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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35169/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 24 November 2015	**On 30 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

JAHANGIR ASHRAF
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

Representation:
For the Appellant: Ms S Haji, counsel, instructed by J R Jones, Solicitors (Birmingham).
For the Respondent: Mr Nath, Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes before me for consideration as to whether or not there is a material error of law in the determination of First-tier Tribunal Judge G McWilliams ("the FTTJ") promulgated on 8 May 2015, in which he dismissed the appellant's appeal against the refusal of his application for a residence card under the *Immigration (European Economic Area) Regulations 2006* (the EEA Regulations). The appellant's

application had been made on 7 March 2014 and refused by the Respondent on 7 August 2014.

2. No anonymity order was made in the First-tier Tribunal and none has been requested before me. I therefore see no need for such an order.

3. The respondent refused the application because she considered that the marriage of the appellant and his spouse was one of convenience. She conducted a "language test" with the appellant and his spouse apparently with the intention of continuing to a formal marriage interview. In the event, the language test was concluded and the respondent decided, because of the quality of the appellant's and his wife's responses, that this was not a genuine marriage.

4. The appellant was granted permission to appeal because it as arguable there was procedural unfairness resulting from the FTTJ's failure to adjourn and his placing weight on the extracts of interviews with the respondent when those interviews could not be seen in full or in context.

Submissions on Error of Law

5. Ms Nath submitted that the FTTJ should have received the interview record or allowed the appeal because the respondent had not discharged the burden of proof. The ICD.4605 (summary of interview) was, she said, a summary of the matters raised in the language test; it was not a record of interview. It was not suggested by the appellant that the hearing before the FTTJ had been unfair; the procedural unfairness was the failure of the respondent to provide an interview record and the fact that insufficient evidence had been adduced to raise a suspicion of a marriage of convenience.

6. Mr Nath submitted that the FTTJ had appropriately relied on the evidence of interview, all of which had been disclosed. He submitted the interview record was sufficient to justify the FTTJ's findings. He accepted that the questions posed of the parties were not related to their marriage but designed to establish the quality of their English language skills; he accepted that the refusal had been based solely on the parties' lack of communication skills. Mr Nath accepted there may be a material error of law in paragraph 24 of the FTTJ's determination in that he appeared to have made a decision as to the purpose of the marriage without making a finding as to whether there was sufficient evidence for the burden of proof passing from the respondent to the appellant.

Error of Law decision

7. **Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC)** makes it clear in the headnote that there is no burden at the outset of an application on a claimant to demonstrate that a marriage to an EEA national is not one of convenience. The FTTJ correctly refers to **Papajorgji** (his paragraph 22) noting that, in the first instance, the burden of proof rested on the respondent. Nonetheless there is an error of law in the FTTJ's findings at paragraphs 23 and 24, where he

considers the European Commission guidance and the appellant's documentation. He concludes paragraph 24 by stating "having regard to this evidence and taking account of the said Guidance criteria, the Tribunal considered it likely that there had been an abuse of Community rights". There is no indication in the FTTJ's decision and reasons that the FTTJ had first made a finding as to whether the respondent had discharged the burden of proof on the issue of suspicion. According to **Papajorgji** (paragraph 14) he should have considered whether there were "factors which support suspicions for believing the marriage is one of convenience. Translated into the technical language of the English law of procedure and evidence, that means that there is an evidential burden on the respondent. If there is no evidence that could support a conclusion that the marriage is one of convenience, the appellant does not have to deal with the issue. But once the issue is raised, by evidence capable of pointing to a conclusion that the marriage is one of convenience, it is for the appellant to show that his marriage is not one of convenience.". Thus he comes to a conclusion about the nature of the marriage without considering the evidence adduced by the respondent and on which the respondent bases her suspicions, namely the outcome of the language test (which, according to the reasons for refusal letter, is the sole basis for the decision to refuse). The issue at that stage of the FTTJ's decision should have been whether there was sufficient evidence for a finding to support the respondent's claimed reasonable suspicion of a marriage of convenience. The failure of the FTTJ to follow the guidance in **Papagorgji** is a material error of law which might have affected the outcome insofar as the respondent's burden of proving a reasonable suspicion is concerned.

8. It was submitted by the appellant's representative that I should decide the matter immediately without remittal to the First-tier Tribunal which would entail further costs for the appellant; she relied on the submissions made in the First-tier Tribunal. Mr Nath, for the respondent, submitted that the mater should be remitted either to the respondent for a fresh decision to be made or to the First-tier Tribunal for a fresh hearing.

