



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: EA/03191/2017

**THE IMMIGRATION ACTS**

**Heard at Cardiff Civil Justice Centre**

**Decision & Reasons**

**On 3 January 2019**

**Promulgated**

**On 8 February 2019**

**Before**

**UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**MUHAMMED ASHRAF KHAN**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms M Bayoumi instructed by Qualified Legal Solicitors

For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. The appellant is a citizen of Pakistan. On 10 May 2016, he married a Lithuanian national, Raimonda Lapinskaite. On 8 August 2016, he applied for a residence card as the spouse of an EEA national exercising Treaty rights in the United Kingdom under reg 18(1) of the Immigration (EEA) Regulations 2016 (SI 2016/1052). On 22 March 2017, the Secretary of State refused that application on the basis that the appellant was a party to a “marriage of convenience” and so was not a “spouse” of an EEA national.

2. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 28 March 2018, Judge Mathews dismissed the appellant's appeal. He concluded that the appellant was indeed a party to a "marriage of convenience".
3. The appellant sought permission to appeal. Permission was initially refused by the First-tier Tribunal but on 16 October 2018 the Upper Tribunal (UTJ Kebede) granted the appellant permission to appeal.
4. On 20 November 2018 the Secretary of State filed a rule 24 notice seeking to uphold the judge's adverse decision.

### **The Judge's Decision**

5. At the hearing before Judge Mathews, the respondent was not represented. The appellant was represented by Counsel and the appellant, sponsor and her son gave oral evidence. This evidence was not, of course, challenged by cross-examination in the absence of a Presenting Officer. In addition, the judge had written evidence, in particular from a health visitor (Louise Crawford) supporting the genuineness of the relationship between the appellant and sponsor. She had become involved with the appellant and sponsor because on 25 November 2017, the sponsor gave birth to a child of which the appellant is the father.
6. There were a number of issues raised in the refusal letter, including discrepancies in the evidence of the appellant and sponsor at their respective interviews concerning their relationship and there was evidence of council tax bills relating to properties in Scarborough and Newport where the appellant and sponsor said they lived together but that the sponsor had, until she more recently made repayment, claimed a 25% reduction for single occupancy.
7. In his determination, Judge Mathews set out that the legal burden, together with the initial evidential burden, was upon the Secretary of State to establish that the appellant's marriage was a "marriage of convenience". The judge then went on to consider the evidence, in relation to the council tax bills, the evidence from the health visitor (including that the appellant and sponsor now had a child together) and a number of "discrepancies" between the evidence of the sponsor and appellant in their respective interviews. The judge also took into account that the appellant had previously sought to remain in the UK as the "potential spouse" of another woman even after he had met the sponsor. The judge also referred to the fact that the appellant had a "poor immigration history" and has sought to avoid immigration control. The judge's reasons are at paras 17 to 37 as follows:
  - "17. My findings are inevitably set out sequentially, but I have considered all evidence in the round before prior to making any findings or reaching any conclusions.
  18. I also note, as observed by the respondent, that council tax bills submitted to prove the claimed addresses of the appellant and

sponsor in Scarborough and later Newport, give properties in the name of the sponsor, but then also grant her a 25% reduction for single occupancy.

