IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003602
First-tier Tribunal No: EA/51974/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 May 2023

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Anton Palushi — Appellant
(ANONYMITY ORDER NOT MADE)

And

Entry Clearance Officer — Respondent

Representation:
For the Appellant: Ms. S Ferguson, of Counsel, instructed by Shan & Co Solicitors.
For the Respondent: Mr E Tufan, Senior Presenting Officer.

Heard at Field House on 11 May 2023

DECISION AND REASONS

1. The appellant is a national of Albania, born on 14 July 1990. By a "Decision and Directions" (signed on 4 February 2023 and served on the parties on 6 February 2023) (the "EOL Decision"), I set aside the decision of Judge of the First-tier Tribunal Tozzi (hereafter the "judge") who, in a decision promulgated on 14 June 2022 following a hearing on 6 June 2022, dismissed the appellant's appeal under regulation 36 of the Immigration (European Economic Area) Regulations 2016 (the "2016 Regulations") (read together with regulation 5 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020) against a decision of the respondent of 23 June 2021 to refuse his application of 15 December 2020 for an EEA family permit in order to join his spouse, Ms Kristina Aleksandrova Grigorova, a Bulgarian national (hereafter the "sponsor"), in the United Kingdom.

2. Terms defined in the EOL Decision have the same meaning in this decision.

3. As stated in the EOL Decision, the sole factual issue before the judge was whether the marriage between the appellant and the sponsor was a marriage of convenience.

4. The EOL Decision was issued following an 'error of law' hearing before me on 23 January 2023 when the appellant was represented by Ms Ferguson and the respondent by Mr D Clarke. The appeal was listed for a further hearing before me on 11 May 2023 (the "resumed hearing") for the decision on the appellant's appeal against the respondent's decision to be re-made.

5. In brief, the EOL Decision restricted the issue at the resumed hearing to the "third stage" (as defined in the EOL Decision and explained below) and stated that the judge's adverse assessment of the credibility of the sponsor and the appellant and her findings of fact stand, including her finding, implicitly made, that she did not accept that there was a genuine relationship between the appellant and the sponsor at the time of the marriage as well as her finding that the appellant and the sponsor had spent "*pockets of time together*".

6. Having briefly summarised the EOL Decision, it is appropriate to explain it in some further detail because this will help to explain why I constrained Ms Ferguson's submissions at the resumed hearing.

The EOL Decision

7. The first, second and third stages were explained at para 20 of the EOL Decision which reads:

> "20. As the authorities make clear, once an appellant who has applied for a family permit establishes a prima facie case that he or she was a family member of an EEA national by providing the marriage certificate and the spouse's passport, the respondent has the legal burden of proving that an otherwise valid marriage was a marriage of convenience so as to justify refusing the application. If the respondent produces evidence justifying reasonable suspicion that the marriage is a marriage of convenience (I shall hereafter refer to this as the "*first stage*"), the evidential burden then shifts to the appellant to address the evidence justifying reasonable suspicion (I shall hereafter refer to this as the "*second stage*"). Ultimately (hereafter referred to as the "*third stage*"), the question for the judge is whether, in light of the totality of the evidence including the assessment of the appellant's answers and any other information provided, the respondent has discharged the legal burden of proof upon him to establish on the balance of probabilities that the marriage is a marriage of convenience. In other words, the initial evidential burden as well as the ultimate legal burden rests on the respondent."

8. In the EOL Decision, I concluded that the judge erred in law in her consideration of the third stage, in that, she incorrectly placed the overall legal burden of proof upon the appellant to show that the marriage was not a marriage of convenience (para 34(iv) of the EOL Decision). However, I was satisfied that she did not err in law in her approach to and application of the relevant principles in relation to the first and second stages, for the reasons given at para 35 of the EOL Decision which reads:

> "(i) After assessing the evidence in relation to the first stage, the judge found at para 59 that *"sufficient doubt is cast ……. to engage the first limb and so the evidential burden shifts to the appellant".* No issue was taken in the grounds or in submissions before me that the judge misdirected herself in law in relation to the first stage or that she erred in law in reaching her finding that the respondent had discharged the evidential burden in relation to the first stage and that the evidential burden then shifted to the appellant.
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> (ii) For the reasons given below in relation to grounds 2(a) and 2(b), the judge did not err in law in her consideration of the appellant's and sponsor's evidence in

addressing the evidence as to reasonable suspicion. She did not err in law in her approach to and assessment of the second stage."

