Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/44412/2014**

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 28 April 2017	**On 3 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

MAHDI TOUATI
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Ndubuisis, of Drummond Miller LLP
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. 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. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge D C Clapham promulgated on 22 August 2016, which dismissed the Appellant's appeal.

Background

3. The Appellant was born on 2 July 1989 and is a national of Algeria. On

20 May 2014 the Appellant applied for a European Economic Area ("EEA") residence card as a family member of an EEA national exercising treaty rights in the UK. The appellant says that he married a Polish national on 10 March 2014.

4. On 21 October 2014 the Secretary of State refused the Appellant's application because the respondent believes that the appellant and the EEA national have entered into a marriage of convenience.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge David C Clapham ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 17 February 2017 Judge Scott Baker gave permission to appeal stating inter alia

> 3. The appeal had initially been dismissed by way of determination promulgated on 8 May 2015. Application for permission to appeal was sought and by order dated 18 December 2015 the appeal was remitted for hearing *de novo*
>
> 4. The decision from the Judge in this remitted appeal relied heavily on the terms of the immigration officer's report and he failed to engage with the evidence submitted previously by the appellant which was paginated in a bundle amounting to 356 pages.
>
> 5. Accordingly the decision discloses an arguable error of law in that the FTT Judge had failed to consider all of the evidence before him.
>
> 6. Permission is granted.

The Hearing

6. (a) Mr Ndubuisi, for the appellant moved the grounds of appeal. He told me that at [20] and [21] of the decision the Judge placed unquestioning reliance on the immigration officer's report, without considering all of the evidence relied on by the appellant. He told me that the Judge made no attempt to critically assess the quality of the immigration officers report. He told me that at [22] the Judge says that he takes the immigration officers report at "face value". That, he told me, amounts to a lack of judicial enquiry, and is a material error in law.

(b) Mr Ndubuisi told me that this case centres on consideration of whether or not the appellant entered into a marriage of convenience. He told me that there were several sources of evidence and that in addition to the appellant's oral evidence there were three inventories of productions. He told me that if the Judge had carried out a balanced assessment of all of the evidence, and not simply accepted the immigration officers report at face value, a different conclusion may have been reached.

(c) Mr Ndubuisi conceded that there is inadequate evidence that the EEA

national was exercising treaty rights at the date of decision. He told me that the appellant and EEA national have now divorced. He told me there are two critical questions to be answered. The first is whether or not the marriage was a marriage of convenience. The second question is whether or not the EEA national was exercising treaty rights of movement. He told me that the appellant accepts that his appeal will be dismissed because there is no reliable evidence that the EEA national is exercising treaty rights of movement, but urged me to find a material error of law in relation to the Judge's decision in relation to whether or not the appellant has entered into a marriage of convenience, to set the Judge's decision aside and then to substitute my own decision dismissing the appellant's appeal because the appellant cannot demonstrate that the EEA national was exercising treaty rights of movement.

7. For the respondent, Mr Govan told me that the decision does not contain an error, material or otherwise. He told me that even if I find the decision is flawed insofar as it relates to the quality of marriage, the dismissal of the appellant's appeal would still stand because it is accepted that the Judge's decision in relation to the EEA national is correct. He argued that there cannot be a material error of law if the decision remains the same. He argued that the appellant is trying to attack part only of the decision, which has no impact whatsoever on the conclusion reached by the Judge. In any event, he told me that it was for the Judge to determine what weight should be placed on the immigration officers report. That is what the Judge did, so that that is no error of law. He urged me to dismiss the appeal and allow the Judge's decision to stand.

Analysis

8. In Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038(IAC) the Tribunal held that "*Although neither the Directive nor the Regulations define it, as a matter of ordinary parlance and the past experience of the UK's Immigration Rules and case law, a marriage of convenience in this context is a marriage contracted for the sole or decisive purpose of gaining admission to the host state. A durable marriage with children and co-habitation is quite inconsistent with such a definition*".

