Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA001712016

THE IMMIGRATION ACTS

Heard at Stoke-on-Trent	**Decision & Reasons Promulgated**
On 21 June 2017	**On 06 July 2017**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

MUHAMMAD MUBASHAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Williams, Counsel
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Muhammad Mubashar, was born on 21 August 1988 and is a male citizen of Pakistan. He has appealed against the decision of the respondent dated 17 December 2015 to revoke his EEA residence card which had been issued on 13 June 2013. The First-tier Tribunal (Judge A Simmonds) in a decision promulgated on 9 November 2016, dismissed the

appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. I find that the First-tier Tribunal decision should be set aside. My reasons for reaching that conclusion are as follows. First, I find that it is not clear from the decision whether the judge has appreciated the fact that the burden of proof in this appeal (insofar as it concerned the respondent's allegation that the appellant was engaged in a sham marriage) rested not upon the appellant, but upon the respondent (*Rosa v Secretary of State for the Home Department* [2016] EWCA Civ 14). In his decision, the judge at [6] stated that, "The burden of proof in this case is upon the appellant and the standard of proof is upon the balance of probability." I note that the judge does refer to *Papajorgji (EEA spouse – marriage of convenience) Greece* [2012] UKUT 0038 (IAC). The Tribunal in that case noted that an evidential burden rested upon a claimant to "address evidence justifying reasonable suspicion that the marriage in question was undertaken for the predominant purpose of securing residence rights." The judge also refers to *IS (marriages of convenience) Serbia* [2008] UKAIT 0031 and correctly notes that any burden upon an appellant as regards proving that a marriage is not one of convenience does not arise in the absence of evidence of matters supporting a suspicion that the marriage is not genuine. However, notwithstanding his references to those relevant authorities, there is nothing in the analysis itself that suggests any attempt to apply the principles enunciated in the cases to the facts of the appeal.

3. Further, for reasons I will set out below, the judge has relied upon evidence which in is plainly problematic. The judge gave weight to evidence produced by Immigration Officers who had encountered the appellant. The appellant was encountered by Officers Shaw and Nixon. There is a statement from Immigration Officer Shaw which indicates that the officers were given permission by the appellant, during an interview, to look at his mobile telephone. There were, however, no screen shots or other written evidence showing the Facebook images placed before the judge. Whilst hearsay evidence is, of course, admissible before the Tribunal, the evidence in IO Nixon's statement is disputed by the appellant as would have been apparent to the respondent from the appellant's grounds of appeal to the First-tier Tribunal. For example, the statement records that "a search on the subject's Facebook also showed that he was not friends with his wife and that she was in a relationship with another man and had been since 2012 and also appeared to have had a child." This evidence begs an important question; if the appellant was not friends with his wife on Facebook it is not clear how IO Nixon examined the wife's entries on the appellant's telephone. It is possible that the wife has no restrictions upon her Facebook account but, equally, the "search" carried out by IO Nixon and to which he refers may have occurred after the encounter with the appellant and using a different telephone. If that was the case, then it is unclear why the concerns of the Immigration Officers were not put to the appellant and his response invited. Moreover, I find that it is unsatisfactory for important evidence to have be given in the

form of the statement of IO Shaw which is not supported (as easily could have been) by photographic copies of the actual entries on the Facebook account.

4. Thirdly, I note that although IO Shaw prepared the witness statement, the notebook upon which the contents of the statement is based was completed by the other Immigration Officer, IO Nixon. Indeed, according to the extract of the notebook we have in the papers, it was IO Nixon and not IO Shaw who had examined the mobile telephone of the appellant. There was no mention in the notebook of the wife's Facebook account.

5. Fourthly, there is concern that the judge has not done anything other than accept the statement and notebook evidence without question. The appellant, who was not represented before the First-tier Tribunal, is recorded as having stated in evidence that he believed it was possible to "backdate" an entry on a Facebook account and suggested that the judge gave little weight to the Facebook evidence. The judge rejected that suggestion out of hand but, again in the absence of the actual Facebook entries and relying upon nothing more than the second-hand hearsay evidence of the Immigration Officer's statement (unsupported by any entries from IO Nixon's notebook) that is not clear to me why he did so.

6. In the light of what I have said above, I have decided to set aside the First-tier Tribunal's decision. The evidence of the Immigration Officers, in its current form and without the addition of the copies of the Facebook entries, it seems to me unsatisfactory. However, I do not suggest that the evidence cannot be presented in a more satisfactory form or that the Immigration Officers' evidence cannot be of value. The next Tribunal will expect the respondent to look again at this evidence before the next hearing and, in particular, to produce screen shots of any internet pages upon which she may seek to rely.

Notice of Decision

7. The decision of the First-tier Tribunal promulgated on 9 November 2016 is set aside. None of the findings of fact shall stand. The appeal is returned to the First-tier Tribunal (not Judge A Simmonds) for that Tribunal to remake the decision.

8. No anonymity direction is made.

Signed Date 3 July 2017

Upper Tribunal Judge Clive Lane