Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04343/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29th October 2018	**On 20th November 2018**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

ALEX [A]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms D Ofei-Kwaja, of Counsel, instructed by BWF Solicitors
For the Respondent: Mr J McGill, Senior Home Office Presenting Officer

Introduction

1. The appellant is a citizen of Ghana born on 18th September 1969. He made an application for a permanent residence card as the husband of an EEA national under Regulation 15 of the Immigration (EEA) Regulations 2006. The appellant was, at that time, married to [GA] who is a citizen of the Netherlands, henceforth the sponsor. This application was refused by the respondent on 6th April 2016. His appeal against the decision was dismissed by First-tier Tribunal

Judge AK Hussain in a determination promulgated on the 6th December 2017.

2. Permission to appeal was granted by Upper Tribunal Judge Kebede on 13th July 2018 on the basis that it was arguable that the First-tier judge had erred. I found an error of law for the reasons set out at Annex A of this decision, and adjourned the remaking hearing.

3. The matter now comes before me to remake the appeal. The issues in this appeal are firstly whether the marriage is one of convenience and secondly whether the sponsor has permanent residence, it being accepted by the appellant's representative that she is not currently otherwise a qualified person under the EEA Regulations.

Evidence & Submissions – Remaking

4. The appellant attended the hearing and gave evidence through a Twi interpreter. He adopted his statement as his evidence, confirming that it was true and correct. His oral and written evidence amounts, in summary, to the following.

5. The appellant divorced from the sponsor on 25th September 2018, and he showed a copy of the divorce certificate to the Tribunal. He also provided a copy of her air travel itinerary showing she was away in Ghana from 4th October 2018 to 1st November 2018. He said he was only told by his solicitors that she should attend the hearing on Thursday, but this clearly was not possible in the circumstances. The appellant also produced a copy of his original Italian residence permit which showed that he had indefinite leave to remain based on work granted in 2005, having entered Italy as a worker in 1997.

6. In his statement he says that the sponsor gave discrepant answers at their marriage interview on 15th February 2016 not because the marriage is one of convenience but because the sponsor became medically unwell and was stressed, and because the interviewing officer was physically intimidating. The sponsor is a type 2 diabetic, has high cholesterol and is asthmatic. Following the interview he says that the sponsor became depressed. The appellant says that he would not have a motive to have married the sponsor for immigration reasons as he has a 7 year old Dutch son born on 8th July 2011 conceived outside of his marriage with whom he has contact with in the UK and on whom he could rely to remain in the UK, and because he had indefinite leave to remain in Italy before marrying.

7. He says he met the sponsor on a visit to his cousin in the UK in 2006 when he travelled from Italy where he was living at that time. They met at church and exchanged phone numbers. They then

spoke on the phone, and the conversations gradually became romantic. They began a relationship in December 2007, and at this he time spent time together in the UK visiting the sponsor. On 20th December 2009 he proposed to her on her birthday when he came to the UK on a visit. A meeting was held between the families and a dowry and marriage date fixed. On 12th February 2010 the sponsor went to Ghana for the marriage whilst he remained in Italy. On 20th February 2010 the customary marriage took place with the appellant being represented by his parents and other family members due to his work commitments in Italy which meant he could not travel. His wife wanted him to relocate to the UK after their marriage, so he gave his work notice in March 2010 and came to join her in the UK in June 2010. The appellant was issued with a residence card valid from November 2010 to November 2015 based on his marriage.

8. The appellant accepts that there were difficulties in the relationship. The sponsor held against him the fact that he had had a child with another Dutch citizen in the UK, and she disagreed about his remittances to support this child. At the point of the statement the appellant maintained that they made up afterwards when they fell out and loved each other, and as a result on 16th July 2015 the sponsor supported his application for a permanent residence card.

9. In the reasons for refusal letter the respondent accepts that the sponsor was employed with Daisy Chain Pre School from April 2007 to April 2011 due to the P60s and a letter from HMRC, but not that there is a period of 5 years continuous employment entitling the sponsor to permanent residence. The respondent does not accept that the sponsor is currently exercising Treaty rights by working or claiming benefits as a work seeker. As such the position of the respondent is that the sponsor is not currently a qualified person.

