Upper Tribunal
(Immigration and Asylum Chamber)

Elsakhawy (immigration officers: PACE) [2018] UKUT 00086 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 and 17 November 2017	
	…………………………………

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE JACKSON

Between

MAHMOUD AHMED ABDEL-SAMIA ELSAKHAWY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: *Ms J E Norman,* instructed by Sterling Law Associates
For the Respondent: *Ms S Broadfoot QC*, instructed by the Government Legal Department

1. The respondent's instructions and guidance to immigration officers correctly reflect the operation of sections 66 and 67 of the Police and Criminal Evidence Act 1984 (PACE) and of the Immigration (PACE Codes of Practice) Direction 2013, in drawing a distinction between administrative enquiries and formal criminal enquiries. The fact that immigration officers have powers of investigation, administrative arrest and criminal arrest does not require them to follow the PACE codes of practice concerning the giving of a "criminal" caution, when questioning a person whom they reasonably suspect of entering into a marriage of convenience, in circumstances where the investigation is merely into whether an administrative breach has occurred.

2. Section 78 of PACE, which gives a criminal court power to refuse to allow evidence which, if admitted, would have such an adverse effect on the fairness of the proceedings that the court ought

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not to admit it, has little to say about the task facing a Tribunal, in civil proceedings under the EEA Regulations.

DECISION AND REASONS

1. This is the decision of the Tribunal, to which both members have contributed. The appellant appeals against the decision of First-tier Tribunal Judge Millar promulgated on 31 March 2016, in which the appellant's appeal against the decision to give directions for his removal under section 10 of the Immigration and Asylum Act 1999 on the basis of abuse of rights under regulation 21B(2) of the Immigration (European Economic Area) Regulations 2006 (the "EEA Regulations") dated 27 February 2015 was dismissed.

2. The appellant is a national of Egypt, born on 13 January 1987, who came to the United Kingdom briefly as a visitor in 2011 and entered again with entry clearance as a visitor in early 2012. Save for a brief visit to Egypt, he has remained in the United Kingdom since 2012, being granted an EEA Residence Card as the family member of an EEA national (Ewelina Wrzesniewska, whom he married on 28 March 2013) on 15 January 2014.

3. On 27 February 2015, the appellant was encountered by Immigration Officers at Denzil Road (who attended the premises to investigate the marriage of Mr Osaa Said Fetouh Hefnawy, an Egyptian national also married to a Polish national), which led to respondent's decision.

4. The respondent set removal directions for the appellant under section 10 of the 1999 Act on the basis that his marriage to Ewelina Wrzesniewska (his "wife") was a sham.

The appeal

5. The appellant appealed the respondent's decision on the basis that the appellant did not enter into a marriage of convenience and it was not for him to prove that he did not, the burden of proof being on the respondent who has failed to give adequate reasons for the decision made. The decision was further appealed on the basis that the decision was in breach of the rights of the appellant and his wife under the Community Treaties and in breach of Article 8 of the European Convention on Human Rights.

6. Although not forming part of the written grounds of appeal, an issue raised by the appellant before the First-tier Tribunal was the admissibility of evidence (or at least the weight to be attached to such evidence) obtained during the questioning of the appellant on 27 February 2015 on the basis of whether or not the questioning was properly conducted in accordance with the Immigration (PACE Codes of Practice) Direction 2013 ("PACE") (or whether it needed to be so).

7. Judge Millar dismissed the appeal in a decision promulgated on 31 March 2016 on all grounds. Judge Millar found that the respondent had reasonable grounds to suspect a sham marriage and it was for the appellant to rebut those allegations and he did not do so on the evidence before the First-tier Tribunal.

8. Permission to appeal was sought on the basis that Judge Millar had failed to deal with the appellant's submissions on PACE; failed to give adequate reasons; failed to apply the correct test for a marriage of convenience and made various errors of fact. Permission to appeal was granted by Judge Lambert on 23 August 2016 on all grounds.

9. In a decision promulgated on 7 October 2016 (attached as the first Appendix to this decision), Upper Tribunal Judge Rimington found an error of law in Judge Millar's determination, further to which directions were issued on various dates to the parties for this re-making of the decision.

Findings and reasons

The Law

10. Regulation 21B of the EEA Regulations provides, so far as relevant to this appeal:

> (1) The abuse of a right to reside includes –
> (a) engaging in conduct which appears to be intended to circumvent the requirement to be a qualified person;
> (b) …
> (c) entering, attempting to enter or assisting another person to enter or attempt to enter, a marriage or civil partnership of convenience;
> (d) fraudulently obtaining or attempting to obtain, or assisting another to obtain or attempt to obtain, a right to reside.

11. A marriage of convenience is defined in a Council Resolution of the Council of the European Union dated 4 December 1997 and has been approved repeatedly by the domestic courts. A marriage of convenience is:

> "a marriage concluded between a national of a member state or a third-country national legally resident in a member state and a third-country national, with the sole aim of circumventing the rules on entry and residence of third-country nationals and obtaining for the third-country national a residence permit or authority to reside in a Member State."

12. The legal burden of proof of a marriage of convenience is on the respondent, however the evidential burden shifts to the appellant once the respondent evidences reasonable suspicion of a marriage of convenience: Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC) and Rosa v Secretary of State for the Home Department [2016] 1 WLR 1206.

Evidence on behalf of the appellant

Appellant

13. In his written statements signed and dated 20 September 2017 and 2 October 2017, the appellant set out his background and details of how he met his wife and how their relationship started. He stated that they began living together after their Islamic marriage on 28 March 2013.

14. The appellant's wife went to visit her family in Poland for three weeks in February 2015 as her mother was sick. The appellant could not travel with her as he did not have any annual leave remaining and during that time he stayed with a friend for company. It was at that friend's address that Immigration Officers visited on 27 February 2015. The appellant described his experience of that visit, in particular stating that he was treated in a very rude manner; that he requested an interpreter but was not offered one; that he asked to call his lawyer but was not permitted to do so and that he was questioned when he had not even properly woken up. He also disputed a number of points of the record from the interview, in particular that he gave his full address in New Eltham and it was only the postcode that he could not remember.

