**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/00718/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 11 July 2014** | **On 25 July 2014** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE FROOM**

**Between**

**AMER MOHEB ABDDELHAY ABDELAZIZ**
(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mrs H Price, Counsel
For the Respondent: Mr C Avery, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a citizen of Egypt born on 1 February 1981, who has appealed with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Quigley, who dismissed his appeal against a decision of the respondent to refuse to issue a residence card as confirmation of a right of residence as the family member or extended family member of an EEA national exercising Treaty rights.

2. The appellant appears to have entered the UK in around November 2009. Since then he has been refused a residence card on six occasions. On 1 October 2012 he was refused because his claimed spouse's Slovakian ID card had been reported stolen.

The appellant made his most recent application on 15 October 2012 through the offices of his former representative, Mr T S Chodha. The appellant again claimed to be the family member (spouse) of Ms Ivana Kariĉková, a Slovakian national born on 29 June 1986. It was stated in the application form that she worked for Mr Mohamed Al Masri (trading as "MNH Fashion") earning £121.60 per week and that her job was permanent. Documents were submitted suggesting the couple married in Cairo on 23 September 2008. Ms Kariĉková's passport, issued in March 2011, was submitted with the application. The respondent refused the application because it had not been possible to contact Ms Kariĉková's claimed employer, the employment letter was not on headed paper and there were discrepancies in the pay slips. There was insufficient evidence to show she was a qualified person. The Egyptian marriage document had previously been found to be not as issued. The evidence showing cohabitation was considered. There was only one document in the name of Ms Kariĉková and none in joint names. There was insufficient evidence to show they were in a durable relationship. The letter also considered the rules relating to article 8 of the Human Rights Convention.

3. The appellant's grounds of appeal asserted he is the family member of an EEA national and removing him would breach article 8. He requested his appeal be determined on the papers. Judge Quigley considered the documents. She noted the appellant had stated in his application form that Ms Kariĉková was employed whereas his claim was now that she was self-employed and had been since 2011. She considered the appellant's responses to the reasons for refusal but concluded the burden of proof, which rested on the appellant, had not been discharged.

4. The appellant sought permission to appeal, arguing the judge erred by failing to consider the evidence and merely endorsing the respondent's reasons for refusal. Permission to appeal was granted by Judge of the First-tier Tribunal Astle because it was arguable the judge had failed to give adequate consideration to the evidence submitted on behalf of the appellant. The respondent has filed a rule 24 response opposing the appeal. This notes that Ms Kariĉková's financial statement for the tax year 2012 to 2013 had been submitted but this was insufficient to show that she was exercising Treaty rights.

5. I heard submissions as to whether the judge had made a material error of law. Mrs Price was concerned that she had not seen the respondent's bundle or the grounds seeking permission to appeal so I provided her with a copy of them. I explained to her that the appellant's bundle, which she had a copy of, had not been lodged at the First-tier Tribunal. The judge only had witness statements and some original documents before her. I showed these to Mrs Price. In her submissions, she relied chiefly on evidence which she understood had been filed showing the appellant had been granted an EA family permit in order to enter the UK as the family member of Ms Kariĉková. I noted that. Mrs Price did not pursue an adjournment application.

6. The reason Mrs Price felt the family permit was significant was that the refusal letter had noted that, in the appellant's previous application made on 21 September 2012, he submitted the same Egyptian marriage document which was found not to be "as issued". The judge simply reproduced this in her determination even though no evidence had been submitted on the point by the respondent. Mr Avery pointed out that the appellant had had two previous unsuccessful appeals.

7. Mrs Price said she was prepared to deal with the financial issue, which I took to mean whether the appellant had shown that Ms Karičková was a qualified person. It is clear from the notice of decision that this was the primary reason for refusal. She argued there was sufficient material before the judge to find Ms Karičková was a qualified person and the judge had erred by failing to take into account all the evidence. She had not given adequate reasons for rejecting the evidence. Mrs Price also argued the judge had given insufficient reasons for finding the couple were not in a durable relationship.