9. At paras 37-42 of the EOL Decision, I considered the submission of Mr Clarke that even if the judge had erred in law in placing the overall legal burden of proof upon the appellant, it was not material. Paras 36-42 of the EOL Decision read:

> "36. Mr Clarke's submission summarised at para 28 above amounts, in essence, to a submission that, even if the judge erred in law in placing the overall legal burden of proof upon the appellant, it was not material.
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> 37. **Although Ms Ferguson did not address me on the issue,** I have approached Mr Clarke's submission in this regard with great caution. One ought to be very slow to reach such a conclusion. In a case in which the judge assesses the evidence and then makes findings of fact upon the premise that the burden of proof rests on one party when it in fact rests on the other party, it is difficult to see how such an error would not be fatal to the judge's assessment of the evidence. In such a case, the placing of the burden of proof upon the wrong party would itself vitiate the assessment of the evidence because the two are inextricably linked.
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> 38. That is to be distinguished from the instant case. The judge did not err in law in her assessment of the evidence. She did not err in law in her approach to and application of the relevant principles including the burden of proof in relation to the first and second stages. The error by the judge in the instant case was limited to the third stage. The third stage did not involve an assessment of credibility. It called for a judgment to be made, based upon the assessment of the evidence at the first and second stages, whether the overall legal burden of proof that rested upon the respondent had been discharged to the standard of the balance of probabilities.
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> 39. I am therefore of the view that it is open to me to consider whether the judge's error in placing the burden of proof incorrectly upon the appellant in the third stage was material to the outcome. I now proceed to consider that issue.
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> 40. As Mr Clarke submitted, the judge found the appellant an incredible witness whose evidence was wholly unreliable and the sponsor an incredible witness whose evidence was also unreliable. Her assessment of the evidence before her was entirely adverse save that she accepted that the appellant and the sponsor had spent pockets of time together.
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> 41. Having proceeded with great caution in considering this issue and having considered with great care the judge's decision, I have concluded that, unusually, if the judge had placed the burden of proof upon the respondent in the third stage and asked herself the right question (i.e. whether the respondent had discharged the burden of proof to the standard of the balance of probabilities that the marriage was a marriage of convenience at the time that it was entered into), it is inevitable that she would have answered the question in the affirmative in view of her wholesale adverse credibility assessment, on any legitimate view.
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> 42. I am therefore satisfied that the judge's error in placing the overall legal burden of proof upon the appellant in the third stage is not material."
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> (emphasis now supplied)

10. Nevertheless, at para 43 of the EOL Decision, I said that I had decided to adopt a "*belts and braces*" approach and to set aside the judge's finding at para 62 of her decision where she had said:

> "62. In light of my findings, I am not satisfied, on the balance of probabilities, that the appellant has shown that the marriage was not one of convenience."

11. I therefore decided to carry out the task called for in the third stage myself. Given that I was satisfied that the judge had not erred in law in her assessment of the credibility of the sponsor and the appellant or in reaching her findings of fact on their subjective evidence, the EOL Decision limited the sole issue in the re-making of the decision on the appellant's appeal to the third stage, that therefore it would not be necessary for the Tribunal to re-assess the evidence and credibility (para 45 of the EOL Decision) and that accordingly it would not be necessary for me to hear further oral evidence (para 59 of the EOL Decision).

12. The judge's findings of fact, in summary, were:

    (i) the appellant and the sponsor had spent "*pockets of time together*" (para 61 of the judge's decision); and

    (ii) (a finding implicitly made, para 46 of the EOL Decision) she did not accept that there was a genuine relationship between the appellant and the sponsor at the time of the marriage.

13. At para 60 of the EOL Decision, I said that the appeal would be listed for a further hearing in the Upper Tribunal limited to the parties making legal submissions concerning the third stage, unless I received from both parties within the specified timescale a written notice requesting the Upper Tribunal to re-make the decision on the appeal on the basis of written submissions.

14. Neither party requested the Upper Tribunal to re-make the decision on the appeal on the basis of written submissions.

