



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005425
First-tier Tribunal No:
EA/50531/2020
IA/01177/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 May 2023

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

ELSAYED SAID RASHAD ABDELMOTALEB
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs H Price of Counsel, instructed by Addison and Khan Solicitors

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

Heard at Field House by remote video means on 11 May 2023

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no technical difficulties for the hearing itself and the papers were all available electronically.
2. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Spicer promulgated on 9 April 2022, in which the Appellant's appeal against the decision to refuse his application for an EEA Residence Card under the Immigration (European Economic Area) Regulations 2016 dated 15 October 2020 was dismissed.

3. The Appellant is a national of Egypt, born on 26 June 1985, who applied for an EEA Residence Card on 22 November 2019 as the spouse of an EEA national (the Sponsor) exercising treaty rights in the United Kingdom. The Respondent refused the application on the basis that the marriage on 5 November 2019 was a marriage of convenience. In particular, that there were discrepancies in the answers given in marriage interviews of the Appellant and the Sponsor; the two knew little of each others' families and backgrounds; the Sponsor had been away over Christmas just after the marriage and the Appellant knew little about the trip; the Appellant lacked knowledge of rent, bills and the lodger and had said that he and the Sponsor don't see each other much.
4. Judge Spicer dismissed the appeal in a decision promulgated on 9 April 2022 on all grounds. It was found that neither the Appellant nor the Sponsor was credible, taking into account the Appellant's history of falsely claiming asylum as a Palestinian national, a position maintained for many years, before the First-tier Tribunal and in further submissions; that the relationship was only of a short duration before the marriage; that no family members attended the wedding; that the Sponsor had travelled over Christmas shortly after the wedding; a lack of joint finances and knowledge of housing and bills and a paucity of evidence of any shared life as a couple. Overall, it was found that the Respondent had established on the evidence a reasonable suspicion of a marriage of convenience and the Appellant had not addressed those such that the appeal was dismissed.

The appeal

5. The Appellant appeals on three grounds. First, that the First-tier Tribunal failed to properly consider all of the evidence before it, including the marriage interviews in which over 550 questions were asked and the majority of which were answered consistently, with evidence addressing the points relied on by the Respondent, which had also not been taken into account. Secondly, that the First-tier Tribunal relied on points for rejecting the evidence that were not raised in the reasons for refusal letter or during the course of the hearing, such that the hearing was procedurally unfair. These points included an alleged discrepancy as to when the couple met, the speed at which the relationship developed, why there were no family members at the wedding, why the wedding rings had not been resized and why the couple had not been on a short break together. Finally, that the First-tier Tribunal's decision making process was flawed, as shown by the structure of the decision, with credibility findings made before credibility was considered, and the lack of finding that the Respondent had discharged the evidential burden.
6. At the oral hearing, Mrs Price relied on the written grounds of appeal and expanded on the same in submissions. It was noted that the Respondent did not appear before the First-tier Tribunal and whilst acknowledged that the hearing could proceed in the absence of a party, in this case it meant that the Judge was left to prove the Respondent's case for her. It was submitted at the same time that the Judge did not rise much above the

reasons for refusal letter, but when he did, he did so in an unfair manner and proceeded on the basis of assumptions contained in the reasons for refusal letter.

