Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/24731/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 June 2017	**On 16 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SHOAIB MUHAMMAD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Jones of Counsel, instructed by Farani Javid Taylor Solicitors
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Telford promulgated on 4 October 2016 dismissing the Appellant's appeal against a decision of the Secretary of State for the Home Department dated 23 June 2015 to refuse to issue a residence card pursuant to the Immigration (European Economic Area) Regulations 2006.

2. The Appellant is a citizen of Pakistan born on 6 November 1991. On 27 November 2014 he made an application for a residence card as

confirmation of a right to reside in the United Kingdom. The application was made on the basis of his marriage to Ms Deimante Jaseckyte, a citizen of Lithuania born on 8 March 1992. The Appellant and Ms Jaseckyte were married on 15 October 2014. Ms Jaseckyte has a son from a previous relationship (d.o.b. 20 June 2010), the father of whom is said to be in Lithuania.

3. In the course of the application the Home Office made a visit to the Appellant's address on 22 May 2015. The Immigration Officers attending on that occasion formed the view that the Appellant and Ms Jaseckyte were not sharing the same room. In due course the Appellant's application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 23 June 2015. The Respondent concluded with reference to regulation 2 of the Immigration (European Economic Area) Regulations 2006 that the marriage was *"one of convenience for the sole purpose of you remaining here in the United Kingdom"*. The Respondent was also not satisfied that Ms Jaseckyte was exercising 'Treaty Rights', and therefore was not a qualified person within the meaning of regulation 6 of the 2006 Regulations.

4. The RFRL articulated reasons in these terms:

> *"Jaseckyte stated she met you on Facebook while she was still in Lithuania and met you in person in June 2014 when she came over to the UK with her son... but could not remember the exact date. She stated [you] started living together since.*
>
> *When asked when you both got married Jaseckyte was unable to give the officers any date and stated it was in 2014. She also stated you married in an Ilford office. Jaseckyte stated that you also sleep in the same room. However officers only seen one double bed which was shared by Jaseckyte and her son and there was hardly any room for a third person to sleep in that bed. When asked for your belongings Jaseckyte opened a cupboard and told officers all your clothes were there.*
>
> *Seen were three shirts (two inside and one was hanging at the door) and the rest of them were female clothes. She then stated you were keeping your clothes in the suitcase underneath the bed. No men toiletries were seen in the room. Also although you had two sisters living in the UK, in Manchester, Jaseckyte had never met them and they didn't even attend the wedding. When asked Jaseckyte stated they couldn't come because they have children.*
>
> *Although you were encountered at the address you failed to convince the officers that you were both sharing the same room."*

5. In respect of the issue under regulation 6 with regard to Ms Jaseckyte's exercise of Treaty rights, the RFRL records that an attempt was made to contact the alleged employer, who was uncooperative with the enquiries being made by the Home Office.

6. The Appellant appealed the refusal to grant a residence card to the Immigration and Asylum Chamber. His grounds of appeal - when standardised pleadings and trite padding are whittled away - essentially amount to an assertion that the Respondent had placed too much weight on what were said to *"minor"* discrepancies in the interviews conducted at the time of the home visit. The grounds of appeal to the First-tier Tribunal did not otherwise address the issue in respect of regulation 6.

7. The Appellant and Ms Jaseckyte attended the appeal hearing before the First-tier Tribunal and were supported by two further witnesses. A bundle of materials in support of the appeal was also filed with the Tribunal. There was no Presenting Officer present at the appeal hearing. The Appellant was represented by Counsel (not Ms Jones).

