Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18135/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 15 January 2016	**On 19 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

MS NKEIRUKA KELECHI OKALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Corben, counsel instructed by Legacy Law Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against the decision, promulgated on 30 July 2015, of First-tier Tribunal Judge Porter (hereinafter referred to as the FTTJ).

Background

2. The appellant married Mr Germain Comlan Essenam Caccavelli, a French national, on 23 October 2013. She sought a Residence Card

as confirmation of her right of residence as the spouse of an EEA national. In refusing her application on 30 April 2015, the Secretary of State concluded that the appellant was a party to a marriage of convenience owing to the comments of the appellant's son to immigration officers to the effect that the appellant was residing solely with him and not the aforementioned EEA national, that there was no evidence at the address suggesting that the EEA national lived there; that the appellant had signed a marriage questionnaire in which she stated that she intended to live permanently with the EEA sponsor and that her son had to be prompted by immigration officers to mention the claimed relationship with the EEA national.

3. In the grounds of appeal, the appellant asserted that the appellant's son was a registered mental health patient and was not competent at the time owing to his state of mind. The appellant also denied that she had been working as her son had stated and it was said that she had been shopping with her husband when the immigration officers called.

4. The hearing before the FTTJ was decided on the papers, at the appellant's request. The appellant forwarded a bundle of documentary evidence in support of her appeal. The FTTJ concluded that the appellant had entered into a marriage of convenience and dismissed her appeal.

Error of law

5. The grounds of application argue that the FTTJ wrongly dismissed the appeal under the Immigration Rules as opposed to the Immigration (European Economic Area) Regulations 2006. Complaint was also made of the FTTJ's reference to the 16-year age gap between the parties, a matter, which had not concerned the respondent. It was implied that the FTTJ made irrational findings that the appellant and EEA sponsor were not living together, despite documentary evidence of the payment of rent and Council Tax.

6. FTTJ PJM Hollingworth granted permission on the basis that the FTTJ arguably erred in making references to the Immigration Rules at [22] of the decision. Permission was not refused on the remaining grounds.

7. The Secretary of State lodged a Rule 24 response on 27 November 2015. In opposing the appeal, the respondent said that the FTTJ directed himself appropriately; that there were no material errors of law which were capable of having a material impact on the outcome of the appeal; it was unclear to what extent consideration of the Rules may have affected the FTTJ's analysis and the reference to the Rules was nothing more than a "slip of the pen."

8. At the hearing before me, Mr Melvin submitted an expanded Rule 24 reply, to which Mr Corben did not object.

9. In addressing ground one of the application for permission to appeal, Mr Corben drew my attention to the fact that the FTTJ made three erroneous references to the Immigration Rules. He argued that the FTTJ had begun by considering the issue of whether this was a marriage of convenience before veering off to consider whether the relationship was subsisting. That the relationship was no longer subsisting was not relevant to whether it was a marriage of convenience and he argued that the FTTJ was clearly considering the Rules.

10. With regard to the second ground, Mr Corben argued that the FTTJ took into consideration an immaterial matter, that being that the appellant was 16 years older than her 30-year old EEA husband. He argued that there was no real difference in age and what there was indicative of nothing. The FTTJ had also made reference to a matter, which was not supported by any material in the respondent's bundle, that being a previous unsuccessful application for a residence card.

11. As far as ground 3 was concerned, Mr Corben asked me to note that documentary evidence before the FTTJ linked the sponsor to the claimed matrimonial home; the FTTJ found that the appellant was living at the address but concluded that they were not living together. While the appellant's son had told the immigration officers that he did not know where the EEA sponsor lived, there was no need for a couple to permanently live together.

12. In reply, Mr Melvin argued that the respondent had discharged the burden of showing that the marriage was one of convenience and the burden was on the appellant to show that it was not. There was no material error of law. The appeal was considered on the papers at the appellant's request and she had been aware of the issue. The FTTJ had made a number of clear findings, which were open to her on the evidence. Mr Melvin was unaware of the earlier unsuccessful decision and argued that the FTTJ's reference to it did not amount to a material error of law.

13. Mr Corben responded by focusing on the issue of the previous refusal of a residence card, about which there was nothing on file. He argued that the FTTJ used it as a factor in her assessment in the appeal and without knowing why it was difficult to see how this can be justified.

14. At the end of the hearing, I announced that the FTTJ made no material error of law and that I would be upholding her decision. My reasons are as follows.

15. The FTTJ made three, erroneous, references to the Immigration Rules in her decision. These appeared at [21], [22] and under the Notice of Decision heading. The first reference at [21] is in the context of a standard paragraph and I consider it to be a typographical error possibly owing to copying and pasting. The second reference at [22] occurs where the FTTJ is explaining why she is not going to consider the appeal under Article 8 ECHR outside the Rules. While her reasons for not doing so are, incidentally, erroneous, the end result was not. Similarly, I consider the reference to the Rules in the notice of decision to also be a typographical error. I am fortified in my conclusions by the fact that the FTTJ referred to the 2006 Regulations in detail at [3] and [4] of the decision and reasons. Furthermore, the entirety of her reasons, from [13] to [20] are focused on whether or not the appellant and sponsor entered into a marriage of convenience (a concept which does not form part of the Immigration Rules) and with reference to the relevant case law, that of Papajorgi (EEA spouse – marriage of convenience)(Greece) [2012] UKUT 00038 (IAC). The FTTJ did not materially err in this regard.

16. Mr Corben argued that the FTTJ had relied on immaterial matters in concluding that this was a marriage of convenience. I conclude that this is not the case. The FTTJ took into consideration many matters including that the appellant's son was capable of giving reliable information to the immigration officers; that the residence was a 1 bedroom flat; that the bills were solely in the name of the sponsor including Council Tax showing single occupancy yet he was not living there; that the appellant was living there evidenced by the outcome of the immigration officers' visit; that the appellant had twice avoided a marriage interview and had avoided giving evidence at her appeal hearing.

17. I find there to be no basis for disturbing the findings of the FTTJ that this was a marriage of convenience.

18. I do not find the age difference to be of no materiality and it was open to the FTTJ to take into consideration any matters apparent from the evidence before her. Indeed there is EU guidance to decision-makers on marriages of convenience, which mentions just this issue. While there appears to be no reason for the FTTJ to take an adverse view of the previous unsuccessful application for a residence card, I find that the outcome of the appellant's appeal would have been the same without consideration of this matter.

19. Lastly, I find there to be no ambiguity in the FTTJ's findings as to the evidence of residence of the purported matrimonial home. While at [17] she notes that there is evidence linking the sponsor to the address in question, it is clear that she rejects the implication that he was in fact living at the address. She does not find the evidence before her suggesting cohabitation to be "*satisfactory*"

and concludes that the appellant is not living at that address "*with the sponsor*." Given the information provided by the appellant's adult son to the immigration officers to the effect that the appellant and her son lived alone and that he made no mention of the EEA sponsor at all until prompted, the FTTJ's conclusions cannot be faulted in this regard.

20. There is no material error of law in the FTTJ's decision.

21. There is no justification for making an anonymity direction in this matter.

Conclusions

(1) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

(2) I uphold the decision of the FTTJ.

Signed: Date: 17 January 2016

Deputy Upper Tribunal Judge Kamara