Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/02844/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 August 2019	**On 9 December 2019**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

VINNETTE SANDRA FULLER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms A. Jones, instructed by Chris & Co. Solicitors
For the respondent: Mr T. Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 07 March 2018 to refuse to issue a residence card recognising a right of residence as the family member of an EEA national.

2. First-tier Tribunal Judge Geraint Jones dismissed the appeal in decisions promulgated on 09 November 2018 and 17 April 2019.

3. The Upper Tribunal found that the First-tier Tribunal decisions involved the making of errors of law and set them aside in a decision promulgated on 30 October 2019 (annexed). The respondent was directed to serve a position statement within 14 days if new issues were to be relied upon. The appellant was given a further 14 days to

respond. Both parties were asked to confirm whether the matter could be determined on the papers or whether a further hearing was required to remake the decision.

4. The Upper Tribunal has no record of a response to these directions from either party. I am satisfied that I can proceed to remake the decision on the papers.

5. The only reason given for refusing the application was that the appellant failed to show that the EEA sponsor was a 'worker who has ceased activity' within the meaning of regulation 5 of The Immigration (European Economic Area) Regulations 2016. The reasons for refusal were set out in the error of law decision at [2].

6. Regulation 5 of the EEA Regulations 2016 states:

> "5.(1) In these Regulations, "worker or self-employed person who has ceased activity" means an EEA national who satisfies a condition in paragraph (2), (3), (4) or (5).
>
> (2) The condition in this paragraph is that the person—
>
> (a) terminates activity as a worker or self-employed person and—
>
> (i) had reached the age of entitlement to a state pension on terminating that activity; or
>
> (ii) in the case of a worker, ceases working to take early retirement;
>
> (b) pursued activity as a worker or self-employed person in the United Kingdom for at least 12 months prior to the termination; and
>
> (c) resided in the United Kingdom continuously for more than three years prior to the termination."

7. Article 17 of the Citizens Directive provides:

> 17(1) By way of derogation from Article 16, the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by:
>
> (a) workers or self-employed persons who, at the time they stope working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years.
>
> If the law of the host Member State does not grant the right to an old age pension to certain categories of self-employed person, the age condition shall be deemed to have been met once the person concerned has reached the age of 60;.."

8. The First-tier Tribunal judge heard evidence from the appellant's husband and made the following findings, which were preserved.

> "8. The respondent refused the present application as it was not satisfied that the appellant's sponsor husband had been exercising Treaty Rights; had not demonstrated that her sponsor husband had reached the age of entitlement to a state pension; and had not established that her sponsor husband had been a worker or self-employed person in the United Kingdom for at least 12 months prior to retirement.

> 9. The appellant has still adduced little by way of documentary evidence to establish the foregoing, except that she has now demonstrated that her sponsor husband is in receipt of a state retirement pension.
>
> 10. The appellant's sponsor husband gave oral evidence which, whilst lacking in detail and specificity, was sufficient to persuade me that it is more probable that not that he was a worker in this country prior to his retirement, for a period of not less than 12 months."

9. Having heard evidence from the sponsor, the First-tier Tribunal judge was satisfied on the balance of probabilities that the EEA sponsor was a worker for a period of at least 12 months prior to the termination of his employment. The evidence contained in the sponsor's witness statement indicates that he came to the UK in the 1960s and that he is a long-term resident in the UK. This fact did not appear to be in dispute. I am satisfied on the balance of probabilities that the EEA sponsor was also likely to have been resident in the UK for a continuous period of more than three years prior to his retirement. For these reasons the sponsor meets the requirements of regulation 5 of the EEA Regulations 2016 as a worker who has ceased activity.

10. The decision letter did not dispute that the appellant is a family member of the EEA sponsor. The couple were married and the genuine nature of their relationship was accepted by an earlier Tribunal. Although the respondent's representative initially sought to defend First-tier Tribunal Judge Geraint Jones' assertion that this was a marriage of convenience, the respondent has not sought to raise it as an issue in response to directions. The burden would be on the respondent to prove that it was such a marriage. For these reasons I am satisfied that the appellant has a right to reside in the UK as the 'family member' of an EEA national.