8. The First-tier Tribunal Judge dismissed the Appellant's appeal for reasons set out in his Decision.

9. The Appellant made an application for permission to appeal which was granted by First-tier Tribunal Judge Kelly on 2 May 2017. Judge Kelly granted permission to appeal in respect of the following matters (as summarised in the permission decision):

> *"The grounds assert that the decision of the Tribunal (a) is infected by error due to it being promulgated some six months after the date of the hearing, and (b) does not identify the "inconsistencies" in the evidence of the witnesses to which it refers at paragraph 8. Those grounds are arguable."*

10. Judge Kelly also gave consideration to a challenge to some specific credibility findings but determined that those were essentially *"a quarrel with the findings of the Tribunal"* and permission was not granted on that particular ground.

11. However, Judge Kelly also identified two further matters that had not been pleaded by the Appellant. At paragraph 3 of the grant of permission to appeal the following is stated:

> *"In addition to the grounds identified in the application, it is arguable that the Tribunal materially erred in law by (a) identifying the issue in*

the appeal as being whether the Appellant and the Sponsor were in a marriage that was genuine and subsisting at the date of the hearing rather than whether it had been one of convenience at its inception (see the third sentences of paragraphs 1 and 7), and (b) making contradictory and confusing statements about whether the evidence of the Appellant was found to be credible (see the first sentence of paragraph 7).”

12. In respect of the issue of delay, the hearing before the First-tier Tribunal took place on 26 April 2016 and not - as erroneously specified on the face of the Decision and Reasons itself - on 26 May 2016. The Decision of the First-tier Tribunal Judge is signed 19 September 2016, but it was not promulgated until 4 October 2016. It follows that there was a delay between the hearing and the conclusion of the Decision and/or the promulgation of the Decision of just under or just over five months depending on whether one focuses on the date the Decision was signed or the date of its promulgation.

13. It is to be noted that the grounds to the Upper Tribunal as pleaded do not seek to place determinative weight on the delay per se. Paragraph 11 of the grounds is in these terms: *“While not a ground in and of itself, in the absence of any other factor, it is a matter which causes concern, and makes other challenges to credibility stronger, the Appellant submits.”* This is consistent with the established authorities in this area, in particular **Secretary of State for the Home Department v RK (Algeria) [2007] EWCA Civ 868**, which essentially requires that a nexus be established between any undue delay and any defect in the evaluation process. Inevitably this shifts the focus of the challenge to the other grounds raised by the Appellant and in particular the allegation that the Judge did not identify inconsistencies in the evidence.

14. I should pause to note in this context that it is the case that there is a contemporaneous Record of Proceedings on file, and indeed at paragraph 7 of the Decision the First-tier Tribunal Judge expressly states: *“I took a note of the questions and answers.”*

15. In this context it is also to be observed that nothing in the grounds of appeal or the submissions before me seeks to identify expressly any error in any of the factual matters recorded by the First-tier Tribunal. The challenge does not rest upon the suggestion that the Judge has misunderstood, misrecorded or omitted any relevant evidence so much that he has failed adequately to explain his reasons.

16. Yet further in this context, for completeness I note that the grounds of appeal refer to counsel’s note in respect of the hearing in which it is said

that counsel *"did not note any particular discrepancies in her note of the evidence"*, see paragraph 14 of the grounds. However, no such counsel's note has been produced before the Tribunal.

17. As I say, the focus of the challenge is really in respect of the reasonings, and in this regard paragraph 8 of the grounds of appeal identify the Judge's reference at paragraph 8 of the Decision to aspects of the evidence that were characterised as 'oddities' or 'inconsistencies'. At paragraph 12 of the grounds it is argued that the inconsistencies were not identified by the Judge, and indeed at paragraph 13 whilst it is acknowledged that not every inconsistency needs to be identified it is pleaded that the Judge identified no inconsistencies properly or clearly.

18. It may be seen that in essence the core of the challenge is that the Judge, whilst stating that he found that there were problems in respect of the Appellant's and Ms Jaseckyte's respective accounts of their relationship, did not support such an assertion with any adequate reasoning. I turn to this fundamental matter in the challenge in a few moments, but first consider it convenient to address the additional matters raised by Judge Kelly in the grant of permission to appeal.

