Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34009/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal	**Decision & Reasons promulgated**
on 19 May 2017	**On 24 May 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

DIVESH CHANDLA
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Khurram of Khurram and Co Solicitors.
For the Respondent: M D Mills Senior Home Office Presenting Officer.

ERROR OF LAW FINDING -DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Grimmett ('the Judge') who in a decision promulgated on 14 September 2016 dismissed the appellant's appeal against the respondent's refusal to issue a Residence Card as confirmation of a right to reside in the UK as the spouse of an EEA national exercising treaty rights.

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Background

2. The appellant, a citizen of India, was born on 22 May 1992. He entered the United Kingdom on 7 October 2010 with leave as a student which was subsequently extended in both 2013 and 2014. On 1 April 2015, the appellant applied for a residence card as the family member of his wife, a Slovakian national, whom he married on 9 July 2015.
3. The application was refused as the Secretary of State as it was said the marriage was a marriage of convenience and because the EEA national family member had failed to provide evidence that she was a 'qualified person'.
4. Having considered the evidence with the required degree of anxious scrutiny the Judge sets out her findings at [7]-[16] which can be summarised in the following terms:

    a. Notwithstanding difficulties with the interpreter the Judge was satisfied that the appellant and his wife were in a genuine marriage because it appeared they had been living together since their marriage for some time and there was evidence relating to a child who was, unfortunately, stillborn [8].

    b. The Judge was not satisfied the appellant and his wife are still in a relationship as a result of discrepancies relating to issues surrounding an address it was claimed the parties lived at, when the appellant's P60 for 2016 provided a different address [9].

    c. The Judge finds, however, that the question of whether the parties lived together or not did not affect the appellant's position under the Immigration (European Economic Area) Regulations 2006 (as amended) for under the Regulations the appellant and his wife remain married [9].

    d. The Judge was not satisfied the appellant had shown that his wife is exercising treaty rights in the United Kingdom for the reasons set out at [10] - [15].

    e. The Judge found that considering the inconsistencies together with the lack of independent evidence to show the appellant's wife has worked and is making National Insurance contributions, she was not satisfied the EEA national is exercising treaty rights in the United Kingdom. It was noted the appellant was aware that the respondent had been unable to verify his wife's income through enquiries, yet had not produced anything to show she is in lawful employment.

5. As the appellant had not discharged the burden to show he was married to an EEA national exercising treaty rights in the UK the appeal was dismissed.

6. The appellant sought permission to appeal challenging the Judges findings in relation to the relationship, and whether it was continuing, and the findings about the EEA national sponsors employment, claiming that there were several documents contained in the appeal bundle.
7. Permission to appeal was granted by First-tier Tribunal Judge Hodgkinson on 15 December 2016, the operative part of the grant being the following terms:

> "3. It is arguable that the Judges reasoning is flawed, in concluding that the relationship between the appellant and the sponsor is no longer subsisting, as there is no indication that the sole piece of evidence relied upon by the Judge, in arriving at that conclusion, was referred to the appellant or sponsor for their comment, and the Judge does not appear to have considered the totality of the available evidence in arriving at such adverse conclusion. The Judge accepted that their relationship *had* been a genuine one and, by implication, therefore appears to have concluded that their marriage was not one of convenience, but does not say so in terms. It cannot be said that such arguable errors are immaterial as they are linked to the issue of the exercise of Treaty rights and, were the decision to be upheld, then the *Devaseelan guidelines* would apply to any future appeal.
>
> 4. The Judges findings with reference to the appellant's sponsors claimed employments appear to be adequately reasoned and sustainable and, in itself, reveals no obvious arguable errors of law. However, as this issue is also inextricably linked to the question of the subsistence of the relationship (eg see [11] and [12] of the decision), permission is also granted on this ground. In short, permission is granted on all grounds pleaded."

8. The Respondent in her Rule 24 response dated 6 January 2017 challenges the application asserting there is no legal error in the decision.

Error of law

9. There is specific reference in the grant of permission to two paragraphs of the decision under challenge which are in the following terms:

> "11. She said she worked for 40 hours each Monday and Friday; she did not work on Sundays or Saturdays and her husband also worked at the shop. She earned £650 which is paid into her bank at the end of each week. Her husband worked from Monday to Friday and she said that he earned the same amount as she did.
>
> 12. The appellant, however, said his wife was paid about £650 a month. He worked from 9 till 1 but sometimes he had Wednesdays or Thursdays off and he always worked on a Saturday. He earned £450. He was paid cash in hand by his uncle."

