**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/29770/2014

**THE IMMIGRATION ACTS**

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| **Heard at Field House** | **Decision & Reasons Promulgated** |
| **Heard on 8th of June 2017** | **on 26th June 2017** |
| **Prepared on 16th of June 2017** | |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT**

**Between**

**[K K]**
**~~(Anonymity order not made)~~**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms H Masood of Counsel
For the Respondent: Mr K Norton, Home Office Presenting Officer

**DECISION AND REASONS**

**The Appellant**

1. The Appellant is a citizen of India born on [ ] 1986. She appeals against a decision of Judge of the First-tier Tribunal Andrew sitting at Birmingham on 4th of October 2016 in which the Judge dismissed the Appellant's appeal against a decision of the Respondent dated 10th of July 2014. That decision was to refuse to issue the Appellant with a residence card as confirmation of a right of residence under the EEA Regulations 2006 as

the spouse of a qualified person. The Appellant had previously appealed that decision to the First-tier Tribunal but her appeal was dismissed. The Appellant sought permission to appeal to the Upper Tribunal. The Upper Tribunal finding a material error of law in the First-tier Tribunal's decision remitted the matter to the First-tier for a fresh hearing *de novo*. It thus came before Judge Andrew who also dismissed the Appellant's appeal. The Appellant appealed that decision and permission to appeal was granted by Deputy Upper Tribunal Judge Chapman on 22 April 2017. Thus the matter came before me to determine whether there was a material error of law in the First-tier decision of Judge Andrew such that it fell to be set aside and the matter reheard. If there was not, then the decision would stand.

2. The Appellant entered the United Kingdom on 26 January 2013 with leave to remain as a Tier 4 student. She married [WK] ("the husband") a Polish citizen (born on [ ] 1985) on 7th of February 2014 in Luton having met him in September of the previous year. Her student leave expired in or about June or July 2014. She had attended the European Higher College studying for a business diploma but did not pass the course. She last attended college in March 2014.

## The Refusal

3. On 10th of February 2014 the Appellant applied for a residence card and she and her husband were invited to an interview with immigration officers on 13th of June 2014. The Appellant and her husband were interviewed separately and at length. Questions were asked in relation to their first meeting, how the relationship developed, the proposal of marriage, the wedding day, their respective religions addresses, occupations, studies and recent events. The Appellant was asked 641 questions and her husband was asked 248. The Respondent considered there were several major discrepancies throughout the interview and it appeared to the Respondent that the Appellant and her husband did not know each other very well. Certain of the discrepancies were set out in the reasons for refusal letter dated 10th of July 2014.

## The Appeal

4. The Appellant's explanation for the interviews' inconsistencies was that there was a communication gap. She regretted being interviewed without an interpreter. The Appellant and her husband had had a long journey just before the interview and the interviews were too long. Her husband was drinking too much, his eyes were very red and she had had travel sickness problems on the way. She nevertheless acknowledged to Judge Andrew that she had said to the interviewing officer that she was all right to be interviewed.

5. The Appellant complained in an amended witness statement dated 14th of May 2015 that her relationship with her husband had gone through a

violent patch. She stated that she was pregnant with her husband's child but had a miscarriage as the result of his domestic violence against her. Her family believed that she had brought shame upon them by marrying a Polish Christian and they disowned her. She was adamant that the marriage to her husband was genuine and it was wrong to suggest that it was a marriage of convenience. She was afraid that if returned to India she would be subject to an honour killing because she had brought shame to her family. India was not safe for a lone woman.