15. The appellant went on to describe what had happened since the respondent's decision, the impact it has had on his relationship and on his life more generally. He stated that his relationship with his wife started breaking down in October 2015 but that his wife was still prepared to support him in his appeal up until the adjournment in January 2016 when she said she could not handle the pressure any more. The appellant's wife refuses to communicate with him until his immigration status is resolved, fearing for her own future in the United Kingdom.

16. In the second witness statement, the appellant responded in detail to the written evidence of IO Hale and Mr Toleman. In particular, the appellant did not recall being cautioned at any point by Immigration officers; he never claimed to be on holiday from Egypt; he did not willingly show IO Hale texts on his phone and that his wife's new number was stored under the contact "Ewelina Lovely#". The appellant stated that they called and texted each other as well as using *Whatsapp* and *Viber* to stay in touch but records of contact were lost when his phone broke about 2 years ago. The appellant was not asked to contact his wife or show any further evidence of contact with her.

17. In relation to a suitcase found at Denzil Road during the enforcement visit by the respondent's immigration officers, the appellant stated that it had been there for about six months and left with his friend because the appellant had used it to bring back items from Egypt for his friend. The appellant's documents were in a small bag within the suitcase which he kept with him when staying with his friend because he was moving address at the time and wanted to keep them safe.

18. In relation to his wife's travel movements, the appellant stated that she travelled to and from Poland in October 2014, February 2015 and attended a wedding in May 2014 in Poland. She has been continuously living in the United Kingdom.

19. The appellant could not explain why his wife's brother-in-law referred in his marriage interview to his wife coming to visit her sister and brother-in-law in the United Kingdom with her baby and noted discrepancies within that marriage interview. Further, the appellant did not recognise the Facebook page referred to by the respondent nor all of the photographs within it. He did recognise the name of his wife's sister and brother listed on the Facebook page but not any of the other friends. He denied that his wife was single and that she had any children. The appellant did not know who the man in many of the photos was and he could not confirm when the photographs were taken.

20. The appellant attended the oral hearing, confirmed his details, adopted his written statements and gave oral evidence through a court-appointed Arabic interpreter. The appellant confirmed that he first came to the United Kingdom in 2011, staying for four days before returning to Egypt. He returned to the United Kingdom in February 2012 with entry clearance as a visitor for six months which expired in July 2012. The appellant did not return to Egypt before the expiry of his visa on the basis that he would prefer to stay in the United Kingdom considering the economic and political situation at the time in Egypt. From the first moment he came to the United Kingdom he said that he wanted to spend the rest of his life here and have a family here. In 2011 he was checking things out in the United Kingdom for this purpose. When he had returned to the United Kingdom in 2012, in possession of a visit visa, it had been with the intention of remaining here permanently. He had therefore brought with him a sum of money to cover his living expenses until such time that he could work. The appellant applied for a visit visa because entry as a visitor or entry as a student were the only options available to secure entry to the United Kingdom. The appellant accepted that he knew his visa was granted on the basis of a visit only and that he lied to secure entry.

21. After about 3 months in the United Kingdom, the appellant asked around and was advised that the only lawful means of staying were if he married or studied. He could not afford to study due to the cost and would in any event have had to return to Egypt to make an application to do so from there. He therefore decided that he had to marry and find a lady to spend his life with in the United Kingdom.

22. The appellant was asked about his Islamic marriage certificate dated 5 April 2013, as there was no translation of it available in the hearing bundle. The appellant clarified that he was married in the Islamic way in a mosque and after that on a different date went to the Egyptian Consulate to certify the marriage, on 5 April 2013. That certificate contains three references to George's Drive in Pimlico, which the appellant said was the address that he and his wife used for correspondence. It was his sister-in-law's address and was a more secure one to use. The appellant and his wife were not sure of an address where they would settle as husband and wife and so used this as an alternative. The three questions on the certificate, to which "George's Drive" was answered, were for the appellant's address, the appellant's correspondence address and the address where the appellant and his wife were going to live. When asked why this address was given for all answers when it was to be used only as a correspondence address, the appellant stated that the same was used to prevent anything being mixed up.

23. The witnesses at the appellant's marriage were a friend of his and Hussain Ahmed Sayed Ali, his wife's brother-in-law, whom the appellant met for the first time at the wedding.

24. The appellant stated that he had never lived at Denzil Road, but he had a friend who lived at this address and used it when he first came to the United Kingdom, to open a bank account and for correspondence. He could not remember what documents he had used to prove he was living there, so as to be able to open a bank account showing that address. He thought he might have had "a letter or something".

25. The appellant was asked about his work history and also about meeting his wife. They met at a birthday party and friends mediated between them so that they could communicate as the appellant did not speak Polish and his wife did not speak any Arabic. A friend introduced the appellant's wife and explained his feelings for her; then the relationship started. After the birthday party they saw each other a week to 10 days later and then every three or four days on an ongoing basis. The appellant's wife knew that he was in the United Kingdom without lawful leave to remain and knew that he needed to find someone to marry to obtain a visa.

26. The appellant proposed to his wife around the middle of February 2013. He did so in English but did not need to say very much because his wife had been prepared in advance by a friend about what he was going to say. When the couple met, the appellant stated that they didn't need to talk much and instead used body language to express their feelings.

27. After the wedding, the appellant and his wife moved to Stonebridge Park. The appellant used the address on Denzil Road in November 2014 to apply for a driver's licence as his friend offered him advice to use this address on his application as it was an important document and he had had problems receiving mail at his own address. He accepted that he received bank statements at his home address but said that it was easier to get replacement bank statements if needed than it would be to get a replacement driving licence, if not received.

28. At the end of 2014 or the beginning of 2015, the appellant moved to Inca Drive. He stated that, when interviewed by immigration officers in February 2015, he did know that address, but not its postcode.

29. The appellant had converted one of his bank accounts into a joint bank account after his marriage, but could not remember exactly when this happened. It was a joint account that he said both of them paid into. He could not explain who paid in different sums to the account, nor who could he initially explain payments out of significant sums of money (£3500 and £7500). He then said they were made to his brother who was in financial trouble in Egypt. He borrowed the money from a large group of friends. The appellant had other accounts in his name, some of which were inactive. He denied having multiple accounts to prevent someone tracing his finances.