10. The respondent submits that the marriage is one of convenience due to the answers given by the sponsor and appellant at interview which are viewed as discrepant, a fact that the appellant accepts in his statement. It is also said that there is a lack of knowledge of important aspects of matters which should affect their mutual lives as a genuinely married couple. The medical evidence provided is said not to support the contention that the sponsor's medical problems specifically affected the sponsor's performance at interview. The appeal should therefore be dismissed.

11. Ms Ofei-Kwaja, for the appellant, submits that I should consider the witness statement from the sponsor even though she did not attend the hearing, particularly as it has been shown she is in Ghana. In this document she says that she felt weak at the interview due to her sugar levels dropping as she is diabetic and due to issues with her cholesterol medication, and thus for this

reason could not answer questions properly, and that she also struggled because she felt physically intimidated by the interviewing officer.

12. Ms Ofei-Kwaja submitted that the interview record shows the interview with the sponsor starting at 10.15am and finishing at 1pm. The sponsor was asked over 300 questions over a period of nearly three hours. It is clear from question 180 that she began to feel confused. At question 206 the interviewing officer asked her if she needed to check her bloods, and issues of a break and calling at first aider are recorded at questions 214 and 217. The sponsor was given a food break at question 219, but it seems the questioning continued despite the sponsor having indicated that she did not feel well enough to continue at question 223, and a further interruption happened at question 229. The interviewing officer herself comments that the sponsor had "an episode" at the end of the interview in the box for such comments; and there is no signature for the sponsor confirming she (or indeed the appellant) was happy with the interview despite there being a section of the form for this to be completed, and despite the sponsor having signed that she had been read the initial declaration at the beginning of the interview. The appellant therefore submits that there is evidence that the interview was not conducted fairly and appropriately, and that the sponsor was physically unwell during the interview. It is argued that as a result this is not fair evidence showing that the marriage was one of convenience.

13. Further the respondent takes points about the sponsor not knowing details about the appellant's Dutch child conceived outside of the marriage, but this was clearly something she only wanted an apology for from the witness statement. It was just a linguistic difference when the sponsor said the appellant was living in the UK at the time of the proposal and when they married whereas he said (correctly) that his permanent residence was Italy at that time. What she meant was he was physically there visiting at the time of the proposal and came on regular visits up until he joined her after the wedding.

14. The appellant also argues that there are many details that the appellant and sponsor are not discrepant about at interview, for instance the number of smoke detectors in the home, the number of televisions, the names of family members and the fact that the sponsor's son lived with them.

15. It is also argued by Ms Ofei-Kwaja that the appellant had no motive to enter a marriage of convenience. He had indefinite leave to remain in Italy; he has a Dutch child in the UK with whom he has contact and on whom he could base an application to remain in the UK if he needed; and because the relationship with the sponsor is

clearly a long and complex one which would be unnecessary and unlikely if it were just a relationship of convenience.

16. The appellant argues that the sponsor acquired indefinite leave to remain as a result of working continuously for five years from April 2007 to April 2012. Mr McGill confirmed for the respondent that it was accepted that the sponsor had four years continuous employment from April 2007 to April 2011. The HMRC letter sets out evidence of work from April 2011 to September 2011 for Amey Service and overlapping work from July 2011 to June 2012 for Ocean Contract, and as such the sponsor clearly obtained indefinite leave to remain in April 2012 as she has shown continuous work also from April 2011 to June 2012. Thus, the sponsor was residing in accordance with the Regulations, initially as a worker and then as someone who qualified for permanent residence under Regulation 15(1)(a) for the five plus years of the marriage with the appellant. The appellant, in turn, therefore met the requirements of 15(1)(b) of the EEA Regulations 2006, and is entitled to permanent residence as the sponsor's spouse.

