Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/08503/2017

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Determination Promulgated**
On 11 February 2019	**On 25 February 2019**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

JAMSHED KHAN
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Chohan of SZ Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before me following the grant of permission to the appellant in respect of the determination of First-tier Tribunal Judge Obhi dismissing his appeal on 27 September 2018.

2. The appellant is an Indian national born on 5 October 1966. He initially entered the UK as a visitor in 2005 and overstayed. He was served with removal papers in June 2011 and in August 2011 he

married a Portuguese national and unsuccessfully applied for a residence card. A subsequent application was, however, granted and on 18 July 2012 a card was issued to him. It is his unsuccessful application for a permanent residence card, made in February 2017 and refused on 19 September 2017, that is the subject of this appeal.

The Hearing

3. The appellant and his wife attended the hearing but were not required to give evidence as the issue was only whether the judge had made material errors of law.

4. For the appellant, Mr Chohan relied on the grounds and submitted that although the judge found that the burden was on the respondent and that the only ground raised in the decision letter (the non-attendance at interviews) had been explained, she nevertheless dismissed the appeal. Her decision was, therefore, irrational. No reasonable judge could have reached that decision. The appellant and sponsor both attended the hearing. The respondent had, in the decision letter, done no more than made an assertion. The judge acknowledged it was difficult to proceed without a Presenting Officer so she should have adjourned the hearing so that one could attend. No reasons had been given for the dismissal of the appeal.

5. I then heard submissions from Mr Lindsay. He argued that the grounds did not particularise the error of law being alleged. It now appeared to be a rationality challenge, but the judge had given a number of reasons for her conclusion and had properly directed herself to the standard/burden of proof. She noted that, as stated in the decision letter, the appellant had married the sponsor just a few weeks after being served with removal/enforcement papers, that there had been no guests at their wedding, that inconsistent evidence had been given about the non-attendance of guests and that there had been a paucity of evidence to show the relationship was as claimed. The appellant had not pleaded that the judge had stepped into the arena as Judge Bird had suggested when granting permission to appeal but, in respect of that allegation, Mr Lindsay submitted that the judge had been wary of overstepping the line and had been very careful in the way in which she put her questions.

6. Mr Chohan responded. He submitted that an explanation had been given for the absence of guests at the wedding. The Secretary of State had already accepted the marriage was genuine because he issued a residence card to the appellant in 2012 so he could not now say that it was a sham and nor could the judge. He questioned what more evidence the appellant could have produced and he submitted that the judge should have asked more questions to test the evidence although he then submitted that it was not her role to do so. He submitted that the decision was irrational, and the judge had done the job of a Presenting Officer. There should be a de novo hearing.

7. That completed submissions. At the conclusion of the hearing, I reserved my determination which I now give with reasons.

Discussion and Conclusions

8. I have considered all the evidence before me and have had regard to the submissions made.

9. My first observation is that the grounds pleaded before me bear little resemblance to those contained in the written grounds and no application to amend the grounds was made either prior to or at the hearing.

10. I deal firstly with the grounds as contained in the application. I accept fully that the judge was careless when she described the appellant as being a Pakistani and not an Indian national. However, as the appeal does not hinge on any issues of return, the mistake over the country of origin, whilst regrettable, is not material.

11. It is also argued that the judge gave the date of the appellant's birth as 5 June 1966 rather than 5 January 1966. I note, however, that the appellant's passport copy gives it as 5 October 1966 as does his application form for a residence card, the decision letter, the notice of appeal and various items of correspondence from the appellant's representatives. Again, the judge has been careless (indeed, so have the representatives) but nothing turns on this.

12. The third example of carelessness on the part of the judge is that she referred to the appellant's representative as Mr Sharma rather than Mr Khan. I note that the judge does refer to Mr Khan in the body of the determination but again, this kind of mistake should not happen. It is hoped that the judge will have regard to this determination and take more care with such matters in the future. Again, however, this does not impact upon the decision. I invited Mr Chohan to tell me whether there were any errors with regard to the facts of the case as pertaining to this appellant, but he was unable to refer me to any.

13. The next point argued in the grounds is that the judge ignored the fact that the appellant had already been granted a residence card previously and *"considered it as an 'issue' whether the parties married for the purpose of enabling the appellant to remain in the UK! "*. I am unclear as to the need for an exclamation mark here but plainly as the application had been refused on the basis that new matters had led the respondent to conclude that the marriage was one of convenience, the judge was obliged to consider this. She did not make this an issue of her own volition; it was made an issue by the respondent's decision letter. I would add that the issue of a residence card does not bind the respondent to having to make positive decisions from then on. If matters arise which raise concerns, it is wholly open to the respondent to revoke a residence card or to

refuse to grant permanent residence. It was not argued that the appellant had a legitimate expectation that he would be granted permanent residence because he had obtained an initial residence card. Indeed, such an argument would have been hopeless as no unambiguous promise was made and no assurance was given to him by a public official (Mehmood (legitimate expectation) [2014] UKUT 469).