30. In relation to his wedding, the appellant stated that he did not know that an Islamic marriage was not a legal marriage in the United Kingdom. The appellant stated that there were photographs of his wedding which were submitted to the respondent with his application for an EEA Residence Card, and which were returned to him by the respondent. No explanation was given as to why none were available in the course of this appeal.

31. The appellant was asked about the *Facebook* evidence submitted by the respondent and evidence regarding his wife's travel to and from the United Kingdom. He did not necessarily agree with information about the first flight his wife took. He accepted that there was a photograph of his wife taken outside the Egyptian Consulate on the day that their marriage was registered there. He called this their wedding as well on the basis that at the Egyptian embassy you had to repeat the

marriage ceremony. The appellant was able to positively identify his wife in a number of the Facebook photographs but did not recognise all of the other people in them and could not be certain that some of them were his wife. He did not accept that these photos were accurate and said that anyone could use *Photoshop* and put them on a *Facebook* account. He did not accept any information about his wife suggesting that she had three children.

32. Overall, the appellant stated that he did not recognise the *Facebook* account as belonging to his wife and stated that someone had fabricated all of it.

33. The appellant's wife moved out in March 2016, after his appeal hearing was adjourned for the second time. He could not explain why the draft statement said to be from her prepared for his appeal hearing had not been signed. He stated that she was willing to assist him in his appeal but that there had been too many adjournments.

34. The appellant stated that he did know anything about the statement made by Mahmoud Shamakh. The appellant did not know much about him and had not been in touch with him since the date of the letter in the bundle. He stated that people now hesitated to help him because he was in trouble with the Home Office.

35. The appellant was then asked about the interview with him during the enforcement visit to Denzil Road. He stated he was living with his wife at that time. When asked about phone contact with his wife, the appellant stated that he was asleep when the immigration officers arrived, was totally confused and he couldn't understand other than to say that his solicitor should be contacted if there were any concerns. The Immigration Officer asking him questions was screaming at him, was very aggressive and the appellant could not understand what he wanted in terms of contact with his wife in Poland. The appellant was not given a chance to explain that the contact telephone number looked at by the Immigration Officer on the appellant's mobile telephone was his wife's old number. The phone subsequently broke and the appellant had lost it. The appellant did not agree the contents of the Immigration Officer's record of the visit.

36. In February 2015, the appellant's wife travelled Poland by car to visit her sick mother. She travelled with friends who happened to be going back at the same time.

37. The last time the appellant had any contact with his wife was via *Facebook Messenger* when he told her that he had good news but never received any reply. The appellant thought that his wife's concerns about starting a family were always in her mind and in particular, consideration of what would happen if the couple had children and the appellant had to return to Egypt. The appellant's wife wanted security in the United Kingdom. They had a good relationship. It was not a sham marriage and their relationship only went wrong after the enforcement visit.

38. We asked the appellant further questions about the evidence he submitted that he said was his wife's true *Facebook* account, which he had used to communicate with her. That single *Facebook* page was on its face said to have been created on 13 October 2016 but the appellant stated that this was the account that he used to communicate with her prior to that date.

Osama Hefnawy

39. In his written statement signed and dated 12 November 2017, Osama Hefnawy set out his background and experience of the immigration visit at his property on 27 February 2015. Mr Hefnawy opened the door to Immigration Officers who said they were from the Home Office but did not show him any form of warrant or ID and did not make him aware that he had the choice as to whether to let them in or that he could seek legal advice. He stated that IO Hale was very aggressive and hostile when questioning the appellant, raising his voice and shouting at him, behaving in a way that was aggressive and threatening. He heard him tell the appellant that he would be sent back to his country. The Immigration Officer interviewing Mr Hefnawy was rude, did not offer him an interpreter, suggested that he was lying and told him on two occasions that his answers were "bullshit". Mr Hefnawy was not shown what was recorded in the Immigration Officer's notebook and he was not asked to sign anything during the visit.

40. Mr Hefnawy attended the oral hearing, confirmed his details, adopted his written statement and gave oral evidence through a court appointed Arabic interpreter. In cross-examination he confirmed that he had known the appellant in Egypt and they were good friends. Mr Hefnawy came to the United Kingdom on 14 October 2011. He stated that he had seen the appellant's wife's brother-in-law on one or two occasions but they didn't know him as such.

41. Following the visit, Mr Hefnawy's application for an EEA Residence Card was refused on the basis that he had entered into a marriage of convenience. His appeal against that refusal was allowed by the First-tier Tribunal in a determination promulgated on 30 October 2015. A copy of that determination was exhibited to the written statement.

42. In relation to the immigration visit to his property. Mr Hefnawy stated that he could not remember if he had been showed an ID badge by IO Hale; he was not sure if they did or not. He did not remember signing any of the officers' notebooks when they came in.

43. Mr Hefnawy described his bedroom at his premises which had one double bed and one single bed in it. The double was for himself and his wife and in the single bed was the appellant.

44. Mr Hefnawy stated that he could recognise IO Hale but had only been told what his name was the day before the hearing when he attended the solicitor's offices and they showed him a picture. He stated that he was asked to give a witness statement because of what happened at his flat and he had not previously been asked to do so. Mr Hefnawy stated that despite being interviewed by a different IO, he could hear what IO Hale was saying to the appellant because IO Hale was speaking loudly and was being aggressive and threatening towards him. He expressly stated that he recalled when the officer was leaving, the appellant asked if his solicitor should contact the IO and was told in response that he could do that when they were sending him back to his country. He stated that he heard IO Hale laugh at the appellant when he was leaving. He denied exaggerating the behaviour of officers to help his friend.

45. We asked Mr Hefnawy some further questions. He stated that the appellant had been staying with him for 7 to 10 days at the time of the immigration visit but not permanently. He stated that the appellant had used Mr Hefnawy's address for his driving licence on the basis that the appellant did not at that time have a fixed address and that it was Mr Hefnawy's idea for him to do that. He stated that his address was not used by the appellant for anything else. In further cross-examination, Mr Hefnawy stated that the appellant only used address for the driving licence and when asked about its use for the appellant open a bank account in May 2012, he stated friends who were without permanent addresses could use his address and there had never been any problems with his mail. He stated that he moved to the address in May 2011 and there were a number of Egyptians living there, some of whom came and went. He said he did not know the appellant's wife's brother-in-law who was living at the same address when he moved in until April 2012.