Conclusions – Remaking

17. The burden of proof of showing the marriage is one of convenience is on the respondent, see Sadovska & Ors v Secretary of State for the Home Department [2017] UKSC. This must be shown to be the case on the ordinary civil standard of the balance of probabilities.

18. The evidence of the respondent that there was a marriage of convenience derives from the marriage interview conducted on 15th February 2016. I have considered the full transcript. I was not assisted by the fact that the respondent did not indicate which questions were being relied upon when making assertions of discrepancies, but I have done my best to analysis the evidence as is set out below.

19. It is clearly the case that the sponsor became unwell at the marriage interview. From question 176 it is clear that the interviewer realises that things are going wrong, and says that "you're not making sense here". Up until that point the sponsor has answered all the questions without problem. After this point the interpreter has to repeat the questions and there are other clear issues with her health. The only discrepancy issues identified that arise before this are issues that the appellant does not know the sponsor has some scars on her leg and hand; that she did not know about a pierced ear that the appellant says he has. It is of course possible that these scars and piercings are not very visible as there is no evidence they are prominent, and thus I find they are not strong evidence of the marriage being a sham. It is also held against the sponsor that she does not know about the appellant's son out of marriage, which arises in questioning prior to the point

when she becomes unwell, but she makes it plain that she does know his name but does not want to know more about this child, and further the appellant says she has no contact with his son at all in his interview, and as such I find that this is not evidence of the marriage not being genuine.

20. From question 176 in the interview I find that there is evidence of unreasonable questioning of the sponsor, which seems likely to have arisen from the sponsor becoming unable to cope with the interview and finding the questions hard to follow and the interviewing officer then becoming impatient. At question 188 the sponsor is told she does not know enough for her marriage to be genuine because she did not know why or how often the appellant came to the UK prior and around the time of their romantic relationship developing. The sponsor, when she understands the issue says, reasonably at question 192 that it was about ten years previously and she does not remember how often the appellant came to the UK at that time. Similarly at question 200 the interviewer demands to know how often they spoke on the phone in the period 2006 to 2008 when a relationship developed saying: "Which was what? Was it weekly? Was it daily? Was it fortnightly? How regular's regular to you?" (The answer from the sponsor is weekly, but it would be understandable to have found this style of questioning intimidating.) At question 206 the interviewing officer seeming realises that the sponsor is unwell and asks her if she needs to check her bloods, and she says she thinks she does. There is then a pause, and it seems the appellant is eating something as at question 207 as she says her mouth is full so she cannot answer. It is in this context that the sponsor does not make it clear when the appellant came to live permanently in the UK, but I find that this questioning and her answers cannot be properly relied upon due to her physical and mental state.

21. It is only at question 210, after the appellant is unwell, that the questions about the marriage proposal are put starting with the question about where the appellant was living at that time being interrupted by her being so unwell that the interviewer asks if she needs a first aider and indicating she believes that she might be sick and asking if she needs to go to the toilet (see questions 214 and 215). The reply of the sponsor is that she does not want to be alone in case anything happens, indicating she is in a real state of fear about her health. There is then a break at questions 218 -223 where apparently the interviewer seeks a first aider and the appellant eats something and says she needs the food to settle in her stomach. The interview however continues at question 224 without apparently giving the sponsor time to digest her food. [The note in the interview summary sheet indicates that the sponsor had forgotten to take her morning medication and that she also took this at this time and that a first aider did attend. It is also clear from medical documents in the bundle that the sponsor is a

diabetic.] The sponsor says that the appellant was visiting her, and she did not know where he was living at the time of the proposal at question 230, but then implies he had been in the UK for a year or six months at question 232. At question 233 the interviewer asks a long multiple question about the proposal, and the interpreter says that the sponsor is not answering and he has to repeat the question. I find that any discrepancy about the appellant's residence based on the questioning at this point is not one on which weight can be given due to the sponsor's acknowledged ill health and the inappropriate style of questioning. I also do not find it of any significance that the appellant initially said the proposal with in the bedroom, and then changed this to the living room – the answer the appellant gave. He did not know what the appellant had said in interview at that point and could not be said to be altering his evidence to fit what she had said rather than correcting his account from his own recollection.

