Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31468/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 April and 8 June 2017	**On 23 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD QASIM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant:	Mr N Bramble, Home Office Presenting Officer (6 April 2017)
	Mr C Avery, Home Office Presenting Officer (8 June 2017)
For the Respondent:	Mr J Edwards, Counsel (6 April 2017)
	Mr B Malik, Counsel (8 June 2017)

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Frazer) allowing an appeal by the applicant against a decision refusing him a residence card as the spouse of an EEA national exercising treaty rights in the UK. In

this decision I will refer to the parties as they were before the First-tier Tribunal, the applicant as the appellant and the Secretary of State as the respondent.

Background

2. The appellant is a citizen of Pakistan born on 16 October 1993. He entered the UK with a student visa on 25 April 2011, valid until 30 September 2013. On 23 June 2014 he made an application for a residence card. According to the immigration history set out in the respondent's summary there were a number of similar applications in 2013 and 2014 which were refused.

3. The appellant and sponsor were interviewed about their marriage on 16 December 2014 and in the light of the fact there were a large number of inconsistent and conflicting answers, the respondent was not satisfied that the marriage was anything other than a marriage of convenience. The respondent was also not satisfied from the answers given at interview that the EEA national sponsor was a qualified person.

The Hearing Before the First-tier Tribunal

4. At the hearing before the First-tier Tribunal both the appellant and the sponsor gave oral evidence. A bundle of documents was produced on behalf of the appellant indexed and paginated A1 to J1 and on behalf of the respondent a bundle indexed and paginated A1 to H52. The judge referred to the judgment of the Court of Appeal in Agho v Secretary of State for the Home Department [2015] EWCA Civ 1198 and the Upper Tribunal decision in Papajorgi (EEA spouse – marriage of convenience) Greece [2012] UKUT 0038 confirming that the burden of proving that a marriage was not one of convenience lay on the appellant, subject only to the fact if there was no evidence that could support such a conclusion, the appellant did not have to deal with the issue.

5. The judge set out his findings and conclusions in [16] – [26]. He summarised his findings as follows at [26]:

> "26. Having considered all of the evidence in the round and having regard to the guidance in Papajorgi (supra), I am satisfied that this is a genuine marriage. There were some inconsistencies in the answers that the appellant and the EEA sponsor gave at interview. However, there is ample evidence that they have lived at the same residences for four years. They conduct the financial affairs in their relationship in a fairly sporadic way, which I find accounts for the absence of regular transactions from the appellant going into the EEA sponsor's account. This is because the appellant is paid in cash and operates his financial affairs accordingly spending some of the cash, giving some to the EEA sponsor and on occasions, paying some money into her account. The appellant intended to move in with the EEA national straight away and this accounted for the swift engagement. I therefore allow the appeal to the extent that the marriage is not a marriage of convenience".

6. The appeal was allowed under the Immigration (EEA) Regulations 2006.

The Grounds and Submissions

7. In the respondent's grounds it is argued that no reasons have been provided for the discrepancies given during the marriage interview which were considered quite major, such as what happened after the wedding ceremony, whether the sponsor had an accountant, and what they did for their wedding anniversary. The judge had accepted that documentary evidence addressed individually to the sponsor and appellant was sufficient to show that they were living at several addresses together but in the absence of joint tenancy agreements the respondent considered that all this showed was that the parties lived at a common address. It is then argued that the question of the sponsor's status was not dealt with, and there was no finding on whether she was exercising treaty rights. Without this being established, it could not be said that the appellant was residing in accordance with the Regulations and his appeal could not succeed.

8. Mr Bramble adopted the grounds in his submissions, arguing that the judge had failed to deal adequately or at all with the discrepancies which had been set out in paras [2] – [4] of the decision. He submitted that the fact that there was evidence of joint residence did not necessarily lead to a conclusion that they were living together. The judge had failed to give adequate reasons for his findings.

9. Mr Edwards submitted that this was a plain case: the discrepancies related to relatively minor matters and the judge had been entitled to deal with them shortly. It was fair to assume, so he argued, that there had been no real issue about whether the sponsor was exercising treaty rights in the light of the judge's failure to deal with that issue.

Assessment of the Issues

10. I must consider whether the judge erred in law such that the decision should be set aside. The first challenge to the judge's decision is that he failed to take proper account of the discrepancies at the marriage interview highlighted in the decision letter or failed to give adequate reasons why he did not regard them as significant. The judge set out the discrepancies in paras [2] – [4] of his decision. Different answers were given about matters such as when the appellant met the sponsor, whether it was October or November 2012, whether it was at a local bar, and then whether they saw each other again a week later at the same bar as opposed to next meeting outside a kebab shop. There were differences about whether the sponsor had an accountant, when the appellant last visited the mosque, the time they were married, and what they did following the ceremony.