Mr Ryzhko & Mrs Sokolowska-Ryzhko

46. In their written statements signed and dated 4 and 11 October 2017 respectively, Mr Ryzhko and Mrs Sokolowska-Ryzhko set out their details. Mr Ryzhko is a Ukrainian national and his wife is a Polish national. When Mr Ryzhko applied for an EEA Residence Card, they were visited by three male Immigration Officers at their home in the early morning of 17 March 2016. Neither could remember being shown any warrant or the officers introducing themselves and were not aware they could have refused the officers entry.

47. Mr Ryzhko says that IO Hale was unpleasant and intimidated him, telling him that he would not get any residence documents, that he was lying and should wait for the refusal. He was rude throughout the visit, speaking in a nasty tone of voice and acting in an aggressive manner throughout the visit. At the end of the visit IO Hale sneered at Mr Ryzhko. Mr Ryzhko and his wife were left scared and intimidated from the visit.

48. Mrs Sokolowska-Ryzhko stated that she heard IO Hale say that her husband "must be gay" which she considered to be inappropriate. IO Hale was described as being very rude, talking in a nasty tone of voice and with an aggressive manner throughout the visit, leaving Mrs Sokolowska-Ryzhko and her husband feeling scared and intimidated.

49. The couple were not asked whether they wanted to speak to a lawyer and were not informed that they could refuse to answer questions during the visit. No interpreter was offered and at times Mrs Sokolowska-Ryzhko had to act as an interpreter for her husband.

50. The application for an EEA Residence Card was refused on the basis that the couple had entered into a marriage of convenience but they successfully appealed this decision on 6 September 2017.

51. Mrs Sokolowska-Ryzhko attended the oral hearing, confirmed her details and adopted her statement and gave oral evidence in English. In cross-examination, she stated that she knew that it was IO Hale who was rude and made derogatory comments as she had identified him from a picture sent to her by her solicitors (who also acted for the present appellant). Mrs Sokolowska-Ryzhko confirmed that

around the time of the visit she made a complaint against IO Muir but did not know this had been investigated following her statement. She stated that she had not mistaken IO Hale for IO Muir.

52. At the visit, IO Hendry asked most of the questions and wrote them in his notebook, with some additional questions from IO Hale which were not recorded in the Q&A record of the interview.

53. Mr Ryzhko attended the oral hearing, confirmed his details and adopted his written statement. He gave oral evidence with the assistance of a Ukrainian interpreter. In cross-examination, he confirmed that he did not know the appellant and had only seen him for the first time at the oral hearing. When asked why he was giving evidence in court, Mr Ryzhko stated that this was to see justice prevail as he understood that the gentleman from the Home Office didn't do his job properly.

54. Mr Ryzhko identified IO Hale from being sent a single photograph by his solicitors, after his appeal hearing in September 2017. He did not mistake IO Hale for IO Muir.

55. Mr Ryzhko did not remember making a complaint personally after the visit but thought that maybe his solicitors did this. He could not remember if there was any response to this complaint. A complaint was made in October 2017 but Mr Ryzhko did not know if this had yet been responded to.

56. During the enforcement visit, IO Hale was said to have acted in a superior manner and his behaviour made it look as if he was the decision-maker. He was rude and it was not just what he said but the way he said it.

57. Mr Ryzhko stated that he understood English and was capable of responding to some questions in English but not all of them during an interview. His wife helped him other than on simple questions. He stated that when previously arrested on 11 June 2014 he did not refuse an interpreter. He was not offered one. In re-examination he stated that after his arrest in 2014, when given details of his removal from the United Kingdom them, he did have access to an interpreter.

The respondent's evidence

<u>Jamie Toleman</u>

58. In his written statement signed and dated 29 December 2016, Mr Jamie Toleman set out his professional background working for the respondent, his qualifications and his investigations about the appellant's wife. He accessed the appellant's wife's *Facebook* account and took screenshots of what he found, which included information about her; the places that she has lived; contacts including family, friends and relationships; life events and multiple photographs.

59. Separately Mr Toleman conducted online searches for the appellant's wife's employer, named on her alleged payslips as "Samiramies Salon". This had no internet presence and the only company of such a name registered with Companies House was dissolved on 20 October 2015.

60. Mr Toleman attended the oral hearing, confirmed his professional details, adopted his written statement and gave oral evidence. In cross-examination he stated that he is a criminal investigator and a digital media investigator using open source material with the appropriate level 3 qualification to do so. Open source material is limited to what is publicly available online. What can be seen would depend on a person's privacy settings. Mr Toleman used *Google Translate* as a guide to assist him in his work and in this case it was used because he does not speak Polish. He stated that he was unable to confirm whether the photographs on *Facebook* were contemporaneous with the dates on which they were posted, as *Facebook* strips out the "metadata" from the photograph.

IO Richard Hale

61. In his written statements signed and dated 10 January 2017 and 30 November 2017, IO Richard Hale set out his professional background working for the respondent, his response to the appellant's written statement dated 2 October 2017 and recollection of the enforcement visits to both the appellant/Mr Hefnawy and to Mr and Mrs Ryzhko.

62. As to the visit on 27th February 2015, IO Hale stated that he attended Denzil Road with IO Whittaker. IO Hale showed Mr Hefnawy his warrant card and asked him to come in to speak to him. Mr Hefnawy consented to them entering and signed IO Whittaker's notebook to confirm this. IO Hale made notes in his official notebook throughout the visit.

63. IO Hale woke up the appellant and asked to see his passport, which the appellant stated was at another address, but his driving licence was provided. IO Hale heard Mr Hefnawy stating that the appellant was on holiday from Egypt but the appellant's driving licence was issued to the address of the visit and the appellant claimed to be married to a Polish lady. IO Hale then suspected that the appellant was not lawfully in the United Kingdom. He cautioned the appellant, recorded as "C+2" in his notebook and asked him further questions.