22. I also do not find it of any significance that the sponsor says she would ask the lawyer to appeal if the application is refused, and the appellant says they had not discussed what they would do in these circumstances as these are not mutually incompatible answers. Likewise, I do not find it significant that the sponsor did not know the appellant was staying with a cousin on the very first occasion she met him and assumed he was staying in a hotel particularly as he says in his interview he had never told her about this cousin. I cannot find any reference to the sponsor meeting the appellant's parents in Ghana in 2015, the only reference to this visit to Ghana seems to be at questions 207 to 209 when she says she went for herbal treatment and the evidence of the appellant in his interview about this visit appears to be the same. I do not find the answers about the sponsor's son [C]'s whereabouts on the last Sunday are significantly different: both said he was home, but the sponsor adds he then went out later. Again, I do not find that it is of significance that the appellant did not know why the sponsor had moved to the Netherlands in the 1980 or precisely when she went there as this was a very long time prior to the commencement of their relationship.

23. With respect to the wedding it is clear that there were issues of inaccuracy on the wedding certificate as she was not spinster but a divorcee; with the sponsor's and appellant's understanding about the time the marriage was registered, which was 10 days later not 3, and because it stated she lived in Italy on the marriage certificate not in the UK. However, before me the respondent accepts that the appellant and sponsor were lawfully married by the proxy marriage and these are not ultimately issues which I find go to the genuineness of the marriage.

24. The only issue arising from the interview that I find can properly go to whether the marriage is genuine is the fact that the appellant

did not know the name of the church/ street in which the church is situated where he met the sponsor and where they continue to worship. I do not find however that the appellant has significantly stated that her involvement is different from that of the sponsor as he says that he does not know if she goes to any midweek church activities and just says she is able to teach bible classes but does not know about them. I also note that there is an original letter from the particular Methodist Church before the Upper Tribunal which confirms the appellant and sponsor have attended since 2006 and that they are both valued and respected members of the congregation. I conclude that the appellant simply forgot the name/street of the church in the interview.

25. Against the respondent's contentions I balance information from the interview which gives a broadly consistent account of a relationship which developed from a meeting in 2006 and then a pattern of visits becoming a romantic relationship with a proposal in 2009, which is described in very similar terms, and with the appellant moving in after the proxy wedding in Ghana in 2010, with both parties giving similar reasons for choosing this type of wedding. They both know the names of each other's family members; the two addresses they lived at; the practical details of the current property such as the number of bedrooms, council tax, bins, smoke alarms, electricity supplier, the fact that the sponsor receives no benefits and is not working, the description of the sponsors' work uniform and hours; the details of the sponsor's last trip to Ghana in 2015 for medical matters; and the description of what they did last Sunday which included attending church, watching television, the food they ate and the presence of the sponsor's son [C].

26. From a consideration of the evidence of the appellant before me, the church letter and medical letters in the bundle and the interview transcript I am satisfied that the respondent has not shown that the marriage is a sham or one of convenience to the required standard of proof.

27. I am also satisfied that the appellant has shown on the balance of probabilities that the sponsor acquired permanent residence in April 2012 as she has shown five years of continuous work from April 2007 to April 2012, the first four years being conceded by the respondent and the final one from April 2011 to April 2012 being evidenced by the HMRC letter as set out above by Ms Ofei-Kwaja.

28. I therefore concluded that the appellant is entitled to permanent residence under Regulation 15(1)(b) of the Immigration (EEA) Regulations 2006 as he has resided in the UK for more than five year with his wife (from June 2010 until their decree nisi in the divorce in August 2018), and his wife was residing in accordance with the Regulations for this period as initially, from June 2010 she

was present as a worker and then after April 2012 she was present in accordance with the Regulations as a person who had acquired a right permanently to reside under Regulation 15(1)(a) of the Immigration (EEA) Regulations 2006.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal in its entirety.

