Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/01427/2015**

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 22nd September 2017	**On 12th October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

MR ABID NOOR AZIZ
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mahmood of Whitefields solicitors
For the Respondent: Mrs Petterson Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Mr Abid Noor Aziz date of birth 13 September 1977, is a citizen of Pakistan. No anonymity direction was made previously and none was applied for before me. Having considered all the circumstances, I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Simmonds promulgated on 14th December 2016, whereby the judge dismissed the Appellant's appeal against the decision of the Respondent to refuse him a residence card as the spouse of a European Union citizen, who is exercising treaty rights in the UK. It was accepted that the appellant had gone through a ceremony of marriage with an EEA national and that the EEA national was exercising treaty rights. The judge found that the appellant had failed to prove that this was a genuine marriage and

concluded therefore that it was a marriage of convenience. On that basis the judge dismissed the appeal.

3. By a decision of 31st May 2017 Tribunal Judge Adio granted permission to appeal to the Upper Tribunal. Thus the appeal came before me to determine whether or not there was a material error of law in the original decision.

4. There was no representative for the respondent at the hearing before Judge Simmonds. The appellant was present along with a number of potential witnesses but only the appellant and the EEA spouse gave evidence. The grounds of appeal at paragraph 5 alleged that the judge has failed to give the reasons why there was no representative for the Home Office at the hearing. I fail to see how the fact that the judge has not given reasons for the failure of the respondent to field a representative in the court impacts upon the decision in the circumstances.

5. The grounds of appeal also raise the issues that the judge has asked questions and as a result found the appellant's responses incredibly vague. The judge is entitled to ask questions to clarify issues which are central to the appeal. The evidence by the appellant and his spouse was that they conversed in English. The judge found the English of the sponsor wholly inadequate. Again given that it was an issue as to whether or not the parties could genuinely conduct a relationship, the judge would have been entitled to look at the extent to which they could converse.

6. Issue is also taken that there were witnesses available but the witnesses were not called. It is not for the judge to decide how an appellant's representative should present the case. The judge has pointed out discrepancies in the witness statement as the judge was entitled to do. The representative was present and if the evidence needed to be bolstered by further witnesses it was for the representative to call them.

7. However that having been said in paragraph 6 of the decision the judge states that the burden of proving that this is not a marriage of convenience is on the appellant. The judge applied the standard of proof of the balance of probabilities.

8. The case of Rosa v SSHD [2016] EWCA Civ 14 places the burden of proof in marriage of convenience cases on the respondent. As confirmed in Rosa and Agho v SSHD 2015 EWCA Civ 1198 the evidential burden may shift in the case but as stated by Lord Justice Underhill at in Agho

13… What it comes down to is that as a matter of principle the spouse establishes a prima facie case that he or she is a family member of an EEA national by providing the marriage certificate and the spouse's passport; that the legal burden is on the Secretary of State to show that any marriage thus proved is a marriage of convenience and the burden is not discharged merely by showing 'reasonable suspicion'. Of course in the usual way the evidential burden may shift to the applicant by proof of facts which justify the inference that the marriage is not genuine, and the facts giving rise to the inference may include a failure to answer a request with documentary proof of the genuineness of the marriage where grounds of suspicion have been raised. Although, as I say, the point was not argued before us, that approach seems to me to be correct…

9. Clearly in stating that the burden of proof is on the appellant, the judge has approached the burden of proof wholly wrong. The judge in examining the facts of the case commences by making an assessment of those factors which support the appellant's account. The judge does go on to look at evidence arising from the interview to consider whether the respondent has answered the case presented by the appellant. However it is clear at that point that the judge is considering that the burden rests upon the appellant to prove that this is not a marriage of convenience. That with the respect is clearly not the approach to be taken in accordance with the case law identified.

10. I take account of the fact that an assessment has to be made whether or not the approach of the judge constitutes a material error of law or whether if the judge had directed herself properly the judge would have reached the same conclusion. Having considered the approach whilst the judge has considered both factors in favour of the appellant and factors against, it was submitted by the respondent's representative that even if the judge had not correctly directed herself, she in considering the issues applied the correct test and accordingly the misdirection by the judge made no material difference. However having looked at the approach of the judge I find that the approach by the judge placed the burden on the appellant and that was wholly wrong. The approach of the judge in dealing with those factors that supported the appellant's account clearly represented that the judge was placing the burden upon the appellant throughout.

11. Having considered the approach of the judge I find that there is a material error of law in the approach that the judge has taken to the case. The appropriate course is for the case to be heard afresh in the First-tier Tribunal.

Notice of Decision

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

13. I set the decision aside. The matter has to be heard afresh in the First-Tier Tribunal.

Signed Date

Deputy Upper Tribunal Judge McClure.