Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/03464/2020
UI-2021-001395

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Thursday 24 March 2022	**On Tuesday 31 May 2022**

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

MR MARIO BARO

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss U Dirie, Counsel instructed by BMAP
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge I Coutts dated 1 December 2021 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 5 March 2020, refusing him 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 United Kingdom.

2. The Appellant is a national of Albania. He first entered the United Kingdom, clandestinely, in 2014. In 2016 he established a relationship with a Polish national, Justyna Malgorzata (hereinafter "the Sponsor"). They lived together from June 2017 until later that year when the Appellant returned to Albania to visit his elderly parents. The Sponsor subsequently joined him in Albania and they entered into a marriage on 22 December 2017. On 1 January 2018, the couple travelled to Calais and the Appellant sought to enter the United Kingdom as the spouse of an EEA national. The Appellant and Sponsor were interviewed by immigration officers. In consequence of discrepancies between their answers in respect of their relationship the Appellant was refused entry on 2 January 2018. The Appellant sought legal advice and was advised that in light of the refusal it would be difficult to obtain entry and the process could take two years. The Appellant, unwilling to endure any period of separation from his wife, entered the United Kingdom unlawfully a few days later.

3. On 27 April 2018, the Appellant applied for a residence card as the family member of an EEA national. The Respondent invited the Appellant and the Sponsor to an interview, which took place on 20 February 2020. The Respondent considered that the interview highlighted several inconsistencies between the evidence of the Appellant and the Sponsor and accordingly suspected that the marriage was one of convenience for the sole purpose of obtaining an immigration advantage. The Respondent refused the application on 5 March 2020.

4. The Appellant's appeal against that decision was heard in the First-tier Tribunal by Judge Coutts on 9 November 2021. The Appellant, the Sponsor and five witnesses gave oral evidence at the appeal. The Judge accepted the relationship "is a genuine and subsisting one" at [34], but concluded that the marriage was one of convenience owing to a number of discrepancies and inconsistencies in the evidence and he dismissed the appeal.

5. The Appellant's appeal against the Decision is on two grounds. Ground 1 asserts that the Judge misconstrued the Appellant's evidence. Ground 2 complains that the Judge failed to apply the correct legal test.

6. Permission to appeal was granted by First-tier Tribunal Judge Komorowski on 20 January 2022 on all grounds. We note, however, in respect of Ground 2 Judge Komorowski stated as follows:

> "5. I have difficulty understanding the complaint in Ground 2 given the judge specifically states that the decision is based on the appellant's "predominant reason"….But permission is granted on both grounds taking a "pragmatic view"…"

7. The Respondent filed a Rule 24 Reply on 24 February 2022 seeking to uphold the Decision in the following terms:

> "2. … In summary, the respondent will submit *inter alia* that the judge of the First-tier Tribunal directed himself appropriately.

3. The Respondent's representative drafting this response does not have sight of the record of proceedings and therefore at this stage does not accept that there is any material error of law in the decision of the FTTJ regarding what evidence the Appellant gave at the hearing."

8. The matter comes before us to determine whether the Decision contains an error of law and, if we so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. We have before us a core bundle including the Respondent's bundle and the Appellant's bundle before the First-tier Tribunal (referred to hereafter as [RB/xx] and [AB/xx] respectively). At the hearing Miss Dirie provided us with a transcript of the interview that took place on 1 January 2018. This transcript was before the Judge, but was not produced in the documentation before us. We have read the documentation and considered the evidence and submissions when reaching our decision.

Error of Law

9. The grounds of appeal on behalf of the Appellant are drafted by Miss Dirie, who represents the Appellant before us. We indicated to Miss Dirie, that like Judge Komorowski, we also had difficulty in understanding Ground 2. We pointed out to Miss Dirie that the Judge cited the relevant authorities at [23] and that it was appreciably clear that he applied the correct legal test at [27] to [32] and [48]. Miss Dirie rightly and properly accepted that there was no merit in Ground 2 and did not pursue it further.

10. Ground 1 is the Appellant's substantive ground of challenge. The challenge centres around the Judge's understanding of the Appellant's evidence relating to the events following his marriage to the Sponsor in Albania and his subsequent entry to the United Kingdom in January 2018. The salient parts of the evidence relating to these matters appear in the Respondent's "Interview Summary Sheet" dated 20 February 2020 [RB/108 -118] and the Appellant's witness statement dated 15 September 2020 [AB/1-5].

11. The Respondent's "Interview Summary Sheet" records as follows:

"When asked why the applicant chose to re-enter the UK illegally (having previously been refused entry to UK on 02 January 2018) rather than applying for an EEA FM visa once they had married, the sponsor claimed that they had sought advice from a solicitor who advised it would be too difficult, and so the applicant decided to re-enter illegally via a potentially dangerous route via lorry" [RB/110].

12. In his witness statement the Appellant states:

"9. On the 2nd January 2018, my wife and I travelled to Calais to enter the UK. **We had previously been advised that as we were married we could seek entry at the border**. However, I was refused entry as some of the answers my wife and I gave did not match.

10. Approximately 8-10 days later, I entered the UK clandestinely. I was desperate to be with my wife. I knew how upset she was when I was refused entry**. I know that was a wrong thing to do, but when I asked a solicitor for advice, they told me that it would be very difficult to get a visa to enter the UK as I had been refused entry.** They also told me that this process could take more than 2 years. I could not be without my wife for this time."

…

17. In respect of me re-entering the UK illegally, I was told by a solicitor that as I had been refused entry to the UK, if I returned to Albania and applied for a visa this would be refused and the appeal process would take about 2 years. It was for this reason, I had to risk my life and enter the UK the dangerous way as I needed to be with my wife."

