Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/09432/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13th December 2018	**On 25th January 2019**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

MR SOFIANE ADI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Paraskos of Counsel, instructed by Kamberley Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

The appellant appeals against the decision of First-tier Tribunal Judge Rai promulgated on 19 March 2018 with permission from Upper Tribunal Judge Coker granted on all grounds. The respondent's original decision was to refuse his application for an EEA residence card on the basis of permanent residence following the issue previously of a residence card as the spouse of an EEA national exercising treaty rights in the United Kingdom. That was following his marriage in 2012 to the EEA national.

The respondent's reasons for refusal primarily relied on a visit to the appellant's address on 24 October 2017, in which the respondent concluded that there was no evidence at all of the appellant's spouse having ever lived there and no evidence of any contact with her. The assertion by the appellant that she was in Morocco visiting her sick father was not accepted, given the lack of any evidence of her having lived at the address at all. Also, at the time, it was considered that the appellant's brother-in-law, sister and child were living in a one bedroom flat with him. Essentially, it was not accepted that there had been a genuine relationship.

Based on those findings, the respondent concluded that the Secretary of State had sufficient evidence to believe that the marriage undertaken in 2012 was one of convenience for the sole purpose of the appellant remaining in the United Kingdom and the application was refused on that basis. There are a number of other details in relation to the visit contained in the Reasons for Refusal Letter.

The appellant duly appealed, and the appeal was dismissed by the First-tier Tribunal following consideration of the appellant's history and the basis of the somewhat limited evidence before it. The Judge sets out the law, including the cases of Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 and Sadovska [2017] UKSC 54 in paragraph 10 and correctly identifies that the burden of proof is on the appellant to establish that he meets the requirements of the Immigration (European Economic Area) Regulations 2016, but in relation to whether there is a marriage of convenience, that there is a legal burden on the respondent to demonstrate that an otherwise valid marriage is in fact a marriage of convenience, with the standard of proof being the balance of probabilities and the evidential burden then shifting between the parties if there is reasonable suspicion of a marriage of convenience. The burden is again re-iterated in paragraph 12 although in less clear terms than it was in paragraph 10.

The Judge then goes through the evidence before her in the First-tier Tribunal, which includes what was recorded by the respondent from the visit to the appellant's home, the lack of any clothing, paperwork or documentation for her, the appellant's inability to produce a telephone number for his wife, a lack of any evidence of communication on his phone and the respondent's conclusion of a reasonable suspicion that it was a marriage of convenience. In response, the appellant produced his marriage certificate, photographs of the marriage, joint British Gas bills, bank statements and employment documents including payslips and P60s.

The Judge finds in paragraph 15 that there was a marriage but the difficulty in concluding that that marriage was genuine and once a happy one but now going through a period of difficulty, is the lack of documentary evidence of the sort that one would normally expect of a relationship that had been subsisting for six years as the appellant claimed and the fact that there was no evidence at all from the appellant's spouse. The documents are then considered in detail, including bank statements, payslips and signs of activity from the

appellant's spouse in the United Kingdom during a period that she claimed to be in Morocco. There is also reference to a landlord also being an employer.

The conclusion then comes at paragraph 20:

> "Having considered the totality of the evidence and in particular the lack of communication evidenced between them throughout the period of five years, a lack of financial support between them, a lack of evidence of cohabitation, the lack of supporting evidence from friends or family about the relationship, on a balance of probabilities I am satisfied not only that the appellant's spouse has never lived at the address listed with the appellant despite correspondence in her name being sent there but also that the appellant and Mrs Delli are not in a genuine and subsisting marriage together. They are not in a genuine, subsisting and durable relationship either and the marriage undertaken was one of convenience. Therefore, the appellant is not entitled to a permanent residence card under Regulation 15 of the Immigration (European Economic Area) Regulations 2016."

The grounds of appeal are threefold, although there are points of detail contained therein. In summary, the first ground of appeal is that the Judge has confused earlier in the decision, in a part that I have not expressly referred to, that there were two separate applications by the appellant, one for an initial right of residence card and one for a permanent right of residence. Although the language is not particularly precise in paragraph 13 of the decision it is clear that there was an original residence card issued and that the judge is looking at the issue of permanent residence five years later on in a separate application. I find no error of law on that point and it is clear that the judge has not proceeded on the wrong basis or following any confusion between the applications actually made.

The other two grounds of appeal have more substance. The second is that there is a reliance on a particular lack of documents which is too narrow in the context of this appellant from a particular background, culture, age or religion and fails to allow for differences in relationships. The third ground of appeal is that the findings at paragraph 17 are speculative, in particular the bank statements and so on do not support the findings reached. Although not expressly in the written grounds of appeal, orally today, the appellant has also challenged whether the correct legal tests had been applied in this case and in particular whether the judge has correctly assessed the evidence as the correct point in time, which is when the marriage was entered into in April 2012, and not whether there was any continuing and subsisting relationship in 2017.

Individually, the reference to a lack of documents in the circumstances of this case is one which was reasonably open to the Judge to observe. The findings are perhaps somewhat speculative in terms of the deductions drawn from the bank statements but not necessarily unreasonable in the scheme of things. I would have found no error of law on those grounds if the Judge had clearly set out and distinguished whether she was looking at a marriage of convenience or a genuine and subsisting relationship thereafter.

What the Judge appears to do by inference, and not expressly, is consider that the paucity of evidence before her, of which there can be little doubt in the circumstances of this case, leads to the inevitable conclusion that it was a marriage of convenience from the outset. The same inference is essentially drawn by the respondent in the Reasons for Refusal Letter, primarily based on the visit five years after the marriage and on even less evidence than there was before the First-tier Tribunal.

In this case, I find that the First-tier has erred in law in considering the evidence as a whole without specifically considering what the position was at the date of marriage in 2012. Although the legal test is set out and the shifting burden is set out, it is not, I find, sufficiently expressed nor are the two different questions that the First-tier Tribunal sufficiently distinguished, such that it appears that they are being dealt with together. The simple conclusion in paragraph 20 listing the evidence for and against in very broad terms with a conclusion that there was a marriage of convenience does not properly explain how that conclusion was reached based on the situation in 2017 but looking at the genuineness of the relationship and marriage significantly before that date. There is no express question posed or consideration of the intention of the parties for entering into the marriage at that relative date. The findings therefore in relation to the evidence and the documents may have been sustainable had the correct test been looked at but that is far from certain, given that the marriage was over five years before the date of the visit and the appeal hearing.

For these reasons, there is a material error of law in the decision of the First-tier Tribunal and I set it aside.

This is a case that is most appropriately remitted to go back for a de novo hearing in the First-tier Tribunal. There needs to be further findings of fact in relation to the right date in April 2012. On the paucity of evidence that was before the First-tier Tribunal, that same conclusion might well be reached, but it needs to be expressly addressed as to the correct date.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and remit the appeal for a de novo hearing before the First-tier Tribunal (Taylor House hearing centre) to be heard by any judge except Judge Rai.

No anonymity direction is made.

Signed Date 14th January 2019

Upper Tribunal Judge Jackson