Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/50941/2014**

THE IMMIGRATION ACTS

Heard at Field House
On 29 January 2016

Decision & Reasons Promulgated
On 24 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DILANKA RUWAN FERNANDO
(Anonymity Direction Not Made)

Respondent

Representation:
For the Appellant: Ms A Fijiwala, Senior Home Office Presenting Officer
For the Respondent: Mr M Biggs, (Counsel) instructed by SEB solicitors

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an

appeal by the Secretary of State against a decision of First-tier Tribunal Judge Majid, promulgated on 17 July 2015, which allowed the Appellant's appeal.

Background

3. The Appellant was born on 03 October 1987 and is a national of Sri Lanka. On 5 December 2014 the Secretary of State refused the Appellant's application for an EEA residence card.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Majid ("the Judge") allowed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and on 4 November 2015 Judge Andrew gave permission to appeal stating *inter alia*

> "Whilst it is not an arguable error of law for the Judge to fail to set out in detail the contents of the refusal letter it is incumbent on the Judge to make clear in his decision the findings that he makes in relation to the evidence adduced in response to the concerns raised by the refusal letter. In this decision the Judge has failed to do so. He has also failed to make findings as to the weight that can be placed on the letter from the EEA sponsor's mother but appears to have taken this into account. Accordingly I am satisfied that there are arguable errors of law in the decision."

The Hearing

6. (a) Ms Fijiwala, for the respondent, referred me to the grounds of appeal and told me that the Secretary of State's position has not been considered by the Judge at all. It is the Secretary of State's position that the appellant and sponsor had entered into a sham marriage. The Secretary of State relies on a marriage interview which is reproduced in the respondent's bundle. No mention of the marriage interview, nor the answers which the respondent believes discrepant, is made by the Judge in his decision. Ms Fijiwala told me that the Judge has ignored the case of Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC) and has failed to take guidance from case law. In his summary of evidence, between [4] & [8] the Judge does not set out what evidence he accepts, nor why he finds that evidence persuasive.

(b) Ms Fijiwala took me to [10] of the decision, where the Judge sets out his findings and conclusions, and told me that between [10] and [14] what is recorded by the Judge is vague and lacking in specification, so that the objective reader cannot tell why the Judge made the decision that he made. She urged me to set the decision aside and remit the case to the First-tier Tribunal because (she said) the Secretary of State has not been given a fair hearing.

7. Mr Biggs, for the appellant, vigorously opposed the appeal and told me that the grounds of challenge really amount to an argument that insufficient reasons are given in the decision. He referred me to South Bucks District Council v Porter [2004] UKHL 33, and argued that the Judge had clearly focused on the one issue that is in dispute and made

findings of fact which were open to the Judge to make. He explained that the appellant's bundle, placed before the First-tier, contains 281 pages and is the extensive evidence to which the Judge refers at [10(c)]. He told me that the decision is not tainted by a material error of law, & urged me to dismiss the appeal and allow the decision to stand.

Analysis

8. At [7] the Judge sets out a summary of the appellant's oral evidence. At [4] the Judge narrates that he has witness statements for the appellant and the sponsor which clarify "*some points of the evidence before the caseworker*".

9. At [10(a)] the Judge clearly says that he relies on the oral evidence of the appellant, and at [15] the Judge concludes that the appellant and sponsor are parties to a genuine marriage.

10. The difficulty is that the Judge races to a conclusion. The respondent's position is set out in the reasons for refusal letter. The Judge has given no consideration to the marriage interview, and the Judge has not explained why he preferred the appellant's evidence to the respondent's evidence, nor which parts of the appellant's evidence he placed weight on. The appellant's 281page bundle is not considered by the Judge. In short there is no meaningful analysis of the evidence which was placed before the Judge.

11. In MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), it was held that (i) It was axiomatic that a determination disclosed clearly the reasons for a tribunal's decision. (ii) If a tribunal found oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it was necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight was unlikely to satisfy the requirement to give reasons.

12. I can only come to the conclusion that the summary nature of the decision indicates that the Judge has given inadequate reasons and that his fact-finding exercise is flawed. These are material errors of law. I must therefore set the decision aside.

13. There is, however, sufficient evidence before me to enable me to substitute a decision. I have before me the respondent's PF1 bundle together with the appellant's bundle which contains the items listed on the index to the bundle. The respondent was not represented before the First-tier. No application was made from an adjournment. If the respondent was happy for the case to be considered without representation before the First-tier there is no reason why I should not proceed to determine this case of new.

Findings of Fact

14. The appellant is a national of Sri Lanka. On 17 August 2010 the appellant was granted leave to enter the UK as the dependent of his Sri Lankan wife, who was present in the UK as a student. The respondent extended leave to remain in the UK until 1 April 2014.

15. Whilst in the UK the appellant's marriage to his Sri Lankan wife broke down irretrievably. On 18 June 2014 decree of divorce was granted by a Sri Lankan court.

16. On 8 August 2014 the appellant married Katarzyna Bala, a Polish national, in London. Ms Bala ("The Sponsor") is an EEA national exercising treaty rights of movement as a worker in the UK. The appellant and the sponsor have lived together since 1st July 2014 and continue to live together.