6. In support of her claim that she had been the victim of domestic violence at the hands of her husband she produced in one of her bundles a letter dated 7th of October 2014 from a firm of solicitors in Leighton Buzzard, Usmani King. They had attended with the husband at Luton police station on 4th of October 2014 following an allegation of assault made by the Appellant against her husband. The allegation was that the couple had argued on the doorstep and that the husband had struck the Appellant. The solicitors repeated in their letter the instructions they had received from the husband that although he had had something to drink and had cross words with the Appellant he did not lay a finger on her. She was arguing with him because he was comfortably sitting on the doorstep drinking a can of beer but she did not want him to be seen by the neighbours sitting outside drinking. The solicitor's advice was that the husband should give a full explanation of what had happened as on those instructions no assault had taken place.

7. On 29th of October 2014 just over four weeks after the incident the Appellant made a statement for her appeal. Her explanation of the incident was that when she asked her husband to drink indoors he shouted very loudly at her and the neighbours called the police because they thought she and her husband had had a fight and perhaps he had beaten her up. Her husband was arrested but, she said, she was not in fact hit.

## The Hearing at First Instance

8. On the 4th of October 2016, the matter came before Judge Andrew when both the Appellant and the Respondent were represented. At the commencement of the hearing the Judge handed to both representatives a copy of a letter sent to the court apparently from the husband dated 22nd of September 2016. She granted a short adjournment in order that the Appellant's representative might take instructions. The representative objected to the letter being put in evidence but was overruled. The letter was written in broken English.

9. The letter stated that all allegations made against the writer were false and moreover his marriage to the Appellant "has been finished and the divorce has been done". He complained that the domestic violence case against him was a fake allegation and the Magistrates court had given a decision in his favour. The police report "[about] a miscarriage was also

not real as I never ever been [in] a relation at that time [with] the Appellant". Although he had married her for a good reason he later came to know she just needed a visa. Her brother also offered him money to continue the relationship until she got a visa. It was when he refused this that both the Appellant and her brother created the false allegations to prove that she was a victim of domestic violence. He was not attending court because the marriage had broken down and the divorce had been made. He had been cleared of all false allegations.

10. The Judge noted at paragraph 10 of her determination that the discrepancies identified by the Respondent in the refusal letter had not been addressed in the Appellant's statement or the statement of her husband. The Judge was satisfied on the evidence that there were substantial inconsistencies in the answers given by the Appellant and her husband at interview and these were not satisfactorily explained merely by saying the interview was long or that there had been a long journey.

11. The Judge noted a number of letters confirming that the Appellant was depressed and had been prescribed medication and that the Appellant had had a miscarriage in January 2015. However, there was no indication from the medical documentation that the miscarriage was the result of an assault on the Appellant by her husband as she claimed. Further there was no indication as to the paternity of the child. When the assault matter had gone to court, the husband was found not guilty.

12. The Judge acknowledged at paragraph 19 that the evidence showed that at least at some point the Appellant and her husband were living in the same house. This was acknowledged by the husband in his letter upon which the Judge said she placed some weight. The Appellant confirmed in her evidence that she was in the process of divorcing her husband although she was still awaiting the decree absolute from her divorce solicitors. I pause to note at this point that towards the end of the hearing before me counsel for the Appellant explained that there had been a decree absolute on 7th of April 2016 in other words 6 months before the hearing before Judge Andrew. Why that information was not given to Judge Andrew was not explained. Instead she was told that the Appellant was still awaiting the decree absolute from her divorce solicitors.

13. This was obviously highly relevant to the issue Judge Andrew had to decide because if the Appellant and her husband were not married the Appellant was not entitled to a residence card as his spouse. The case was not put to Judge Andrew on the basis that the Appellant retained a right of residence because the marriage had broken down due to violence by her husband. Instead the issue before Judge Andrew and the issue that was to take up most of the time of the onward appeal against her decision was whether the Judge was correct in finding that the marriage of the Appellant and her husband had been one of convenience. The marriage was certainly short, just over 2 years. The Judge, influenced by the letter

and the failure of the parties to explain the interview discrepancies, found that it was a marriage of convenience and dismissed the appeal.

