Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14102/2015

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 4 May 2017	**On 11 May 2017**

Before

UPPER TRIBUNAL JUDGE PITT

Between

MR WAQAS MAZHAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, Counsel instructed by S G Law Solicitors
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision issued on 19 October 2016 by First-tier Tribunal Judge Aujla which refused the appellant's appeal against the refusal of an EEA residence card.

2. The appellant maintains that he is entitled to a residence card as he is married to an EEA national who is working in the UK.

3. The history of the matter is that the appellant came to the UK in 2009. The papers do not suggest that he has had legal status at any time. In February 2012 he made an application as the unmarried partner of a British national. That application was refused on 11 January 2013. On 24 January 2013 the appellant made an application for a residence card on the basis of his relationship with an EEA national. On 13 March 2013 the appellant married that EEA national. On 28 September 2013 the respondent refused the application finding that the marriage was one of convenience. The appellant's appeal against that decision was refused by First-tier Tribunal Judge Shamash on 14 July 2014, the respondent's that the marriage was one of convenience being upheld.

4. The appellant then made a further EEA spouse application for a residence card on 19 January 2015. The application was refused on 20 March 2015. The appeal against that decision led to a hearing before Judge Aujla on 11 October 2016.

5. At the hearing on 11 October 2016 the appellant did not attend, his wife did not attend and there was no appearance for him by his representatives. First-tier Tribunal Judge Aujla dealt with that matter as follows:

> "13. The Appellant did not attend the hearing and was not represented at the hearing. No explanation for his absence and that of her representatives was received. I was satisfied from the Tribunal file that the notice of hearing was properly and timeously served on both the appellant and his representatives. The notice was sent on 01 October 2016. I waited until 11.30am in case the Appellant and/or his representatives were late. None of them having arrived, I resolved to proceed with the hearing in the absence of the Appellant and her representatives under Rule 28 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I concluded the hearing at 11.35am.
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> 14. However, at 12.20, whilst I was hearing another case, my clerk gave me the faxed letter of 07 October 2016 from the Appellant's solicitors which they had faxed to Taylor House on 07 October 2016 at 1447. The letter included with it a letter from the Appellant's doctor stating that he could not attend because he had a stiff back and pain in his letter (sic) and asked to postpone the hearing. As I had already concluded the hearing, I did not consider it appropriate to reopen the matter and therefore did not revisit this appeal.
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> 15. Incidentally, even if I had reopened the matter, I would not have adjourned the hearing. I would not have considered the letter from the doctor to be sufficient, given its wording, to justify an adjournment. The letter did not indicate the Appellant was hospitalised, bedridden, unable to walk or unable to travel to court by public or private transport. I therefore would have refused an adjournment."

6. The documents that were placed before First-tier Tribunal Judge Aujla on 11 October 2016 were a letter dated 7 October 2016 from SG Law and a letter dated 6 October 2016 from Dr Chatterjee, a GP.

7. The letter from SG Law states:

> "We have been informed that the appellant was involved in a road traffic accident on 30 July 2016 and he needed an MRI scan. Because of that accident he had twists and he also reported that he tripped downstairs at home recently and therefore unable (sic) to attend the court. His doctor, Mr Arup Chatterjee has requested the Tribunal to postpone the hearing until 01 November 2016 by considering the patient's present condition.
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> **We believe that without his presence, it will be hard for the Tribunal to decide the genuinely (sic) of their marriage as this is the key issue of this case.**
>
> In this circumstance, we would like to request the Honourable Tribunal to adjourn the hearing date and relist it."

8. The letter from Dr Chatterjee is dated 6 October 2016 and states:

> "I have seen and examined the above named. He gives a history of a road traffic accident on 30 July for which he needed an MRI scan. He has had twists and falls subsequently; he also reports tripping downstairs at home. He reports that his back is stiff and he has pains down left leg. I would be grateful if his engagements and interviews etc. are postponed till after 01 November 2016."

9. The appellant challenges the decision on declining to reopen the proceedings and the findings on the substance of the adjournment request. The grounds of appeal state as follows:

> "2. At [14] of the determination the FTJ refers to the facts received by the Tribunal from the appellant requesting an adjournment, which also included a letter from the doctor stating that the hearing should be postponed as the appellant had a stiff back and pain. In circumstances where the facts had been sent to the Tribunal on 7 October 2016 and the hearing took place on 11 October 2016, the appellant submits that the FTJ ought to have granted the adjournment.
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> 3. As the FTJ had heard the appeal, he should have recused himself and granted an adjournment. His consideration of the adjournment application (which was made before the hearing) was tainted by the fact that he had already concluded the appeal. Moreover, his reasons for rejecting the medical evidence is inadequate. A person for example does not have to be bedridden. The medical evidence was clear as to why the appellant could not attend the appeal hearing and bearing in mind the civil standard applies, the FTJ erred in refusing to adjourn.
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> 4. It was imperative for the appellant to be given a proper opportunity to attend and give oral evidence. Incidentally, had the adjournment application been dealt with sooner, the appellant would have had an opportunity to make arrangements, for example for a representatives

(sic) or to obtain better evidence if the reason for refusal of an adjournment was solely because the medical evidence was not clear enough.