19. The reference to single occupancy at the claimed addresses of cohabitation, together with the apparent discrepancies on the face of the marriage interviews, such as the appellant stating that his wife went with him to hospital in the last 12 months, when she denied any such attendance, are matters that persuade me to find that the respondent has met the legal burden of proof imposed by the decision of **Rosa [2016] EWCA Civ.**
20. I have noted the DNA results, photographs and maternity notes before me, I note too the letter from Louise Crawford (health visitor) at page 316 of the bundle.
21. I am persuaded to find from the consistent oral evidence, DNA paternity assessment, and supporting letter from the health visitor, that the appellant and sponsor have a child born on the 25<sup>th</sup> November 2017. I note that the health visitor has conducted parenting assessments over weekly visits for a 7 week period prior to her letter of the 12<sup>th</sup> January 2018. She suggests that the appellant and sponsor are committed and caring parents, and are in a genuine relationship with each other.
22. The account of the health visitor is supported by the account of the sponsor's son, who spoke of similar commitments, and other letters of support.
23. I keep in mind the evidence above, and consider next the contents of the marriage interviews. I have noted with care that the appellant suggests that during his interview he was nervous and struggled to understand some questions, hence the apparently contradictory replies given by him and the sponsor in their interviews.
24. On reading the interviews in full I do find that there are significant discrepancies despite the assertions of nervousness and confusion by the parties.
25. I note simple erroneous answers, such as stating that the sponsor was with him at hospital, then later stating that she was not.
26. The sponsor could not give the names of the witnesses at the couple's marriage, did not know what work her husband had been doing before he came to the UK. Was not sure how long he had been in Ireland claiming asylum, despite claiming to have been in a relationship at that point.
27. Both parties were unable to give full and consistent accounts of the jobs of their respective fathers.
28. I view those replies in the context of council tax bills indicating single occupancy of the homes claimed to have been occupied by both appellant and sponsor.
29. The sponsor said in relation to her Newport property that she had subsequently repaid her council tax refund, I do not accept that fact given that she made no mention of it in her witness statement, and produced no receipt for such repayment,

something that would be reasonable to expect had she realised her error, recognised the impression of single occupancy that it had given, and sought to remedy it.

30. I also note that in her evidence the sponsor stated that the appellant had not been to Ireland, since they moved to Newport. That rather begs the question as to how the council tax for their property would ever have included a single occupancy discount if truthful details were provided when the accommodation was first taken up.
31. For the reasons given above, I am not satisfied that the couple have co-habited as claimed for the period claimed. I am not persuaded that they have had a genuine and committed relationship for the period claimed prior to the present application.
32. I note that the appellant accepts a previous attempt to secure status in the UK as the potential spouse of a woman in the UK, and that occurred after he had met this sponsor, yet she knew nothing of that fact. The appellant did not pursue that matter after refusal, despite asserting that the relationship had been genuine when making the application.
33. I note too that he accepts having been previously removed from the UK, and returning covertly. I find that he has a poor immigration history and has demonstrated a willingness to avoid immigration control by illegal entry, and to work illegally within the UK.
34. Bringing together these strands of evidence I find that the appellant and sponsor have a new child as claimed. I accept that the appellant is a caring and loving parent of that child, as noted by the health visitor.
35. I note the health visitor's views as to the relationship of the parents, but I must view all of the evidence before me. For the reasons set out above I am not persuaded that the relationship in this case is genuine and subsisting, despite a decision to conceive and give birth to a child. I make that finding given the telling lack of knowledge displayed in marriage interviews, and the documentation recording that the sponsor lived alone in Newport and Scarborough, rather than with the appellant as claimed. The dreadful immigration history of the appellant reflects on his credibility, but is of course only a single factor.
36. I note and recognise the implication of my findings, that this man and the sponsor have conceived a child despite the fact that their relationship is not a genuine one as claimed. I have considered all matter at length, and I regret having to make such a finding, but I note that considerable lengths that this man has already gone to in the past to secure his position in the UK.
37. I find that the marriage in this case, was a marriage of convenience in light of the concerns set out and found above. The respondent's concerns have not been adequately addressed in the evidence, and are made out on the evidence before me. I find that the appellant has further sought to strengthen his

position in the UK by conceiving a child with the sponsor. I do not find that the sponsor necessarily knew that the appellant's intentions were dishonourable in fathering a child, hence the appearance of a happy couple to the health visitor. But I am not persuaded that the appellant's intentions have been honourable or genuine."

8. As will be clear, the judge concluded that despite the evidence of the health worker and that the appellant and sponsor had a child, the "lack of knowledge displayed in the marriage interviews" and the judge's view that the council tax documentation demonstrated that the couple had not been living together, together with the appellant's "dreadful immigration history", led to the conclusion that their relationship was not a "genuine and subsisting" one and was a "marriage of convenience" (see paras 35 and 37 in particular).

