Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/49117/2014
IA/47075/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 26th November 2015	**On 4th January 2016**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

MR OLIVIO ASSUNCAO
MRS TAIWO ORIYOMI SHOKUNBI
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr T Onokwu (solicitor)
For the Respondent: Mrs R Pettersen (Home Office Presenting Officer)

DECISION AND REASONS

1. The Appellants before the Upper Tribunal are Mr Olivio Assuncao and Mrs Taiwo Oriyomi Shokunbi. He is a national of Portugal who was born on 7th August 1976. She is a national of Nigeria who was born on 10th August 1985. The two are married

to each other. They have appealed to the Upper Tribunal, with permission, against a decision of the First-tier Tribunal (Judge Cox) promulgated on 16th April 2015 dismissing their appeals. The first Appellant's appeal to the First-tier Tribunal had been directed against a decision of 21st November 2014 to remove him from the UK pursuant to Section 10 of the Immigration and Asylum Act 1999 with reference to Regulations 19, 21B and 24 of the Immigration (European Economic Area) Regulations 2006. The second Appellant's appeal to the First-tier Tribunal had been directed against a decision of 21st November 2014 refusing to grant her a residence card as confirmation of a right of residence as the spouse of an EEA national (the first Appellant). Judge Cox decided that the marriage between the two Appellants was a marriage of convenience within the meaning of the 2006 Regulations. Accordingly, it followed that the second Appellant should be refused a residence card on the basis of the marriage. He also upheld the Respondent's decision, with respect to removal of the first Appellant on the basis of abuse of rights or fraud.

2. The two Appellants have been interviewed by the Respondent and, at the hearing before the First-tier Tribunal, challenges were made on the basis of their alleged treatment during the interview, the accuracy of the interview record and the interpretation of the answers. It was also contended, with respect to the first Appellant, that his removal was not proportionate.

3. The judge dealt with those matters in this way;

> "26. The Appellants submit that significant problems arose during the interview and as such the interview records are unreliable. The Appellant's solicitor drew my intention to the EU Commission working document on addressing the issues of alleged marriages of convenience between EU citizens and non EU nationals. There are 'tips for a good interview', which include:
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> - it should be made explicitly clear to the interviewed spouses that the questions are given to dispel concerns the national authorities have as to whether the marriage is genuine or not;
> - The interviewed spouses should be warned about the legal consequences of their failure to be truthful and about the sanctions national law imposes on persons abusing EU law and free movement of EU citizens;
> - Any contradictions, inconsistencies, lack of details in implausible statements which are relevant for the decision making should be identified and explicitly put to the interviewed spouses;
> - it is important to avoid as far as possible any communication or comprehension problems. A printout of the interview record should be given and the interviewed spouses should be given an opportunity to amend or add anything they wish in a follow up.
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> 27. I have taken the above tips into account and note that the Appellants knew why they were being interviewed and had been warned about the possible sanctions if the UK authorities considered they were abusing EU law. Following the interview, the EEA Sponsor was given an opportunity to comment on the officer's suspicions (see the enforcement note).
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> 28. The Appellants state that they were treated harshly during the interview (see paragraph 6 of the Appellant's witness statement) and that they were largely misrepresented by the

interview record. In particular, the Appellant states that the EEA Sponsor does not speak very much English and that this caused significant problems during the interview. She also stated that English is not her first language and the interviewing officer made no attempt to use an appropriate level of English. There was confusion as to whether they were being asked for information relating to themselves or their spouse and on occasions they were being compelled to give an answer.

29. I have carefully considered the interview records and agree that the EEA Sponsor clearly did not understand question 18 of the interview and there was possibly further confusion at questions 3 and 6 of the interview records. As such, I have given anxious scrutiny to the remainder of the interview record.

30. On the other hand, there are a significant number of differences between the Appellant and the EEA Sponsor's answers during the interview record. In particular:

- The Appellant stated that the lawyer helped them sign the application form whilst the EEA Sponsor stated that the Appellant signed the form (Q1);
- The Appellant stated that they first met in October/December 2013 whilst the EEA Sponsor stated it was in 2011 (Q19);
- The Appellant stated that they first met in a pub/club in Beckham (should be Peckham), whilst the EEA Sponsor said that they met at a Costa Café in Peckham (Q20);
- The Appellant stated that the EEA Sponsor was with two of his friends whilst he said he was by himself (Q22);
- The Appellant stated that she was with her friend, Baby Davis, whilst the EEA Sponsor said she was on her own (Q23);
- The Appellant stated that she was with him all night, that they stayed at the club until the morning, whilst the EEA Sponsor stated that they spent 3 hours together 'we stayed in the café shop for 3 hours. After there we went to walk around London and after an hour we stopped walking and left' (Q24);
- They were asked what time of day did they meet and the Appellant replied night time to early in the morning, whilst the EEA Sponsor said in the afternoon (Q26).
- The Appellant stated that the EEA Sponsor asked for her phone number whilst they were in the nightclub and the EEA Sponsor said he had asked for her number while they were still in the coffee shop (Q27);
- The Appellant stated that they went on their first date about 1 or 2 months later, whilst the EEA Sponsor said it was about a week later (Q28);
- The Appellant stated that they went to his house whilst the EEA Sponsor said they went to a restaurant in Peckham, but he did not remember the name (Q30);
- The Appellant stated that the EEA Sponsor got there first whilst the EEA Sponsor said that she got there first (Q33);
- The Appellant stated that they stayed at home and spent time together, whilst the EEA Sponsor said they looked around the shops and after that they went and had a meal (Q34);