64. The appellant was asked for his address, but he could not give it save for the fact that it was in New Eltham. When asked to show IO Hale contact with his wife, the appellant unlocked his mobile phone and handed it to IO Hale, displaying on its screen a number on the phone's contact list, which read "Ewelina Lovely". The appellant consented to IO Hale looking at the text. IO Hale considered the text to be about the appellant's wife rather than to or from her. There were no texts of a personal nature and nothing to indicate any direct contact between the appellant and his wife. The last call made to or received from this contact was on 6 September 2014. IO Hale called the number and spoke to a man who turned out to be the appellant's wife's brother-in-law who had not had contact with her for over six months.

65. Overall, IO Hale was satisfied that there was sufficient evidence that the appellant's marriage was a sham and that the couple did not live together in a subsisting relationship. The case was referred to Immigration Inspector Smith who authorised service of papers on the appellant, including the respondent's decision under challenge in this appeal.

66. IO Hale did not offer the appellant an interpreter during the visit as it appeared him that his English was sufficient, that he understood the questions and was able to respond in English. IO Hale denied the other allegations against him, stating in particular that he did not shout at the appellant; was not rude and did not laugh at him; did not ask to see his notes; did not ask for an interpreter and did not say he wanted to call his lawyer save for where this was recorded at the end of the notes.

67. Checks were conducted by the respondent on the movement history of the appellant's wife, showing that she had only visited the United Kingdom for a total of six days in the last five years, spread over two different trips, both of which originated in Poland. IO Hale said not all passenger movements were recorded prior to 2014, so it may be that flights in 2013 would not show up. The passenger movement check system was expanded to cover all travellers by air, sea and rail on 8 April 2015 but there were no records of the appellant's wife travelling to Poland by car, i.e. using channel or ferry.

68. On 2 August 2013, a marriage interview was conducted with both the appellant's wife's sister and her brother-in-law, which named the appellant's wife and referred to her visiting the United Kingdom for a week in April 2013 with her baby.

69. IO Hale also searched for the appellant's wife on Google and found a *Facebook* page which appeared to belong to her. He confirmed that this is the same page referred to in and exhibited to the statement of Mr Toleman.

70. In response to the appellant's written statement, IO Hale stated that the appellant did not make any attempt to show any other listing or conversation with his wife on his mobile phone as claimed and was satisfied that he saw no second listing for "Ewelina Lovely#".

71. IO Hale exhibited Experian credit records to his written statement, showing that the address given on the appellant's marriage certificate from the Egyptian Consulate was that of the appellant's wife's brother-in-law, who was linked to that address between December 2012 and September 2013. That person was also linked to the address at Denzil Road between February/March 2010 and April 2010 or April 2012. The appellant was also showing to be linked to the address at Denzil Road on 25 May 2012 when he opened a Barclays bank account using that address.

72. In relation to the enforcement visit to Mr & Mrs Ryzhko, IO Hale stated that he did not recognise the claims relating to him and believes that he may have been mistaken for IO Muir. He was aware that there was a complaint against IO Muir at the time which was fully instigated by HMI Stratton. He did not remember any trouble communicating with Mr Ryzhko during the visit that he had previously in 2014 refuse the use of an interpreter.

73. IO Hale attended the oral hearing, confirmed his professional details, adopted his written statement and gave oral evidence. He stated that he had worked in the West London Arresting Team since 2001 and had never been specifically crime trained, nor had he had any specific training on PACE, other than a short lecture when he first started. He had not had any specific training on or after the 2013 direction on PACE. IO Hale specialises in marriages of convenience and confirmed that although it is not a criminal offence to enter into a marriage of convenience it would potentially be one

to seek an EEA Residence Card on that basis. Overstaying is also a criminal offence, as is breach of conditions and he did not know about any potential offences under the Perjury Act.

74. IO Hale's work does not involve any criminal prosecution and although he has a power of arrest it is not normally used in connection with the kind of work he undertakes. His role is to examine marriage applications by individuals and he did not go on enforcement visits with the objective of finding offenders or arresting them. He speaks to them and if relevant information arises, he transfers the case to a Chief Immigration Officer or investigator to consider further. As to the visits undertaken, these are targeted at those as regards whom there is intelligence to suggest that there may be a marriage of convenience. It was not possible to make such visits in the case of every EEA marriage application. It may be, for example, that those who were already immigration offenders when they got married were targeted for investigation. IO Hale described his visits as including a "pastoral" element and explained that this was a phrase coined by management to show that he was not there in order to identify and arrest offenders but as part of a wider investigation. The pastoral element was to speak to people about their application and life in the United Kingdom. This did include the provision of some advice and support on genuine marriage applications and other colleagues, for example the family team, may give advice about leaving the United Kingdom.

75. IO Hale explained what a caution was and repeated the exact phrasing used. He stated that it means a person does not have to answer questions but if they do not, then inferences may be drawn against them. It was important because it is part of English criminal law that the suspect has a right to silence.

76. In relation to the visit to Mr Hefnawy's address, Mr Hefnawy had been identified by someone else as a suspected party to a marriage of convenience and IO Hale was part of the team tasked to undertake the visit. He knocked at the door, showed his warrant card, explained the purpose of his visit and Mr Hefnawy signed IO Whittaker's notebook. There was an explanation that Mr Hefnawy was not required to let the immigration officers into the premises.

77. Inside the premises, IO Hale woke the appellant up and asked him for his ID, further to which the appellant handed IO Hale his driving licence. IO Hale identified a number of reasons why the appellant might not be lawfully in the United Kingdom (that he had no passport; that Mr Hefnawy had said that the appellant was on holiday in the United Kingdom; and that he had a driving licence which was issued to the address some four months before the visit). At that point the appellant was cautioned.

78. As to the appellant's contacts for his wife, IO Hale stated that he looked beyond the first contact listed for her on the appellant's mobile phone and was sure he had made a wider search, despite the fact that this was not in his record made at the time. He was asked how he remembered this from February 2015 and he stated that he remembered the text that he had seen did not show any direct contact with her and had desperately looked through the phone to find anything else. It was not recorded in his pocket book as it did not seem important at the time. IO Hale checked the appellant's call history and other information.