7. Mrs Price acknowledged that the Judge properly self-directed to the relevant authorities in the decision, but submitted that these were not applied properly. For example, in Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC) it was found that just because there was an immigration advantage does not mean that it is a marriage of convenience and in Rosa v Secretary of State for the Home Department [2016] EWCA Civ 14 it was held that the assessment needed to be of the parties' intentions at the date of the marriage and whether it was subsisting. On this point it was submitted that the First-tier Tribunal had failed to take into account the evidence of witnesses who attended the hearing on the assumption that they did not know the parties' intentions, but contradicting that approach, also relied on the lack of family attending the wedding when the same could have also been said about their knowledge or lack of as to the intentions. The Judge also failed to take into account the potential travel difficulties for family members coming to the United Kingdom. Overall, in relation to Rosa it was submitted that there was prima facie a genuine marriage and the Respondent's reasons for refusal amounted to no more than suspicion that it was not. As confirmed in Sadovska v Secretary of State for the Home Department (Scotland) [2017] UKSC 54, the burden of proof that it is a marriage of convenience is on the Respondent.
8. In paragraphs 53 and 54 of the decision, there is reference to the Respondent relying on inconsistencies in the marriage interviews, but in relation to consistencies, the Judge found that consistent answers could be learned, so either way the Appellant could not win. It was submitted that greater weight should have been attached to the marriage interview and consistency in answers beyond the finding that they were 'broadly consistent'.
9. In relation to the reasoning, the matters relied upon in paragraph 56 of the decision are issues which are personal to a particular relationship and relies on matters which should not have been taken into account, such as the length of the relationship. It was submitted that all matters in paragraph 56 breached procedural fairness and in any event should not have been taken into account in substance as they were not relevant to the issue of whether this was a marriage of convenience. The points were based on assumptions without putting the matters to the Appellant or the Sponsor, it can not be assumed that a couple would take a short break, not even a honeymoon and as the Appellant did not have a personal bank account, he could not pay bills and therefore it was credible that he may not know the details of them. It was suggested that it was also a presumption against the modern world that a spouse could not travel independently or with friends.

10. Mrs Price submitted that paragraph 58 of the decision should have appeared much earlier, with a section following as to the Respondent's case and dealing with each point in that to determine whether the Respondent met the evidential burden. This paragraph appearing at the end only pays lip service to the burden and then continues in substance to place the burden on the Appellant and find that he has not discharged it. It was further submitted that the Appellant's immigration history should not be relevant as it was a long time ago and people can change, however the Judge appeared biased against the Appellant because of his history and then failed to pay enough attention to the evidence in relation to the marriage and relationship. It was accepted that there was a shifting burden, on the Respondent evidentially to establish a prima facie case initially, then on the Appellant to respond and finally the legal burden on the Respondent to establish a marriage of convenience. However, in this case, it was submitted that the decision went straight to placing the burden on the Appellant to disprove the case against him, with too much focus on the Appellant's past.
11. On behalf of the Respondent, Mr Walker submitted that there was no material error of law in the decision of the First-tier Tribunal. There was a clear and correct self-direction as to the burden of proof being on the Respondent in paragraphs 12 and 50, including a direct quote from the case of Sadovska. It was a matter for the Tribunal what weight was to be given to the evidence when assessing credibility and part of that rationally included that the Appellant had a long history between 2011 and 2019 of using a false name and nationality with the Respondent and the Tribunal, and in any event, with considered evidence about the marriage and interview. The conclusion reached was one which was rationally open to the Judge on the evidence before the First-tier Tribunal. Finally, there was no procedural unfairness in this case, the Judge was simply mindful not to take on the role of a Home Officer Presenting Officer and entering the arena.

Findings and reasons

12. The first ground of appeal concerns the weight attached by the Tribunal to the marriage interviews and explanations for the matters relied upon by the Respondent as to inconsistencies in the same. It is trite that the weight to be attached to evidence is primarily a matter for the First-tier Tribunal hearing the case absent any irrationality or perversity (neither of which is suggested in this appeal). In the present case, the decision expressly refers to the written statements from the Appellant and the Sponsor (including the detail of responses in relation to points in the reasons for refusal letter from the marriage interviews) and the marriage interviews. In paragraph 54 the Judge accepted that the answers given by the Appellant and Sponsor at the marriage interview were broadly consistent; albeit the interview was on notice and information may be learned. It is expressly clear that this evidence was taken into account by the Judge, in the round alongside the other evidence before the Tribunal. There is no specific statement as to the weight to be attached to this

evidence. In these circumstances, where the evidence was expressly, accepted albeit with some caution, there is no identifiable error of law in the Judge's assessment of it. In the absence of a statement as to the weight attached (contrary to other factors upon which significant or more weight was expressly attached) it is further difficult to submit that it was not sufficient. It was rationally open to the Judge to find that the marriage interviews were broadly consistent but that in the context of considering all of the evidence before the Tribunal, also find that it was a marriage of convenience.