14. The Judge could have dismissed the appeal on the basis that the parties were not married and thus the Appellant was not entitled to a residence card. Even if the Judge was wrong in finding that the Appellant's marriage was one of convenience, such an error was not a material one since the appeal could not succeed in any event. That is not quite the end of the matter for the reasons which I will now set out in more detail. In doing so I will of necessity give some more detail about the onward appeal and the submissions made to me particularly about the weight the Judge placed on the letter from the Appellant's husband.

## The Onward Appeal

15. In her grounds of onward appeal the Appellant complained that the Judge had erred in finding that the Appellant's marriage was one of convenience. The Judge had given weight to the husband's letter ignoring objections to its admission. It was doubtful whether in fact it was sent by the husband. The presumption in a case where the child is that of a married couple is that the husband is the father. The Judge had not considered this but was looking for evidence from the Appellant. Evidence of domestic violence was clearly relevant as it showed that the couple were cohabiting. It was difficult to see why parties to a fake marriage would go to the trouble of having a child together.

16. Permission was refused by a Judge in the First-tier but when renewed Deputy Upper Tribunal Judge Chapman found that there were arguable errors. The Judge may have erred in finding that the Respondent had discharged the burden of proving the marriage was one of convenience in the light of the evidence submitted on the Appellant's behalf. It was arguable she had erred in apparently accepting the contention by the husband that he was deceived into thinking that the marriage was real. There was evidence from reputable sources that the Appellant's case was identified as a high-risk case of domestic abuse. Whilst domestic violence and a marriage of convenience were not necessarily mutually exclusive it was arguable that since the parties were living in the same house and the Appellant had during the duration of the marriage become pregnant the Judge may have erred in her assessment of the evidence as a whole. In finding that she could not know whether the Appellant's husband was the father of the child the Judge arguably erred given the presumption in English law that a husband was the father of any child born of the marriage. Although no child was born it was the case on the medical evidence that the Appellant had suffered a miscarriage.

## The Hearing Before Me

17. At the hearing before me counsel concentrated on her complaint about the treatment of the letter said to be from the husband. The Judge had

placed significant weight on the letter. Whilst the First-tier had more flexibility than a court would and under rule 14 of the Procedural Rules might admit evidence, the letter from the husband should not have been admitted. Firstly, the relationship between the Appellant and her husband had broken down in less than amicable circumstances and the letter may have been motivated by ill feeling. Secondly, what he said in the letter was inconsistent with what he had said in his witness statement in support of the appeal. Thirdly, there was nothing to show that he had signed the letter. The signature on the letter was inconsistent with the signature on the statement taken by the previous solicitors. Fourthly, the letter could not be tested in cross examination and that affected the weight to be given to it. If the Judge had wanted to probe this aspect of the case further she could have issued a witness summons to compel the husband's attendance in order that he could be cross examined. That would have been a fairer course of action.

18. The husband's letter appeared to suggest that this was a marriage by deception yet there was clear evidence that the Appellant had been a victim of domestic violence. It was not open to the Judge to simply dismiss that. The fact that no further action was taken by the police and/or the Appellant's husband was acquitted by the Magistrates did not mean that no domestic violence had taken place since the criminal standard was higher than the civil standard of balance of probabilities.

19. Counsel relied on an extract from Phipson on evidence that there was a presumption that husband was the father of a child born in wedlock. She accepted that the decree absolute dated 7th of April 2016 meant that the Appellant could not succeed in her application for a residence card as a spouse. However, the Appellant might succeed under the provisions for a retained right of residence (under Regulation 10 of the 2006 Regulations). The Upper Tribunal should therefore set aside the decision of the First-tier and either remake the decision itself or remit the matter back (which would be for a third time) to be re-determined under Regulation 10. In reply, the Presenting Officer indicated that the case came down to the weight to be ascribed to the letter from the husband. It was not perverse to attach some weight to the letter. There was other evidence that the marriage might be one of convenience. Counsel added that the date of the domestic violence incident was 27th of September 2014. There was a handwritten statement from the Appellant to the police about what had happened but the main submission in this case was about the husband's letter.

