IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24271/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 8th April 2015	**On 17th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

RAIANE RIBEIRO MENDIS ARMALIS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Latymer (Counsel)
For the Respondent: Mr S Kandola (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge McMahon, promulgated on 1st December 2014, following a hearing at Taylor House on 14th November 2014. In the determination, the judge allowed the appeal of Raiane Ribeiro Mendis Armalis. The Respondent, Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female citizen of Brazil who was born on 30th April 1986. She applied for a residence card under the provisions of Immigration (European Economic Area) Regulations 2006 to confirm her right to reside in the UK as the spouse of an EEA treaty national, namely, Mr Valdis Armalis, exercising treaty rights in the UK. By a letter dated 27th November 2014, the application was rejected. The Respondent referred to how on two previous occasions the Appellant had applied for a residence card which had been refused. Furthermore, in the course of the application, Immigration Officers had visited the claimed matrimonial home on 25th February 2014, and spoke to a man, who claimed to be the Appellant's husband, Valdis Armalis. Mr Armalis was unable to say where the Appellant was and the Respondent found it difficult to accept that her husband would not know the whereabouts of his wife. Furthermore, the bank statement and material produced by the Appellant showed her to have an address different from the address said to be the matrimonial home.

The Judge's Findings

3. At the hearing before Judge McMahon, there was no attendance by Mr Valdis Armalis. Instead, evidence was given by a Mr Namino, the husband of the Appellant's mother, Maria Aparecida, a family friend, and Masood Zaher, a friend (see paragraph 5). When the Appellant herself gave evidence before Judge McMahon, "she accepted there were apparent inconsistencies in the accounts given by her and Mr Armalis." Moreover, "she appreciated Mr Armalis had given a wrong date of birth for his daughter..." (paragraph 13).

4. Ultimately however, the judge observed that the evidence from the three witnesses was to the effect that

> "They had had experience over an extended period of time of the Appellant and Mrs Armalis living together both at the property in East Acton and, more recently, in accommodation held by the Appellant's mother. I am satisfied that each of those witnesses gave reliable evidence. Their evidence was consistent and supported by detail" (paragraph 14).

5. The judge concluded that, "it is clear to me that although there have been difficulties in the marriage this was not a marriage of convenience entered into with the purpose of providing an immigration law basis for the Appellant to remain in the United Kingdom" (paragraph 17). The appeal was allowed.

Grounds of Application

6. The grounds of application state that the Respondent had maintained in the refusal letter that this was a marriage of convenience. However, no Home Office Presenting Officer was provided and the Appellant was not cross-examined. The Sponsor did not attend at all. The evidence from the Appellant was that she and the Sponsor, Mr Armalis, were not on speaking terms following an argument. The judge failed to consider or attach

weight to the absence of any evidence, even in the form of a written statement, from the Sponsor.

7. On 9th February 2015, permission to appeal was granted on the basis that it was correct to say that there is no apparent consideration of the weight, if any, to be attached to the absence of evidence from the husband. There was also scant reference to the content of the Appellant's and her witness' oral evidence forming the basis of the credibility findings made.

Submissions

8. At the hearing before me on 8th April 2015, the Respondent Secretary of State was represented by Mr Kandola. He relied upon the Grounds of Appeal. In particular he relied upon the ground that the Sponsor, Mr Armalis did not attend, and the judge failed to ascribe any importance to his non-attendance and dealt with it very briefly. The failure to factor in his failure to attend affected the whole decision. If the Appellant did intend to rely upon the evidence of her husband, Mr Armalis, in the manner that she would otherwise intend, there should have been an application for an adjournment so that he could indeed attend. Instead, what paragraph 7 of the determination states is that: "Mr Armalis did not attend the hearing. The Appellant told me that she and Mr Armalis had had a recent disagreement and they were not currently on speaking terms" (paragraph 7). If that is what was told by the Appellant to the judge, there should have been an accompanying application for an adjournment, if the Appellant's intention was to be able to show that she and her husband were in a subsisting marriage relationship.