10. The above appear to be findings reasonably open to the Judge on the evidence who records firstly the nature of the evidence provided and, secondly, the contradictory nature of that evidence.
11. The assertion the Judge found against the applicants on the basis of one piece of evidence that should have been put to the parties has no arguable merit. Proceedings in the First-tier Tribunal are adversarial in nature and the evidence relied upon is that provided by the appellant. It is not a case of the Judge relying on evidence of which the appellant had no notice. That evidence is recorded at [9] in the following terms:

> "9. I am not satisfied, however, that they are still in a relationship despite their evidence before me to suggest they were. The appellant said in his witness statement and in his oral evidence that he lived at [ ] Bacchus Road, the address of his uncle's hairdresser's shop which is also his wife's address. On his wife's P60 for April 2016 which was prepared by her employer who is the appellant's uncle, her address was given as [ ] Bacchus Road. The appellant's 2016 P60, prepared by the same person, gives his address as [ ] Reycroft Avenue. It does not appear, therefore, that the appellant and his wife are still living together. That does not affect the appellant's position under the regulations and he and his wife, it appears, remained married."

12. Considering the lack of an adequate explanation for why important tax documents should be sent to the appellant and his wife at different addresses the Judge was arguably entitled to draw the adverse conclusion she did. In any event, it is not made out that even if the appellant and his wife were living together that the Judges conclusions regarding the residential address are material. The appellant's claim was for a Residence Card as evidence of a right to reside in the United Kingdom as the family member of an EEA national exercising treaty rights. A spouse is a family member which would satisfy the first part of the test but this does not bear any direct relationship to the factual issue of whether the EEA national is exercising treaty rights. This is an important consideration for the right of family members to reside with the EEA national is based upon there being no obstruction to an EEA national exercising a right of free movement to work in another Member State which they might not be able to do if they could not have their family members with them. A Residence Card does not confer upon an applicant a freestanding right to reside as it is not an application similar to a right to remain made under the Immigration Rules.

13. The question of whether the EEA national is exercising treaty rights depends upon whether it was proved to the Judge's satisfaction that the EEA national was a qualified person. The claim before the Judge was that the EEA national is qualified as a worker. The evidence before the Judge cast doubt upon such a claim. The burden of proof is upon the appellant and/or EEA national to prove that the EEA national is exercising treaty rights. As a result of the matters recorded in the decision, the Judge was arguably entitled to come to the conclusion that it had not been made out that the EEA national was exercising treaty rights in the United Kingdom.

14. Mr Mills in his submission made specific reference to [10] of the Judge's decision where it was found:

> "10. I was not satisfied that the appellant has shown that his wife is exercising treaty rights in the United Kingdom. It is said that both he and she work for the appellant's uncle in his barbershop. The appellant's wife in interview said that she worked as a cleaner in the shop and had done so since she started to live with her husband which was sometime in 2014. She could not remember the name of the hairdresser's shop she says she worked at although it is owned by the appellant's uncle and bears the same name as the Appellant. It is also the address at which she says she lives. The P60 omits the appellant's husbands National Insurance number which gives rise to doubts as to the reliability of the document."

15. It was submitted by Mr Mills that the Judge was arguably entitled to come to adverse conclusions in relation to the claim by the EEA national to be working at

the same place as her husband when she did not even know the name of the place she had worked at for some considerable time, and the lack of the reference to a National Insurance number relating to the appellant, I agree.

16. The grant of permission acknowledges that there was no obvious arguable legal error in the Judges conclusions regarding the EEA national's employment. The appellant has failed to make out any inextricable link between the nature of the relationship and such findings that could amount to legal error, let alone material legal error.

17. Mr Khurram submitted the Judges findings were infected by legal error as a result of interpreter problems experienced by the EEA national during the marriage interview but it was also accepted that at no point was the Judge invited to put no weight upon the record of the interview. Accordingly, the Judge was entitled to attach weight to that interview as she saw fit, as she did, and there is no arguable merit in a challenge to the degree of weight attached.

18. In relation to the two distinct issues, the Judge was entitled to conclude the appellant was a family member of an EEA national based upon the existence of a marriage which is not infected by arguable legal error. The Judge was also entitled to concluded it had not been made out that the EEA national is exercising treaty rights in the UK. As indicated at the conclusion of the hearing before the Upper Tribunal, if the evidence the Judge noted was not made available to her is now available, such as to prove the entitlement claimed, it is always open to the appellant to make a fresh application for a Residence Card which can be considered afresh by the Secretary of State.

Decision

19. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

20. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……………………………………………….
Upper Tribunal Judge Hanson

Dated the 19th of May 2017