11. However, the appellant has not yet acquired a right of permanent residence for the purpose of regulation 15. A family member can only acquire a right of permanent residence if they have resided in the United Kingdom with the EEA national in accordance with the regulations for a period of five years. Although the appellant was in a durable relationship with the EEA sponsor before she married, she was never granted a residence card on that basis and could not benefit from the operation of regulation 7(3). The couple married on 22 November 2017. It was only at this point that the appellant became a 'family member' for the purpose of regulation 7 or regulation 15. At the date the decision is remade by this Tribunal the appellant is unable to show that she had been a 'family member' of an EEA national for a continuous period of five years for the purpose of regulation 15(1)(b). Nor is she able to show that she was the 'family member' of the EEA sponsor for the purpose of regulation 15(1)(d), because the date he retired pre-dated their marriage.

12. For the reasons given above, I conclude that the decision breaches the appellant's rights under the EU Treaties in respect of entry to and residence in the United Kingdom.

DECISION

The appeal is ALLOWED on European law grounds

Signed  Date 05 December 2019
Upper Tribunal Judge Canavan

ANNEX

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Representation:

For the appellant: Ms A. Jones, instructed by Chris & Co. Solicitors
For the respondent: Mr T. Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 07 March 2018 to refuse to issue a residence card recognising a right of residence as the family member of an EEA national.

2. The respondent did not dispute the fact that the appellant was a 'family member' for the purpose of The Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016"). The sole reason given for refusing the application was that the appellant did not produce sufficient evidence to show that she was the family member of a person exercising Treaty rights because:

> " - You have not provided adequate evidence to show that your sponsor reached the age of entitlement to a state pension on termination of employment/self-employment.
> - You have not provided adequate evidence to show that your sponsor pursued their activity as a worker or self-employed person in the United Kingdom for at least 12 months prior to retirement.
> - You have not provided adequate evidence of your sponsor residing in the UK for a continuous period of more than three years prior to retirement.
>
> In reference to the above points the home office would require proof that your EEA sponsor was employed for at least a 1 year period in the UK before reaching retirement. No evidence of previous employment has been submitted therefore I am unable to verify that any employment lasted for a period of at least 1 year before retirement. Lastly you have not provided evidence that the EEA sponsor has resided in the UK continuously for more than three years prior to retirement."

3. The reasons given for refusing the application related solely to the requirements contained in regulation 5 of the EEA Regulations 2016 relating to workers or self-employed persons who have ceased activity. The respondent did not dispute that the appellant was married to the sponsor and was therefore a 'family member' for the purpose of regulation 7.

4. First-tier Tribunal Judge Geraint Jones ("the judge") dismissed the appeal in a decision promulgated on 09 November 2018. He outlined the appellant's immigration history [2-7]. He noted that the appellant entered the UK in 2002 on a visit visa and then overstayed. She only came to the attention of the authorities when she applied for leave to remain on human rights grounds in 2009. He observed that a further application for leave to remain was made in 2011, which was refused in 2013. He noted that the appellant made an application for a residence card to recognise a right of residence as an 'extended family member' based on a durable relationship with an Irish citizen (Bernard Carson). The application was refused on 26 August 2016. The appellant married Mr Carson on 22 November 2017 and made a further application for a residence card. The decision to refuse the most recent application was the subject of this appeal.

5. In respect of the only issue that was in dispute between the parties in the appeal the judge made the following findings:

> "8. The respondent refused the present application as it was not satisfied that the appellant's sponsor husband had been exercising Treaty Rights; had not demonstrated that her sponsor husband had reached the age of entitlement to a state pension; and had not established that her sponsor husband had been a worker or self-employed person in the United Kingdom for at least 12 months prior to retirement.
>
> 9. The appellant has still adduced little by way of documentary evidence to establish the foregoing, except that she has now demonstrated that her sponsor husband is in receipt of a state retirement pension.
>
> 10. The appellant's sponsor husband gave oral evidence which, whilst lacking in detail and specificity, was sufficient to persuade me that it is more probable that not that

> he was a worker in this country prior to his retirement, for a period of not less than 12 months.
>
> 11. I raised with Miss Jones the issue of whether the application nonetheless fell [to] be refused under Part 4 of the 2006 Regulations, to which she responded that the appellant's conduct was essentially irrelevant because, she submitted, the 2006 Regulations contained no provisions akin to those within the Immigration Rules directed at those who have deliberately flouted and abused the immigration laws of this country.
>
> 12. The evidence does not establish that the appellant has acquired a permanent right of residence – see 15(1)(b) of the 2006 Regulations – because it does not establish that she has resided with her sponsor husband, in the United Kingdom, for a continuous period of five years. Indeed, the evidence was to the contrary and to the effect that they had lived with one another only since May 2017."

