Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19663/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 July 2016	**On 12 July 2016**

Before

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD KASHIF
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin
For the Respondent: In person

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellant, Muhammad Kashif, a citizen of Pakistan born on 19 September 1982, as the appellant herein.
2. The appellant entered the UK on 31 May 2014 with an entry clearance valid until 16 November 2014. He applied for a residence card on 7

© CROWN COPYRIGHT 2016

November 2014. The appellant married Simona Kermavnar on 14 October 2011. The appellant's wife is a citizen of Slovenia.

3. The application for a residence card was refused for reasons set out in a letter dated 7 May 2015. The refusal followed a home visit on 6 May 2015 where the appellant was spoken to but he said that his wife was visiting her sister who was in hospital. It is recorded and disputed that his wife had gone to Slovakia for the visit.

4. The appellant claimed he had been married for five years and living at the address for one year. He said that his wife had not currently got a job and had not been working for the previous four months.

5. The Immigration Officers found scant evidence of a woman's presence at the house and there was a lack of photographs and phone records, etc. The officers did not believe that the relationship was genuine and subsisting. It was further considered that the appellant was party to a marriage of convenience within the meaning of the Immigration (EEA) Regulations 2006. Furthermore it was considered that there was insufficient evidence to demonstrate that the appellant's wife was exercising treaty rights in the United Kingdom as defined in Regulation 6 of the Regulations. The appellant had relied on wage slips dated October 2014. The department had contacted Davina's Retail Limited who confirmed that the appellant's wife currently worked for them part-time. However this was taken to contradict the information supplied by the appellant to the Immigration Officers that his wife had not been employed for four months. As the appellant's wife's employment could not be verified he did not meet the requirements of Regulation 6.

6. The appellant appealed and his appeal came before a First-tier Judge on 4 December 2015. He was not represented then and is not represented before me.

7. The judge in paragraph 4 of his decision summarises the grounds of appeal. It was said that the record of the appellant's replies at interview was inaccurate and incomplete. He had struggled to understand the officer's accent and there had been no interpreter.

8. The judge correctly addressed himself in paragraph 5 about the shifting burden of proof in EEA cases and the shifting of an evidential burden as set out in **Papajorgii (EEA Spouse – Marriage of Convenience) Greece [2012] UKUT 00038 (IAC)**. The determination is very short and reads as follows:

> "6. In addition to the Home Office bundle the Appellant provided a file of documents including photographs and a large number of letters, bills and the like addressed to both himself and the Sponsor. Both attended the hearing and gave evidence in

English, the oral evidence and submissions are set out in the Record of Proceedings and referred to where relevant below.

7. It is not disputed that the Appellant and Sponsor are legally married and that the Appellant has previously been issued with a residence card. It is also clear that the Appellant was visited by a UKBA team on the 6th May 2015 and was asked a number of questions and the flat where he lives was inspected and that at the time the Sponsor was out of the country. The contents of the interview, the state of the flat and the inferences drawn and whether the Sponsor was exercising treaty rights are all in dispute.

8. There is a minor point with regard to the Refusal Letter which clearly upset the Sponsor. In the letter there is a reference to her being Slovakian. This is incorrect as she is Slovenian. The error in the Refusal Letter and in the Immigration Enforcement report at page L1 of the Home Office bundle is not such as to undermine the Refusal Letter itself but does raise a concern about the care with which it was produced.

9. For the hearing the Appellant provided a bundle received by the Tribunal on the 13th of November 2015. That contains the Notice and Grounds of Appeal, the original application, documentation sent to the Appellant and to the Sponsor at the address where they both live, a tenancy agreement in both names, a return ticket for the Sponsor of the 6th June 2015 and photographs.

10. At the hearing both gave evidence in English without the need for an interpreter and with the Sponsor absent from the hearing room whilst the Appellant gave evidence. The Appellant maintained his objections to the manner in which he was questioned and the way in which the visit was reported. His view was that the officer wanted to find that the marriage was one of convenience although he accepted that the officer had nothing to gain from lying about it.