9. For his part, Mr Latymer drew my attention to the well-established case of **Papajorgji (EEA spouse – marriage of convenience) [2012] UKUT 38**. He submitted that one must be aware of the basic principles that underlie any allegation of a marriage of convenience. There is no burden on the Appellant to show that his or her marriage is not one of convenience. The initial burden is upon the Secretary of State. Once a evidential basis for a "reasonable suspicion" is established, the evidential burden then shifts upon the Appellant to show why the reasonable suspicion is not well-founded. The Appellant did do precisely that. It was open to the Respondent Secretary of State to cross-examine the Appellant and her witnesses. As the judge makes clear at paragraph 16 of the determination, they did not field a Home Office Presenting Officer, and chose not to avail themselves of the opportunity to cross-examine the witnesses present. The Appellant could not be penalised for this. Secondly, as far as the Sponsor's not attending was concerned, whereas the judge refers at paragraph 7 to the fact that the Appellant had said that she and Mr Armalis had had a recent disagreement, if the judge did consider the attendance of the Sponsor to be vital to the determination of the issues, he could have adjourned the matter himself. There was no Presenting Officer to make a request for an adjournment. The judge should have done so himself.

10. With respect to the current situation, Mr Latymer submitted before me, after taking due instructions from the Appellant specifically on this issue in the court room before me, that should there be a finding of an error of law, and the second stage of remaking the decision then arose, the current state of affairs was that the Appellant and Mr Armalis had indeed now separated. However, there was a witness statement prepared by the Sponsor initially, but the judge appears to not have had a copy. Mr Kandola, on behalf of the Respondent Secretary of State, also submitted that he did not have any witness statement from the Sponsor as alleged.

Error of Law

11. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision (see Section 12(2) of TCEA 2007). My reasons are as follows.

12. First, no apparent consideration was given of the weight to be attached to the absence of the evidence from the husband by the judge. The allegation was that of a "marriage of convenience" and in such circumstances the evidence of both parties is generally of importance. This was particularly the case here, given that the parties were not living together at the time that the Immigration Officers visited the matrimonial home. It is said that there was a witness statement prepared by the Sponsor for the purposes of the hearing. However, no attention was drawn to this witness statement by either the Appellant or to those representing her for a consideration by the judge. Had this been the case, the judge would have referred to this at paragraph 13 of the determination when he refers to other evidence from Mr Armalis. In any event, it was important for the judge to have heard the evidence from the Sponsor where there was a question mark over the marriage.

13. Second, whereas the judge states that he heard evidence from the three witnesses who "had had experience over an extended period of time of the Appellant, and Mr Armalis living together both at the property in East Acton and, more recently, in the accommodation held by the Appellant's mother", no breakdown is given of this evidence to indicate how it shows that they were in a marriage that was not one of convenience.

Remaking the Decision

14. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am dismissing this appeal for the following reasons. This is a case where at the time of the visit to the matrimonial home on 25th February 2014, the Appellant and the Sponsor were not living together. The Sponsor did not know the whereabouts of his wife.

15. Second, at the time of the visit, the evidence was that the Appellant had an address different from the address said to be the matrimonial home.

16. Third, in his conclusions, the judge was clear that there were

> "Apparent inconsistencies within the accounts given by the Appellant and Mr Armalis in interview and there were other concerns raised in the refusal letter. I am satisfied that there was a proper basis for the Respondent to suspect that this was not a genuine marriage and was in a fact a marriage of convenience" (paragraph 15).

17. The judge had gone on to refer to how there had been "turbulent periods" in the married life of the Appellant and the Sponsor. Whereas it is, of course, the case that many perfectly genuine and subsisting married relationships have "turbulent appearance", and are not for that reason alone marriages of convenience, the fact here was that at the time of the visit by the Immigration Officers on 25th February 2014 the parties were not living together, the Sponsor did not know where the Appellant was, and the Appellant was living at a different address to that of the matrimonial home.

18. For the judge to have concluded therefore, that the parties "were truly living together as husband and wife" "from October 2013 up until October 2014" is not borne by the evidence. In point of fact, in remaking the decision, the evidence before this Tribunal is now clear that the parties have indeed separated fully.

19. Accordingly, notwithstanding Mr Latymer's valiant efforts to persuade me otherwise in his cleared and measured submissions before this Tribunal, this appeal fails.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is dismissed.

No anonymity order is made.

Signed Dated

Deputy Upper Tribunal Judge Juss 15th April 2015

TO THE RESPONDENT
FEE AWARD

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

Signed Date

Deputy Upper Tribunal Judge Juss 15th April 2015