79. The appellant was not offered an interpreter as IO Hale thought that his English was fine when he spoke to him and there was no need. He had no doubts about that even when there was a misunderstanding about the word 'cleaner'. When the appellant said to him he didn't understand, IO Hale thought that this wasn't a lack of understanding due to language reasons but a lack of understanding on the substance as to why his wife's relatives had given the information that they did about contact on his phone. The appellant was not prevented from speaking to a lawyer and IO Hale told him at the end that he could contact one. IO Hale stated that the appellant did not repeatedly ask for a lawyer nor did he repeatedly say that he could not understand. He also stated that the appellant did not give him his full address. When asked specifically about the following points, IO Hale stated that he did not rely on the appellant not knowing his rights; he did not rely on him not understanding any questions; he did not rely on the lack of interpreter; he was not rude; he did not laugh or swear at the appellant.

80. IO Hale was asked about his visit to Mr and Mrs Ryzhko and he cross-referred to written statements from IO Hendry and IO Hendry's notebook about what happened on that occasion. He denied being rude or intimidating and denied making any comment about the sexuality of Mr Ryzhko, on which there were notes and a statement from IO Muir referring to evidence suggesting that he may be gay. IO Hale denied making any derogatory comments; telling Mr Ryzhko that his application was going to be refused; denied telling him he would need a lawyer; denied laughing at him and denied having any concerns about his language ability. He did not recall Mrs Ryzhko providing any interpretation for her husband. IO Hale was unable to offer a view from the notes available to him as to whether IO Farnham followed PACE in this interview.

81. IO Hale was not able to provide any details of the proportion of his visits which resulted in further action about marriages of convenience as he did not keep any statistics. His job was to write up the evidence and someone else would then decide if it was sufficient to find image of convenience or not.

82. In re-examination, IO Hale confirmed that he had powers under paragraph 17(1) of Schedule 2 to the Immigration Act 1971 to arrest an immigration offender, which was not a criminal but an immigration power. He does not directly exercise any powers covered by PACE and does not directly gather evidence for any criminal prosecution. Any intelligence received would be passed on to criminal teams who would then visit and as needed arrest the person themselves. He believes that an individual would be re-interviewed on such occasions. In terms of the pocketbooks used, IO Hale stated that he was not supposed to write down every word which was spoken.

83. At the time of the visit to the appellant, IO's Hale team was instructed to administer a "caution +2" on marriage visits if a person's status was uncertain, so they could be questioned about that, and then, if warranted, to serve them papers such as an IS151A or IS151B (now RED001). IO Hale only dealt administratively with immigration offenders. From around August 2016, the PACE caution was no longer used by any officer who is not trained in the investigation of criminal offences. There is no option for such an immigration officer to arrest under section 28A of the 1971 Act (arrest without warrant), on suspicion that an immigration criminal offence has been committed. They can only use the powers of paragraph 17(1) of Schedule 2. The

PACE caution was not therefore used in this situation. It had been replaced by an administrative caution. Members of a criminal investigation team would use the powers under section 28A.

Closing submissions on the evidence

84. On behalf of the respondent in closing, Ms Broadfoot set out the relevant legal framework which was not in dispute between the parties. She submitted that on the evidence, the respondent had discharged the burden of proof showing that the appellant had entered into a marriage of convenience with the predominant purpose of achieving an immigration advantage for the following reasons:

    (i) The appellant was candid in stating his intentions on coming to the United Kingdom on a false basis in 2012 and needing to marry someone to regularise his stay to remain here.

    (ii) The appellant's evidence as to how he met his wife was very limited and contained no real detail. It was clear that the couple could not communicate with each other and had to rely on friends to do so for them; and yet within a few months they were married.

    (iii) The appellant married in a mosque on 28 March 2013 but there were no wedding photos. The mosque was nowhere near where the appellant was living and there are distinct oddities in the documents relating to the registration of his marriage at the Egyptian Embassy on 5 April 2013. This included repeated use of an address at which the appellant had never lived.

    (iv) The appellant's evidence was lacking in detail about the period of his marriage between March 2013 and March 2016, when his wife was said to have moved out. There are very few photos of the couple, those which were available are undated and of low quality with no explanation for the circumstances of the photographs. It would be reasonable to expect much more would be provided for a marriage which had subsisted for three years.

    (v) There was no evidence at all from the appellant's wife herself. The unsigned witness statement from her is almost identical to the first unsigned statement of the appellant and appeared to have been made up as a hopeful first draft rather than based on any direct instructions for her.

    (vi) The appellant's evidence as to addresses used by him was both suspicious and unsatisfactory. He used an address on his marriage certificate and a different one on his driver's licence but claimed that he never lived at either property. The explanations given for the use of these addresses were unsatisfactory, particularly when post was clearly being received at the address which he said he did live at that time. There was a question mark as to how the appellant was able to obtain a driver's license, a document used for identification and proof of address purposes, at an address at which he had never lived and for which he could provide no other documentary link.

(vii) There was also limited evidence connecting the appellant's wife to the address in Stonebridge Park consisting only of a TV licence and a few letters from HSBC.

(viii) There was some evidence linking the appellant's wife to the address at Inca Drive, including joint bank statements but this account was previously in the appellant's sole name to which she was added. No evidence has been submitted on the process of converting this to a joint account and it was clear that the appellant had been able to open numerous bank accounts without identity documents. In any event, it was impossible to tell from the bank statements whether the appellant's wife undertook any of the activity contained therein.

(ix) There were payslips between May and December 2015 for the appellant's wife linked to the address at Inca Drive, but it was submitted that such documents were easy to produce to maintain the fiction of a genuine marriage. It was noted that the pay on these payslips fell just below the threshold for payment of tax and any other deductions were very small. The last few payslips post-dated the dissolution of the company that they were said to emanate from. In the circumstances it was submitted that no weight should be attached to this evidence.

(x) There was evidence from the respondent as to the appellant's wife's travel in and out of the United Kingdom which showed that there were only two records of such travel by air, both of which originated and finished in Poland, albeit air travel was not fully recorded prior to 2014. Similarly, although there were no records of travel by car prior to 8 April 2015, there were no records of such travel since that date for the appellant's wife. This evidence does not fit with the appellant's explanation of how his wife travelled to and from Poland. The suggestion that the appellant's wife was able to travel with friends by car at the particular moment when she needed to return to visit her sick mother was implausible.

