Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/35032/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 April 2018	**On 01st May 2018**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

ZOHAIB ASLAM RAJA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Raw, Counsel, instructed by Middlesex Law Chambers
For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant, a citizen of Pakistan, has permission to challenge the decision of First-tier Tribunal Judge Brewer sent on 27 June 2017 dismissing his appeal against the decision made by the respondent on 16 December 2015 refusing his application for a residence card as the family member of an EEA national.

2. I am grateful to Mr Raw and Ms Fijiwala for their submissions in this case.

3. There are two aspects to this appeal, one procedural, one substantive. The procedural aspect was not raised in the written grounds of appeal but was addressed by Mr Raw with reference to the chronology of proceedings. It seemed to me that this aspect could not be ignored and that it was important for me to hear submissions from both parties on it. Mr Raw contended that the judge's decision made in June 2017 was procedurally flawed because it made no reference to the earlier directions made by a FtTJ judge on 22 March (adjourning the case) or to the subsequent notice of hearing sent on 25 April 2017. The said direction included the stipulation that "If Respondent is relying on the marriage interview record full transcript and summary identifying issues relied on by Respondent to be provided within 21 days". Mr Raw submitted that the respondent did in fact reply to that direction but not until 24 August 2017 when she sent to the appellant's solicitors supplementary reasons to be attached to the 2015 refusal.

4. Ms Fijiwala did not object to Mr Raw raising this ground but argued that the chronology did not disclose a material error because the judge did have regard to the interview record and summary when deciding it on the papers in June 2017. The case had been processed to be dealt with on the papers because the appellant had indicated that he wanted the appeal to be decided on the papers without a hearing.

5. It is indeed odd that the respondent should have written to the FtT and appellant's solicitors on 24 August 2017 attaching a supplementary decision dated 28 July 2017 in response to earlier directions made by the FtT in March 2017, since the court file shows that she had already responded to these directions in a letter sent to the FtT on 24 May 2017 stating "In accordance with the directions, please find enclosed the Marriage Interview Record and Interview Summary Sheet". Further, the author of the 24 August letter clearly knew the decision had been determined on the papers in June. Whilst odd, I agree with Ms Fijiwala that this did not cause any procedural unfairness. I arrive at that conclusion for four reasons. First, the appellant himself specifically requested that the case be dealt with on the papers. Middlesex Law Chambers wrote to the FtT on 2 May 2017 stating:

> "As the court will be aware our client suffered substantial injuries to his spine and head. This has caused him to be immobilized and unable to attend court for the next few months. Our client therefore requires the hearing to be transferred to a paper appeal."

Second, as already noted, the respondent did respond to the FtT directions of March 2017 on 24 May 2017 and produced materials fully complying with those directions. Third, the judge's decision made on the papers in June 2017 clearly took full cognisance of the respondent's further materials. Fourth, the appellant did not seek to make any further submission or provide any further evidence in response to the FtT directions as set out in the letter of 2 May 2017 that any written evidence or submissions must be sent to the Tribunal and respondent by 30 May 2017.

6. I turn then to the substantive grounds; which in essence are twofold.

7. It is first contended that the judge failed to have regard to or to have adequate regard to the substantial body of documentary evidence which included a will and life insurance policies, a tenancy agreement signed on 29 December 2012 saying the accommodation was shared, photographs and medical reports. Secondly it is argued that the judge was wrong to characterise the discrepancies in the marriage interview as major; they were in fact relatively minor and they arise in the context of a lengthy interview in which the respondent acknowledged that the couple's answers to most questions were satisfactory.

8. Before turning to specifics, it is salient to make several observations about the judge's decision. At paragraphs 17-20 he correctly set out the relevant case law principles noting in particular at paragraph 17 that:

> "In **Rosa** **[2016] EWCA Civ 14** it was held that the focus in relation to a marriage of convenience ought to be on the intention of the parties at the time the marriage was entered into, whereas the question of whether a marriage was subsisting looked to whether the marital relationship was a continuing one. Nonetheless, the First-tier Tribunal was correct to look at the evidence concerning the relationship between the Claimant and the Sponsor after the marriage itself, since that was capable of casting light on their intention at the time of marriage."

and at paragraph 20 that:

> "In **Rosa …** it was held that the Secretary of State had the legal burden of proving that an otherwise valid marriage was a marriage of convenience so as to justify refusing an application for a residence card. If the Secretary of State adduced evidence capable of suggesting that the marriage was not genuine, the evidential burden shifted to the applicant."