## **Findings**

20. As I have indicated this appeal cannot succeed before me, indeed it could not succeed before Judge Andrew for the simple reason that although the parties were married at the time of the application, appeals in relation to the 2006 (and 2016) Regulations are determined on the basis of the facts at the date of hearing not the date of decision. In this case that has

worked to the detriment of the Appellant since by the time of the hearing before Judge Andrew the Appellant was no longer married. The Appellant may or may not have prospects of success with an application under Regulation 10 but that would have to be a separate application made to the Respondent. The Appellant cannot vary an application once the Respondent has made a decision on the application. There was no section 120 notice in this case and no application to Judge Andrew (or me) to vary the grounds of appeal.

21. In any event, I do not consider that having to make a fresh application would be to the detriment of the Appellant. Firstly, there is no fee payable on an EEA application. Secondly, it is not necessary to have leave before making an EEA application and so the fact that the Appellant has no leave at the present time is irrelevant. Thirdly, the Appellant would retain full rights of appeal by making a fresh application if that fresh application under Regulation 10 was to be refused by the Respondent. As against that I understand the Appellant's concern that she has at present a decision against her from a First-tier Judge finding that her marriage to an EU citizen was one of convenience. It would follow that she would not be able to demonstrate that she retained a right of residence if the marriage to which she had been a party was one of convenience.

22. This perhaps explains why the Appellant has persisted in her onward appeal against the decision of Judge Andrew. In truth, it is not an onward appeal against the dismissal of her appeal against the Respondent's decision since that was hopeless following the divorce. It is however an appeal against the findings that Judge Andrew made that the marriage was one of convenience. A better course of action might have been for the Appellant to withdraw her notice of appeal before the matter came before Judge Andrew to make a fresh application under Regulation 10. The Respondent might have repeated her decision in relation to the marriage of convenience when considering a fresh application under Regulation 10 but the Appellant could have put in more evidence to counter that.

23. The issue for me is whether in the light of the submissions it is open to me to find that the First-tier arrived at the right decision (dismissing the appeal) but by the wrong route (wrongly finding that the Appellant's marriage was one of convenience). It was urged upon me by counsel for the Appellant that I should not seek to put myself in the position of a factfinder when the case before me was one in which I was only to determine whether there had been an error of law. That submission is somewhat self-defeating since it would mean that I would not deal with the issues raised in the onward grounds of appeal but reaffirm that the decision at first instance was correct insofar as it dismissed the Appellant's appeal.

24. What then of the allegation that this was a marriage of convenience? The Judge was entitled to admit the letter and it was a matter for her to decide how much weight she intended to place on it. The author of the letter was not present to be cross examined and ordinarily that would significantly reduce the weight to be placed on such a letter. The important point is whether the letter in fact says what the Judge interpreted it as saying.

25. Taking this letter into account together with the letter from the husband's solicitors regarding the dismissal of the domestic violence matter it seems clear that the Appellant's husband regarded himself as being in a genuine and subsisting marriage with the Appellant. What he was disappointed to find out was that the Appellant did not reciprocate his feelings for her but rather he felt she was more calculated, she very much wanted to stay in this country and was prepared to use a European Union Citizen for that purpose. The husband indicated that he had been offered money "to continue relation … until she got a visa". He was suggesting he had been offered money to continue an existing relationship, not to enter into the relationship in the first place. The husband does not say that he was paid money to marry the Appellant.

26. In his letter dated 22nd of September 2016 he acknowledged that the divorce had taken place. That weighs significantly on the question whether the letter is from him since it indicates that he knew something about the marriage which the Appellant apparently did not (if her evidence to the Judge at first instance was to be believed). In the absence of a handwriting expert it is not possible to say that the signature on the letter differs significantly from the signature on the statement to the extent that they must have been made by two different people. A careful reading of the husband's letter shows that far from being the prejudicial material that the Appellant's counsel feared it was, in certain important respects, it supports the Appellant's case.

