UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: IA/28822/2014

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
on 11 February 2016	**on 29 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MR SYED NABEEL ATHAR

NO ANONYMITY DIRECTION MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: **Mr A Al Arayn, Farani-Javid-Taylor Solicitors LLP**

For the Respondent: **Mr N Bramble, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The appellant is a national of Pakistan, born on 5 January 1985. His appeal against the decision of the respondent dated 30 June 2014 refusing his application for a residence card as a family member of an EEA national exercising Treaty rights under the Immigration (EEA) Regulations 2006 ("the 2006 Regulations"), was dismissed by First-tier Tribunal Judge James in a decision promulgated on 19 August 2015.

2. The appeal was determined on the papers at the request of the appellant.

3. On 22 December 2015, First-tier Tribunal Judge Frankish granted the appellant permission to appeal following the assertion by the appellant in his application for

permission to appeal, that the First-tier Tribunal had directed him to file his evidence in his appeal by 8 September 2015. However, his appeal was determined on 19 August 2015. He found that the grounds were arguable.

4. Mr Al Arayn had not prepared the grounds of appeal, but relied on them. He accordingly submitted that the documents before the Tribunal showed that the appellant had indicated on 9 March 2015 that he wished the appeal to be decided on the papers. The prior appeal hearing was adjourned. The Judge had directed the appellant to re-affirm the decision that he wanted a paper case, which he did on 10 August 2015.

5. On 11 August 2015 the Tribunal accordingly issued directions that the appellant was to submit all the evidence that he wished to rely on by 12 August 2015. This was complied with and paper representations, including further evidence, was submitted on 12 August 2015.

6. The Tribunal also directed the respondent to submit her submissions and evidence by 8 September 2015.

7. Notwithstanding such direction, however, the Judge promulgated her decision on 19 August 2015 without giving the respondent the opportunity to respond within the time limits directed. That he submitted constituted a procedural error as the Judge had failed to note the Tribunal's own directions. The respondent could possibly have conceded a point.

8. He referred to paragraph 5 of the grounds where it is asserted that "... The determination therefore is strongly indicative that it was produced with the Judge stepping into the feet of the Respondent. That is so asserted because the respondent themselves had made no response (sic)".

9. Moreover, he submitted that the respondent had not provided the interviewer's comments, Form ICV.4605, which following the decision in Miah (interviewer's comments: disclosure: fairness) [2014] UKUT 515, amounts to an error of law. The respondent may well have provided the evidence or conceded this point. The respondent was required to engage with this ground (Ground 1(b)) and the grounds raised in the paper appeal, which the Judge "... denied due to her prematurely promulgated determination."

10. By way of background, Mr Al Arayn referred to paragraph 8 of the grounds, where the history is set out in some detail. He noted that the appellant's earlier hearing on 10 March 2015 was adjourned by another Judge as the respondent had failed to provide the interview records. The appellant had asked for the appeal to be allowed at the hearing as the respondent was not able to discharge the burden of proof on

her, but the previous Judge instead adjourned the matter, giving the respondent "another bite of the cherry."

11. Mr Al Arayn adopted Ground 2, contending that the Judge stated in her determination that the burden of proof is on the appellant who must show on the balance of probabilities that all relevant requirements are met. The Judge stated at [46] that the general burden of proof is on the appellant and the civil standard of the balance of probabilities applies.

12. Mr Al Arayn referred to Papajorgi (EEA Spouse – Marriage of Convenience) Greece [2012] UKUT 38 which held that the burden of proof is on the respondent in cases in which there is an allegation of a marriage of convenience. The Judge disregarded the representations and did not engage with the current law.

13. He submitted in accordance with ground 3 that the Judge "based her decision on her factual assumptions which were manifestly incorrect." The Judge questioned the finances of the appellant. Her finding at [19] that "even though he has no permission from the respondent to work," is incorrect. In a letter dated 17 February 2014, the respondent in fact stated that the appellant has permission to work pending his application and its outcome.

14. She further found at [8] that the appellant's Tier 4 student leave was refused and he then made his application under the 2006 Regulations. The impression given was that he made his EEA application when he did not have leave to remain. That impression is incorrect. The respondent had withdrawn the earlier refusal.