11. The Appellant and Sponsor were consistent about where she works, Dosa Indian fast food restaurant, and that tax is due in January next year. They were also consistent about details such as the bedroom furnishings, sleeping arrangements, and details such as what they had for breakfast. There were differences over what they did last weekend. They do not appear to have a current tenancy and may be holding over pending renovation of the property by the landlord.

12. It would be surprising if a couple were completely consistent in their evidence relating to domestic arrangements and daily activities. Differences over fundamental matters would be telling

and could lead to a finding that a marriage is not genuine. However in this case I bear in mind that the Appellant and Sponsor do not have the benefit of legal representation and that the case has not been presented as clearly as it might have been, the absence of legal representation is not to be held against the Appellant.

13. The documentation that has been provided shows that the Appellant and Sponsor have been joint signatories to their tenancy agreements which shows that they jointly occupy a small flat with a single bedroom and have done so for some time. It is not the case that they occupy different rooms in the same building. The evidence is that the Sponsor was out of the country when the Appellant was visited, there is evidence of her return in addition to the extensive evidence of her living at the address given and her presence and evidence at the appeal hearing. There are joint accounts such as the Santander Everyday Current Account which supports their claims.

14. Whilst the Secretary of State was justified in expressing concerns about the nature of the relationship between the Appellant and the Sponsor I am satisfied, taking into account the documentary and oral evidence, that the Appellant has discharged the evidential burden and has shown that the [sic] and the Sponsor are genuinely married and that it is not a device to facilitate his remaining in the UK. As the Appellant and Sponsor are genuinely married I find that the Appellant is entitled to a residence card."

9. The respondent applied for permission to appeal. Permission was granted by First-tier Judge Holmes on 1 June 2016. It was apparent that the judge had allowed the appeal only as a result of information provided at the hearing of the appeal.

10. Paragraphs 4 and 5 of the grant of permission read as follows:

"4. It is arguable, as the grounds set out, that the decision fails to identify with the requisite clarity whether the judge was satisfied that the sponsor was a qualified person, given this was disputed, and given there is no such finding.

5. Moreover, given that the judge considered that the evidence before the respondent justified her decision that this was a marriage of convenience, it is arguable that he has failed to identify with the requisite clarity what evidence was placed before him which had led him to the conclusion that it was not. The answers given when the appellant was interviewed at his home (when the sponsor was on his own account out of the UK) were not disputed as having been given by him. Arguably the

judge failed to engage adequately or at all with the content of that interview in his decision."

11. The standard directions were sent to the parties with the notice of hearing on 8 June 2016. No bundle was lodged or response on behalf of the appellant.
12. Mr Melvyn relied on the grounds and submitted that the first issue was the question of whether the sponsor was exercising treaty rights.

13. The sponsor had not been present at the time of the visit and it was argued that the marriage was one of convenience. The judge's determination was inadequately reasoned. There was a question of the joint tenancy agreement and there appeared to be no current tenancy. There were inconsistencies in the account. There was a lack of clarity in paragraph 11 in referring to tax due in January next year as the grounds said it was not clear what if any supporting documentation had been produced as evidence. There had been no finding that the sponsor had been exercising treaty rights. It was submitted that the reasons given for accepting co-habitation were conflicting. Mr Melvin handed in the authorities of **Rosa v Secretary of State [2016] EWCA Civ 14** and **Agho v Secretary of State [2015] EWCA Civ 1198**.

14. I then heard from the appellant, supported by his wife. They had helpfully produced a series of points. It was claimed that the Home Office had mixed up the two places where the appellant's wife had been working: Davina's and Dosa. In the autumn of 2014 she had been working in Davina's News and Off Licence which had closed. She did not have a P60 but had payslips. She had worked in the Dosa Restaurant in October 2015 but she had not been issued with payslips. She only had payslips from January 2016. The notes take issue with the Secretary of State's decision and account of the visit. For example, the appellant had been recorded as saying that he did not know when his wife would be returning. The sponsor comments: "actually my husband could not know, because also I could not know. In the end of April I visited Sicily and in the meantime my sister in Slovenia had broken her hip. ..." She had remained to assist her sister.

