent regarded the marriage as one of convenience based on inconsistencies in the appellant's and sponsor's accounts during interviews that had taken place on 4th June 2019, relating to: the sponsor's religion, the duration of visits to Romania; the appellant having worked in the UK; the number of asylum claims that the appellant had previously, unsuccessfully made; and the appellant's previous EEA application, together with a number of other inconsistencies.

The FtT's decision

6. The FtT noted at §5 that the burden was not on the appellant to demonstrate that his marriage was not one of convenience and that the burden instead lay on the respondent. At §13, the FtT noted the appellant's poor immigration history and made detailed findings at §§18 to 22, referring to inconsistencies which he did not regard as having been adequately addressed by the appellant or his witnesses. There were significant areas where the FtT would have expected greater consistency, including in relation to wedding arrangements. Having referred to the evidence, at §§24 to 25, the FtT stated:

> *"24. The respondent must show reasonable grounds for suspecting that the marriage was one of convenience, before the appellant is required to show that on the balance of probabilities it is not a marriage of convenience. I am not satisfied that the reasons given by the respondent for suspicion as to the nature of the marriage were sufficient to shift the evidential burden to the appellant.*
>
> *25. Whether or not I am wrong about that I am not satisfied to the required standard that the appellant had shown that his relationship with the sponsor is not a marriage of convenience."*

7. The FtT then went on to dismiss the appellant's appeal.

The grounds of appeal and grant of permission

8. The appellant lodged grounds of appeal, the gist of which is as follows:

   8.1. Ground (1) - the FtT had failed to explain why the respondent had shown reasonable grounds for her suspicion; had concluded that the respondent had in fact not shown such reasonable grounds, then appeared to contradict himself.

8.2. Ground (2) - the FtT had erred in focusing on a small number of perceived inconsistencies during the marriage interviews but failed to take into account the extensive core consistency in over of 300 questions. The FtT had further erred in stating at §22 that the appellant had sought to stay in the UK on the basis of a previous relationship with a British citizen which he now admitted was not genuine. At no stage had the appellant accepted making an application on the basis of a relationship that was not genuine.

8.3. Ground (3) – the FtT failed to engage with the witness evidence of three live witnesses in addition to the appellant and sponsor. The FtT had failed to engage with or analyse their evidence.

9. First-tier Tribunal Judge Keane granted permission on 11th August 2020. His grant of permission was not limited in its scope.

The hearing before me

The appellant's submissions

10. Ms Bustani emphasised that the refusal letter itself had not referred to the described poor immigration history of the appellant, which had focussed instead solely on the alleged inconsistencies in the marriage interviews. All the appellant needed to do in this case was to provide a marriage certificate, with the burden then on the respondent to discharge the initial evidential burden as well as the overall legal burden. In other words, the context of why a marriage interview had been regarded as necessary was not one which was at all clear. It was almost as if the FtT was expecting the appellant to show why his marriage was not one of convenience, as opposed to the other way around.

11. The practical difficulty that the appellant had faced was that the records of the interviews, the sole basis for refusing the applications, were only provided by the respondent to the appellants three days before the FtT Hearing, on 17th February 2020. It was hardly surprising in the circumstances that the appellant and the sponsor had done the best they could to address the brief list of concerns about answers in interview, set out in the refusal letter, and had not gone to provide further details. In context, the interview records themselves in fact ran over to 300 questions and it was clear from §20 of the FtT's decision that he had done little more than to adopt the summary of inconsistencies described by the respondent at the end of each of the interview records and in the refusal letter. Having focussed on those, (which he may well have been entitled to do), what the FtT did not do was to consider whether the remainder of the core account nevertheless was of sufficient weight that the inconsistencies could be regarded as peripheral.

12. The second point, taking aside the issue of the apparent misapplication of the law and impermissible focus on the list of inconsistencies in the refusal letter, was that in addition to the appellant and the sponsor, three witnesses had provided statements and attended the FtT hearing, to attest to their belief in the genuineness of the relationship and none of them had their evidence challenged in any way. The FtT

had simply failed to engage in that evidence or the wider evidence of cohabitation, including that set out at §7 of the skeleton argument, including but not limited to, the tenancy agreement showing a common address at pages 178 and 186 of the appellant's FtT bundle as well as a list of other documentation.

13. In relation to a final ground, the FtT had referred to an application based on a previous relationship with a British citizen, where in fact there was, to Ms Bustani's knowledge, no such application and indeed it had not been raised in the refusal letter.