15. Thus the appeal came to be listed before me on 11 May 2023 for a resumed hearing to enable the parties to advance legal submissions concerning the third stage, that is, whether the respondent has discharged the overall burden of proof upon her to show that the marriage between the appellant and the sponsor was a marriage of convenience.

Submissions

16. Ms Ferguson said that she was very constrained as to what she could argue given that all of the judge's findings and reasoning were preserved save for para 62 of her decision.

17. During her submissions, Ms Ferguson said, inter alia, that the appellant and the sponsor had resumed living together, in the United Kingdom[1]. She informed me that the appellant re-entered the United Kingdom illegally in August 2022 and was prosecuted. He spent 2 ½ months in prison.

18. When asked to explain what matters I should take into account in deciding whether the respondent had discharged the overall legal burden upon her to show that the marriage was a marriage of convenience, Ms Ferguson submitted that it would be an error of law to focus on inconsistencies at the interviews of the appellant and the sponsor. In this regard, she relied upon para 39 of Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC). She submitted that it is

[1] They were both physically present at the error of law hearing, see paras 13 and 58 of the EOL Decision.

necessary to consider the whole history of the relationship between the appellant and the sponsor including the fact that they are married. The appellant and the sponsor did not give oral evidence before the judge which is problematic given that credibility was in issue.

19. I reminded Ms Ferguson that the judge's credibility assessment and findings of fact stand. I asked her to explain what it was about their history that I should take into account in deciding the issue before me. She submitted that it was the fact that the judge had found that they had spent pockets of time together. She submitted that they had spent time together from 2018 which pre-dated the marriage. On the judge's findings, they also spent time together subsequent to the marriage outside the United Kingdom. There was no immigration advantage to the appellant and the sponsor being together. She asked me to find that they have a genuine relationship.

20. Ms Ferguson informed me that she was not fully clear on "*what we are doing today*" and that if the judge's assessment and findings at paras 59 and 61 of her decision stand, the outcome of the resumed hearing was pre-ordained.

21. Ms Ferguson submitted that it might be open to me to look at events that post-dated the marriage. She submitted that there is authority (which she did not specify) to the effect that a marriage may be regarded as genuine and subsisting even if it was said not to be so at the time of the marriage. She submitted that there was sufficient evidence for me to be satisfied that the appellant was a family member of the sponsor at the time of the marriage.

22. I heard briefly from Mr Tufan.

ASSESSMENT

23. It is necessary to 'unpick' Ms Ferguson submissions.

24. Firstly, she gave me "information", as set out at para 17 above. I have not taken this "information" into account, for the following reasons:

(i) Counsel's submissions do not constitute evidence. There was therefore no *evidence* before me that the appellant and the sponsor had resumed living together.

(ii) Although the fact that the appellant and the sponsor were both present at the error of law hearing (para 13 of the EOL Decision) constituted evidence before me as at the date of the error of law hearing that they were both physically present in the United Kingdom then, there was no evidence before me then or now that they were and have been living together in the United Kingdom.

(iii) The EOL Decision stated that it would not be necessary for me to hear oral evidence. Nevertheless, it was open to the appellant to have made an application for oral evidence to be given at the resumed hearing on the basis of a change of circumstances since the EOL Decision. No such application was made before the resumed hearing or even *at* the resumed hearing. Ms Ferguson simply 'slipped' into her submissions the "information" set out at my para 17 above.

25. It therefore remains the case that, on all the evidence before the Upper Tribunal as at the resumed hearing, the judge's adverse assessment of the credibility of the appellant and the sponsor and her findings of fact stand.

26. Ms Ferguson's submission, that it would be an error of law to focus on inconsistencies at the interviews of the appellant and the sponsor and that the appellant and the sponsor have a genuine relationship, amount to an attempt to re-open the judge's assessment of credibility and/or circumvent her findings which was not open to Ms Ferguson.

27. Ms Ferguson submitted that the fact that the appellant and the sponsor did not give oral evidence was problematic given that credibility was in issue. This submission ignores the fact that Ms Ferguson informed me at the error of law hearing that she was not pursuing ground 3. Para 11(iii) of the EOL Decision quotes ground 3 and para 12 of the EOL Decision records how it came about that Ms Ferguson decided not to pursue ground 3. Furthermore, this submission amounts to another attempt to re-open the judge's assessment of credibility.