3. I remaking the appeal allowing it under the Immigration (EEA) Regulations 2006.

Signed: Fiona Lindsley Date: 29th October 2018

Annex A: Error of Law Decision

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Ghana born on 18th September 1969. He made an application for a permanent residence card as the husband of an EEA national under Regulation 15 of the Immigration (EEA) Regulations 2006, henceforth the 2006 EEA Regulations. The appellant is married to [GA] who is a citizen of the Netherlands. This application was refused by the respondent on 6th April 2016. His appeal against the decision was dismissed by First-tier Tribunal Judge AK Hussain in a determination promulgated on the 6th December 2017.

2. Permission to appeal was granted by Upper Tribunal Judge Kebede on 13th July 2018 on the basis that it was arguable that the First-tier judge had erred in the assessment of the sponsor's employment, and thus in the assessment as to whether the appellant was entitled to permanent residence.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

4. The appellant submits that Regulation 15 of the 2006 EEA Regulations does not require the EEA sponsor to have worked for 5 years from the date her marriage to the appellant. It is argued that the appellant's spouse acquired permanent residence in 2011, as she has worked continuously from 2006 to 2015 in the UK. The appellant and his wife were married on 20th February 2010, and he came to live in the UK in June 2010. The First-tier Tribunal erred, it is contended, by finding that it was necessary for the sponsor to be in continuous employment from the date the appellant and sponsor started to reside together in June 2010 and not finding that he could rely upon her permanent residence from the point it was obtained. This, it is contended, is not a correct application of Regulations 15(1) of the EEA Regulations 2006.

5. Mr Kotas noted that the decision also failed to deal with the issue of whether the marriage was one of convenience which was raised in the reasons for refusal letter and which was not conceded by the respondent at the hearing. He reserved his position as to whether Regulation 15(1)(b) of the EEA Regulations 2006 could be met by the sponsor having a period of work followed by a period of permanent residence, as he felt it was the case that the sponsor would have had to continue to work or otherwise be a qualified

person for the whole five year period, but could not cite an authority for this point.

6. I informed the parties that I found that the First-tier Tribunal had erred in law and would set aside the decision in its entirety; and would set out my reasons in writing. It was agreed by both parties that the remaking hearing should be adjourned as the appellant had had no notice that the remaking hearing would also need to deal with the issue of the marriage being one of convenience, as there was no Rule 24 notice from the respondent raising this point, and further the appellant's wife had not attended. The appellant and his wife are in the process of divorcing but it was possible that she would provide a further witness statement and attend the Upper Tribunal to give evidence on her work history, as well as their relationship, and if not it was desirable that the appellant set out his understanding of his wife's full work history in a witness statement in writing.

Conclusions – Error of Law

7. The First-tier Tribunal errs in law as there is a failure to engage with the materials in the bundle and to establish whether the sponsor had acquired permanent residence under Regulation 15(1)(a) of the EEA Regulations 2006, and if so when it was acquired. It was not sufficient to simply observe that she had not applied for permanent residence, as is done at paragraph 13 of the decision, as this is not a relevant consideration. From the point that permanent residence is acquired then the only requirement is that the appellant was physically present with the EEA spouse to satisfy Regulation 15(1)(b) of the EEA Regulations 2006 as any time spent with permanent residence will be residence in accordance with the Regulations. It was therefore an error to require in addition that the sponsor was also present as a worker after acquiring permanent residence. Evidence of the sponsor being as a worker would only be relevant to qualify the appellant under Regulation 15(1)(b) for a period prior to permanent residence being acquired by the sponsor.

8. Further the First-tier Tribunal also materially erred in law by failing to decide whether the marriage between the appellant and sponsor was one of convenience as contended by the respondent in the refusal letter and failing to give consideration to the evidence put forward by the appellant that this was not the case.

Directions

1. The appellant should lodge any further witness statements or updating evidence 10 days prior to the date of the remaking hearing.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal in its entirety.

3. I adjourn the remaking hearing.

Signed: Fiona Lindsley Date: 11th September 2018