5. Moreover, the FTJ at [39] states that the appellant "chose not to attend the hearing". That contradicts the medical evidence and adjournment application which suggests that he could not attend the hearing."

10. The difficulty for the appellant in this challenge is that, even if, at [14], the First-tier Tribunal judge took an incorrect approach to considering the adjournment request by declining to "reopen the matter", he went on to set out, in the alternative, whether the materials provided were capable of leading to an adjournment and his reasons for finding that they did not were entirely sound. He does not require the appellant to provide evidence that he is "bedridden" as the grounds suggest. He was manifestly entitled to find that the material did not support the claim that the appellant cannot travel to the hearing centre. They do not do so. The view of the First-tier Tribunal is bolstered by the wording of the GP's letter which merely reports what the appellant has said rather than providing objective support as to ongoing difficulties following an accident. The GP's letter does not suggest that the appellant was examined or that the GP has any first-hand knowledge of the appellant. The grounds also fail to indicate why, given that there had been no response to the adjournment request, even if the appellant could not attend, his spouse or the legal representatives did not attend on his behalf.

11. For these reasons I did not find the challenge to the refusal to reopen the appeal or to adjourn the hearing amounted to a material error of law.

12. In assessment of the merits of the appeal, the First-tier Tribunal made the following finding at [39]:

> "39. Whilst I have considered the documentary evidence in the Appellant's bundle, I find that none of those documents goes to show that the Respondent's conclusions were erroneous. No additional evidence has been placed before me which addressed the concerns expressed by Immigration Judge Shamash in her judgment. The appellant has not provided any further evidence and chose not to attend the hearing. In the circumstances, I find that the findings and conclusions of both Immigration Judge Shamash in her determination as well as the Respondent's findings and conclusions in the current decision under appeal stand. I find that the Respondent has discharged the evidential burden to establish that the marriage between the Appellant and the sponsor was a marriage of convenience. I therefore uphold the Respondent (sic) findings and conclusions."

13. The appellant's second ground challenges this finding:

> "At [39] the FTJ materially errs in stating that no further evidence has been submitted. The appellant had submitted evidence by way of notice of appeal, additional appellant of (sic) 125 pages and supplementary appeal bundle of 41 pages (sent to the Tribunal on 6/10/2016 by royal mail signed for delivery) to show cohabitation and that the relationship was subsisting

since the previous application and appeal. The appellant's witness statement submitted with the notice of appeal clearly deals with the concerns raised in the refusal letter following the interview. It appears that the FTJ may have overlooked this and has not made findings in respect of the crucial documentary evidence submitted. In this respect the appellant points to **MK (duty to give reasons) Pakistan [2013] UKUT 641 (IAC)** (28 October 2013) which states the following of relevance in the headnote:

> (1) It is axiomatic that a determination discloses clearly the reasons for a Tribunal's decision.
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> (2) If a Tribunal finds oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it is 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 is unlikely to satisfy the requirement to give reasons.

7. At [40] the FTJ erred in concluding that the Respondent has discharged the evidential burden to establish, on the balance of probabilities, the marriage between the appellant and the sponsors was a marriage of convenience. As such the FTJ wrongly applied the legal test in **Papajorgji** as approved in **Agho [2015] EWCA Civ 1198** "... that the legal burden is on the Secretary of State to show that any marriage thus proved is a marriage of convenience; and that the burden is not discharged merely by showing "reasonable suspicion" (paragraph 13, **Agho**)."

14. The list of documents that the judge considered is set out at [16] and includes the appellant's 125 page bundle. The judge can be presumed to have seen the appeal statements of the appellant and his spouse as they were included in the respondent's bundle which is also referred to at [16]. It may be that the First-tier Tribunal did not have the appellants' 41 page bundle before him but where that consisted of material of essentially the same probative value as that in the 125 page bundle, that did not appear to me to be a material issue. In any event, it is clear that the grounds at [6] are not correct in suggesting that the judge did not consider any of the new material.

15. It is my conclusion, however, that there is nothing in [39] or anywhere else in the decision explaining to the appellant why the appeal statements and further evidence of the couple living at the same address, post-dating the hearing before Judge Shamash, was not sufficient to distinguish her findings and displace the view of the respondent that the marriage was one of convenience. The new material included a new tenancy agreement in joint names, bank statements and payslips for the appellant and sponsor which showed them living at the same address and medical documents for the wife showing that she had become pregnant in 2014 but undergone a termination. It is not that the new material had to lead to the appeal being allowed but the appellant was entitled to adequate reasons as to why it was not sufficient. The only statement on the evidence is that it had not "addressed the concerns expressed by

Immigration Judge Shamash in her judgment." For this reason it is my view that the findings of the First-tier Tribunal Judge must be found to have been materially in error as they fail to give adequate reasons for rejecting the appellant's evidence.

16. For these reasons, therefore, I find that a material error of law arises and the decision of the First-tier Tribunal must be set aside.

17. It follows from the nature of the reasons for my decision on error of law that there are no findings of fact here to be preserved and that it is therefore appropriate for the appeal to remade *de novo* in the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal discloses an error on a point of law and is set aside.

The decision will be remade in the First-tier Tribunal.

The decision will be heard at Taylor House and not before First-tier Tribunal Judge Aujla.

Signed  Date: 10 May 2017
Upper Tribunal Judge Pitt