



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/52681/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 15 September 2014**

**Determination
Promulgated
On 29 September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS KHADIJA ASSILA
(NO ANONYMITY ORDER MADE)**

Respondent/Claimant

Representation:

For the Appellant: Mr T Melvin, Specialist Appeals Team
For the Respondent/Claimant: Mr M Jackson, Counsel instructed by J
McCarthy Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimant's appeal against the decision to refuse her application for a residence card on the ground that she had entered into a marriage of convenience.

- 2.** The claimant is a national of Morocco, whose date of birth is 17 November 1986. She claims to have last entered the United Kingdom on 13 February 2013, and on 15 May 2013 she sought a residence card. She was living at an address in London W1, and her spouse was living at an address in London W2. The spouse was an Italian national, Samuele Di Novo, and his date of birth was 19 October 1971. He had been doing agency work through a firm called Classified Personnel in Hounslow since 23 November 2012. The marriage certificate enclosed with the application showed they had got married in Hackney on 3 May 2013, and the separate addresses given for each of them corresponded to the separate addresses given for each of them in the application form. She enclosed initial rent receipts evidencing that they had taken a four month tenancy of bedroom two in an address in Orchard Street, London NW8.
- 3.** The appellant and her husband were summoned for a marriage interview in Liverpool, which took place on 24 September 2013. The appellant was interviewed in Arabic, and her husband was interviewed in Italian.
- 4.** On 5 October 2013 the Secretary of State gave her reasons for refusing to issue the appellant with a residence card as confirmation of a right to reside in the United Kingdom as the family member of an EEA national exercising treaty rights here. As a result of the marriage interview, there were a significant number of discrepancies, inconsistencies, irregularities and issues concerning the credibility of both their accounts that led this department to believe that her claimed relationship was not genuine. The respondent then went on to set out a transcript of their interviews.
- 5.** While it was believed that they both knew each other and were aware of various elements of each other's life, the "above highlighted sections" from the marriage interview indicated numerous occasions where, when questioned about their relationship, she and her EEA national sponsor were unable to provide consistent answers when recalling basic, sometimes fairly recent, moments from their life together. Some of the major discrepancies and issues highlighted in the interview demonstrated, among other things:

 - You and your EEA sponsor's account of what you both did on a first date together was insignificantly different. All the details you provided about your first date were notably different to that of your EEA sponsor.
 - You and your EEA sponsor gave a different response to where you claimed he proposed to you. You said he proposed to you in Starbucks, yet your EEA sponsor stated he proposed to you in a Lebanese restaurant.
 - You and your EEA sponsor gave a completely different account of how you both practice your religions.
 - You and your EEA sponsor did not give the same response as to when you last entered the UK.

- Your EEA sponsor did not know that since arriving in the UK you had to report to the UK Border Agency. This is despite you reporting as recently as March this year when you both claimed to have started dating each other.
6. Having taken into account all the above, it was concluded that her marriage to an EEA national sponsor was one of convenience contracted purely to circumvent the United Kingdom Immigration Rules.

The Hearing Before, the Decision of, the First-tier Tribunal

7. The appellant's appeal came before Judge Maxwell sitting in the First-tier Tribunal at Richmond Magistrates' Court in June 2014. Mr Jackson of Counsel appeared on behalf of the claimant, and Mr Chaudri, Home Office Presenting Officer, appeared on behalf of the Secretary of State. The judge received oral evidence from both the claimant and the sponsor. In his subsequent determination, he set out her case at paragraph 5. She had first come to the UK on 3 June 2012 with valid entry clearance as a Tier 4 Student. She went back to Morocco on 25 October 2012 and returned on 4 November 2012, but was not officially landed due to some discrepancies. Her passport was seized and she was obliged to report to the police until 3 February 2013 when her passport was returned to her. She and her sponsor had first met at the beginning of December 2012 at a Starbucks coffee shop. They met again later in the month, and the claimant asked for her sponsor's telephone number. Matters developed from there after she got in touch on New Year's Eve. The couple decided to marry. This was towards the end of March 2013. They moved in together after the marriage on 3 May 2013. They attained a joint tenancy at the Orchard Road address, and thereafter they had had a joint tenancy at an address in Edgware Road.
8. The judge's findings are set out at paragraph 6 onwards. In paragraph 8, he disagreed with Mr Jackson's submission that the respondent had not discharged her evidential burden to produce evidence of matters supporting a suspicion that the marriage was one of convenience. Whilst a number of the claimed discrepancies relied on were clearly ill-founded, a limited number of them might be regarded as reasonable; in particular responses given in respect of the claimant's practice of her religion. In addition, the claimant and the sponsor knew each other for a very short period of time before deciding to marry; and there was a significant age difference between them as well as a language bar – they both required interpreters in their mother tongue.
9. The judge went on to find at paragraph 10 that the documentary evidence "although a little confused" indicated a period of cohabitation by the claimant and her sponsor at two different addresses. At paragraph 11, he noted that the Secretary of State's representative chose not to further explore the private lives of the claimant and her sponsor. He had therefore had to give anxious scrutiny to the interview record, in which some 137 questions were asked of them. The couple were unable to answer a number of personal questions "relating one to the other". Some

of the concerns were frankly fatuous. Some assertions were plainly wrong. The concerns were based on a difference of phraseology. No account seems to have been taken of the fact that both parties were giving evidence in his or her own language and their answers were being translated by different interpreters. The judge continued in paragraph 12:

Looked at in the round, the answers given by each of them were largely in accordance one with the other. The evidence given before me did not give rise to concerns about the relationship as between the parties and they came across as credible witnesses. True there is an age gap however this is only about fifteen years and not so wide, in my judgment, it is to undermine their claim to be in a genuine relationship.

