Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/02066/2015**

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly
On 17 August 2015

Decision & Reasons Promulgated
On 28 August 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

HUSNAIN QURESHI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Johnrose of Ellen Court Partnership
For the Respondent: Ms C Johnson Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Appellant is a citizen of Pakistan born on 22 April 1991.

3. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Wedderspoon promulgated on 30 April 2015 which dismissed the Appellant's appeal

against a refusal dated 22 December 2014 to refuse his application for an EEA Residence Card on all grounds.

4. The reasons given in the refusal letter were, in essence, that:

   (a) As a result of the marriage interview dated 4 December 2014 the Respondent regarded the marriage of the Appellant and his EEA sponsor Peterne Kollar as a sham marriage and therefore the application did not meet Regulation 2 of the Immigration (European Economic Area) Regulations 2006 (the EEa Regulations)

   (b) The Respondent was not satisfied on the basis of the evidence produced that the Appellant's Sponsor met the definition of worker in Regulation 6 of the EEA Regulations and she was therefore not a qualified person.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal and the grounds of appeal set out the reasons why the Appellant believed that he met the requirements of the EEA regulations.

6. First-tier Tribunal Judge Wedderspoon ("the Judge") dismissed the appeal against the Respondent's decision. The Judge:

   (a) Set out the oral evidence that he heard from the Appellant and the EEA Sponsor.

   (b) Set out the law that applied including the definition of worker including the case of Levin v Secretary of State for Justice (1982) ECR 1035 that found that '*activities on such a small scale as to be regarded as marginal and ancillary are excluded*.'

   (c) He set out the guidance given in Papajorgii (EEA Spouse –Marriage of Convenience) Greece (2012) UKUT 38 in relation to sham marriages.

   (d) He found on the basis of the evidence before him the sponsor and his wife were not credible witnesses.

   (e) He found that the Sponsor was not a worker and that whatever work she had done was marginal and ancillary.

   (f) He was not satisfied that the Sponsor was a job seeker.

   (g) He found that the marriage between the Appellant and his wife was not a genuine one. He did not find that the explanations given for the inconsistencies in the marriage interview were credible.

   (h) He identified a number of inconsistencies which he found significant.

   (i) He did not find that the fact they had a child was determinative of htiers being a genuine relationship.

   (j) He did not consider that Article 8 was engaged.

7. Grounds of appeal arguing that the Judges assessment under Article 8 was flawed in that he failed to consider the relationship between the Appellant and his daughter and stepdaughter; his assessment of whether the Sponsor was a worker was flawed as he did not consider the wage slips and the evidence of the bank statement; in relation

to the marriage interview the Judge placed too much weight on a relatively small number of alleged inconsistencies in a lengthy interview; he failed to have regard for Papajorgji where it was stated that a durable marriage with children and co–habitation is quite inconsistent with a sham marriage.

8. On 7 July 2015 First-tier Tribunal Judge Astle gave permission to appeal

9. At the hearing I heard submissions from Ms Johnrose on behalf of the Appellant that:

   (a) She relied on the grounds to the Upper Tribunal dated 12 May 2015.

   (b) The Judge had failed to make an assessment in relation to Article 8 in relation to his daughter and step daughter.

   (c) There was no authority for the comment that a sham marriage precluded Article 8 being engaged.

   (d) In relation to whether the marriage was a sham the Judge had failed to make a finding in relation to whether they were co habiting or take into account the fact that the marriage started well before the Appellant's visa expired.

   (e) The discrepancies he took into account were not real and explanations were given.

   (f) In relation to whether the sponsor was a worker the Judge failed to take into account that the Sponsor had a baby in June 2014 and worked up to the point when she took maternity leave.

10. On behalf of the Respondent Ms Johnson submitted that :

   (a) She relied on the Rule 24 notice

   (b) Article 8 was not relevant to this appeal as there were other routes open to the Appellant

   (c) If the sponsor was not a worker she had no right to remain and therefore any error in relation to Article 8 would not be material.