### **The Submissions**

9. In her oral submissions, Ms Bayoumi made a number of focused points arising out of the grounds.
10. First, she submitted, in effect, that the judge failed to make a balanced assessment of the evidence as required by the Supreme Court in Sadovska and Another v SSHD [2017] UKSC 54 at [34]. She submitted that there had been no challenge to the evidence of the health visitor (in the absence of cross-examination) or, indeed, of the sponsor's son. The judge had focused, and relied upon, the inconsistencies in the interviews without having regard to the consistencies in their evidence as well.
11. Secondly, she submitted that the judge had failed properly to engage with the appellant's explanation in relation to the sponsor's claim for "single occupancy", namely that she had repaid it when she discovered her error. Ms Bayoumi was unable to say whether the council tax documents were an issue before the judge.
12. Thirdly, Ms Bayoumi submitted that the judge had made a simple mistake in identifying a discrepancy between the evidence of the appellant and sponsor at their interviews as to whether or not the sponsor had accompanied the appellant to hospital for a scan. The judge 'read' the evidence as being that the appellant had said, at first she accompanied him, but then secondly said she had not. Ms Bayoumi submitted that looking at the interview records it was clear from the appellant's interview (at questions 39-46) that he had not said the sponsor accompanied him but rather had said she had not. Likewise, in identifying the inconsistency between their evidence at interview, the judge had wrongly interpreted her answer at question 44 when she had been asked whether the appellant had been "in hospital at all over the last year" - to which the sponsor answered "no" - as inconsistent with the appellant's evidence which was not about being "in hospital" but about attending as an outpatient for a scan.

13. Finally, Ms Bayoumi submitted that if the judge was to, as he did in para 36, find that the sponsor and appellant had conceived their child in order to secure the appellant's immigration position, that matter should have been put to them in their evidence, at least by the judge raising the issue.
14. On behalf of the Secretary of State, Mr Howells submitted that the judge had properly directed himself on the burden and standard of proof consistently with the Court of Appeal's decision in Rosa v SSHD [2016] EWCA Civ 14 (approving the Upper Tribunal's decision in Papajorgji [2012] UKUT 38 (IAC)). Mr Howells submitted that the judge had considered the evidence in the round and the evidence in the marriage interviews was key evidence bearing in mind that the interviews were conducted in English, so there was no translation which could, if mistranslated, could result in apparent discrepancies. Mr Howells submitted that the fact that the Presenting Officer was not present at the hearing did not mean that the judge was obliged to accept all the oral and documentary evidence at its face value without considering its reliability and what weight to give it. Relying upon a passage in the judgment in R (Molina) v SSHD [2017] EWHC 1730 (Admin) at [73], Mr Howells submitted that the judge had correctly considered whether this was a "marriage of convenience" based upon the parties' intentions at the date the marriage was contracted.
15. Mr Howells accepted that the judge had been wrong, in para 25, to identify a discrepancy in the evidence of the sponsor and appellant as to whether or not she accompanied him to hospital for his scan. He accepted that the appellant had not said that she accompanied him in his answers at interview. However, Mr Howells submitted that this error was not material as there were other discrepancies which the judge could properly rely upon.

## **Discussion**

16. I accept Mr Howells' submission that the judge correctly identified (at para 15) that the legal burden of proof was upon the Secretary of State to establish that the appellant's marriage was a "marriage of convenience". Further, the judge correctly identified that the evidential burden lay upon the Secretary of State. Finally, I accept that the judge correctly looked to the "intentions" of the parties at the date of contracting the marriage as to whether or not their marriage was a "marriage of convenience." That is a distinct question from whether or not their relationship is a "genuine" one; the focus is upon whether the predominant purpose of contracting the marriage was to gain a right of residence for the appellant under EU law (see Molina at [73] and Sadovska and Another at [34]). Thus far, therefore, the judge's decision is sound. I do not accept Ms Bayoumi's submission that, despite his reference to the correct and relevant law, the judge in effect placed the burden upon the appellant.
17. That said, however, I have nevertheless concluded that the judge did not carry out a lawful assessment of the evidence, in the sense of a balanced

assessment of the factors weighing in favour of the appellant against those weighing against the appellant.