15. During the course of his submissions it was drawn to Mr Al Arayn's attention that the respondent's bundle was contained in the bundle before the First-tier Tribunal. That included the interview record sheet. In addition there was an interview summary sheet containing the box: "interviewer recommendation – genuine/marriage of convenience?" The recommendation was that this was a marriage of convenience. The evidence to support the recommendation is set out at page 1, which was a summary of the interview, which contained 233 questions in all to the appellant and his sponsor. The marriage interview transcript was enclosed in the Tribunal's bundle as per a letter from the Home Office dated 24 March 2015.

16. Mr Al Arayn very properly informed me that the appellant's solicitors had also had pages 1 and page 3 of the "interview summary sheet" prior to the hearing. However, they did not have page 2. He accepted that in the light of the recommendation, namely that this was a marriage of convenience, that the assertion that the respondent could possibly have conceded a point was no longer arguable.

17. Moreover, he accepted that although the full interview summary sheet had not been provided, the interviewer recommendation as referred to on Form ICV/4605 had been given to the appellant, albeit that page 2 was missing.

18. Mr Bramble relied on the respondent's Rule 24 response. Even if the respondent had responded to the directions it was unlikely that she would have conceded the matter given the particular facts of the case.

19. The Judge properly took into account the documentary evidence and made adequate findings of fact. The Judge found that the marriage was not genuine, or that there was there a genuine relationship. Crucial findings were made irrespective and apart from the interview records. These are set out at [10-37]. The Judge was accordingly correct in finding that the appellant had not discharged the burden of proof.

20. He also relied on the reasons for refusal letter in which there was a summary of the inconsistencies and discrepancies that were highlighted to the interviewing officer during the course of the marriage interview. It cannot be said that the appellant was not in a position to know what topics were dealt with. The Judge moreover had a full copy of the interview.

21. In the circumstances, he submitted that Grounds 1 and 2 fall away. The Judge had taken into account the interview records before and during the hearing as well as the evidence on appeal from the appellant and his sponsor [6].

22. With regard to count 3, even if there was a factual error, its materiality must be assessed in the context of all the findings. That includes the findings at [8]. Those findings were stated from [10] and continue beyond [37] where the Judge noted that the witness statements produced by the appellant confirm that they do not cohabit at the Shakespeare Road, Brixton address. This undermined the weight to be accorded to the bank statements and gas/electric bills in the EEA National's name at this address. They confirmed that as the sponsor's son is at school in Tunbridge, they would not cohabit until he has completed his schooling. As he is about five years of age now, and compulsory school leaving age is 16, it is their intention not to reside together for another decade.

23. He submitted that the claim that they meet up on weekends was not supported by the production of train tickets or other forms of travel to confirm this. Nor were there any invoices or receipts for services in the names of the respective couple for these areas. From that, she thus did not accept that they routinely visit each other as claimed. The “mistakes” at [19] and [8] are accordingly not material.

24. In his reply, Mr Al Arayn submitted that the factual errors do amount to an error of law.

Assessment

25. The First-tier Tribunal Judge has given a detailed decision setting out the detailed reasons for her findings.

26. In the light of the fact that the relevant pages of the interview summary sheet were in the possession of the appellant's solicitors, it is evident that the fact that the respondent was incorrectly only given a short time period to respond, was, as asserted by the appellant, without significance. The interviewer recommendation, including the evidence supporting such a recommendation, was contained at paragraph 1 which had at all relevant times been in the possession of the appellant. It was noted that there was a marriage of convenience. The evidence in support is set out in full, beginning at page 1 and continuing at page 2 and 3.

27. The evidence to support the recommendation that this is a marriage of convenience contains a summary of the very detailed interview of both the appellant and the sponsor that took place the same day. It is not contended that the evidence in support of the recommendation was in any way inaccurate.

28. Accordingly, the fact that page 2 of the interviewer's evidence supporting the recommendation had not been available did not result in any unfairness to the appellant. The full interview was available. The appellant had elected to have a determination on the papers without an oral hearing. The Judge had regard to the interview records, before and during the hearing, as well as the evidence on appeal of the appellant and his sponsor [6].