8. Mr Avery agued the judge had not made a material error of law and her decision should stand. She had set out the evidence in paragraph 7 of her determination and given reasons for rejecting it in paragraph 11. She was perfectly entitled to reach the conclusion she reached.

9. I find there is no material error of law in Judge Quigley's determination. The key issue was whether Ms Karičková was a qualified person. As noted, the appellant did not file a complete bundle. The judge noted in paragraph 7 that the appellant had submitted various documents and witness statements. She noted the evidence had changed and that the appellant now said his wife worked as a self-employed cleaner in addition to working for MNH Fashion. The judge noted in particular that trading accounts had been provided for the period March 2012 to March 2013. The following paragraphs of the determination show that the judge felt the change of evidence was very significant. There had been no mention of self-employment in the application and, following the refusal, which was in large measure based on an inability to verify Ms Karičková's employment, a different case was made that she was self-employed and had been since 2011. The judge noted the appellant's attempt to explain why telephone calls made to MNH Fashion were not picked up and rejected it. The judge went on to note, in paragraph 12, that there were unexplained discrepancies in the pay slips which the appellant had produced.

10. In fairness to the appellant, it is right to point out that the judge did not comment on the letter he provided from Leadenhall Financial Management Ltd commenting on the rates of pay and the change in the National Minimum Wage, although it does not deal with what the respondent regarded as discrepancies in the figures for total pay. The judge did not comment in detail on those either. Paragraph 12 does therefore given the impression the judge was endorsing the reasons for refusal without assessing the evidence for herself. This impression was compounded by paragraph 13, which simply notes what was recorded about the marriage documents without acknowledging the fact the appellant had submitted evidence

from the Consulate addressing this. Nor does the judge note what the appellant said in his witness statement about gaining a family permit on the strength of the marriage.

11. However, on the primary issue of whether the appellant had discharged the burden of proving Ms Kariĉková was a qualified person, the judge was entitled to make the finding she made for the reasons she gave in paragraphs 8 to 11. The appellant had fundamentally shifted the basis of his application in the manner described and, having chosen to have his appeal determined on the papers, gave no opportunity for any of the evidence to be tested. The judge's conclusion was rational and based on the evidence. Her reasons were adequate. The appeal was bound to be dismissed.

12. It follows that any error concerning the validity of the marriage was immaterial to the outcome of the appeal. There is a further reason why any error was immaterial. The marriage documents in question show that the appellant's marriage to Ms Kariĉková was conducted through proxies. The Upper Tribunal has now clarified in *Kareem (Proxy marriages – EU law)* [2014] UKUT 00024 (IAC) that in those circumstances, the appellant had to show that his marriage was recognised under Slovakian law. That is the law whether or not the issue was raised in the reasons for refusal letter. No evidence has been provided by the appellant on this issue and therefore he could not have demonstrated that he was a family member for the purposes of his application for a residence card.

13. Mrs Price also challenged the judge's assessment of the issue of whether the couple were in a durable relationship. The reasons for refusal letter noted the appellant had provided some documents. However, they were not considered sufficient. He provided 7 documents, such as bills and bank statements dating back to 2010, in his name and only one document in Ms Kariĉková's name from April 2011. No joint documents were submitted. In paragraph 14 the judge simply says she has studied the documents provided in support of the appeal and she remained "far from satisfied" that the couple were in a durable relationship. No other reasons are given and the judge does not describe the documents which were submitted.

14. I have carefully considered the documents. There are still no joint documents. The majority of the documents are what might be described as marketing materials and there is an absence of significant documents, such as bank statements or official correspondence in respect of Ms Kariĉková. There is a single BT bill for Ms Kariĉková going back to May 2011. Otherwise the documents are all relatively recent.

15. The judge's conclusion, albeit somewhat briefly expressed, was one which it was open to her to reach. There is no material error in her decision.

**DECISION**

The Judge of the First-tier Tribunal did not make a material error on a point of law and her determination dismissing the appellant's appeal under the EEA Regulations shall stand.

No anonymity direction has been made.

**Signed** **Date 23 July 2014**

**Neil Froom, sitting as a Deputy Judge of the Upper Tribunal**