18. It is, perhaps, axiomatic that a judge must undertake a balanced assessment of the evidence and it is illustrated by Lady Hale's approach in [34] of Sadovska and Another. Here, the judge, in my judgment, gave undue prominence to discrepancies between the evidence of the appellant and sponsor. Those discrepancies were, of course, entirely relevant to his assessment but had, as Lady Hale pointed out, to be considered in the light of both parts of the evidence which support their claim. Here, it is accepted, by Mr Howells that in para 25 the judge fell into error in identifying a discrepancy between the evidence of the appellant and sponsor. The appellant did not state that he was accompanied to hospital for his scan by the sponsor. Likewise, the answer which the sponsor gave at question 44 of her interview was in answer to the question "has he been in hospital at all over the last year?"; to which she replied 'no'. The interviewer did not follow up on that answer and the judge took it (in my judgment erroneously) as an unequivocal statement that the appellant had not been "to" hospital. In fact, the question concerns whether he had been "in" hospital. The fact that the appellant had attended a clinic in order to have a scan did not mean that had been "in" hospital - in the sense of admitted to hospital but only that he had been "to" hospital. Without further elaboration, in my judgment, the judge placed undue weight on this answer as being inconsistent with the appellant's evidence that he had been to hospital in order to have a scan.
19. In addition, there was evidence before the judge, quite independent of both the appellant and sponsor, that their relationship was a "genuine" one from a health visitor who had the opportunity to see the appellant and sponsor regularly following the birth of their child on 25 November 2017. This evidence was, of course, in the absence of a Presenting Officer effectively not challenged. Of course, the health visitor may be mistaken and the evidence was only some evidence of their intentions when marrying. It could not, however, be simply discounted. It was also supported, albeit by evidence not likewise describable as independent, from the sponsor's son.
20. The appellant's case was not, on the evidence, without its difficulties. There were discrepancies in the evidence, including absences of knowledge about each other's lives which the judge could take into account. There was also the evidence concerning the council tax payments and that the sponsor claimed a single occupancy discount during 2016 when the appellant and she claimed to live together. It may well be that the judge was entitled to disbelieve her explanation that this was an innocent mistake.
21. However, having identified those parts of the evidence which weighed against the appellant's claim, it was nevertheless incumbent upon the judge to give due weight to those parts of the evidence which supported his claim. The judge's focus is readily apparent and it is upon the negative

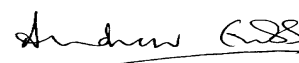
factors, including the appellant's adverse immigration history. The positive evidence, which included the consistent parts of their evidence, the independent evidence of the health visitor and the fact that they had had a child together were not, in my judgment, given due weight such that a balanced assessment of the evidence resulted in the judge's adverse finding.

22. This was a case which 'cried out' for an assessment of the evidence of the appellant and sponsor following cross-examination. The judge was deprived of that option because no Presenting Officer was present. Entirely properly, the judge did not seek to descend into the arena and cross-examine the witnesses. Their evidence was, as a result, not directly challenged before him. Likewise, the 'new' evidence was simply not subject to challenge. In the circumstances, the judge should have given due weight to the support evidence. His legal error is, in my judgment, a failure to engage in a 'balanced' assessment of the positive aspects of the evidence which, as a result, led him to focus on the negative aspects of the evidence. That was an error of approach in assessing the evidence which amounts to an error of law.
23. For these reasons, the judge erred in law in reaching his adverse credibility finding and in concluding that the appellant's marriage was a "marriage of convenience". That finding, and consequently his decision, cannot stand.

### **Decision**

24. Thus, the decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. That decision cannot stand and is set aside.
25. Given the nature and extent of fact-finding and having regard to para 7.2 of the Senior President's Practice Statement, and as was accepted by both representatives before me, the proper disposal of the appeal in the circumstances is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Mathews.

Signed



A Grubb  
Judge of the Upper Tribunal

18 January 2019