19. At paragraph 7 of the Judge's decision the opening sentence states: *"I found the evidence of the Appellant credible."* Judge Kelly identifies this as being contradictory when measured against the remainder of the decision. Indeed, it may be seen in the immediately preceding sentence at the end of paragraph 6 the Judge said this: *"The Appellant and his witnesses were incredible in all aspects relating to the issues in this case"*; further the whole tenor of the decision is one where the Judge is clearly and plainly rejecting the evidence presented to him.

20. Ms Jones realistically indicates that she does not seek to place any particular weight on the first sentence at paragraph 7. In my judgment, that is an entirely sensible approach to adopt. I find that it is absolutely clear that this amounts to no more than a slip on the part of the Judge. Moreover, consistent with the approach adopted today by Ms Jones it would appear that the Appellant and his advisers did not consider it worthy of raising as a ground of challenge in the grounds of appeal submitted in support of the application for permission to appeal, no doubt in recognition of it being so obviously an immaterial 'slip'.

21. The other matter identified by Judge Kelly relates to the issue of 'marriage of convenience'.

22. It is clear that the Respondent, with reference to regulation 2 of the 2006 Regulations, raised the issue of marriage of convenience in the RFRL. A marriage of convenience is of course a distinct concept from the question of whether or not a relationship is 'genuine and subsisting' at any particular point in time.

23. In such circumstances it is at the very least unfortunate that the Judge does not express the issue accurately in his opening paragraphs. In many ways this is, sadly, a poorly written Decision: not only are there such inaccuracies as those to which I am about to refer, but the 'flow' of the Decision and the structuring of the reasons offered in support of the conclusion, do not read easily or well. Be that as it may, those matters are not inevitably fatal to the decision if at the core of it there is adequate reasoning - to which I will turn in due course.

24. The Judge opens the Decision by saying that the Appellant claims *"that he has a right to enter and remain in the UK indefinitely as a spouse"*. That was not the basis of the Appellant's application. What he was requesting was a Residence Card as a recognition of his present right to be in the United Kingdom: it was not an application for indefinite leave to enter or remain.

25. The Judge continues at paragraph 1 to state: *"The issue was whether there was a valid genuine and subsisting marriage and whether there was a real case that the spouse was exercising Treaty Rights as an employed person."* Mr Tarlow on behalf of the Secretary of State does not seek to suggest that the Judge's reference to a 'genuine and subsisting marriage' was an appropriate or correct identification by the First-tier Tribunal Judge of the core issue in the appeal. However, the Secretary of State through Mr Tarlow today - and indeed in the Rule 24 response dated 24 May 2017 - pleads that in substance it was clear that the Judge did indeed address his mind to the question of whether the marriage was one of convenience from its outset.

26. In this context it is to be noted that at two points in the decision the Judge does refer to 'convenience'. At paragraph 8 he states: *"The marriage was plainly one of convenience to my eyes."* Similarly at paragraph 11 the Judge states *"a marriage which was, I found, simply for the convenience of both parties and not a genuine and subsisting marital relationship"*. Whilst I acknowledge that there appears to be some elision of the two concepts of 'marriage of convenience' and 'genuine and subsisting relationship' in that latter quotation, such matters should not be looked at in isolation. As may be seen in the explanation that follows in respect of the adequacy of reasons, it seems to me abundantly clear that the First-tier Tribunal Judge completely rejected the notion that there had ever been a genuine relationship between the Appellant and the Ms Jaseckyte and found their

relationship and marriage essentially to be a contrivance - that is to say, the marriage had been contrived for immigration purposes.