The respondent's submissions

14. In response, Mr Melvin reiterated the terms of the Rule 24 response. Crucially, the FtT had reminded himself correctly of the burden of proof and had then had set out his concerns quite clearly as to why the inconsistencies were of concern and the fact that the witnesses had not addressed those concerns. In those circumstances, the subsequent reference at §25 had to be read in context and could only be realistically read as a typographical error rather than any misapplication of the law.

15. In relation to the second ground, the marriage interviews had taken place after an initial refusal of the appellant's application for a Residence Card as an extended family member, prior to his marriage to the sponsor, and before the second application following their wedding. Mr Melvin was not in a position to confirm precisely when the interview notes were provided but it was clear that they were taken into account nevertheless by the FtT. Mr Melvin accepted that the appellant's immigration history had not been expressly referred to in the refusal letter but had been clearly set out in the bundle before the FtT and it was a matter that the FtT was entitled to consider.

16. In relation to the challenge that the FtT had impermissibly focussed solely on areas of inconsistency identified by the respondent in her refusal letter, the FtT's reasons were, Mr Melvin urged me to consider, sufficient enough and it was not necessarily for the FtT to have listed or written a detailed analysis of all the questions. It was sufficient that where such concerns were identified that the FtT set these out and then ask himself the question, which he did, as to whether the subsequent witness evidence addressed these concerns.

17. In relation to the third area of concern around an arguably erroneous statement as to reliance upon a previous relationship with a British citizen, which it said was not correct, Mr Melvin suggested that it was only safe to assume that this related to the previous asylum claim where the appellant had claimed to have been in a relationship with a man and the protection claim had been rejected and not appealed. In circumstances where the protection claim, based on the fact of that relationship was not appealed, that was strongly indicative of the relationship referred to by the FtT.

The appellant's response

18. Finally, in response, Ms Bustani stated that the earlier EEA application was simply explained by the fact that the couple were unmarried and had not been living together for two years and therefore by virtue of that would have failed under the durability provisions of the EEA Regulations. Instead they had got married and then applied on a different basis. In relation to receipt of the interview records she made clear the basis of her instructions as to when the interview records had been received and it had not been included in the respondent's bundle. The point was that there was that there was no analysis of the whole of the interview records and simply a focus unduly on the brief list of inconsistencies. It was similarly unfair in that context to focus on the list, and dismiss or fail to analyse the evidence, unchallenged, of the witnesses who had attended the FtT's hearing to attest as to the genuineness of the couple's relationship.

Discussion and conclusions

19. First, in relation to ground (1), I accept Mr Melvin's submission that although it is regrettable, that a typographical error must have occurred and I am satisfied that §§24 and 25 must be read in the context of the FtT previously and correctly referring himself to the burden of proof being upon the respondent to prove that the marriage is one of convenience. That was in the context not only of the early reminder by the FtT of the test at §5; but also the inconsistencies identified at §20; the discussion of those inconsistencies by reference to the sponsor and witnesses at §21 and also what the FtT regarded as the adverse history of the appellant at §22. Put in very simple terms, throughout the analysis, the substance of which is at §§19 to 22, it is all critical of the appellant and in those circumstances it is clear that the criticism was in the context of the burden of proof being on the respondent, and not the other way around.

20. However, where I do regard the FtT as erring is in relation to grounds (2) and (3). In concluding that there were material errors of law, I should emphasise that assessments of credibility are nuanced and fact-specific assessments and I am acutely conscious that it is not appropriate for me to substitute my view as to what I have decided and equally, I do not have the benefit of hearing all of the live evidence that the FtT had before him.

21. Nevertheless, I do regard there as being three crucial errors. The first, as Ms Bustani compellingly submitted, was the FtT's focus in §20 on inconsistencies clearly recorded by the FtT as:

> "*relied upon by the respondent [and] summarised at the end of the interview record.*"

22. The decision then listed 11 bullet-points of concerns, consistent with the summaries at the end of the interview records. The practical difficulty is that although the FtT referred at §18 to having considered all of the evidence, the FtT did not analyse whether the noted inconsistencies were ones that were in the context of core,

consistent accounts in other areas, during lengthy interviews and any inconsistencies were merely marginal or ancillary; or instead were ones of such gravity that even if the remainder of the account was said to be plausible, the quality of the inconsistencies raised such serious concerns, to outweigh the remainder of lengthy, consistent accounts.