6. It is unclear what submissions were made on behalf of the respondent at the hearing because they were not summarised. On the face of it, the judge appeared to raise and then determine two issues against the appellant that had not been raised by the respondent. First, the judge concluded that the marriage was one of convenience (an issue where the burden of proof would be on the respondent) solely based on the appellant's immigration history and without proper assessment of the oral or documentary evidence [13-17]. Second, having found that it was a marriage of convenience, he proceeded to find that this was an "abuse of rights" under regulation 21B of the EEA Regulations 2006 [18].

7. Having raised two major new issues without notice, which were not previously in issue between the parties, the judge reflected on the fairness of his approach when he prepared the decision after the hearing:

> "20. It is also fair to keep in mind that Miss Jones did not address any of these points because she asserted that there was no basis upon which any application could be properly refused once the primary facts, referred to [in] paragraph 8 above, were established by evidence. It is equally fair to observe that I did not take issue with that assertion and specifically invite her to address the issue of abuse of rights within the meaning of regulation 21B of the 2006 Regulations. That has caused me some concern because I cannot be satisfied that had this matter been specifically raised, and Miss Jones had been specifically asked to deal with it, she might not have advanced submissions to persuade me to depart from the conclusion at which I have presently arrived.
>
> 21. Thus basic fairness requires that the appellant should have a full and proper opportunity to address these matters despite Miss Jones dealing with the abuse issues raised by me in a very perfunctory and dismissive manner. In retrospect, perhaps I should have specifically drawn her attention to regulation 21B, which might have prompted her to deal with the matter more fully. I am now concerned that that omission should not act to the appellant's prejudice in circumstances where I have decided that the importance of immigration control, particularly when exercised against those who have shown their determination to flout and abuse the immigration laws of this country, weighs heavily in the balance when proportionality is considered. Indeed, it is my judgement that the balance comes down heavily against the appellant.

> 22. Accordingly, my provisional decision is that this appeal must be dismissed. However, for the reasons which I have set out in paragraphs 20 and 21 above, the appellant has liberty to apply for this appeal hearing to be restored before me for further argument, if so advised, solely in respect of the matters relating to paragraph 21B of the 2006 Regulations."

8. The appellant duly applied for the hearing to be resumed following the 'provisional' dismissal of the appeal. A further hearing took place on 10 April 2019. The judge promulgated a second decision on 17 April 2019 dismissing the appeal on the same grounds. He accepted that he had wrongly referred to the EEA Regulations 2006 throughout the previous decision when the applicable regulations were the EEA Regulations 2016. The appeal appeared to proceed by way of legal submissions on the question of misuse of rights under regulation 26 of the EEA Regulations 2016. The judge rejected the appellant's argument in the following terms:

> "13. In my judgement there is no doubt that the decision made by the appellant to get married was very substantially motivated by her desire to procure continued residence in the United Kingdom (a desired outcome that she had previously failed to procure), by the artifice of getting married. In my judgement the fact that she married somebody with whom she had previously resided, is far from decisive as to whether artifice was or was not involved. A marriage might be artificial within the purport and intent of paragraph 26(1)(b) of the 2016 Regulations notwithstanding that, as a matter of matrimonial law, it is a valid marriage which can come to an end only through death or a lawfully pronounced decree of divorce of annulment. The essential issue to address is whether getting married was part and parcel of a scheme to obtain an advantage under the 2016 Regulations. On that issue I am in no doubt that that was precisely this appellant's intention. It was part of her manifested resolve to procure continued residence in this country by any means which she thought might procure that outcome for her.
>
> 14. In the foregoing circumstances, strictly speaking I need not consider whether the marriage was or was not one of convenience. One of the hallmarks of a marriage of convenience will be the absence of love and affection between the contracting parties. But I am satisfied that even if there is a manifested degree of affection a marriage might, as a matter of law, still be a marriage of convenience; although the facts which will need to be in existence to allow such an inference to be drawn, will need to be far more persuasive than those needed in a situation where the parties to the marriage have no love and/or affection for one another.
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> 15. Again, given the appellant's immigration history and her determination to procure continued residence in this country by any means whatsoever (including remaining illegally and flouting the immigration laws of this country), the facts of this case lead me to conclude that it is more probably than not that this was a marriage of convenience."