27. Which brings me to a consideration of the 'reasons' challenge.

28. I have already referred to the Judge stating at paragraph 6 of the Decision that he did not find the Appellant and the supporting witnesses credible in all aspects relating to the issues in the case. At paragraph 8 the Judge goes on to say this:

> *"There were a number of discrepancies in the evidence. These related to the kind of oddities which had occurred in the parties' relationship – their meeting, marrying and living together was at odds with what might reasonably be expected. The couple were not ad idem in the evidence today and there were inconsistencies of understand, approach and on matters of fact. The vagaries and implausibilities and inconsistencies undermined the claimed status of a genuine and subsisting marriage. The marriage was plainly one of convenience to my eyes. The claimed levels of earnings from genuine tax and national insurance compliant work were not made out on the balance of probabilities."*

29. The Judge continues at paragraph 9 in these terms:

> *"The home visit by officials in 2014 exposed a large number of discrepancies between the couple. These were not properly answered by today. The statements given to me were easily exposed as either incomplete and missing details which undermined the account or were inconsistent with other evidence so that at the end of today the evidence as a whole compounded rather than answered the issues facing the Appellant."*

That is essentially a summary of the reasons reached by the Judge as to why he did not accept the Appellant's case, and found that the Appellant had failed to answer the concerns legitimately raised by the Respondent in respect of the nature of his relationship with Ms Jaseckyte.

30. The Appellant seeks to suggest that the Judge has simply stated his conclusions in these paragraphs but has failed to reason them, either at all or adequately. The focus in the grounds of appeal, and indeed in in the submissions initially presented on behalf of the Appellant today, skip over the second half of paragraph 9, and paragraphs 10 and 11, but instead goes directly paragraph 12 and aspects of Ms Jaseckyte's pregnancy at the time of the hearing before the First-tier Tribunal. This focus on one particular issue in the appeal seems to me to ignore what is a substantial set of reasons advanced by the Judge in support of the conclusions

summarised in the paragraphs I have already quoted. Moreover, reasons continue to be offered by the Judge for his conclusions, in particular at the end of paragraph 12 and in paragraph 15.

31. I set out such reasons to demonstrate the extent of them and the issues that they cover. They are as follows:

(i) *"Here we have a meeting on marriage straight away. Even if that sometimes but rarely happens the evidence of their following life together undermines the reality claimed of a genuine and subsisting marriage."* (paragraph 11).

(ii) *"The lack of proper explanation as to why no family members were at the wedding was incredible."* (paragraph 10).

(iii) *"The mother of the spouse claimed health issues that forced her away from the wedding, in fact two weddings - one civil in late 2014 and one religious in 2015. She claimed to be ill in bed with a bad back for one of the events but she was able to travel in June 2015 to meet up with the daughter. Apart from normal medications which she bought she had no medical evidence of being too ill or having a bad back at any time preventing her from attending either marriage – civil or religious at six months apart."* (paragraph 15).

(iv) *"The lack of forethought or involvement of the spouse in regard to her child, her family in Lithuania and the son's father's potential for involvement in the child was not credible."* (paragraph 11).

(v) *"The lack of clear understanding either Appellant or spouse of the role of the Appellant's or spouse's different family religion and culture in their lives in the future was also revealing of a marriage which was, I found, simply for the convenience of both parties and not a genuine and subsisting marital relationship."* (paragraph 11).

(vi) *"The lack of evidence of the involvement of families when both would apparently have very loving involved families undermines this claim."* (paragraph 11).

(viii) *"The evidence of the spouse was seriously at odds today with the Appellant in regard to the sequence of events in the officials' visit to their home, the belongings in the room, the bag – or no bag – that held clothes and where it was – under the bed or in a cupboard."* (paragraph 10).

(viii) *"It was plain when visited that any cohabitation was not in the sense of a married couple but for convenience the claim that the had toiletries packed away in a suitcase due to an imminent move was wholly undermined by evidence that the move was not for at least another month."* (paragraph 12).

(ix) *"The explanations given by the Appellant in particular as to sleeping with the child, having another bed and not having another bed for the child and lack of explanation as to what happened to the bed bedding and belongings which should have been there if the couple were genuinely living together as a family were frankly risible."* (paragraph 9).