23. In the absence of such an analysis, I accept the criticism that instead, the FtT impermissibly focussed only on the inconsistencies identified, without considering the wider context. This was particularly material where the appellant had not received the interview notes until three days before the FtT hearing. In those circumstances, it was all the more important that the FtT considered all of the answers in the interviews, not least because the witnesses could not have been expected to have dealt with the full interview in their written witness statements, for example to highlight the areas where there were substantial consistencies, for example, in relation to cohabitation. The impermissible focus is material where the core issue was the appellant's and sponsor's credibility.

24. The FtT's second error was the lack of his analysis of the three witnesses other than the appellant and the sponsor. The FtT noted at §21 the witnesses' evidence (all unchallenged and all attesting as to the genuineness of the marriage). The FtT even went so far as to say that

> "*it is quite possible that the sponsor and the witnesses honestly believe that the relationship is genuine and subsisting*"

25. Mr Melvin's response was that such a comment was consistent with a marriage of convenience, where the intention of the parties at the time they married was relevant, and the marriage may then have blossomed into a genuine relationship, or one party may have come to believe that the relationship is a genuine one.

26. I accept Mr Melvin's submission that the correct focus must be on the intention of the couple at the time they married. However, here, it is far from clear that the witness evidence was only limited to post-marital evidence or could, instead, also relate to the couple's relationship before getting married. While the written witness statements appear to be brief, that was also in the context of late disclosure of the marriage interview records. Each of the witnesses had taken the trouble to attend the FtT's hearing, adopt their statements attesting to their belief in the genuineness of the relationship. Their evidence was unchallenged and could well have crossed over into the earlier stages of the relationship. In contrast, the FtT's analysis of their evidence was limited, at §21, to the following:

> *"I have considered the evidence of the sponsor and the witnesses who have provided statements. I do not consider any of the statements adequately addresses the detailed inconsistencies in the marriage interviews or substantiates the assertion that the relationship between the appellant and the sponsor is genuine and subsisting. I accept that that it is quite possible that the sponsor and witnesses honestly believe that the relationship is genuine and subsisting…"*

27. That, in my view, was not an adequate analysis of the witnesses' evidence. In particular, there is no analysis of how reliance is placed upon apparently inconsistent answers given by the sponsor during her interview, if it is accepted that she is an innocent party to the relationship. To take one example, one of the claimed inconsistencies was a reference to the couple giving "*differing accounts of their friends and of their last time out together*." How such an inconsistency would have a bearing on the credibility of the couple's intentions when marrying, when the sponsor's genuine intentions are apparently accepted as possible, is not analysed or explained (although I am conscious that the test is not whether the marriage is genuine and subsisting).

28. I emphasise that not in every case would it be necessary to ask questions of witnesses and the FtT should not fall into the trap of carrying out an enquiry of their own, in the absence of cross-examination. Nevertheless, the FtT should have explained why the account of the witnesses had no substantive bearing on the specific concerns identified.

29. The FtT's final error was to place weight, at §22, on the appellant's admission that he had sought leave on the basis of a relationship with a previous British citizen which was not genuine. I have not carried out an examination of all of the extensive FtT bundle, but Mr Melvin was unable to refer me to any evidence or document where there was such an admission. Moreover, there is a clear distinction between pursuing an asylum claim unsuccessfully, and admitting that it had been made on a false basis. Second, I accept Ms Bustani's submission, and Mr Melvin could not point to any claimed relationship in that context being with a British citizen.

30. Bearing in mind that the sole issue was the intention of the couple at the time that the marriage was entered into, I am satisfied that the FtT's assessment of their credibility was critical. Each of the three identified errors alone was material, so as to make the FtT's decision unsafe, and they compounded one another.

Decision on error of law

31. In my view there are material errors here and I must set the FtT's decision aside, without preserved findings of fact.

Disposal

32. With reference to paragraph 7.2 of the Senior President's Practice Statement and the necessary fact-finding (involving 5 witnesses) this is clearly a case that has to be remitted to the First-tier Tribunal for a complete rehearing. All aspects of the claim must be addressed and there are no preserved findings.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside, without preserved findings of fact.

I remit this appeal to the First-tier Tribunal for a complete rehearing.

Directions to the First-tier Tribunal

This appeal is remitted to the First-tier Tribunal for a complete rehearing with no preserved findings of fact.

The remitted appeal shall not be heard by First-tier Tribunal Judge Trevaskis.

No anonymity direction is made.

Signed *J Keith* Date: 25th March 2021

Upper Tribunal Judge Keith