9. 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. As a matter of principle, a spouse established a prima facie case that he was the family member of an EEA national by providing the marriage certificate and his sponsor's passport. The legal burden was on the Secretary of State to show that any marriage thus proved was a marriage of convenience and that burden was not discharged merely by showing 'reasonable suspicion'. The evidential burden might shift to the applicant by proof of facts that justified the inference that the marriage was not genuine. The facts giving rise to the inference included a failure to answer a request for documentary proof of the genuineness of the marriage where grounds for suspicion had been

raised.

10. In Rosa [2016] EWCA Civ 14 it was held that the Secretary of State had the legal burden of proving that an otherwise valid marriage was a marriage of convenience so as to justify refusing an application for a residence card. If the Secretary of State adduced evidence capable of suggesting that the marriage was not genuine, the evidential burden shifted to the applicant.
11. It is common ground that the central part of the respondent's evidence is a report from immigration officers. What is argued for the appellant is that the Judge did not analyse the evidence produced for the appellant to demonstrate that his marriage was genuine. The immigration officers report is sufficient to suggest that the marriage was not genuine, so that the evidential burden shifted to the appellant.

12. The appellant relied on his witness statement, a witness statement from the EEA national and a witness statement from the EEA national's brother. The appellant attended the hearing alone, so that it was only the appellant who adopted the terms of his witness statement, and it was only the appellant who was offered for cross-examination. At [22] of the decision, the Judge explains that he places little weight on the EEA national's brothers evidence because the EEA national's brother did not give evidence.

13. The second inventory of productions for the appellant contains vouching of the appellant's income and financial position. It contains the EEA national's payslips from April 2015 and September 2015.

14. The first inventory of productions contains 357 pages, but few of those pages relate to the marriage between the EEA national and the appellant. There are cards from the EEA national sponsor address to the appellant, together with invitations from the EEA national's brother addressed to the appellant and the EEA national, and then a sequence of photographs of the appellant and EEA national together, and photographs of the bedroom visited by immigration officers.

15. There is very little in the documentary evidence which directly addresses the quality and sincerity of the marriage between the EEA national and the appellant. In the face of the documentary evidence, and the absence of the EEA national and her brother, the Judge had the unchallenged evidence that the marriage between the appellant and sponsor had broken down by the date of hearing.

16. At 20 the Judge realistically declares

> I have to deal with the evidence as it is

He then goes on to explain why he attaches weight the immigration officers report.

17. In Green (Article 8 – new rules) [2013] UKUT 254 (IAC) the Tribunal

said that

> Giving weight to a factor one way or another is for the fact finding Tribunal and the assignment of weight will rarely give rise to an error of law.

18. At [20] and [21] of the decision the Judge explains why he places weight on the immigration officers report. At [25] of the decision the Judge explains why he prefers the evidence of the immigration officers to the evidence presented by the appellant.

19. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

20. At [26] the Judge sets consideration of the quality and sincerity the marriage to one side, and explains that because that is no evidence that the EEA national was exercising treaty rights at the date of hearing, he dismisses the appeal

21. The decision does not contain an error of law. It is for the Judge to decide what weight to place on the evidence. The Judge explains in the decision why he prefers the evidence of the immigration officers to the evidence lead for the appellant. There is no justifiable criticism of the fact-finding exercise. The Judge directed himself correctly in law. The Judge sets out adequate reasons for reaching the conclusion that he reaches. The decision reached by the Judge is well within the range of reasonable conclusions available to the Judge.

22. In any event, the determinative issue in this case is whether or not the EEA national was exercising treaty rights of movement at the date of decision. Mr Ndubuisi agreed that there is no error of law contained in [26] and [27] of the decision and that those to paragraphs support the conclusion reached by the Judge. As a result, all parties agree that if the discussion about marriage of convenience was removed from the decision, the conclusion reached by the Judge would remain the same and is beyond challenge. Even if I am wrong and the decision contains an error of law, that the error cannot be material because it has no impact on the First-tier Judge’s decision to dismiss the appeal.

23. In this case, there is no misdirection in law & the fact-finding exercise is beyond criticism. The decision is not tainted by a material error of law.

The Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed.

CONCLUSION

24. No errors of law have been established. The Judge's decision stands.

DECISION

25. The appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed Paul Doyle Date 1 May 2017

Deputy Upper Tribunal Judge Doyle