11. It is without doubt the case that these conflicting answers were capable of supporting a finding that this was a marriage of convenience and, in these circumstances, the onus was on the appellant to prove that was not in fact the case.

12. When assessing this issue the judge considered the evidence about who had attended the wedding, noting that the appellant's mother and sister had come from Pakistan for the ceremony [16]. He also noted the explanation for the speed of the marriage, the appellant saying that the reason that he proposed so soon was because he was a Muslim and, in his country, they did not do years of engagement. The judge also took account of the evidence about their finances at [19] – [20] and where they had been living at [21] – [23]. He noted that both the appellant and the sponsor had received correspondence at the two addresses where they had been living. He took into account the fact that there were no letters in the bundle jointly addressed to them but, given that the evidence about the accommodation spanned the period between 2012 and 2016, he concluded that it would be reasonable to infer that they were living at those addresses between those two dates.

13. Having considered the evidence, the judge was satisfied that this was a genuine marriage. I am not satisfied that his failure to deal at any greater length with the inconsistencies set out at [2] – [4] undermines that finding. He was clearly aware of them, having set them out fully, and in [26] he referred to the fact that there were inconsistencies but contrasted them with the evidence that they had lived in the same residences for four years. It was for the judge to balance these various factors and to decide whether the appellant had discharged the onus of proof. He was satisfied that he had for the reasons he gave. In summary, I am satisfied that the judge reached a decision properly open to him for the reasons he gave, having balanced the adverse inferences that might be drawn from the inconsistencies with the positive inferences from the other aspects of the evidence he identified. I am therefore not satisfied that he erred in law in this respect.

14. However, I am satisfied that he erred in law by not making a finding on whether the sponsor was exercising treaty rights. The judge specifically said at the end of [26] that he allowed the appeal to the extent that the marriage was not one of convenience, but there is no indication why he did not go on to decide the issue of whether the sponsor was exercising treaty rights and the representatives were unable to cast any light on this. The issue was raised in the respondent's decision and addressed, at least in general terms, in the grounds of appeal and there is nothing to indicate that this issue was conceded by the respondent. It had to be decided to determine whether the appellant was entitled to a residence card. By failing to do so, the judge erred in law. This issue therefore remains to be determined. As the parties were not ready to deal with the issue at the initial hearing, I give directions for the filing of further evidence.

15. At the resumed hearing before me the appellant produced and relied on a bundle of documents (A) indexed and paginated (0)-(J1-2). This includes a witness statement from the appellant at 0-1 dated 6 June 2017 and further evidence relating to the sponsor's employment.

16. Mr Malik relied in particular on the documents at A15-19 which are payslips covering the period January to May 2017 showing that the sponsor has been

employed by Tesco. Her wages were paid into her bank accounts (A20-28). There is a P60 for year ending 5 April 2017 at A29 showing earnings during the tax year 2016-17 of £14,258.71. There are further documents at F1-H15 evidencing the sponsor's employment at various times in 2013-2016. In her statement dated 6 October 2016, prepared for the hearing before the First-tier Tribunal, she says that she has been exercising treaty rights in the UK since 2012, she is self-employed, has been working as a sole trader since November 2012 and during 2015-2016 she worked for Tesco. This is repeated in the appellant's statement of 6 June 2017 saying that the sponsor has been self-employed from October 2012 to the end of 2015 and has been working full-time for Tesco from November 2015 to date although there does appear to have been a break in the employment at some point as at H14 there was a P45 showing a leaving date from Tesco on 29 August 2016.

17. Mr Avery did not seek to raise any issues with the appellant or the sponsor and accepted that the documentary evidence appeared to support the claim that the sponsor was exercising treaty rights. Looking at the evidence as a whole and there being no basis for a challenge to the validity of the documents relating to her employment with Tesco, I am satisfied that the sponsor is exercising treaty rights in the UK. As already noted there have been previous applications which were refused. It was clear that there was an issue between the parties as to what evidence had been submitted in support of those applications but, whatever the position in that respect, in the light of the evidence before me, I am satisfied that the sponsor is a qualified person within the relevant Regulations.

Decision

18. The decision of the First-tier Tribunal is set aside as erroneous in law. I re-make the decision by allowing the appeal against the refusal of a residence card as the spouse of an EEA national exercising treaty rights in the UK. No anonymity direction was made by the First-tier Tribunal.

Signed H J E Latter Date: 22 June 2017

Deputy Upper Tribunal Judge Latter