Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/29287/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
on 6th May 2014	**On 13th May 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MS NANA SARAJISHVILI
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Bonavero instructed by Arlington Crown Solicitors.
For the Respondent: Mr T Melvin – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Cohen promulgated on 26th February 2014 in which he dismissed the Appellant's appeal under the EEA Regulations and on human rights grounds.

2. The challenge to the determination is based upon an allegation of procedural unfairness.

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Discussion

3. The claim there has been procedural unfairness sufficient to amount to an error of law has arguable merit. The Appellant applied on form EEA4 for a Residence Card recognising her right to permanent residence as a family member of an EEA national exercising Treaty rights in the UK. This was refused by the Secretary of State on 26th June 2013 on three grounds being: (a) that the Appellant had failed to adduce sufficient evidence to show that her EEA sponsor was exercising Treaty rights in the United Kingdom [Regulation 15(1) (b) of the 2006 Regulations], (b) that the sponsor's identity card submitted with the application had been reported lost or stolen to the relevant authorities. The application was therefore refused on the basis that the Appellant had not provided evidence in the form of a valid ID card as evidence that the family member is an EEA national as claimed [Regulation 17 (1) (b)] and, (c) that since no valid application had been made for Article 8 consideration, it had not been considered whether removal from the United Kingdom would breach any Article 8 rights.

4. Notwithstanding these being the issues upon which the First-tier Tribunal was required to make findings, in paragraph 16 of the determination Judge Cohen states:

> 16. I find that there is a wider issue that is connected with the respondent's reasons for refusal of the appellant's application. I find that the marriage between the appellant and sponsor is simply one of convenience and I find that the appellant's appeal under the Regulations is bound to fail.

5. The Judge found the Appellant to be a "particularly unimpressive witness" [17] who clearly knew very little about her husband's circumstances or work pattern. The Judge noted that the sponsor was not in the country at the time of the appeal and the Appellants evidence that they have in fact separated [19]. The Judge found this to be indicative of the fact that the sponsor was not living permanently in the UK and had not been exercising Treaty rights continuously in the UK for the five years as claimed and as being indicative of the fact that they were not in a genuine and subsisting relationship.

6. In relation to the evidence of the sponsors earnings during the relevant period, [A's bundle pages 94 to 103], the Judge found, at paragraph 21:

> " …In considering the documentation submitted in support of the claim of the sponsor having being continuously self-employed in

the UK exercising Treaty Rights for five years I applied Tanveer Ahmed and in light of my findings hearing , I attach very little weight to the same ".

7. The alleged procedural irregularity is that at no point during the course of the hearing or afterwards did the Judge make it known to the parties that he had any concerns regarding the validity or nature of the marriage. Finding a marriage is a marriage of convenience has a specific meaning in Community law. The fact the Appellant appeared to know very little about her husband from whom she is now separated does not mean that she is not lawfully married. In Baumbast v SSHD [2003] INLR 1 the Court interpreted the word spouse literally and found that as long as the marriage is not formally dissolved a spouse remains a spouse even if separated, although I acknowledge that Community rights of free movement and residence are not intended to arise from relationships which exist in form only, and nor can community rights be relied on for abusive or fraudulent ends or to evade the lawful provisions of national legislation.

8. The definition of a marriage of convenience was considered by the Tribunal in the case of Papajorgji (EEA spouse - marriage of convenience) [2012] UKUT 00038 in which the Tribunal held:

"Although neither the Directive nor the Regulations define it, as a matter of ordinary parlance and the past experience of the UK's Immigration Rules and case law, a marriage of convenience in this context is a marriage contracted for the sole and decisive purpose of gaining admission to the host state. A durable marriage with children and cohabitation is quite inconsistent with such a definition"

9. It is arguable therefore that if the Judge was considering whether the marriage is one of convenience not only should he have put the parties on notice of this fact and either reconvened the hearing or called for written submissions, he should have considered the wider issue relating to intention. In this case the Appellant has been in the United Kingdom for some time and was issued with a Residence Card in 2007 in recognition of the fact that she was lawfully married.

10. It is also arguable that dismissing the evidence that the sponsor had worked in the United Kingdom for the relevant five-year period based upon such a finding is irrational. Whether the marriage is one of convenience or not is not determinative of whether the sponsor actually worked in United Kingdom as an EEA national exercising Treaty rights for the relevant period.

11. I find the Judge made a legal error material to the decision to dismiss the appeal. I set aside the determination. During discussions with the advocates, particularly Mr Melvin, regarding whether the Secretary of

State intended to take the point regarding the question of whether the marriage is a marriage of convenience or not, he indicated she did not but also submitted that the Appellant's evidence regarding the marriage raised issues of credibility concerning the marriage. As shown by Baumbast above, EU law does very much 'pigeonhole' individual concepts and the ability of individuals to satisfy whether they meet the requirements of a Regulation. Whilst the Secretary of State may wish to avoid stating that this is an issue she wishes to pursue, in light of where the burden of proof may then lie, she cannot claim that it is not an issue being relied upon but then seek to make it an issue by raising credibility issues 'through the back door'.

12. As it is not exactly clear on what basis the Secretary of State intends to maintain her challenge it was decided that it was appropriate in all the circumstances, including the interests of fairness and justice, for the appeal to a remitted to the First-tier Tribunal to enable that Tribunal to consider all relevant issues and examine the evidence and make findings in accordance with the law. This is a process that did not properly occur before Judge Cohen.

13. The following direction shall therefore apply to the future management of this appeal:

i. The determination of Judge Cohen shall be set aside.

ii. The appeal shall be remitted to Taylor House to be heard by a judge other than Judge Cohen on 27th May 2014 at 10 AM with a time estimate of three hours.

iii. There shall be no preserved findings although the record of the Appellant's evidence given to the First-tier Tribunal shall stand.

iv. The Secretary of State shall no later than 4 PM 13th May 2014 send to the First-tier Tribunal and the Appellant's advocate a skeleton argument/letter setting out in detail the nature of the issues that she intends to rely upon at the forthcoming hearing.

v. The Appellant shall no later than 4 PM 20th May 2014 file and serve a consolidated, indexed, and paginated bundle, containing all the evidence she intends to rely upon in support of her appeal. Witness statements shall stand as the evidence in chief of the maker.

vi. No interpreter is required.

vii. Any application to vary these directions shall be made in writing to the Resident Judge at Taylor House who shall be responsible for the future case management of this appeal.

Decision

14. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. This appeal is remitted to Taylor House in accordance with the directions set out above.**

Anonymity.

15. 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 6th May 2014