15. In relation to the tenancy agreements the point is made that there were two tenancy agreements for the flat. There was a twelve month agreement from 1 June 2014 and six months from 1 June 2015. As no bundles had been submitted as required by the directions it was extremely difficult to establish what material had been placed before the First-tier Judge. The court file records that original documents had been returned to the appellants following the hearing. I was shown the tenancy agreements and the recent tax returns.

16. Mr Melvin submitted that the appellant's employer might have been reluctant to issue payslips because he was paying below the minimum wage. There was no evidence to show that she had been working at the

material time. The tax returns had not been sufficient to show that she had been exercising treaty rights at the date of the hearing. There was little evidence to support the claim that she had been working prior to the hearing. It was accepted that there was evidence of the tenancy agreement. The main problem with the First-tier Judge's decision was the lack of evidence to support the reasoning. There was no corroborative evidence from the employer to show that the sponsor worked at the material time.

17. At the conclusion of the submissions I reserved my decision. I can only interfere with the judge's decision if it was materially flawed in law.

18. There are two major problems with this case. The first is the brevity of the judge's decision and the second is the failure on the behalf of the appellant's to lodge a proper bundle. With hindsight they should have been legally represented. I took a considerable amount of time with Mr Melvin to try and establish what material the couple had put before the First-tier Tribunal and what was new.

19. One matter that does appear clear and indeed was accepted by Mr Melvin was that the couple had put in tenancy agreements covering the relevant period and I need no longer deal with that point.

20. In relation to the marriage of convenience issue, it is important to record that the First-tier Judge had the benefit of hearing oral evidence from both parties. He further records that he heard the evidence separately so that the sponsor was outside the hearing room while the appellant gave his evidence. The judge found the evidence given to be consistent as he records in paragraph 11 of the decision. The reference to the tax due is explained by the subsequent material which was placed before me. The judge records consistencies as well as differences over the activities over the previous weekend. In my view although brief the judge does deal with the evidence before him concerning the marriage and it was open to him to conclude that the marriage was not one of convenience for reasons which are adequately set out in paragraphs 11 to 14 of the determination. It was open to the judge to find that the appellant had discharged the evidential burden in relation to the point taken by the respondent that the marriage was one of convenience.

21. Unfortunately that does not resolve the difficulties for this couple. It does appear that the judge was concentrating on the marriage of convenience issue rather than the question of whether the sponsor was exercising treaty rights. I tried to assist the parties as best I could but it does appear that there was a dearth of evidence before the judge in relation to the sponsor's employment at the relevant time. As I say, I went through the material with Mr Melvin and the appellant and his wife in an effort to see whether the point could be resolved.

22. In the end I am not persuaded that it would be right to gloss over the difficulties on this particular point. I reach this conclusion with some regret because having seen the couple and the material they produced including many photographs I can understand why the First-tier Judge resolved the question of whether the marriage was one of convenience in their favour. Nevertheless, in my view he concentrated on that matter and perhaps overlooked or did not deal properly with the question of whether the sponsor was exercising treaty rights.

23. Because of the deficiencies in the documentary evidence before me it is not possible for me to resolve that matter in the favour of the appellant. Had the appellant been legally represented and complied with the Rules things might have been different. However in my view the appropriate course in this case is for the appellant to make a further application to the respondent supported by current evidence that his wife is indeed exercising treaty rights.

24. For the reasons I have given, the determination is materially flawed in law. I substitute a fresh decision.

Notice of Decision

Appeal dismissed.

Anonymity order not made.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and nor do I.

Signed Date 12 July 2016

G Warr
Judge of the Upper Tribunal