(x) *"The photographs produced do not enhance this claim. They appear staged to me."* (paragraph 11).

32. I have reordered those passages slightly in order to fit them together in terms of the areas they cover, and to allow them to 'flow' better than perhaps they flow in the decision itself. However, it seems to me abundantly clear that all such matters constitute the "*vagaries and implausibilities and inconsistencies*" that the Judge stated at paragraph 8 undermined the claimed status of the marriage and supported his conclusion that it was plainly one of convenience from the outset. The passages I have quoted do indeed in part cover "*their meeting, marrying and living together*" and offer explanations for why the Judge considered this "*at odds with what might reasonably be expected*" – e.g. see paragraphs (i)-(vi) above. The passages in part relate to the finding that "*the couple were not ad idem in their evidence today*" – e.g. see (viii). In combination the passages offer adequate explanation for the Judge's rejection of their narrative in all material respects.

33. Further to this it is plain that the First-tier Tribunal Judge had regard to the supporting evidence of witnesses, for example see paragraph 15. It is also clear that the Judge had regard to the Ms Jaseckyte's explanation with regard to her answers at the time of the visit by the Immigration Officers, but rejected the explanation: he did not accept that English skills would explain the discrepancies or that the account was inconsistent with what might reasonably be expected from a genuine couple bearing in mind, as he identifies at paragraph 14, that it was apparent that an interpreter had attended the visit.

34. Whilst it may well be the case that the Judge's expectations in respect of the production of DNA evidence for a yet unborn child was unrealistic and misplaced, in the overall context of this case it seems to me that the Judge has adequately explained in some length and detail his reasons for rejecting the accounts of both the Appellant and the Ms Jaseckyte.

35. In all those circumstances I reject the challenge raised by the Appellant before the Upper Tribunal.

36. Even if it were otherwise, in order to establish entitlement to a Residence Card the Appellant would still need to show that his partner was exercising Treaty rights and was thereby a qualified person within the meaning of regulation 6. The Judge concluded against the Appellant and the Ms Jaseckyte in this regard: see paragraphs 7, 14 and 16. Just as the grounds of appeal to the First-tier Tribunal did not address the issue of regulation 6, neither has it been the subject of any express challenge in the grounds to the Upper Tribunal but rather is subsumed in the general grounds as to 'delay' and 'reasons'. Indeed, before me today Ms Jones did not seek to identify any particular error in that regard but suggested no more than that the Judge's evaluation would be tainted if it were the case that his approach to the issue of the relationship was in error. However, in my judgement the reasoning at paragraph 16 is essentially 'free-standing', and does not rely upon the adverse assessment in respect of relationship and marriage.

37. In all the circumstances I find no error of law, and accordingly the decision of Judge Telford stands.

38. For completeness I should add that it has been drawn to my attention that the Appellant has made an application to admit further evidence in the light of a finding of error of law. That application at the present time unfortunately has not yet reached the file that is before me, but I am told that it comprises evidence to demonstrate that the child with whom Ms Jaseckyte was pregnant at the time of the hearing before Judge Telford has since been born (in July 2016), and that DNA evidence establishes the paternity of the Appellant. Such evidence is not 'before me' in the context of error of law.

39. It is of course open to the Appellant to advance such evidence in support of a further application for a Residence Card. It would then be a matter for the Secretary of State to make what she will of such evidence. It will still be necessary for the Appellant to address the issue of regulation 6, and in that regard it may be necessary to consider the position of somebody who for some of the time is pregnant or is otherwise a new mother and therefore might not be expected to be in employment. However, these are matters for another time and are not matters that I have any jurisdiction to evaluate.

Notice of Decision

40. The decision of the First-tier Tribunal contained no error of law and stands. The Appellant's appeal remains dismissed.

41. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing

Signed: Date: **15 June 2017**

Deputy Upper Tribunal Judge I A Lewis