(xi) As to the *Facebook* evidence generally, it was submitted that on the balance of probabilities, the details produced by the respondent in evidence were of the appellant's wife's *Facebook* account. First, it has her name on it with the correct spelling. Secondly, the *Facebook* shows connections to 2 people to whom we knew that the appellant's wife is connected in real life: her sister and her brother. Thirdly, the appellant accepted that it contained pictures of his wife. It would have to be questioned who else would create such a page in the appellant's wife's name, with her details and photographs on it. There was no reason for that to have been done. As to the photographs, comparisons can be made between the person who is in them and in particular the identical clothing worn by person identified as the appellant's wife. A partner and child are evident in many of the pictures and there is a record (in the marriage interview of her sister and her brother-in-law) of the appellant's wife having visiting the United Kingdom in April 2013 with her baby.

(xii) The Experian credit records submitted by the respondent show the connections between the appellant and certain addresses, as well as others connected with those addresses, including his wife's brother-in-law.

85. Overall, it was submitted that there was overwhelming evidence that this was a marriage of convenience. It was not necessary in light of the above to have any regard to or reliance on the evidence of the interview at the immigration visit on 27 February 2014 to reach the conclusion that this was a marriage of convenience.

86. As to the immigration enforcement visit, the appellant's evidence shows matters of perception only. It was submitted that it was not surprising that someone who was woken early and unexpectedly by an immigration officer would think that the experience was unpleasant. This is not the same as establishing that IO Hale was rude, aggressive, sneering and so on.

87. Counsel for the respondent also raised concerns about the evidence given by others about IO Hale and the process by which he was identified with those being shown a single photograph of him and none of the other officers involved. In particular, Mr & Mrs Ryzhko made a formal complaint against IO Muir following the visit made to them no further action was taken. It was only in recent weeks that they now claimed the behaviour complained of was that of IO Hale and a complaint had been made against him. The only reason that this had been made now was to allow the appellant to try to cast doubt on the Immigration Officer's credibility and not because of any genuine complaint. The substance of that complaint was not put to IO Hale in cross-examination. It was submitted that IO Hale's evidence was clear as to his role in enforcement visits relating to marriages of convenience and that there was a similarity between his oral evidence, written statement and his pocketbook record.

88. As to Mr Hefnawy's evidence, it was submitted that he had exaggerated his evidence to help out his childhood friend from Egypt.

89. On behalf of the appellant, Ms Norman submitted on the evidence that the respondent had failed to discharge the burden of proving that the appellant had entered into a marriage of convenience on the balance of probability. She submitted that the fact that the appellant was candid about his plan to stay in the United Kingdom did not of itself mean that his marriage was one of convenience. It was submitted that people limit their potential dating pool on many different grounds and there was no reason why the appellant could not legitimately have restricted his to EEA nationals or someone who was in a position to support his application for leave to remain. It was stated that there is a difference between a convenient marriage and a marriage of convenience. In any event, this was not a "shotgun" wedding. There were a few months between the couple meeting and getting married and therefore no significant urgency in doing so.

90. As to the wedding itself, little turned on the location of the mosque and as to the address used on the forms with the Egyptian embassy, it was plausible that the appellant had no fixed or permanent address to use and therefore used a correspondence address.

91. There is documentary evidence consisting of a TV licence and bank statements, including a joint bank statement showing the appellant and his wife at the same address and also of moving frequently. As to the payslips, it was not suggested that the documents were not genuine and not all businesses are registered at Companies House.

92. It was submitted that it was not inherently implausible that the appellant's relationship with his wife broke down in the face of ongoing court proceedings and that this was the reason why there was no evidence directly from her in these proceedings.

93. Counsel submitted that the travel records added nothing of significance to the respondent's case around the date of the marriage. There was nothing inherently implausible about the appellant's wife travelling to Poland to visit her mother at the time of the enforcement visit.

94. As for the *Facebook* evidence, it was submitted that this was limited to what was publicly available in 2016, only when accessed by the respondent. In any event, social media was not necessarily a complete or accurate reflection but was an opportunity for that person to "curate" their life. There was no evidence as to what the *Facebook* profile said in 2013. It was possible that there were different *Facebook* accounts and it was possible that there may be children from a past or new relationship.

Conclusions on the evidence

95. For the reasons set out in paragraphs 96 to 101 below, which do not rely on any evidence obtained during the questioning of the appellant on 27 February 2017, we find that the respondent has discharged the legal burden of establishing, on the balance of probabilities, that the appellant entered into a marriage of convenience with his wife; that is to say, the marriage was entered into with the sole aim of circumventing the rules on residence for a third-country national.

96. The appellant's evidence to rebut the respondent's suspicions as to whether he was in a marriage of convenience is very limited. In totality, it includes an Islamic marriage certificate, an untranslated marriage certificate from the Egyptian Embassy, statements for a joint bank account (converted from an account in the appellant's sole name), bank statements and letters addressed to the appellant and his wife individually at the same addresses, a TV licence issued to the appellant's wife at one of those addresses, payslips and a P60 for the appellant's wife, a mobile phone letter, a letter of support from a friend and a small number of photographs.

97. Some of the evidence that has been submitted on behalf of the appellant carries little weight for the following reasons. First, although there are two marriage certificates, the documents give rise to some concerns. In particular, the one from the Egyptian Embassy has not been translated (save in part, orally by the appellant through the court appointed interpreter at the hearing) and contains information which the appellant has confirmed is and was false as to his address. The marriage certificate asks for an address for three different purposes (current address, intended address and correspondence address) to which George's Drive was given for all three questions, despite the fact that the appellant had never lived there and had no

intention of doing so. His explanation that this was used as a correspondence address because there was no firm plan of where he and his wife were going to live therefore does not withstand scrutiny.

98. Secondly, there is no evidence as to when and how the appellant's bank account was converted into a joint account and it is not clear on the face of the statements who was using the account or whether the appellant's wife paid in or withdrew from it.

99. Thirdly, the letter of support from Mahmoud Shamakh dated 10 January 2016 refers to seeing the appellant and his wife regularly at their home at Inca Drive and refers to them being a genuine couple. However, by this date, the Applicant's evidence was that their relationship was under strain and shortly thereafter the Applicant's wife moved out. The Applicant has also not been in contact with this person at all since the statement and he did not attend the appeal hearing to give oral evidence.