- The Appellant stated that the engagement ring is gold colour and has white stones going all around the ring whilst the EEA Sponsor said that it is dark red and that there is one stone and that the ring is silver (Q43);

- The Appellant stated that they got married on 7 August 2014 whilst the EEA Sponsor stated it was 11 October 2014;

- The Appellant stated that one of the EEA Sponsor's friends took them to their wedding in his car and that there were two of the EEA Sponsor's friends with them. Whilst the EEA Sponsor stated that they got a taxi and were with his friend Victor and her friend Noni (Q53);

- The Appellant stated that the EEA Sponsor's friend Victor was one of the witnesses but she could not remember the name of the EEA Sponsor's other friend, whilst the EEA Sponsor stated that Victor and Noni were present (Q55);

- The Appellant stated that they started living together in January/February 2014, whereas the EEA Sponsor stated it was in July 2013 (Q58);

- The Appellant stated that they started living together at [ ] whilst the EEA Sponsor stated that it was a flat at [ ] (Q59);

- The Appellant stated that the EEA Sponsor last worked yesterday from 7.30am and he finished at 3pm, whilst the EEA Sponsor said it was yesterday and he worked from 11.30 am to 8pm (Q66);

31. Over and above their general concerns, the Appellants specifically addressed some of the differences. In particular

- (Q19) – the Appellant states that she thinks the question was framed differently as the EEA Sponsor appears to be answering the question when she first entered the UK (paragraph 11 of her witness statement). However, I note that the EEA Sponsor did not give an explanation for his answer in his witness statement;

- (Qs 22 & 23), the EEA Sponsor stated that he was alone with her but he had gone out with some friends and therefore was not surprised that the Appellant had said that some of his friends were present. However, neither of them explained why the EEA Sponsor had said that the Appellant was alone;

- (Qs 30-31), the Appellant stated that she had explained to the interviewing officer that the EEA Sponsor came to her house in London around noon and that later on she went to Oxford where he lives.

- (the questions on their first date), the EEA Sponsor stated that he had initially said that he could not remember where they had gone for their first date and that he felt the interviewing officer was forcing him to give an answer, as such he just said something to finish the interview (paragraph 8 of the witness statement).

- (Qs 32-34), the EEA Sponsor stated that all that he could remember was that they met each other several times at several different locations and the answers were based on those several meetings as it was not clear what the interviewing officer wanted (paragraph 9 of his witness statement)

- (Q43) the Appellant states that she believes the EEA Sponsor had got confused about which ring he was being asked about as she has two rings. However I note

that she has not described her wedding ring and there are no photographs of her engagement ring or her wedding ring; and

- (Qs 48, 58 and 59), the Sponsor explained that he was being told to say something even though it was difficult to remember 'every address and date whilst on the spot'.

32. I appreciate that it can be difficult to recall exact dates or locations, especially when 'put on the spot'. I also accept that the EEA Sponsor may have been confused, when answering a few of the questions and that the Appellants responses Qs 23 and 24 appear to have been transcribed the wrong way round.

33. Nevertheless, on the totality of the evidence I am satisfied that I can attach weight to the interview record. In my view the substantial differences cannot simply be explained away because English is not their first language. Moreover, I am not satisfied that the Appellant and the EEA Sponsor have adequately addressed the Respondent's concerns.

34. In any event, having had the opportunity to hear the EEA Sponsor I am satisfied that the Appellants have not provided any cogent or credible evidence to rebut the substantive issues raised by the Respondent. The EEA Sponsor was an unimpressive witness. I appreciate that the EEA Sponsor's spoken English is limited and have taken this into account, when assessing his evidence. Nevertheless, I am satisfied that he has a have a very good understanding of English and I have concluded that his evidence is wholly unreliable.