13. The second ground of appeal primarily concerns procedural fairness in the hearing, although in oral submissions this was extended in the alternative to include that none of the matters in paragraph 56 were properly to have been taken into account in assessing whether the marriage was one of convenience. I deal with the procedural fairness aspects first.
14. This was an appeal before the First-tier Tribunal in which the Respondent was not represented. In those circumstances, guidelines are in place known as the Surendran guidelines which were endorsed in guidance to Adjudicators (as they were at the time in 2003, the role now taken by a First-tier Tribunal Judge) by reference to the case of MNM v Secretary of State (IAT starred appeal) 00TH02423. Those guidelines confirm that in such cases, it is not the role of a Judge to adopt an inquisitorial role and in the absence of a representative for the Home Office, its case is as put in the letter of refusal and any further written representations and it is not the function of a Judge to expand upon that document or raise matters not raised in it, unless they are apparent from a reading of the papers and drawn to the attention of the Appellant. Questions may be asked for clarification but these should not amount to cross-examination which may have been undertaken by the Respondent if represented. Further, where matters of credibility are raised in the reasons for refusal letter, the Appellant's representatives should be invited to address these matters and whether or not that is done, the Judge is entitled to form his own view as to credibility on the basis of material before him.
15. The oral submissions on behalf of the Appellant in this case were critical of the Judge for not going beyond the reasons for refusal letter and for not asking more questions of the Appellant and the Sponsor. However, in this case it appears the Judge acted entirely within the normal guidelines for appeals where the Respondent is not represented, putting the case as in the reasons for refusal letter for response and not embarking on any cross-examination herself. The matters relied upon in paragraph 56 of the decision are all points upon which no further questions were necessary as a matter of procedural fairness and covered matters raised directly in the reasons for refusal letter (including the Appellant's knowledge of living arrangements in (v) and evidence of a share life together in (vi)) or simply arose from the marriage interviews themselves which were in evidence (including as to discrepancies about when they first met, the Sponsor's travel over Christmas in 2019, which overlaps with the reasons for refusal letter) and evidence as to rings, length of relationship and wider family. In

cases where the Judge relied on points arising from the evidence before her, these was also consideration of possible reasons, such as difficulty in travel particularly by the Appellant's family in Egypt. These matters were simply those which the Judge was entitled to form her own view about and did not require any specific questions to be put to the Appellant or Sponsor, for example to ask further questions as to why matters outlined in evidence were that way. I do not find any procedural unfairness in the hearing, to the contrary, the Judge acted entirely as expected in the absence of a representative for the Home Office.

16. The second part, although not directly raised in the grounds of appeal, was that the Judge was not in any event entitled to take into account any of the matters in paragraph 56 as none were relevant to the issue to be determined and/or none went beyond mere suspicion. There is no merit in these submissions either. The Tribunal set out the evidence, made factual findings and then gave reasons for the overall conclusion. Those matters taken into account in paragraph 56 were all points which were reasonably and rationally open to the Judge to take into account when assessing both credibility and whether this was a marriage of convenience; considering all of the evidence in the round. There are of course a wealth of differences between individuals relationships but certain matters remain as ones which are to be reasonably expected in a marriage, including, but not limited to evidence of a shared life, shared accommodation and finances. These are matters which can be relevant to assessing the intention of the parties at the time of marriage. Cogent reasons are given for the inclusion of all of the points raised in paragraph 56 which are not based on mere assumptions or outdated stereotypes and do not raise any error of law. The final point in paragraph 56(vii) does not in any event seem to fall within any of the Appellant's submissions, it is simply that little weight is placed on written evidence of those who did not attend the hearing and may be unaware of intentions on the marriage anyway.
17. The final ground of appeal is said to be based on the structure of the decision, but is more properly that the First-tier Tribunal has applied the wrong burden of proof, requiring the Appellant to disprove a marriage of convenience rather than the burden of proof being on the Respondent.
18. The First-tier Tribunal's decision sets out clearly the relevant legal provisions, including in paragraph 12 by reference to the cases of Sadovska and Rosa that the burden is on the Respondent (although this only refers to the evidential burden, that of itself does not identify any error of law for failing to also confirm the legal burden is on the Respondent, which is clear from the authorities referred to) and in paragraphs 47 to 50 setting out the relevant case law as to the sole issue of whether the marriage was a marriage of convenience. There is no dispute between the parties that these paragraphs identified the key relevant case law on the approach to be taken in such cases. The Appellant's case is that the structure of the decision shows that they were not properly applied. However, I do not find any error of law in the structure or otherwise of the decision.

