Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-002939**
EA/50225/2020; IA/00292/2021

THE IMMIGRATION ACTS

Heard at Field House
On the 01 November 2022

Decision & Reasons Promulgated
On the 01 December 2022

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

BLEDAR ABDYLI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Tom Wilding, Counsel, instructed by Marsh & Partners
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant appals against the decision of First-tier Tribunal Judge Graves ("the judge"), dated 11 May 2022 (I have been unable to discern the date of promulgation). By that decision the judge dismissed the Appellant's appeal against the Respondent's refusal to issue him with a

residence card under the Immigration (European Economic Area) Regulations 2016 (the 2016 Regulations) as the durable partner of an EEA national.

2. The Appellant is a citizen of Albania, born in 1974. He arrived in the United Kingdom illegally in June 2015 and has accepted throughout that he was an economic migrant. His application for a residence card under the 2016 Regulations was based on a claimed durable relationship with Ms Lena Ovsianikova ("the Sponsor"), a Lithuanian national born in 1975 who had apparently arrived in this country in 2014. Initially, an application was made in July 2019. This was refused by the Respondent on the basis of an insufficiency of evidence.

3. The latest application was made in April 2020. The Respondent refused that application based in large part on answers provided by the Appellant and the Sponsor in an interview conducted in January 2020. A number of responses were quoted in the refusal letter, leading to the conclusion that there were material inconsistencies and a lack of knowledge, which in turn led to the conclusion that the application fell to be refused. It is of note that the wording of the refusal letter does not precisely mirror the observations made by the interviewing officer. The latter had commented that there were "reasonable grounds for suspicion that this was a relationship of convenience for the sole purpose of obtaining an immigration advantage" and "outcome: sham; marriage of convenience." The refusal letter did not include these particular points.

The decision of the First-tier Tribunal

4. It is plain that the judge undertook a thorough and conscientious consideration of the evidence and produced a detailed decision. Having helpfully set out the parties' respective cases and the summary of the evidence, the judge directed herself to authorities on the issue of marriages of convenience, including IS (Marriages of convenience) Serbia [2008] UKAIT 31, Papajorgji (EEA Spouse – Marriage of convenience) Greece [2012] UKUT 00038, Sadovska [2017] UKSC 54, and Rosa [2016] EWCA Civ 14. There was, she said, an initial burden to provide evidence justifying reasonable suspicion that the marriage was one of convenience and if that burden was not discharged, then the appeal fell to be allowed.

5. I note at this juncture that the present case was not concerned with a marriage, but it may well be said that relevant principles emerging from these authorities can be read across to the consideration of durable relationships.

6. I also note that the judge did not state in terms that where an allegation was made that a marriage or a relationship was a sham or one of convenience only, there was a *legal* burden resting on the Respondent to make good such an allegation.

7. The judge set out in great detail numerous findings which were adverse to the credibility of the Appellant and the Sponsor. These related to inconsistencies, both internal and as between their respective evidence, as well as to a lack of evidence on relevant matters. The judge found that there had been material inconsistencies on the year when the couple first allegedly met, a lack of credible evidence as to any emotional bond between the couple, and the absence of documentary evidence which could, in the judge's view, have reasonably been provided.

8. Having set out the findings on the Appellant's and Sponsors evidence, the judge referred to the evidence of five witnesses who had all appeared at the hearing. She noted that the Presenting Officer had not submitted that the witnesses were lying, or that they were mistaken. The judge concluded at [107] that the witness's evidence "cannot outweigh so many issues with the Appellant's and Sponsor's evidence." In the next paragraph, the judge considered the possibility that a relationship had existed, but it was not of the duration claimed and that the Appellant may have sought to gain an immigration advantage.

9. The judge concluded that there was insufficient reliable evidence of a durable relationship of a genuine and loving nature that was committed and long-lasting. In turn, she appeared to conclude that the relationship was not genuine, or was one of convenience. The appeal was dismissed.

The grounds of appeal and grant of permission

10. The grounds of appeal were unfortunately entitled "skeleton argument". Three grounds were put forward. First, it was said that the judge misunderstood or misdirected herself as to the specific basis for the Respondent's decision under appeal. The refusal letter had not stated in terms that the relationship was either a sham or one of convenience only. It was unclear as to how the judge had approached the whole case: in other words, had she assumed that the Respondent had alleged that the relationship was a sham or one of convenience, or had she proceeded on the footing that it was for the Appellant to show that his relationship was durable?

11. The second ground of appeal took issue with a number of the judge's findings on the Appellant's and Sponsor's evidence.

12. The third ground contended that the judge had failed to deal adequately with the witness's evidence.

13. When the application for permission came before the First-tier Tribunal, permission was granted on only ground 3, with an additional (and new) ground raised by the judge who considered the application. He deemed it appropriate to raise an additional ground on the basis that at [109] of the judge's decision, she appeared to have placed the burden on the Appellant

to show that his relationship was not a sham or one of convenience. The judge considering the application, regarded grounds 1 and 2 as being unarguable.

14. On 5 July 2022, the Appellant renewed his application for permission, based on grounds 1 and 2. Unfortunately, this renewed application does not seem to have been brought to the attention of any judge in the Upper Tribunal until I was informed of its existence the day before the hearing. Thus no decision had been made on that application.