29. She also took into account the documentary evidence and submissions made in the appeal [7].

30. The Judge stated at [8], that in 2012 the appellant's application to extend his visa was refused and that he then made his current application under the 2006 Regulations. The submission in the grounds is that this gives the impression that the appellant did not have leave to remain when he submitted the application, which was incorrect. The respondent had withdrawn the refusal. However, the Judge considered the contention that his marriage was a marriage of convenience on its merits. The possible "impression" did not feature at all in that assessment and analysis.

31. In addition, the reference to the appellant's not having permission from the respondent to work, whilst incorrect, was referred to in the context that they claimed not to have sufficient funds to reside together. At [20] the Judge stated that she was not persuaded that this is the case. The sponsor had claimed welfare benefits at her Kent address where she actually lives, and also at the London address of the appellant where she does not live. She was also receiving payments

from the appellant and his brother. It is not claimed that their finances are intertwined or that there is any payment received or made by the appellant or his brother, supporting the possibility that these are payments "for her services" for this marriage of convenience.

32. The Judge has set out the evidence relating to the respondent's conclusion that this marriage was a matter of convenience from [9] onwards. She took into account in some detail the explanations given by the appellant and his sponsor for the discrepancies in their interviews, which are set out from [40-44].

33. The Judge took into account the totality of the evidence before her. She found that this is a marriage of convenience between the appellant and the EEA national.

34. At [46] she concluded that the "general burden of proof" is on the appellant to the civil standard. On the totality of the evidence before her, she found that the appellant had not discharged the burden of proof upon him and the reasons given by the respondent justified the refusal of the residence permit. The decision was accordingly in accordance with the law and the 2006 Regulations.

35. The Judge had been referred to the decisions of Papajorgi and Miah, supra, in the paper representations setting out the burden of proof in such cases.

36. At [44] she found on balance that the appellant had failed to "counter the objections of the respondent set down in her refusal decision regarding her concerns." The appellant's documentation and submissions made in support of his appeal failed to properly address the respondent's objections.

37. I have had regard to the decision of the Tribunal in Papajorgi. There is no burden on the claimant in an application for a family permit to establish that she was not party to a marriage of convenience unless the circumstances known to the decision maker give reasonable ground for suspecting that this was the case. Absent such a basis for suspicion, the application should be granted without more on production of the documents set out in Article 10 of the Directive. Where there is such suspicion, the matter requires further investigation and the claimant should be invited to respond to the basis of suspicion by producing evidential material to dispel it.

38. A marriage of convenience in this context is a marriage contracted for the sole or decisive purpose of gaining admission to the host state. A durable marriage with children and cohabitation is quite inconsistent with such a definition.

39. Accordingly there is an evidential burden on the respondent to produce evidence of matters supporting a suspicion that the marriage is one of convenience.

40. As is clear from Papajorgji, the question for the Judge will therefore be "in the light of the totality of the information before me, including the assessment of the claimant's answers and any information provided, am I satisfied that it is more probable than not that this is a marriage of convenience"?

41. The First-tier Judge stated that, taking the totality of the evidence before her into account, she did not find that this is a genuine or subsisting marriage. The evidence before her confirmed the respondent's concerns and supported the respondent's objections. In summary, the appellant's documentation and submissions failed properly to address the respondent's objections.

42. In those circumstances, she found on the balance of probabilities that the appellant failed to counter the objections of the respondent and did not show on the balance of probabilities that theirs is a genuine relationship.

43. Although it would have been more helpful for the Judge to have set out clearly the approach to be adopted as set out in Papajorgi, I find that she has nevertheless properly approached the evidence as a whole including the documentary evidence produced in support of the contention that theirs is a genuine marriage. Having regard to that evidence she found that theirs was not a genuine or subsisting relationship or marriage.

44. The findings of the Judge were supported by the evidence apart from the interview records. In the circumstances, notwithstanding the factual errors referred to, which were not material in the circumstances, the decision reached was sustainable.

Notice of Decision

The decision of the First-tier Tribunal Judge did not involve the making of any material errors on a point of law. The decision shall accordingly stand.

No anonymity direction is made.

Signed Date 4 March 2016

Judge C R Mailer

Deputy Upper Tribunal Judge