19. The decision sets out the background to the appeal, the law, the evidence and details of the oral hearing, followed by the analysis and determination of the appeal in paragraphs 46 onwards, which itself summarises the relevant case law, makes findings of fact on the evidence and then considers and gives reasons as to credibility findings in paragraphs 53 to 56 and a conclusion in paragraphs 57 and 58. No error is disclosed by that structure and although there may be different permissible ways to set out the decision, the approach adopted here is not unlawful nor does it of itself suggest or support any illegality in the approach taken. I do not find that there are any conclusions on credibility or whether it is marriage of convenience before all of the evidence is considered and on reading the decision as a whole, paragraphs 57 and 58 simply contain the conclusions from the findings made. Paragraph 57 includes the finding that the Respondent has established a prima facie case that the marriage is one of convenience and it was not necessary, let alone unlawful for that conclusion to be reached having considered all of the evidence rather than it being made earlier in the decision. Paragraph 58 the rightly identifies that the evidential burden shifts to the Appellant and the conclusion that in all the circumstances, the Appellant has not adequately addressed the reasonable suspicion that the marriage was one of convenience. That says no more than that the Appellant has not met the evidential burden which had shifted to him once the Respondent had established a prima facie case.
20. Although it may have been helpful if a further sentence was included to say therefore, the Respondent has discharged the legal burden of proving, on the balance of probabilities, that it was a marriage of convenience; that was not strictly necessary in circumstances where the Appellant has not addressed the reasonable suspicions and in combination with paragraph 59 confirming that the Appellant does not satisfy the requirements of the Immigration (European Economic Area) Regulations 2016.
21. Overall, having set out the correct legal position and stated clearly that the burden of proof is on the Respondent, there is nothing in the decision (either structurally or in substance) which gives any support to the submission that the burden was in fact placed on the Appellant. It is clear when read as a whole that the Judge correctly applied the burden of proof, the Respondent satisfying the initial evidential burden of establishing it was a marriage of convenience, the Appellant not adequately addressing the points and therefore the Respondent satisfied the legal burden.
22. There were a number of discrete points in oral submissions which went beyond the grounds of appeal, including an allegation that the Judge was biased against the Appellant because of his immigration history. Such a submission is inappropriate without being properly raised in the grounds of appeal (particularly because if arguable it would be proper to put matters to the Judge for a response) and in any event has no proper basis within the context of this appeal. The Appellant accepted that he had previously claimed asylum in a false name and under a different nationality, a position that he maintained before the First-tier Tribunal on appeal and in

further submissions to the Respondent, over the span of some eight years between 2011 and 2019. The undisputed fact that the Appellant had been dishonest in his dealings both with the Respondent and the Tribunal over a significant period of time was something which could only rationally be taken as significantly adverse to his credibility. The suggestion that this was a long time ago is factually incorrect and that people may change is irrelevant. It was entirely reasonable and rational for this to be a factor weighing heavily against the Appellant and does not in anyway suggest bias.

23. For all of these reasons, there is no error of law in the decision of the First-tier Tribunal.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18th May 2023