28. I acknowledge that Ms Ferguson was constrained by the terms of the EOL Decision in what she could argue were the factors that I should consider in deciding whether the respondent had discharged the overall legal burden of proof upon her to show that the marriage was a marriage of convenience. My reason for listing the appeal for a resumed hearing and giving the appellant an opportunity to advance submissions regarding the third stage notwithstanding what I had said at para 42 of the EOL Decision was that I was conscious (when writing the EOL Decision) that Ms Ferguson had not responded to Mr Clarke's submission at the error of law hearing that, even if the judge had erred in law in placing the overall legal burden of proof upon the appellant, it was not material (see paras 36 and 37 of the EOL Decision, quoted at para 9 above).

29. Despite Ms Ferguson's submission that the outcome of the resumed hearing is pre-ordained, I have approached my task with an open mind whilst remaining true to the constraints set out in the EOL Decision. The existence of such constraints does not preclude my approaching my task with an open mind.

30. Turning to the factors relied upon by Ms Ferguson (explained at paras 18, 19 and 21 above), the judge considered the evidence that the couple had spent time together both before and after the marriage and her finding that they had spent "*pockets of time together*" in order to reach her finding that the relationship between the appellant and the sponsor at the time of the marriage was not genuine. Ms Ferguson's submission, that there is authority to the effect that a marriage may be regarded as genuine and subsisting even if it was said not to be so at the time of the marriage, is misconceived for two reasons: The question for me is not whether the marriage is genuine and subsisting but whether the marriage was a marriage of convenience. Secondly, the submission ignores the fact that I must decide whether the respondent had discharged the ultimate legal burden of proof to show that, *at the time that the appellant and the sponsor entered into their marriage*, it was a marriage of convenience.

31. Ms Ferguson also asked me to take into account the fact that the appellant and the sponsor are married. However, this ignores the fact that the issue is whether the respondent has established that the marriage is a marriage of convenience. Anyone

who is found to have been a party to a marriage of convenience will, by definition, have entered into the marriage.

32. I turn to consider whether the respondent has discharged the overall legal burden of proof upon her to show that the marriage between the appellant and the sponsor was a marriage of convenience.

33. The judge's assessment of the credibility of the appellant and the sponsor is damning. The only finding in the appellant's favour is that he and the sponsor have spent "*pockets of time*" together. I take into account, as Ms Ferguson submitted, that the evidence was that they had spent "*pockets of time*" together before the marriage as well as subsequently. I take into account the judge's finding that their relationship at the time of the marriage was not genuine. The question whether a relationship is genuine is different from the question whether the marriage was a marriage of convenience. The judge's finding that the relationship was not genuine at the time of marriage is relevant in the instant case in deciding whether the marriage was a marriage of convenience because it is a finding that concerns the time of the marriage and casts light on the intentions of the parties in entering into the marriage.

34. Ms Ferguson submitted that there is no immigration advantage to the appellant and the sponsor being together. However, that is only because he has ignored the decision to refuse his application for entry clearance and re-entered the United Kingdom illegally. If it had been open to me (which is not the case) to take into account the "*information*" that the appellant has re-entered the United Kingdom and now lives with the sponsor, the fact that he has ignored the refusal of entry clearance and re-entered the United Kingdom illegally would have gone against him and for the respondent in deciding whether the marriage was entered into in order to obtain an immigration advantage.

35. I have considered the third stage afresh, taking into account the judge's adverse assessment of credibility and her findings of fact. I have considered Ms Ferguson's submissions save that I have disregarded the "*information*" set out at para 17 above. Taking everything into account, I am satisfied that the respondent has discharged the overall burden of proof upon her to show that the marriage between the appellant and the sponsor was a marriage of convenience at the time that they entered into it.

36. I therefore re-make the decision on the appellant's appeal against the respondent's decision by dismissing it.

Decision

The making of the decision of the First-tier Tribunal involved the making of an error of law sufficient to require it to be set aside.

The Upper Tribunal re-makes the decision on the appellant's appeal against the respondent's decision by dismissing his appeal.

Signed
Upper Tribunal Judge Gill Date: 18 May 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**
3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**
5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
6. **The date when the decision is "sent' is that appearing on the covering letter or covering email.**