The hearing

15. Following a discussion with the representatives, I decided that I would grant permission on grounds 1 and 2 (there was no opposition to this from Ms Everett).

16. Ms Everett conceded the existence of a material error of law by the judge in respect of her treatment of the witness's evidence. Ms Everett acknowledged the fact that the witnesses' evidence related to material issues going to the nature of the claimed relationship between the Appellant and the Sponsor and that no issues of credibility, or indeed reliability, had been taken against that evidence at the hearing below. Ms Everett accepted that although the judge had noted that the weight to be attached to oral and witness evidence was a matter for the fact-finding tribunal and had to be taken in the round with all other evidence, she had in effect left the witness's evidence over to the end of her assessment of all other evidence and only then purported to enquire as to whether the witnesses' evidence could have made a difference.

17. Further, the substance of the witness's evidence had not been properly addressed. It followed from this, Ms Everett submitted, that the erroneous approach to the witnesses' evidence could have infected the overall credibility findings and this in turn could (not would) have affected the outcome. Ms Everett accepted that there was therefore a material error of law in the judge's decision.

18. Both representatives were agreed that if the judge's decision were to be set aside, there ought to be a remittal to the First-tier Tribunal for the appeal to be reheard with no preserved findings of fact.

Discussion and conclusions

19. I remind myself that restraint must be exercised before interfering with the decision of the First-tier Tribunal, particularly where it has considered a significant amount of evidence from various sources and heard testimony from witnesses.

20. Having said that, I am satisfied that Ms Everett's concession in this case was probably made and that there is a material error of law in the judge's decision.

21. A good many of the judge's findings on the Appellant's and Sponsor's evidence are eminently sustainable in their own right. However, the five witnesses all had relevant evidence to give on the core issue in the case, namely the nature of the Appellant's relationship with the Sponsor. Their evidence was unchallenged. I agree with Ms Everett's submission that the judge either (a) left over consideration of their evidence until after all other findings and then considered whether what they had to say could plug the gaps or cure the evidential problems with the Appellant's and Sponsor's evidence; or (b) that she failed to conduct a proper analysis of the substance of the witness's evidence seen in the context of it being unchallenged before her. Either way, there was an error and, notwithstanding the other significant adverse findings, it could have made a difference to the outcome.

22. I am bound to say that I had some hesitation before concluding that the error was material: if the relevant test of materiality was "would" rather than "could", I might well have reached a different conclusion.

23. In light of the above, the judge's decision must be set aside.

24. Before moving on to the appropriate disposal of this appeal, I make two observations. First, as I indicated at the hearing, the wording of certain aspects of the grounds drafted by Mr Wilding were, in my view, unnecessary and probably inappropriate. It is perfectly possible to criticise a judge's decision without including phrases such as "a search for reasons to find against the Appellant", "a frolic of her own", "injecting her own assumptions and beliefs", "once again jump to conclusions", "closed mind". Indeed, a rather more severe view could be taken in future.

25. My second observation is this. Having read the judge's decision three times through, it is not entirely clear to me what specific basis she approached the appeal before her. She clearly directed herself to authorities on allegations of marriages of convenience, but the great majority of her analysis of the evidence and findings then appeared to relate more to consideration of whether the Appellant's relationship with the Sponsor had been shown to be durable, not whether that relationship was either a sham or one of convenience. Saying this, I note that it is only in the very end of her decision at [109] that she appeared to consider the alternative possibility that the relationship might have been one pursued to gain an immigration advantage. Yet if this was the case, I would have agreed with the judge granting permission to the extent that the burden of proof seemed to have been placed on the Appellant rather than the Respondent.

26. If a degree of uncertainty is apparent in the judge's decision, it may well be down to the ambiguity arising from the Respondent's position

throughout these proceedings. Whereas the interviewing officer's comments made express reference to the relationship possibly being a sham or one of convenience, his comments did not find their way into the refusal letter. It is the refusal letter which is under appeal and it is the refusal letter which, subject to any amendment, forms the basis of the case to be met by the Appellant.

Disposal

27. A remittal to the First-tier Tribunal should only occur if really necessary. In the present case, there needs to be a wholesale revisiting of the evidence, with relevant findings made. The nature of this exercise is such that remittal is in my judgment appropriate, with reference to paragraph 7.2 of the Practice Direction. There will be no preserved findings of fact. I reiterate the point made in the previous paragraph: the Appellant is entitled to prepare and present his case on the basis of the refusal letter as it stands.

28. It would be highly undesirable for the judge who considers this appeal on remittal to be faced with arguments between the parties at the outset of the next hearing as to the nature of the decision and which legal framework should apply. In other words, there needs to be clarity prior to the next hearing as to whether the Respondent is alleging that the claimed relationship is a sham or one of convenience only, or whether it is simply a case of the Appellant being required to demonstrate that his relationship is durable.

Notice of Decision

29. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

30. I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.

31. I remit the case to the First-tier Tribunal.

Directions to the First-tier Tribunal

1. This appeal remitted to the Taylor House hearing centre to be heard by a judge other than First-tier Tribunal Judge H Graves;

2. There are no preserved findings of fact;

3. The First-tier Tribunal will issue its own case management directions in due course.

Signed: H Norton-Taylor Date: 21 November 2022

Upper Tribunal Judge Norton-Taylor