35. At the outset of his evidence, the EEA Sponsor was asked to confirm his name and address and he told me [ ]. At the end of cross examination the Presenting Officer put to the Appellant that the mother of his children stated that she was living at [ ] (see her letter dated 25 March 2015). The EEA Sponsor then stated that that isn't his address. He said he just uses it as a correspondence address and that at present he is moving around and staying with different friends. If the EEA Sponsor cannot give me a straight answer, when asked for his address, then this begs the question as to what I can rely on. Especially as other aspects of his oral evidence gave rise to further concerns.

36. For example, the EEA Sponsor told me that he phones the Appellant nearly every day and they would speak for about 20 – 40 minutes. However, when I asked for some basic information about the Appellant, the EEA Sponsor's answers were vague and lacked detail. In particular, he told me that she was staying with friends, but he did not know their names or where they lived. In addition, he was unable to tell me how she spent her time, other than to say she went to the shops.

37. I have also considered the Immigration Enforcement note, which includes Immigration Officer Short's record of an interview with the EEA Sponsor after the Appellant was detained. The EEA Sponsor is recorded as saying that he had made a mistake and that he had been trying to help the Appellant but now releases that helping her was wrong. He also is alleged to have said that she was going to give him money for working here. Officer Short recorded the conversation in his notebook and offered the EEA Sponsor the opportunity to read the record. However the EEA Sponsor indicated that he was happy to sign the notebook agreeing the record as a true and accurate account. During cross examination the EEA Sponsor denied making any such statements and effectively stated that the officer had made it up.

38. However the EEA Sponsor has not asked for a copy of the notebook to be produced and although the Appellant's solicitor's skeleton argument suggests that IO Short should have attended the hearing, no formal application for IO Short's attendance has been made.

39. In addition, the Appellant did not attend and I have not had the opportunity to hear her oral evidence. In my view, as she has not been cross examined, her witness statement is of little assistance.

40 On the totality of the evidence the Respondent has satisfied me that this is a marriage of convenience. The interview record highlighted substantial differences on material facts and the Appellant has failed to provide any cogent or credible evidence in rebuttal.

41. Accordingly, I am satisfied that the decision to refuse to issue the Appellant a residence card was in accordance with the law.

42. In relation to the EEA Sponsor, I now have to consider whether or not the decision to remove him as a result of the abusive fraud he has conducted is proportionate.

43. The Appellant's solicitor submitted that I need to consider the factors listed in regulation 21(6) of the regulations. I note that the regulations require these factors to be taken into account when a decision has been taken on the grounds of public policy, public security or public health, which is not the situation in the present case. Nevertheless it seems to me that they are relevant, when determining whether the Respondent's decision is proportionate.

44. The EEA Sponsor asserts that he has been in the UK for over 14 years and that he has 2 children, who were born here and with whom he has a parental relationship. However, there is a lack of evidence to support his claims.

45. In fact, there is a lack of evidence as to the EEA Sponsor's circumstances in the UK generally. He provided some evidence of his employment that dates back to March 2014 (see payslips at pages 71 to 74 of the Appellant's bundle, but there is a lack of evidence of any employment in the UK prior to that date.

46. In addition, there is a birth certificate for A born in 2010 that lists the EEA Sponsor as his father and a letter from a school that confirms that A is attending a school in the UK (pages 6 and 7 of the EEA Sponsor's bundle). He has also provided a letter that is purportedly written by the mother of the children. However, this could have been written by anyone and in light of my general credibility findings, I attach little weight to the letter.

47. Although the EEA Sponsor may be a father of a child in the UK, there is a lack of credible evidence showing that he has any involvement with the child's upbringing, let alone evidence establishing that he has a parental relationship with them.

48. On the totality of the evidence, I am satisfied that the Respondent was entitled to apply regulations 19(3)(c) and 24(2) of the EEA regulations and that the Respondent's decision to remove the EEA Sponsor by way of directions under section 10 of the Immigration & Asylum Act 1999 does not breach Community law and was in accordance with the law."

4. The two Appellants, albeit that by this time the second Appellant had returned or been returned to Nigeria, applied for permission to appeal to the Upper Tribunal. The grounds relied upon were to the effect that the judge had, with respect to the first Appellant, failed to consider the question of proportionality and, with respect to both Appellants, had failed to properly consider the marriage of convenience issue, in particular, in relation to what had been said in interview. Permission to appeal was originally refused by a Judge of the First-tier Tribunal but granted by a Judge of the Upper Tribunal who said this;

> "1. For the avoidance of doubt I make it clear that I give both Appellants permission to appeal on all grounds.
>
> 2. However my main concern is that I find it reasonably arguable that the First-tier Tribunal did not show proper regard for the need for the removal decision against the first Appellant to be proportionate".