27. The husband does not make the Appellant out to be a pleasant person but that is an irrelevant consideration. The husband instructed his solicitors that the Appellant was his partner. He told a third party (the solicitor) that he was in a relationship with the Appellant. He denies he is the father of the baby that was tragically miscarried not because he had never had sexual relations with the Appellant but because he was not having sexual relations with her at the relevant time. The husband indicated in his letter that the relationship began as a genuine husband and wife relationship but quickly broke down when he realised that his feelings for the Appellant were not reciprocated by her but that she had her own agenda whereby she wished to obtain a visa.

28. Such a marriage would not be the first in which one party had entered into it more from material reasons than affection. That does not stop the marriage being genuine and subsisting if the parties were as in this case living together, apparently at some point having sexual relations and

having rows about each other's personal habits that they disapproved of. Against that on the Respondent's side of the scales is the fact that this was a short marriage and the parties appeared to know very little of each other when questioned. As the Judge pointed out the parties did not make detailed statements detailing why they had failed to answer the questions accurately. By the time of the hearing before Judge Andrew that would have been very difficult since the Appellant was clearly no longer in communication with her husband so could not expect him to prepare a statement explaining why his answers were inconsistent. All the Appellant could have done would be to explain her own answers but without a corresponding explanation from her husband her statement on its own might not have taken matters very much further.

29. Judge Andrew was, in my view, right to admit the husband's letter and place significant weight on it. Possibly another Judge might have come to a different decision to the Judge at first instance and instead have found that this was a genuine albeit short lived and stormy marriage between two people from different cultures who needed to know more about each other before rushing into marriage. That would not make Judge Andrew's decision wrong in law but these observations may be of relevance to the Appellant in making an application under Regulation 10. Rather more detail about her married life with her husband is I would suggest of some importance if she is to successfully proceed with a Regulation 10 application. At present, she is still in the position of having an adverse Respondent's decision against her which could not be successfully challenged in the Tribunal because of the Appellant's own decision to divorce her husband (seemingly against his wishes) before the hearing of her appeal. Her decision to divorce as soon as she could is understandable if indeed she has been a victim of domestic violence. There is a one year bar before a divorce petition can be issued.

30. It will be a matter for the Appellant should she make a Regulation 10 application to satisfy the Respondent that she comes within the requirements. Regulation 10 (5) provides that a person satisfies the necessary conditions if they cease to be a family member of a qualified person with a permanent right of residence on the termination of the marriage and that continued right of residence in the United Kingdom is warranted by particularly difficult circumstances such as that she has been a victim of domestic violence while the marriage was subsisting. As the marriage had not lasted for at least 3 years subparagraph (d) (i) of Regulation 10(5) would not apply.

31. It will be necessary for the Appellant to be able to show to the Respondent that her husband had had a permanent right of residence and that she has been a victim of domestic violence. Judge Andrew was not persuaded of this second point. I make no comment thereon as I have not heard sufficient evidence on the point and as counsel for the Appellant pointed out I am not a fact finder in this appeal. I would observe that the evidence is at present somewhat muddled. On the Appellant's case the

September 2014 incident was not one of domestic violence but there was a second incident. Some clarity is required. I also make no comment on the Appellant's fears of what might happen should she return to India. This part of the claim did not feature in the appeal at first instance (because human rights cannot be argued in an EEA appeal, see the Court of Appeal decision in **Amirteymour [2017] EWCA Civ 353**) and would have to be the subject of a separate application if so advised. I dismiss the appeal.

**Notice of Decision**

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 23rd of June 2017

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Judge Woodcraft
Deputy Upper Tribunal Judge

**TO THE RESPONDENT**
**FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed this 23rd of June 2017

…….
Judge Woodcraft
Deputy Upper Tribunal Judge