   (d) The Judge identified the evidence relied on to show that the Sponsor was working and the wage slips dated 17 February that were produced significantly post dated the decision.

   (e) The evidence of work at B25 significantly pre dates the alleged relationship and was not relevant to the decision or the appeal.

   (f) There was no documentary evidence that the Appellant took maternity leave or when that occurred.

   (g) The Judge took account of the evidence before him and concluded that the marriage was a sham: it was a finding that was open to him.

11. In reply Ms Johnrose on behalf of the Appellant submitted:

   (a) At page 23 of the bundle there was evidence that the Sponsor was in receipt of working tax credit.

Legal Framework

12. I enquired of the parties whether there was a recent case in relation to EEA appeals and EEA rights and was told by Ms Johnson that she understood there was a decision pending. Since the hearing date I have noted that in the case of Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC) the Tribunal held:

> "Where no notice under section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot bring a Human Rights challenge to removal in an appeal under the EEA Regulations. Neither the factual matrix nor the reasoning in JM (Liberia) [2006] EWCA Civ 1402 has any application to appeals of this nature."

The Law

13. Errors of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on facts or evaluation or giving legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

14. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue under argument. Disagreement with an Immigrations Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law.

Finding on Material Error

15. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law.

16. In this case the decision of the Respondent has been to refuse to issue documentation sought as confirmation of the right of residence under EU law. She has not taken action to remove the Appellant , but has reminded him that he has no right to be here, and has advised him that if he wishes to remain here on some other basis, then the appropriate applications should be made using the correct application forms and procedure, and, on payment of any appropriate fee.

17. In relation to the Judge's claimed failure to make an assessment in this case under Article 8 I am satisfied that this was not an error of law in line with Amirteymour. There was no removal decision in this case and no section 120 Notice and indeed Article 8 was not in fact raised in the grounds of appeal before the Judge although apparently it was argued. It is however now clear that the Judge was not obliged to consider it in those circumstances.

18. In relation to the Judges conclusion that this was a sham marriage I am satisfied that this was a finding open to him on the basis of the evidence before him: what weight he gave to each individual piece of evidence and whether he made findings in relation to every issue are matters for him. This appeal is merely a disagreement with

findings that were open to him. The Appellant concedes that there were discrepancies in the marriage interview, discrepancies that the Judge did find were significant, and gave explanations that the Judge rejected.

19. In determining that this appeal involved a sham marriage I am also satisfied that the Judge took into account that the Sponsor had a child and the Respondent did not dispute that the Appellant was the father. No authority was placed before the Judge to suggest that a child was determinative of the issue of whether a marriage was genuine or not and the Judge made a finding that was open to him that it was not. The ratio of Papajorgii was not that the existence of a child was determinative of whether a marriage was a sham. The quotation relied on by Ms Johnrose from paragraph 29 of the case must be looked at in an entirely different factual context in that the Judge was referring to the specific facts of the case where there was clear evidence in documentary and photographic form of a marriage of 14 years standing of which there were two children with everyone living in a common household.

20. Having found that the marriage was sham marriage and that this was a finding that was open to him and errors or failure to consider evidence in relation to the Sponsor as a worker could not have been material. Moreover I am satisfied that there were no errors. The Judge did not find the Sponsor to be a credible witness given the contents of the marriage interview (paragraph 26) and found that the documentary evidence she submitted was unsatisfactory to show that she was a worker. He gives reasons for that finding: there was no correlation between the pay slips and bank statements, no contract of employment and the Sponsor did not know her employer as other than Immi. The Judge also considered whether the Sponsor could demonstrate that she was a job seeker but again rejected the evidence produced as unsatisfactory (paragraph 28) as there was no evidence that she was actively seeking work.

21. I was therefore satisfied that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning. I find that the reasons given were adequate and the Appellant cannot be in any doubt about why the appeal was dismissed.

CONCLUSION

22. **I therefore found that no errors of law have been established and that the Judge's determination should stand.**

DECISION

23. **The appeal is dismissed.**

Signed Date 26.8.2015

Deputy Upper Tribunal Judge Birrell