5. There followed a hearing before me at which I heard submissions as to whether or not the decision of the First-tier Tribunal ought to be set aside for legal error. I took full account of those submissions and, having heard them, indicated to the parties that I was satisfied the determination did not contain legal error. I set out my reasoning below.

6. The determination is, on any view, most careful and thorough. Mr Onokwu in his Grounds of Appeal and in his oral submissions was critical of the way in which Judge Cox had dealt with the marriage of convenience issue and the interview record and made reference to "the Commission Staff Working Document" which he said indicated that the possibility of misunderstanding of questions, innocently inaccurate recollection of events, limited knowledge, limited understanding and personal perspective regarding relative events had to be taken into account when looking at evidence regarding a marriage. He also contended that, as to the first Appellant, the decision to remove him had been disproportionate bearing in mind a number of factors such as his claimed period of long residence in the UK, his having children (from a previous relationship) settled in the UK and his having acquired a right of residence under the 2006 Regulations. He referred to what he described as "Article 28(1) of the European Directive" and said that a number of specific factors had to be considered in assessing proportionality, the implication being, that Judge Cox had not conducted such an exercise.

7. The judge was clearly very aware of the concerns which had been expressed regarding the conducting of the interview. At paragraph 26 he noted the concerns expressed and made reference to an EUC Commission Working Document on addressing issues of alleged marriages of convenience. He took into account what was said, therein, as to how an effective interview could be conducted. He related that to the way in which the two Appellants' interviews had been conducted at paragraphs 27 and 28. He accepted, in part, that there had been a difficulty with respect to the understanding of a particular question on the part of the first Appellant and some confusion with respect to two other questions and indicated, quite properly, that in consequence he had given anxious scrutiny to the remainder of the interview record. He then analysed, in detail, what he found to be a significant number of differences in the answers given by the first Appellant and those given by the second Appellant. He took into account the proffered explanations which the Appellants had advanced (paragraph 31 of the determination) and reminded himself of the potential for confusion in a formal interview situation (paragraph 32). He then concluded that he was able to attach weight to the interview record. In my judgment he was perfectly entitled to arrive at that view. His consideration of the concerns raised by the two Appellants was full and fair. I can discern no error of law whatsoever in his approach. Further, and in any event, he went on to explain why, independently of the interview evidence, he had found the first Appellant, in particular, not to be a credible witness and the reasons for his so concluding, from paragraphs 34 to 38 of the determination were open to him and were adequate.

8. In short, the judge was entitled to conclude that the marriage was one of convenience for the careful and complete reasons he gave.

9. I now turn to the question of proportionality. To some extent it seemed to me that Mr Onokwu was contending that the matter had simply not been considered by the judge. To some extent he appeared to be seeking to reargue the facts of the case though I have treated what he had to say, in this regard, as a contention that the judge's findings on the point were either incomplete, perverse or irrational.

10. What the judge had to say about all of this appears in a passage from paragraphs 42 to 48 of the determination. Essentially, what he was saying was that although the first Appellant had made various claims regarding matters such as his family and other links to the UK, there was simply a dearth of evidence regarding that. Crucially, with respect to the children, whilst he accepted that the Appellant might be the father of UK-based children he noted the lack of credible evidence to suggest that he had any involvement with the upbringing or any potential relationship with them.

11. It seems to me that the judge was right to conclude that there was a dearth of such evidence. I have carefully looked at the bundle of documents which had been provided for the First-tier Tribunal hearing and there is nothing of substance regarding the first Appellant's claimed UK links contained in them other than some wage slips demonstrating that he was employed in the UK in 2014. It seems to me that against the background of the lack of tangible, corroborative evidence together with a clear adverse credibility finding with respect to the first Appellant, the judge was perfectly entitled to conclude as he did, for the reasons he did, with respect to proportionality. Had he specifically gone through the checklist of factors which Mr Onokwu set out in his written Grounds of Appeal he would have inevitably reached the same decision on the same basis being the lack of credible evidence.

12. In truth, it seems to me that the grounds and submissions represented an attempt to reargue matters properly determined by the First-tier Tribunal. I am grateful to Mr Onokwu for his assistance at the hearing and for his careful submissions but they do not demonstrate that the First-tier Tribunal erred in law.

13. In light of all of the above, therefore, the decision of the First-tier Tribunal, with respect to each Appellant, shall stand.

Conclusions (First Appellant)

14. The decision of the First-tier Tribunal did not involve an error of law.

15. The decision of the First-tier Tribunal shall stand.

16. No anonymity direction is made.

Conclusions (Second Appellant)

17. The decision of the First-tier Tribunal did not involve an error of law.

18. The decision of the First-tier Tribunal shall stand.

19. No anonymity direction is made.

Signed Date

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

Since I have dismissed the appeals there can be no fee award.

Signed Date

Upper Tribunal Judge Hemingway