14. It is then argued that the respondent did not field a presenting officer and that the burden had been on him and not the appellant to prove the allegation of a sham marriage. The judge was fully aware of this. She confirms at paragraph 40 that *"the burden of proving that the marriage is a marriage of convenience is on the respondent"*. She reminds herself of the principles in Sadovska [2017] UKSC 54 and Seferi [2018] EWHC 287 (at paragraph 41) and then at paragraph 42 again refers to the burden being on the respondent.

15. It is maintained that *"Respondent did not even represent herself what to speak of any evidence* (sic). *The FTT Judge made a finding without any evidence"*. As can be seen from the determination, however, the judge sets out the respondent's case (at 14-15) and then notes the appellant's response (at 42). She then once more refers to the respondent's reasons and considers whether they are sufficient to discharge the initial burden of proof (at 43 onwards), concluding that they are. She also has regard to the explanations provided by the appellant and sponsor. there is nothing to support the contention that findings were made without evidence and, indeed, the grounds do not give any examples of this.

16. The grounds then argue that the respondent's refusal *"was base on assumptions (sic)"* because the judge had found that the appellant had probably not received the correspondence inviting him for interview. It is correct that the judge found in the appellant's favour on this point. That shows she approached the case with an open mind and did not simply rubber stamp the respondent's refusal. She makes it clear, however, that there were other reasons which gave rise to concern and so whilst it may be that the respondent was wrong to draw adverse inferences based on the non-attendance at interviews, it does not follow that that vitiates the decision.

17. The grounds maintain that the judge had evidence covering a number of years to show that there was a genuine relationship. At paragraphs 55-59, the judge addresses the documentary evidence adduced, which given the length of the claimed relationship, is very limited and raised further difficulties. She gave full reasons as to why she concluded that the documentary evidence did not establish that there was a genuine relationship.

18. It is then argued that the appellant and sponsor gave consistent replies to questions they would only be able to answer if they were in

an intimate relationship. Unhelpfully, these replies are not identified, and I cannot see any questions of an intimate nature that were put to the parties.

19. Finally, it is argued, that the judge did not take a number of documents into account. No further details are provided. I asked Mr Chohan several times to clarify which documents it was alleged the judge had disregarded but he was unable to point to any. Having looked through the evidence myself, and in the absence of any assistance from the appellant's representatives, I can find no documents which were not referred to by the judge. I note in fact that the judge confirms that all the evidence was considered and that in addition she also took account of fresh evidence not previously submitted and available on the sponsor's mobile phone (at 12).

20. There is nothing, therefore, in the grounds which even remotely identify any material errors in the judge's approach.

21. I referred earlier to the shift in the way the case was argued before me. Mr Chohan raised the following new grounds during the course of his submissions at the hearing: (1) that the judge should have adjourned the appeal hearing so as to enable a Presenting Officer to attend; (2) that the decision was irrational and perverse and (3) that the judge did the job of the respondent.

22. It is not helpful and not appropriate for new grounds to be argued at a hearing without any application for permission to amend those already put forward, either prior to or at the hearing. No such application was made by Mr Chohan at any time. However, as Mr Lindsay did not indicate that he was disadvantaged by these submissions, I proceed to consider them.

23. On the first point, I find there is no merit whatsoever. The appellant was legally represented at the hearing and no application for an adjournment was made. Nor was it suggested, until the hearing before me, that it had been an error for the judge to have proceeded without a PO. Plainly this is an afterthought by the appellant's representative and it does not assist him at all.

24. With regard to the second argument, I have already considered the judge's findings and set out why I conclude that she was entitled to make the findings she did. The threshold to establish perversity/irrationality is very high and it has not been met here.

25. The third complaint is tied up to some extent with the first and probably inspired by Judge Bird's comment in granting permission. I have examined the determination closely to see if the judge did indeed step into the arena, but I conclude that she did not do so for the following reasons. It is clear that the judge was not happy about the absence of a Presenting Officer (at 39) but equally it is plain that

she was fully aware of her limitations in questioning the appellant and the sponsor. She was very careful in making it clear to the appellant, sponsor and representative that her questions were designed for clarification and assistance (at 11, 20, 26, 39 and 52) and she made this known to them at the outset of the proceedings (at 20). No objections were raised by Mr Khan who represented the appellant either at that stage, or during the course of the hearing or at its conclusion. The questions asked by the judge are fully set out in the determination and are plainly open ended rather than interrogative as one might expect from a representative of the respondent. In no way can they be compared to a cross-examination and the assertion that the judge did the respondent's job is wholly unsupported by any evidence. I note that whilst Mr Chohan was quick to make the allegation and criticize the judge, he did not actually point to any part of her questioning which could be said to be inappropriate.

26. For all these reasons, therefore, I conclude that there is no material error of law in the judge's decision. It is open to the appellant to make a fresh application, is he so wishes, and to provide the respondent with more satisfactory documentary evidence.

27. **Decision**

28. The judge did not make any errors of law. The appeal is dismissed.

29. **Anonymity**

30. I make no order for anonymity.

Signed

Upper Tribunal Judge
Date: 21 February 2019