Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/45562/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
On 19th August 2014	**On 1st September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

AMIR SAEED SHEIKH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Bellara, instructed by Veja & Co
For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant, who is a citizen of Pakistan, appeals with permission against the decision of Judge of the First-tier Tribunal Mayall, in a determination promulgated on 2nd June 2014, to dismiss his appeal against refusal to grant to him a residence card as the family member of an EEA

national exercising treaty rights in this country. The Appellant is married to a Lithuanian citizen.

2. Following interview of the Appellant and the spouse the Respondent did not accept that they were in a genuine relationship. It was also stated that the spouse had not been shown to be exercising treaty rights but that point appears not to have been pursued. The application was refused also with regard to the Appellant's Article 8 ECHR rights. No removal decision was made.

3. In his determination the judge concluded that the parties were not in a genuine marriage, which was said to be a marriage of convenience. He found that they had not been living together as husband and wife. The appeal was dismissed under the Regulations and under Article 8.

4. The Appellant applied for permission to appeal. It is asserted in the grounds that the judge was selective in the parts of the interview record he cited, had failed to give weight to large portions of the evidence given by the Appellant and his partner and that there were in fact numerous answers which were consistent. It was said that the judge had failed to set out relevant case law, particularly concerning Article 8 and had failed to give adequate reasons for his views. The judge himself had asked some questions and it was said that answers given had not been properly taken into account. The determination was said to be incomplete.

5. In granting permission Judge of the First-tier Tribunal Ford noted that there was an omission from the determination at paragraph 46 where the judge had apparently intended to set out the relevant law. She said that was unfortunate as the Appellant's argument that the findings of fact were not sufficiently clear was not sustainable on a reading of the determination as a whole. She did not however restrict the Grounds of Appeal.

6. At the hearing I clarified that all grounds could be argued if relied upon. Mr Bellara said that he had been present at the first hearing and it was material that part of the determination was missing. The judge had pointed out inconsistencies but he submitted that the oral evidence had not been considered carefully and, he said, the judge appeared to ignore some of the evidence. His primary submission was that having made findings the judge had failed to apply the relevant law and there had been no specific reference to cases on Article 8 such as **Razgar**. There should have been some consideration of private life on the basis of the information before the judge.

7. Mr Smart accepted that there was clearly an omission from the determination at paragraph 46 but he said that at paragraph 34 there was an adequate exposition of the relevant law. He mentioned that there had apparently been a ten week delay between the appeal being hard and promulgation of the determination but that did not reach the three months' guideline which had been previously accepted as the reasonable limit for promulgation of a decision. He said that the judge had explained

why he had found that the marriage was not a genuine one. The fact that paragraph 46 was missing could not be material. Having found there was no family life the appeal under Article 8 could only relate to private life and there was no material in that respect. The Appellant had arrived here as a student.

8. Having considered the determination, the grounds and the submissions I came to the view that there was in fact no material error of law in the determination of Judge Mayall and I briefly announced my reasons for that decision, which I now set out.

9. It was accepted at the hearing that the only question was whether the parties were in a genuine marriage or a marriage of convenience. The judge set out at paragraph 34 that the initial burden of showing that the marriage was one of convenience lay upon the Respondent but the evidential burden could however shift if the Respondent adduced material which suggested that the marriage was one of convenience. It was accepted by the Appellant's Counsel that the evidential burden had shifted to the Appellant and that the standard of proof was on the balance of probabilities. That statement sufficiently sets out the burden and standard of proof. The judge heard oral evidence from the Appellant and his spouse and he referred in the determination to elements of that oral evidence, in addition to the documentary evidence before him. In the assessment of the evidence, which begins at paragraph 35 of his determination, he referred to inconsistencies, some of which were described as "glaring". At paragraph 41 the judge stated that taking into account the whole of the evidence before him, whether specifically referred to or not, and having been able to observe the couple giving evidence he was satisfied that it was not a genuine marriage.

10. The judge gave adequate and comprehensible reasons for the view he took of the evidence. His conclusions were not perverse or irrational. He applied the correct burden and standard of proof. Whilst it is always conceivable that another judge might have taken a different view, Judge Mayall was entitled to take the view he did take on the evidence before him and he correctly directed himself. He referred in some detail to the evidence and there is no indication that the delay of ten weeks between the hearing and promulgation of the decision affected his conclusions.

11. There is clearly a lacuna at paragraph 46 which reads "[Mr Mayall to paste in the relevant law and private life]". The judge having reached his decision under the EEA Regulations that section can only relate to his decision under Article 8. He had already stated, at paragraph 44, that there could be no question of the decision being a breach of the Appellant's right to a family life. He went on at paragraph 45 to state as follows:

> "as I am satisfied that the Appellant has not told me the truth about his circumstances in the UK I have no information as to his private life

in the UK. It is not stressed that he has any right to remain in the UK pursuant to any other Immigration Rule or policy or concession."

Whilst the omission of the paragraph 46 which the judge intended to insert is certainly to be deprecated, given his findings as to family life and private life there was no prospect at all of the Appellant being able to succeed under Article 8 ECHR. In the circumstances that omission could not have been material to the outcome.

12. No removal decision was made. If the Appellant and his spouse now have further evidence upon which they seek to rely no doubt the Appellant will seek to make a further application.

Decision

There was no material error of law in the original determination and the decision that the appeal be dismissed therefore stands.

Signed Dated 01 September 2014

Deputy Upper Tribunal Judge French