Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/00830/2018**

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 20th August 2018	**On 12th September 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR AMAR MAHBOOB
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Parkin (Counsel), instructed by Whitefield Solicitors
For the Respondent: Mr C Bates (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Shergill, promulgated on 30th May 2018, following a hearing at Manchester on 17th May 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Pakistan, and was born on 24th December 1977. On 6th June 2017, the Appellant applied for permanent residence on the basis of

retained rights after the death of his wife, Ivana Morlova, who was the Sponsor, as an EEA national who had been exercising treaty rights in the UK. That application was refused by the Respondent on the basis that there had been two previous …… determinations which had found that the marriage between the Appellant and the Sponsor was a marriage of convenience. A number of other issues were also raised.

The Judge's Findings

3. In what was a careful and sensitively crafted decision, Judge Shergill held that the issue of there being a marriage of convenience was simply not borne out in the light of the evidence (see paragraph 6 of the determination) and that this was a genuine and subsisting marriage (paragraph 11). However, in the consideration of the other questions, as to whether the Sponsor was a qualified person and whether the Appellant did reside in the UK "at least the year immediately before" the death of the Sponsor, the judge was less persuaded. The submission before Judge Shergill was that the year in question could be accumulated at any point. The judge held that this was not the natural reading of the provision in the Regulations. If the draftsman had so intended it to be the natural meaning, a reference could have been made to the accumulation of a year at any time before the death of a Sponsor. However, the reference here in the provision was to the "year immediately before". The judge held that he must apply the letter of the statutory instrument as drafted (paragraph 23).

Submissions

4. At the hearing before me on 20th August 2018, there was a degree of consensus between Mr Parkin and Mr Bates, the Senior Home Office Presenting Officer. Mr Bates submitted that there had been no Rule 24 response. However, he would have to accept that there was a material error of law. This is because the evidence (at pages 119 to 122 of the Appellant's bundle) had not been considered. This was the evidence that related to the payslips of Ivana Morlova, showing, for example, a period of 6th January 2017 where she earned £183.24, right the way through to 20th January 2017, where she still continued to be in employment. Mr Bates submitted that if one takes into account the fact that there was no contract of employment and no assessment as to how the Sponsor had been paid, this evidence, which had been overlooked, becomes relevant. Mr Parkin, for his part, submitted that there had been an absence of positive findings. This was a case where the Sponsor had been unable to work due to illness, and there was evidence in relation to statutory sick pay which was simply not considered by the judge. No consideration was given to the exercising of treaty rights by the Sponsor.

5. Given the agreement between the parties, I am satisfied that there is an error of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. This is because the judge did not engage with the evidence that the Sponsor was working at least in January 2017 for a different employer (as is plain from the documentation at pages 119 to 122, which shows the Sponsor to be working elsewhere). The judge neglects to mention this evidence (at paragraph 15). This is when the conclusion is reached by the judge that the EEA national cannot be treated as qualified person beyond 6th December 2016. The judge also did not consider that the EEA national may have continued to be a qualified person on the basis that she was temporarily unable

to work (as contended for by Mr Parkin before me), given that she was in receipt of support allowance. Therefore, although the decision is on the whole carefully constructed, there are matters that have been overlooked such that it cannot be said that the decision with respect to Regulation 6(2)(a) of the 2016 EEA Regulations has been correctly arrived at. Given the agreement between the parties as to these points, I need not say more, except to conclude that this matter should be referred to a judge other than Judge Shergill for a *de novo* hearing pursuant to practice statement 7.2(b).

Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

No anonymity order is made.

The appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 10th September 2018