9. The appellant appeals the two First-tier Tribunal decisions on the following grounds:

   (i) The judge erred in his assessment of whether this was a marriage of convenience.

(ii) The judge erred in his assessment of whether there had been a misuse of rights, which is a provision that should only apply to EEA nationals misusing rights of residence.

Decision and reasons

10. I have no hesitation in finding that a fair-minded observer, having considered the facts, would conclude that there was a real possibility that the First-tier Tribunal was bias: see *Porter v Magill* [2001] UKHL 67. An overall reading of the decision makes clear that the judge disapproved of the appellant's immigration history and went well beyond the scope of the only issue in dispute between the parties (upon which he made a positive finding) in a search for reasons to dismiss the appeal.

11. Even if the judge was entitled to raise a new issue at the hearing it must be done with the utmost fairness. It is unclear whether the judge raised his concerns about this being a marriage of convenience at the start of the hearing. The appellant was not on notice that this was an issue because the respondent did not raise it in the decision that was the subject of the appeal. The appellant would not have been prepared to address the issue at the hearing. Although the judge did raise the issue of misuse of rights during the course of the hearing, it seems to have been done in an off the cuff way that would not have given his legal representative sufficient time to prepare or to respond adequately given that the application had only been refused with reference to regulation 5 of the EEA Regulations 2016. Fairness dictated that the appellant should be offered an opportunity to properly prepare and address such significant issues if they were raised for the first time by the judge.

12. I note that the judge did belatedly reflect on whether his actions were unfair during the preparation of the first decision. However, the way in which he then dealt with the issue was not in accordance with the overriding objective to deal with cases fairly and justly. The judge should have considered whether an adjournment was necessary during the first hearing in order to allow an opportunity for the appellant to respond to new issues raised from the bench for the first time at the hearing. Even if he only had time to reflect on fairness after the hearing, the judge could and should have made directions inviting further submissions and allow the parties the opportunity to request a resumed hearing before coming to a concluded view. Instead, the judge went ahead and prepared a decision, making negative findings against the appellant in relation to a marriage of convenience and misuse of rights. Having "provisionally dismissed" the appeal the horse had already bolted. No fair-minded observer, having considered these facts, could conclude that the judge was likely to have kept an open mind about the issues.

13. Even if the judge was entitled to raise new issues, he erred in the way he assessed them. The judge failed to conduct a structured approach to the assessment of whether the marriage was one of convenience in accordance with the relevant principles: see *Papajorgji (EEA spouse – marriage of convenience) Greece* [2012] UKUT 00038. No consideration was given to the fact that the initial burden of proving a

marriage is one of convenience is upon the respondent. No consideration was given to the fact that the respondent did not allege that the marriage was one of convenience.

14. The tone of the judge's findings was pejorative and the language inappropriate for a judicial decision maker. The judge appeared to make no effort to conduct a fair or impartial assessment of the evidence before him. He made no clear findings relating to the credibility of the witnesses. He did not appear to consider any evidence that might support the appellant's case. The overall tone of his findings was that the appellant could not be permitted to stay in the UK because she had remained here illegally. No meaningful attempt was made to establish whether, despite her poor immigration history, she might have acquired a right of residence under European law through her marriage to Mr Carson.

15. The judge failed to take into account other relevant matters including the findings of the previous First-tier Tribunal in 2015. In that case the appellant was found to be a credible witness. It was accepted that she was in a genuine relationship with Mr Carson, but the Tribunal concluded that she did not meet the requirement of the rule to have been living together in a relationship akin to marriage for two years. Certainly, there was no suggestion that the relationship was contrived, merely that it did not meet the strict requirements for cohabitation.

