Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/05236/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th March 2018	**On 20th March 2018**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

MUHAMMAD NASEER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss E Rutherford of Counsel, instructed by Maliks and Khan Solicitors
For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Pacey promulgated on 20 June 2017, in which the Appellant's appeal against the decision to refuse to issue him with an EEA Residence Card dated 21 April 2016 was dismissed.

2. The Appellant is a national of Pakistan, born on 21 November 1981, who first arrived in the United Kingdom on 18 July 2007 with entry clearance as a visitor for a period of six months. The Appellant made applications for an EEA Residence Card on 15 November 2003 and 21 February 2014, both

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of which were refused by the Respondent and the Appellant's appeal against the second decision was dismissed by Judge Obhi on 14 April 2016. The Respondent and then the First-tier Tribunal found that the Appellant had entered in to a marriage of convenience. The Appellant made a further application for an EEA Residence Card on 11 November 2015.

3. The Respondent refused the latest application on 21 April 2016 on the basis that the Appellant had entered in to a marriage of convenience. The reasons given were that the Appellant and his wife had failed a language test and it was not accepted that they could communicate with each other and further, adverse inferences were drawn from the failure to attend a marriage interview on two separate occasions.

4. Judge Pacey dismissed the appeal in a decision promulgated on 20 June 2017 on the basis that there was no genuine marriage between the Appellant and his wife because they had no common language to communicate with each other and they had failed to attend an interview when requested to do so by the Respondent. In essence, Judge Pacey found that there was a marriage of convenience and that there had been no new substantive evidence on the issue since Judge Obhi made the same findings in April 2016.

The appeal

5. The Appellant appeals on two grounds. First, that Judge Pacey recorded in the decision that the Appellant had used an interpreter for the hearing when he did not and that she stated that no adverse inferences would be drawn from the use of an interpreter but in the following paragraph in the decision did just that. Secondly, that Judge Pacey had before her written and oral evidence from a number of witnesses and evidence of continuing cohabitation of the Appellant and his wife, none of which was referred to in her findings and no reasons were given for the rejection of such evidence.

6. Permission to appeal was granted by Judge Pedro on 29 December 2017 on all grounds.

7. At the hearing, Counsel for the Appellant relied on the grounds of appeal (no further development of those grounds was required) and confirmed that the Appellant had accepted that the Respondent had sufficient evidence to raise a suspicion as to whether his marriage was one of convenience but that the First-tier Tribunal had failed to properly consider the Appellant's evidence in response to that.

8. The Home Office Presenting Officer submitted that the issue in this case was not whether there was a genuine and subsisting relationship but whether the Appellant had entered into a marriage of convenience in 2014; the test for which was set out by the Court of Appeal in Rosa v Secretary of State for the Home Department]2016] EWCA Civ 14.

9. In relation to the decision of Judge Pacey, it was submitted that he rightly took into account the earlier decision of Judge Obhi, the language concerns and the Appellant's failure to attend a marriage interview. The Judge indicated that he had taken into account all of the evidence before him, including the witness evidence and there was no need for him to refer to it specifically again in his findings. Finally, it was submitted that there was no adverse inference taken in paragraph 22 of the decision about the request for an interpreter as this was a request rather than use of an interpreter and in any event dealt with the substantive issue of language ability.

Findings and reasons

10. In paragraph 2 of her decision, Judge Pacey records that the Appellant, his sponsor, her daughter, Ms Mrukowicz, Mrs Munshi, Mr Mehmood and Mr Saeed gave evidence at the hearing which is set out in the record of proceedings and in paragraph 11 that there were supportive witness statements from the same persons. The witness evidence covered the start of the Appellant's relationship and marriage as well as their current relationship and included matters in the Appellant's favour to show that he had not entered into a marriage of convenience. However, in her findings, Judge Pacey does not refer to any of the witness evidence and instead in paragraph 22 and 23 simply states that none of the evidence before her disturbs the previous findings of Judge Obhi in particular in relation to language. By implication, the witness evidence and potentially the evidence of cohabitation (albeit this related primarily to after the date of marriage) in the Appellant's favour was rejected but no reasons were given for this. That was an error of law. Although it is not necessary for a Judge to a refer to each and every piece of evidence before them to reach a lawful conclusion with adequate reasons being given, the failure to give any reasons at all for rejecting almost the entirety of the Appellant's evidence does not give adequate reasons for the decision. The statement in paragraph 12 of the decision that all of the evidence has been taken into account is not sufficient in this case.

11. I also find that it is an error of law to rely in paragraph 22 of the decision on the Appellant's request for an interpreter as an adverse reason in support of the conclusion that the Appellant had not satisfactorily addressed the language issue since the previous First-tier Tribunal decision. Judge Pacey correctly set out the position in 21 that no adverse inferences should be drawn from the use of an interpreter and the reasons why but failed to apply this in the following paragraph. I do not accept that the statement at the end of paragraph 22 was based on substantive language ability nor that there was somehow a qualitative difference between a request for and using an interpreter, particularly where in this appeal the Appellant did not actually use an interpreter during the hearing (although he had requested one.

12. At the hearing I indicated to the parties that I was minded to find errors of law on both grounds of appeal. The parties agreed that in the absence

of any lawful findings on the witness evidence in particular, that the appeal should be remitted to the First-tier Tribunal for a de novo hearing.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and remit the appeal for a de novo hearing before the First-tier Tribunal (Birmingham) to be heard by any Judge except Judge Pacey.

No anonymity direction is made.

Signed Date 12th March 2018

Upper Tribunal Judge Jackson