Discussion and Decision

9. It is not in dispute that the appellant and his sponsor, Ms Vanda Paritska, an EEA national, are married. Nor has the respondent challenged the finding of the FTTJ that Ms Paritska is exercising Treaty rights in the UK.

10. The respondent states in the reasons for refusal letter that "Based on the information detailed in immigration/police reports the Secretary of State has sufficient evidence to believe that the marriage undertaken on 4th March 2014 to Vanda Paritska is one of convenience for the sole purpose of you remaining here in the Unite Kingdom.". I am told that no such reports exist. Thus the sole basis for the respondent's decision is the evidence of the language test.

11. At the conclusion of the second bullet point in the reasons for refusal letter, the respondent states "After this, it was deemed that you and your sponsor are unable to converse in a common language and so cannot be part of a genuine subsisting

relationship". Whilst that paragraph of the letter refers to the parties having attended a "marriage interview" it is clear from the documents relating to that "interview" that no marriage interview took place. Rather, the parties were subjected to a "language test" which they were deemed to have "failed". The interview record sheet states "interview did not proceed, language tested and failed. Cancelled with SCW agreement. Lack of understanding". The document states that the interview was concluded at 0920 hrs; thus it lasted only 20 minutes. A second document produced by the respondent, ICD.4605, under the heading "Evidence to support recommendation", lists a summary of the "information … obtained" from the appellant and his spouse during language testing. Each of the parties was asked to make a number of statements to the other. These were not questions, according to the Summary Sheet. Furthermore, they did not relate to the quality of their relationship or their marriage. The following are examples of the statements put to the appellant:

> "1/. Tell your wife that you are considering buying a new car, could she help you with an application for the finance.
>
> 2/. Tell your wife that you had a visit from the electricity supplier today, and that they have offered you free solar panels on the roof to help with your bills.
>
> 3/. Tell your wife that friends are coming from Pakistan, they are students and you have offered them a place to stay for the next 6 months.
>
> …"

12. There is no evidence as to the context in which these statements were made or what the parties were asked to do as a result of being given the statements by their spouse. Whilst the summary states "the following are the six responses to the above statements", this is of little assistance, because the statements are not set out as questions. It is not clear from the respondent's documents, what, if any, questions were asked of the appellant or his wife. Furthermore, all of the information which one party was asked to give to the other was hypothetical in nature and bore no relation to their marriage or their relationship.

13. Given the lack of context, the lack of evidence as to what the appellant and his spouse were told about the interview by way of explanation (for example, that it was a language test and not a marriage interview), or what they were asked to do during the "test", I am unable to give weight to the limited records provided by the respondent. Furthermore, I note that the "reasons for interview referral" states "Section 24, unable to converse in the same language" which suggests that a decision had been taken on the couple's language and communication skills prior to that typed record being made. The manuscript notes of the interviewing officer are of little assistance because they are merely in note form and are thus an incomplete record of what was said to the appellant and sponsor by way of explanation of the purpose of the interview and its content.

14. I take into account the totality of the evidence available to and adduced by the respondent, including that relating to the appellant's immigration history and the

"language test", but I do not consider that the respondent has demonstrated, on the balance of probabilities, that there are reasonable grounds to suspect that the marriage is one of convenience, entered into for the predominant purpose of securing residence rights **(Papajorgji and IS (marriages of convenience) Serbia [2008] UKAIT 31)**.

15. Given these findings, there is no requirement on the appellant to demonstrate that his marriage is not one of convenience.

16. I preserve the findings of the FTTJ with regard to the appellant's spouse exercising Treaty rights at the date of his decision. I set aside the decision of the FTTJ to the effect that the marriage was one of convenience and find that the respondent has not discharged the burden of proof in that regard. It follows that the decision of the respondent is in breach of the EEA regulations.

Decision

17. The making of the decision of the First-tier Tribunal did involve an error on a point of law.

18. The findings of the FTTJ, with regard to the appellant's spouse exercising Treaty rights, shall stand.

19. I set aside the FTTJ's decision insofar as it relates to the nature of the appellant's marriage.

20. I re-make the decision in the appeal by allowing it.

Angela M Black
Deputy Upper Tribunal Judge A M Black Date 24 November 2015

Fee Award

The FTTJ did not make a fee award. However, the appeal has been successful on the grounds claimed and the appellant is therefore entitled to a whole fee award of any fee paid or payable.

Angela M Black
Deputy Upper Tribunal Judge A M Black Date 24 November 2015