10. He went on to find that the claimant had discharged the burden of proof, and the reasons given by the Secretary of State did not justify the refusal.

The Application for Permission to Appeal

11. A member of the Specialist Appeals Team sent application for permission to appeal on behalf of the Secretary of State. The judge had made material errors of law in the determination by failing to resolve material conflicts, and failing to give adequate reasons for his conclusions on material matters. While the judge plainly disagreed with some of the points taken by the Secretary of State in the refusal letter, he also clearly accepted that some of them had merit. Despite this, at no point in the determination did he explain why these discrepancies did not undermine the claimant's claim to be in a genuine marriage. At questions 116 to 118 of the interview record, the claimant stated that while she was a Muslim, she did not pray at all. Her husband on the other hand claimed that she prayed every day, in the bedroom and/or in the kitchen, kneeling on the rug. This discrepancy fundamentally undermined the claim that the couple had been cohabiting for six months by the date of the interview. No reasons were given by the judge for his decision not to treat this as fatal to the claim of cohabitation and a genuine marriage. The same could be said for various other issues raised in the refusal letter, which the judge neither clearly identified, nor resolved with any reasoning at all.

The Grant of Permission to Appeal

12. On 27 July 2014 Judge Lambert granted permission to appeal, observing that there was no attempt in the short paragraph 12 to identify the discrepancies to which the judge had referred in the previous paragraph. He found merit in the Secretary of State's contention that the phrase "looked at in the round" was an inadequate means of reasoning in an appeal such as this. The conclusion reached was not demonstrably evidence based. There was therefore an arguable error of law.

The Error of Law Hearing

13. At the hearing before me, Mr Melvin developed the arguments raised in the grounds of appeal. Mr Jackson mounted a robust defence of the

judge's determination. He had reached a conclusion that was reasonably open to him on the evidence. He had applied the correct standard of proof, and had directed himself appropriately.

Reasons of Finding an Error of Law

- 14.** There is a stark inconsistency between the position taken by the judge in paragraph 8 and the position taken by him in paragraph 11. In paragraph 8, he acknowledges that "a limited number" of the identified discrepancies in the interview record give rise to a reasonable suspicion that the marriage is one of convenience, in particular the responses given in respect of the claimant's practice of her religion. When returning to the topic of the interview record at paragraph 11, the judge focuses exclusively on the other claimed discrepancies relied on by the Secretary of State, which he has already dismissed in paragraph 8 as "clearly ill-founded". So what he is doing in paragraph 11 is merely elaborating on this finding. There is no discussion of the limited number of discrepancies which he had earlier found to engender reasonable grounds for suspicion. Not only is there no discussion of these discrepancies, but the judge effectively performs a volte face. His conclusion at the beginning of paragraph 12 is that, "looked at in the round", the answers given by each of them were largely in accordance one with the other. So he is effectively saying that, taken as a whole, the interview record does not engender reasonable grounds for suspicion.
- 15.** It is acknowledged in the refusal letter that the parties to the marriage knew various details about each other, and so it is not sufficient for the judge merely to undertake a quantitative analysis. He also had to undertake a qualitative analysis, focusing on the discrepancies which he had found to be suspicious, such as the discrepancy over the claimant's practice of her religion. While it is going too far to say that the stark discrepancy on this topic was fatal to the claim that the parties had genuinely been cohabiting with each other as husband and wife for a period of six months prior to the date of the interview, it demands an explanation. It is not enough for the judge to say that the parties came across as credible witnesses, when there is no indication that they addressed this discrepancy (and any others which come within the scope of the judge's finding at paragraph 8) in the course of their oral evidence. The result is the judge has failed to resolve a material matter, and the judge has failed to explain why the discrepancies in the interview giving rise to reasonable suspicion did not outweigh the other evidence which pointed to the marriage being a genuine one, such as the evidence given before him that did not give rise to any concerns about the relationship between them.
- 16.** Accordingly, the decision of the First-tier Tribunal is vitiated by a material error of law, such that it should be set aside and remade at a de novo hearing. I consider that the appropriate forum for a de novo hearing is, as

submitted by Mr Melvin, the First-tier Tribunal as both parties have thus far been deprived of a fair hearing in the First-tier Tribunal.

Conclusion

- 17.** The decision of the First-tier Tribunal contained an error of law, such that it should be set aside and remade.

Directions

- 18. The appeal is remitted to the First-tier Tribunal at Taylor House or Richmond Magistrates Court for a de novo hearing, with a time estimate of two hours (Judge Maxwell not compatible).**

Signed

Date

Deputy Upper Tribunal Judge Monson