16. The respondent refused the first application for a residence card on the ground that there was insufficient evidence to show cohabitation. One could not conclude from the refusal that the respondent had suspicions about the relationship, merely that the respondent considered that insufficient evidence was produced that was sufficiently "compelling" to show that she was in a durable relationship with Mr Carson at the time. Even then, the respondent was assessing the issue on the wrong basis because it is trite that European law does not require cohabitation. The appellant did not need to prove her case with compelling evidence. She only needed to show that it was more likely than not that she was in a durable relationship with an EEA national. While on the issue of cohabitation, the judge's finding at [12] was also erroneous because it is not a requirement of regulation 15 for the appellant to have resided with her husband for a continuous period of five years, only that she has resided in accordance with European law.

17. The EEA Regulations 2016 define a 'marriage of convenience' as a marriage entered into for the purpose of (i) using EU law to circumvent immigration rules that would otherwise apply to the non-EEA national or (ii) to circumvent any other requirement that the party to a marriage of convenience might have to meet in order to enjoy rights of residence under EU law. In *Papajorgji* the Upper Tribunal found that a 'marriage of convenience' is a marriage entered for the "sole or decisive purpose of gaining admission to the host state". The Upper Tribunal observed that a durable marriage with children and co-habitation was inconsistent with the notion of a 'marriage of convenience'.

18. In this case there were findings dating back as far as 2015 that the appellant was likely to be in a genuine relationship with an EEA national albeit she was not co-habiting with him at the time. The evidence suggested that the couple had discussed marriage, but the appellant had responsibilities as a carer. In this appeal, the judge appeared to accept that the evidence showed that the couple lived together since May 2017. The judge first heard the case in October 2018. By the time of the resumed hearing in April 2019 it is likely that the couple had been living together for nearly two years and had been in a relationship for much longer. None of this was properly considered. The judge made no clear finding as to whether this was a genuine relationship given that he appeared to accept that there may be "bonds of affection" [17]. In so far as he appeared to conclude that such affection was immaterial, he erred in law. The question of whether a marriage is one of convenience will depend on a fair and balanced assessment of all the facts, which did not occur in this case.

19. There may be some force in Ms Jones' submissions relating to the way the judge assessed misuse of rights. If the appellant did not have a right of residence because he concluded that she was not a 'family member' because she entered a 'marriage of convenience' then she would not have a right of residence to misuse. It is not necessary to deal with the arguments in any detail because the judge's finding was predicated on his finding that the marriage was one of convenience. If that finding was flawed; so too is the finding relating to misuse of rights.

20. For the reasons given above, I conclude that the First-tier Tribunal decision involved the making of an error on a point of law. The decision so far as it relates to the findings relating to marriage of convenience and misuse of rights is set aside. The finding made at [10] is unchallenged and is preserved. The decision will need to be remade.

DIRECTIONS

To the respondent

21. The decision that is the subject of this appeal refused the application for a residence card on the sole ground that the appellant failed to produce sufficient evidence to show that the EEA sponsor met the requirements of regulation 5 of the EEA Regulations 2016.

22. The respondent's position in relation to the issues raised for the first time by the judge at the hearing before the First-tier Tribunal is unclear. At the hearing before the Upper Tribunal, Mr Lindsay suggested that the respondent stands by the findings even though they were not raised in the decision letter. However, the First-tier Tribunal's findings relating to marriage of convenience and misuse of rights have now been set aside. If the respondent were to allege that this is a marriage of convenience adequate reasons would need to be provided.

23. The respondent shall serve a position statement within **14 days** of the date this decision is sent.

    (i) If new matters are raised adequate reasons will need to be given for relying on them so that the appellant can understand the case she has to answer.

    (i) If no new matters are raised, the respondent is invited to make written submissions within **14 days** of the date this decision is sent as to whether the decision could be remade on the papers based on the preserved finding or whether a further hearing is required.

To the appellant

24. Upon receipt of the respondent's position statement the appellant shall make any further written submissions on the issue of remaking with **14 days**.

25. If the parties agree that the matter can be remade on the papers, if either party wishes, they can make further written submissions by the latest date provided for in these directions i.e. within 14 days after the respondent files her position statement.

26. Upon receipt of further submission from both parties the Upper Tribunal will make a case management decision regarding remaking.

27. Liberty to apply.

DECISION

The First-tier Tribunal decision involved the making of errors of law

The decision will be remade in the Upper Tribunal in due course

Signed  Date 30 October 2019
Upper Tribunal Judge Canavan