[our emphasis]

13. There is no dispute between the parties and we accept that the Judge correctly summarised this evidence at [14] of the Decision in the following terms:

"On the 2 January 2018, the appellant and sponsor travelled to Calais to enter the United Kingdom. **They had been advised that because they were married they could seek entry at the border.** However, the appellant was refused entry because some of the answers he gave in his interview differed with those given by the sponsor in her interview."

[our emphasis]

14. We have considered whether this evidence featured in any other documentation before the Judge and we have examined, in particular, the written testimony of the Appellant and the Sponsor, the interview records and the Judge's typed Record of Proceedings. We could find none and Ms Everett candidly accepts that there is none.

15. We consider that it is clear therefore from the Respondent's "Interview Summary Sheet" and the written testimony of the Appellant that his evidence was that he sought legal advice after he married the Sponsor and only after he was refused entry to the United Kingdom at the port in Calais in January 2018. The only advice given prior to the attempted entry together was that "because they were married" they would be entitled to enter without more._

16. The Judge considered this evidence and in his omnibus conclusions stated as follows:

"44. The reality is that the appellant decided to return to Albania towards the end of 2017 for genuine family reasons; namely, the ill health of his parents.

45. Having done so I find that he then had no way of lawfully returning to the United Kingdom as he had been here unlawfully since 2014.

46. It is reasonable to conclude that this posed him and the sponsor with a dilemma.

> 47. **The appellant's own evidence is that they took advice about this and were told that if they were married he could seek entry to the United Kingdom as the sponsor's spouse at the port of entry.**
>
> 48. **They decided upon this as a solution. I therefore find that the sponsor's travel to Albania in December 2017 was furtherance of this aim and the predominant reason why they got married.**
>
> 49. In the circumstances, I find that their marriage was one of convenience."
>
> [our emphasis]

17. The offending paragraphs are [47] and [48] of the Decision where the Judge concludes that the Appellant and the Sponsor decided to marry after they were advised that this would facilitate his entry to the United Kingdom. That was not the Appellant's case and Ms Everett properly acknowledged, and we accept, that the Judge did misconstrue the Appellant's evidence and thus erred in doing so. As that error formed the basis of the Judge's conclusion that this was the "predominant reason" why the couple married at [48], Ms Everett had difficulty defending the Decision. She agreed that the Decision ought to be set aside, and we announced our decision to do so at the hearing.

Remaking

18. The representatives agreed with our indication that we saw no reason why we could not remake the decision. There was no dissent from either representative and both agreed that there was no need to hear further oral evidence in view of the unchallenged finding of the Judge that the relationship is genuine and subsisting.

19. We invited the representatives to make submissions. Ms Everett was content to leave the matter to the Tribunal and made no further submissions. In light of the Respondent's position, Miss Dirie made brief submissions and invited us to observe that the couple were engaged before they travelled to Albania; they could have married in the United Kingdom but chose to marry in Albania and did so because the marriage is genuine and not to obtain an immigration advantage.

20. Having considered the evidence and submissions before the Tribunal in the context of the applicable legal principles we announced our decision allowing the Appellant's appeal.

21. Given the position of the parties before us, there is no need for us to make any detailed findings as we proceed on the agreed factual basis that the relationship is genuine and subsisting.

22. The issue in the appeal is whether the Appellant's genuine and subsisting marriage to the EEA national, is nevertheless, a marriage entered into solely for the purposes of obtaining an immigration advantage and therefore a marriage of convenience.

23. In determining this issue it is settled law that the legal burden of proof is on the Respondent and that she is required to prove that the predominant, rather than sole, purpose of the marriage is to gain rights of entry/ residence. Incidental immigration and other benefits (e.g. tax advantages) that a marriage may bring are not relevant, if this is not the predominant purpose of at least one party to the marriage; Sadovska & Anor v Secretary of State for the Home Department (Scotland) [2017] UKSC 54.

24. The application was refused by the Respondent on 5 March 2020 due to discrepancies and omissions between the Appellant and the Sponsor's answers during a marriage interview that took place on 20 February 2020. It is not necessary for us to set out those inconsistencies. The Appellant accepts that there are discrepancies, albeit, not to the degree identified by the Respondent. Both the Appellant and the Sponsor provide detailed evidence in rebuttal in their respective witness statements and we are satisfied that any discrepancies which had arisen in their evidence previously were no doubt as a result of misunderstanding or human error and/or were insignificant. We also note that there was a considerable level of consistency in other respects in their responses at interview. The evidence of their relationship was supported by the live testimony of five witnesses in addition to documentary evidence supporting the relationship and cohabitation.

25. By the time the Appellant left to see his parents in Albania the couple had been in a relationship since 2016, had lived together since 2017 and were engaged to be married. We agree with Miss Dirie that it was open to the couple to marry in the United Kingdom, but they exercised a choice to marry in Albania. No evidence is brought to our attention by the Respondent that in exercising that choice the Appellant was seeking to gain an immigration advantage. On the contrary this is a genuine marriage. As such, and given that no other reasons are given by the Respondent for refusing the Appellant's application, we conclude that she has failed to discharge the legal burden of proof upon her.

26. For the reasons given above, we conclude that the Appellant has met the requirements of the EEA Regulations to show that he is the family member of a qualified EEA national and is entitled to a residence card on that basis. The appeal is therefore allowed.

Decision

27. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The Decision is set aside and is remade by allowing the Appellant's appeal under the EEA Regulations 2016.

We make no anonymity direction._

Signed: R Bagral
Deputy Upper Tribunal Judge Bagral Dated: 6 April 2022