9. The grounds vaguely allude to the judge failing to clarify that the standard of proof was the balance of probability. It is true the judge does not state this in terms, but it is clear that this was the standard applied and the grounds do not identify any passage indicating otherwise.

10. It is also clear that the judge had regard to the full corpus of the appellant's decision. At paragraph 21 he stated:

> "I have considered the following:
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> (i) Reasons for Refusal Letter;
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> (ii) Grounds of appeal and skeleton argument on behalf of the Appellant;

(iii) Appellant's bundle and additional bundle;

(iv) A number of photographs."

11. Turning to the two grounds, it is convenient to deal first with the contention that the judge erred in regarding the discrepancies in the couple's marriage interview as major. The first thing to observe regarding this matter is that the judge did not describe the discrepancies as "major". That was the description the respondent used in her summary sheet, but it was not taken up by the judge. Rather the judge refers to a number of significant differences. It is clear that an important feature of these discrepancies was their number and cumulative effect. Thus whether or not as Mr Raw asserts, some of the discrepancies taken individually were minor, this did not mean that cumulative effect was not significant. I would also observe that at least some of the discrepancies were not easy to explain; e.g. the fact that the appellant said the sponsor drank coffee on their first date whereas she said she never drank coffee. Further, the judge only saw fit to assess these discrepancies with a view to determine whether the respondent had adduced sufficient evidence to discharge the evidential burden that rested on her: see paragraph 56. This way of assessing the appellant's case meant that the discrepancies were not treated as determinative of the appeal.

12. In my judgement the judge's identification and evaluation of the discrepancies in their marriage interview was entirely within the range of reasonable responses.

13. I am nevertheless persuaded that the appellant's first ground discloses an arguable error of law. By virtue of the guidance set out by the Court of Appeal in **Rosa**, it was incumbent on the judge to consider whether the couple had entered into a marriage of convenience in July 2013 by considering what light was shed on this issue by both prior and subsequent events. In relation to prior events, the judge appears to have proceeded on the basis that there was no evidence indicating cohabitation prior to their marriage. That was correct inasmuch as the appellant had not been able to produce a tenancy agreement naming the couple, but there was a tenancy agreement dated 29 December 2012 at the Northampton Avenue address for two tenants, which was consistent with a claim to cohabitation. More importantly there was cogent evidence of cohabitation in 2014, evidence that was enough to satisfy the judge that "they have co-habited at least since March 2014". Yet the judge's acceptance that the couple had been cohabiting since March 2014 does not appear to have been considered at all for the light it potentially shed on their claim to have begun cohabiting in late 2012.

14. The fact that on his own findings the judge was positing was that the appellant and his wife had deliberately entered a sham marriage, but had then entered into a genuine relationship also required a more focused approach to the photographic evidence. For the judge the weakness of this evidence was that "there were remarkably few non-wedding pictures". That was relevant to assessment of the *post*-wedding relationship between

the couple, but since the judge accepted the couple were cohabiting from March 2014 anyway, the lack of photos from that period onwards was little to the point. Yet as regards the fifteen *wedding* photos, the judge says nothing at all. Given that on his analysis such photos must have been staged or contrived, this is a serious shortcoming.

15. Read as a whole the judge's decision does not demonstrate that the documentary evidence was analysed from the correct perspective and bearing in mind that the respondent bore the ultimate legal burden of proving a marriage of convenience. The shortcomings identified above constitute a material error of law.

16. I do not consider I am in a position to re-make the decision since the documentary evidence relating to the nature of the couple's relationship at the date of marriage is relatively sparse. Because the judge dealt with the case on the papers, I lack any prior judicial assessment of oral testimonies. It is essential that the appellant be afforded an opportunity to attend a further hearing along with his spouse and witnesses who attended their wedding, so that their evidence can be tested in cross-examination. It is most appropriate if the case is dealt with by way of remittal to the First-tier Tribunal.

17. If despite my strong indication that oral testimony should be given to the next hearing the appellant chooses (as he did last time) not to request (and pay for) an oral hearing, he cannot complain (in the absence of special circumstances) if the next judge treats that choice as indicative of a lack of confidence in his own evidence. To conclude:

    The decision of the FtT Judge is set aside for material error of law.

    The case is remitted to the First tier Tribunal not before Judge Brewer)

18. No anonymity direction is made.

Signed: Date: 26 April 2018

Dr H H Storey
Judge of the Upper Tribunal