17. On 23/02/2015 the sponsor's mother wrote a letter singing the praises of the appellant and confirming that the appellant and sponsor are parties to a genuine marriage. Documents 79 to 191 of the appellant's bundle record communications by Viber, mobile phone and text passing between the appellant and sponsor between July 2013 and January 2015. They contain sequences of messages of affection passing between the appellant and sponsor. Documents 192 to 279 of the appellant's bundle are a collection of photographs of the appellant and sponsor enjoying their own company both at home and on social engagements.

18. The appellant and sponsor have matching tattoos to demonstrate their commitment to each other. The appellant and sponsor have visited Poland together.

19. On 21 November 2014 both the appellant and the sponsor were interviewed by an immigration officer. Records of those interviews are reproduced in the respondent's bundle. The appellant and sponsor were each asked 197 questions. The respondent believes that there are material differences in seven of the answers given.

CONCLUSIONS

20. In Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC) the Tribunal held that (i) There is no burden at the outset of an application on a claimant to demonstrate that a marriage to an EEA national is not one of convenience; (ii) IS (marriages of convenience) Serbia [2008] UKAIT 31 establishes only that there is an evidential burden on the claimant to address evidence justifying reasonable suspicion that the marriage is entered into for the predominant purpose of securing residence rights; (iii) The guidance of the EU Commission is noted and appended. The Tribunal in Papajorgji made it clear at paragraph 33 that they did not accept there was a burden as such on the Appellant and at paragraph 39 stated "*In summary, our understanding is that, where the issue is raised in an appeal, the question for the judge will therefore be 'in the light of the totality of the information before me, including the assessment of the claimant's answers and any information provided, am I satisfied that it is more probable than not this is a marriage of convenience?*".(i.e the burden lies on the SSHD) At paragraph 32 the Tribunal held that a visa should be issued promptly on application unless the decision maker has reasonable grounds to suspect a marriage of convenience and the evidential onus of showing that there are such reasonable grounds in the first place rests on the decision maker.

21. In R (on the application of Adetola) v First-Tier Tribunal (Immigration and Asylum Chamber) and SSHD [2010] EWHC 3197 (Admin) It was held that that Immigration Judges should be slow to find that a marriage solemnised in the Church of England was a sham

marriage and should accept the marriage certificate as proof of the marriage, albeit that the certificate could be scrutinised to ensure it was genuine.

22. The respondent's suspicion that this is a marriage of convenience is based entirely on the performance of the appellant and sponsor at marriage interview. The respondent believes that the appellant and sponsor give differing accounts of the appellant's reason to come to the UK. The sponsor knows that the appellant's father died of cancer but does not know what sort of cancer that was. The appellant and sponsor give differing accounts of the purchase price of the car. The appellant and sponsor arguably give different accounts of where they spent their first night together. The appellant and sponsor differ (by £35) on their account of household expenses. The appellant and sponsor give differing accounts of how the news of their engagement was broken to the sponsor's mother. The appellant and sponsor give conflicting accounts of who paid for their wedding rings.

23. When the entire interview is read it can be seen that the appellant and sponsor do not give entirely consistent accounts in those seven areas, but in so far as there is an inconsistency it is not so radical as to form either a conflict or contradictory account. If the appellant and sponsor got seven questions wrong, then they got 190 questions right. The respondent does not give the appellant and sponsor credit for correctly and consistently answering 96% of the questions.

24. Against that there is reliable evidence placed before me of courtship throughout 2013 and 2014, leading to marriage. There is reliable evidence that the appellant and sponsor are the joint tenants of the same domestic property, having signed a lease on 4 May 2014. The photographic evidence & the evidence of regular frequent messages of affection since July 2013 is evidence of a genuine relationship which blossomed into the commitment of marriage.

25. I find that there is no basis for the conclusions drawn by the respondent. I find that the differences in the answers given by each appellant at marriage interview are small and inconsistent. The differences in the answers given by the appellant and sponsor at those interviews is in fact consistent with a genuine relationship characterised by different memories of the same set of circumstances. It is evidence that neither the appellant nor the sponsor concocted a story and committed it to memory.

26. I therefore find that the appellant and sponsor are parties to a genuine marriage, & that the respondent does not have grounds for suspecting that they are parties to a marriage of convenience.

27. In Agho v SSHD 2015 EWCA Civ 1198 it was held that where an applicant sought an EEA residence card on the basis that he was married to an EEA national, he simply had to produce his marriage certificate and his spouse's passport. If the Secretary of State wanted to refuse to issue the card on the basis that the marriage was one of convenience, she bore the burden of proving, to the civil standard, that the marriage was not genuine.

28. I therefore find that the respondent does not have any reason to doubt the validity of the marriage entered into between the appellant and sponsor. I find that the appellant fulfils the requirements of the Immigration (EEA) Regulations 2006.

Decision

29. There is a material error on a point of law in the decision of the First-tier Tribunal. I therefore set that decision aside

30. I substitute the following decision.

31. The appellant's appeal under the Immigration (EEA) Regulations 2006 is allowed.

Signed Date 8 February 2016

Deputy Upper Tribunal Judge Doyle