Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04589/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 October 2018	**On 10 May 2019**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MANZAR MASSOD
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Ms E Daykin, Counsel instructed by Makka Solicitors Ltd

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the appellant, hereinafter "the claimant" against the decision of the Secretary of State refusing him a residence card as the former husband of a Hungarian citizen who had retained rights of residence.
2. The reasons for refusing the application are probably summarised adequately in the report of Immigration Officers following a visit to the claimant's home in April 2017. The writer said:

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> "The evidence clearly shows that the relationship is on the balance of probabilities one of convenience, there are contradictory claims by family members of the address, text messages clearly show that [S] is, and has been in a relationship with Manzar's friend, and that she herself has lived in East and south east London for several years, at least from 2013 to 2015, where she was the director of her own Hair extensions business."

3. The claimant appealed to the First-tier Tribunal on grounds of appeal which might be described more accurately as a skeleton argument. The "grounds" complain that although the Immigration Officer's evidence was coloured by very clear opinion evidence about the claimant it did little or nothing to justify the opinions it so vehemently expressed. The Secretary of State had previously given a Residence Card on the basis of the marriage now held to be one of convenience without explaining adequately or at all why he had changed his mind.

4. At the time of the hearing it was thought that the Secretary of State had an evidential burden to establish the contention that the marriage was one of convenience. We now know that is not right and there is a clear legal burden on the Secretary of State to prove that the marriage is one of convenience. Be that as it may, the Secretary of State was very aware at the hearing that it was his task to assist the Tribunal by laying out the evidence to support his case but the Secretary of State did not attend. It follows that the judge had to make findings on contentious issues without any assistance from the party who relied on them beyond the refusal letter. I fully appreciate that the Secretary of State's resources are stretched and possibly stretched to the point where they are stretched too far. That is not for me to decide. However I record plainly, although this is not something that should have to be spelled out, that a party who bears a burden of proof and chooses not to attend a hearing is likely to run into difficulties as the Secretary of State did on this occasion.

5. Nevertheless, the Secretary of State, like any other absent litigant, is entitled to a fair hearing and a decision that is correct in law. He is entitled to complain that the decision is not correct in law and has being given permission to argue precisely that. There were three grounds of appeal. Grounds 1 and 2 are not impressive. Ground 1 maintains that the judge found that there were reasonable grounds for suspicion that the marriage was one of convenience and then "contradicts this finding" by determining the reports were unreliable. There is nothing in this point. All the judge was saying was that there was evidence which, if taken at its highest, tended to show that the marriage was one of convenience but when the evidence was looked at carefully it should not, in his judgment, have been taken very highly at all. Ground 2 complains that the judge was wrong to dismiss the reports because they were not supported by a statement of truth. This was described as a "mistake as to the purpose of the reports". The grounds might explain why the reports were prepared but the grounds do not explain why they were served in evidence in the form used. It would have been perfectly straightforward for an Immigration Officer to have supplemented the report by supporting it with a statement of truth and even by attending to explain to the judge what had happened. The reports may not have been produced for the purpose of litigation but if that is the purpose for which they were used the judge was entitled to give them less weight than he might have otherwise been inclined if they have been in the

form of high quality admissible evidence. The judge had to choose between reports that were not explained and not supported by oral evidence and not advanced by an advocate for the Secretary of State against evidence prepared with the assistance of a solicitor and argued by experienced Counsel. It is wholly unremarkable that he decided the case the way that he did.

6. For the record I make it plain that I see no error whatsoever in the judge's findings. I should emphasise that this is not to say that the judge's findings were the only findings permissible on the facts. It was a matter for the judge to consider carefully what was before him and how well it was explained and balance it against the other submissions and evidence made. I am far from saying that reports from Immigration Officers *should* be regarded as having little or no value. However, it is very clear, in my judgment that when a judge reads such reports and decides they are of no value or limited value having considered everything else the judge has acted entirely properly and lawfully.

7. Ground 3 requires a little more thought. I set out the Secretary of State's case below. He said:

> "Given the respondent has not accepted that the marriage was genuinely, the appellant's case was refused wholesale under Regulation 10(5) as set out in the notice of decision dated 25 April 2017. It is submitted that in considering the case the judge had to turn his mind to whether the appellant met the requirements of Regulation 10(5) at the date of the hearing. The judge claims that because the RFRL did not deal with this he was under no duty to do so either. This approach is incorrect because even if the appellant succeeded on the marriage of convenience the respondent made no acceptance that he met Regulation 10(5) and that was for the appellant to prove, the burden being upon him."

8. It was established in **R v IAT and Another ex parte Kwok on Tong [1981] Imm AR 214** and reaffirmed in **RM (Kwok on Tong: HC395 para 320) India [2006] UKAIT 0039** that an Immigration Judge cannot allow an appeal on the ground that the decision was not in accordance with the Immigration Rules unless each of the requirements of the Rules is met.

9. Clearly the reasoning does not translate seamlessly into appeals against EEA decisions where "not in accordance with the law" is not a permissible ground. In EEA case the sole permissible ground is that the decision breaches the claimant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom (Clause 1 of Schedule 2 of the Immigration (European Economic Area) Regulations 2016). The appeal is about the claimant's ability to satisfy the rules and **Kwok on Tong** remains relevant.

10. It is extremely easy for the Secretary of State to make plain the points that are in issue. If, for example, an application is refused solely because a marriage is said to be one of convenience and for no other reason then that can be said expressly so the unsuccessful applicant knows the extent of the issues between them. That does not appear to have been done here.

11. In her skeleton argument Ms Daykin contended that it was contrary to the **Surendran** guidelines to require a point to be resolved when it had not been put in issue. That may be taking things too far. Certainly, subject to the duty to act fairly, a judge does not have to allow an appeal where the Home Office

has not taken an obvious point although it may be better not to investigate a point when there is no reason to think that the Secretary of State is dissatisfied.

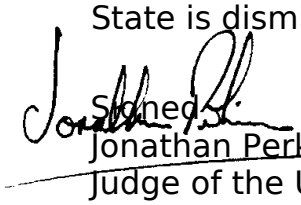
12. However, Ms Daykin also pointed out that it was the claimant's case that he continued to work in his own business and the respondent seemed to have accepted in the Immigration Officer's report that the sponsor's former partner was continuing to work for Sainsburys. When the point is not clearly in issue and was not argued by the Secretary of State who did not attend to present the case, the judge is not to be criticised for being satisfied on very slim evidence that a person satisfies the requirements of the Rules.

13. Different considerations apply if the point has been put in issue or where there is no evidence at all on the point but there is nothing irrational in accepting at face value a plausible and apparently unchallenged claim of the kind made here.

14. It follows that although the First-tier Tribunal's decision is by no means the only one possible on the evidence and may not have been reached by many other judges, it was entirely rational and the First-tier Tribunal did not err in law in deciding the appeal as it did. If a lesson is to be drawn it is for the Secretary of State to state clearly what is in issue, to present the evidence in the best possible form and to attend before the First-tier Tribunal and argue his case.

Notice of Decision

15. The First-tier Tribunal did not err in law and this appeal by the Secretary of State is dismissed.



Signed:
Jonathan Perkins
Judge of the Upper Tribunal

Dated 9 May 2019