100. Fourthly, the payslips for the appellant's wife do not include full details of her employer and the only trace that can be found of the company she worked for shows that it was dissolved over two months prior to the last payslip being issued. This casts significant doubt on the genuineness of those documents.

101. Finally, the photographs submitted are of poor quality, are undated and are very limited in number. There is no explanation from the appellant about the photographs at all.

102. The appellant fails by some margin to discharge the evidential burden on him. Indeed, that evidence fully supports the respondent's conclusion that the appellant's marriage is one of convenience. There are conspicuous gaps in the evidence submitted on behalf of the appellant in the evidence which it would be reasonable to expect a person who undertook a genuine marriage, not one of convenience, to have produced. First, there is no evidence of either marriage ceremony by way of invitations, cards, photographs; and so on. There is a photograph in the *Facebook* evidence of the appellant's wife outside of the Egyptian Embassy on the day of that ceremony, but she is in casual clothing and photographed with her sister and not the appellant. It seems strange at the very least that this was the only photograph taken on the day/outside the place of a ceremony which the appellant said was akin to a marriage ceremony.

103. Secondly, there is no evidence at all of any direct personal contact between the appellant and his wife prior to their marriage and at best, a short series of messages from the appellant to which there were 2 short responses in October 2016. There is no evidence of any tokens of affection, phone calls, messages or other electronic communications at all. The appellant states that all electronic communication was lost when his phone broke two years ago but this was after the decision under challenge and after he lodged his notice of appeal when he knew the respondent was of the view that he had entered into a marriage of convenience, such that it would be reasonable to expect such information to have been preserved prior to that. In the alternative, there is nothing to suggest that the appellant has made any attempt to obtain, for example, copies of phone records to show contact; nor has he made any attempt to explain the lack of other evidence that would it would be normal and reasonable to expect in a genuine marriage.

104. Thirdly, other than the bank statements, there is no evidence of any other joint bills or even bills addressed to one of the couple at the same address, such as utility bills or council tax bills; nor are any tenancy agreements available.

105. Fourthly, no witnesses attended the hearing to vouch for the genuineness of the appellant's marriage.

106. Finally, and strikingly, there was no evidence at all from the appellant's wife. Although the appellant stated that she was prepared to support him up until the second adjournment of his appeal hearing in January 2016, there was no signed statement from her in advance of that hearing, nor since. There is no statement from the appellant's solicitors that she attended either of the first two hearings (which were adjourned only on the day) prepared to give evidence or that they had any direct contact with her. Although it is plausible that a relationship may have broken down in the way the appellant claimed, it is less plausible that a person who was also at risk of a finding that she entered into a marriage of convenience with potential consequences for her own stay in the United Kingdom would not take any steps to defend herself against the allegations of a marriage of convenience.

107. For these reasons, the appellant fails to meet the evidential burden of showing his marriage was not one of convenience. This is so, if his evidence was considered alone, without taking into account the respondent's evidence, including that from the enforcement visit on 27 February 2015. When the respondent's evidence is taken into account, as well as the context of the appellant's position at the time of the marriage, we find it is overwhelmingly the case that the appellant entered into a marriage of convenience.

108. First, the appellant's own evidence was that he entered the United Kingdom in 2012 using deception by applying for a visit visa when his prior intention (supported by his gathering of funds in Egypt to support himself long-term in the United Kingdom) was to settle permanently in the United Kingdom. He candidly stated that his only realistic option to remain longer term in the United Kingdom without becoming an overstayer was to find a person to marry to support an application for leave to remain. We find that the appellant succeeded in doing just that, although not in a genuine or lawful way. Although it was submitted on behalf of the appellant that it would be perfectly permissible for him to look for a partner from a pool of those who could help him achieve his objective of remaining in the United Kingdom and the one he found was convenient to do so, there was no evidence of this from the appellant himself. In fact, the evidence of how he met his wife was very limited and it was clear from his evidence that they had no direct means of communication prior to their marriage as they had no common language and had to use friends to interpret for them – even to the extent that the marriage proposal was effectively made in advance by a third party. This context does not provide any support to it being a genuine relationship or marriage.

109. As we have seen, on his own evidence, the appellant also used addresses for official purposes which were not ones which he had ever lived at, showing at least some element of dishonesty on his own marriage certificate, in applying for a bank account (which would require proof of identity/address) and in applying for a driving

licence (which would also require proof of identity/address and importantly would be used as a form of ID).

110. Secondly, we find that the *Facebook* evidence submitted by the respondent shows a genuine account belonging to the Applicant's wife. The account uses her name, numerous photographs which the appellant accepts are her and contains personal information and references (eg to family members) which we know the appellant's wife has and he accepts are true. There is no plausible explanation for why such a page would be set up containing real information other than that it is a genuine account. In these circumstances, there is no reason to doubt the remaining information on that *Facebook* page, which is in many respects supported by other evidence. This includes that the appellant's wife was resident in Poland (as supported by the passenger movements information which included travel only on 2 occasions for a total of 6 days, both trips originating in Poland); that she had a partner (the photographs of this show the appellant's wife wearing virtually identical clothing to that worn by the woman in photographs which the appellant accepts are of his wife) and that she had at least one child (as supported by information in the appellant's wife's sister and brother-in-law's marriage interview and the photographs).

111. We do not find the alternative *Facebook* page submitted at the hearing before us to be credible. This page was created only on 13 October 2016, contains very little personal information and only 2 posts about the appellant's wife's relationship status. The appellant stated in evidence that this was the means by which he communicated with her prior to the date on which the page was created, which is of course impossible. We find on the balance of probabilities that this account was created for the sole purpose of supporting the appellant's appeal and is inherently unreliable.

112. As referred to above, the respondent has submitted evidence to show that the appellant's wife travelled to the United Kingdom only twice in 2014 and not otherwise and that her travel started and finished in Poland on both occasions. Although records were not complete for other travel prior to 2015, there is no evidence of any other travel once they were comprehensive and this directly contradicts the appellant's evidence. This evidence, together with the above, strongly suggests that the appellant's wife was resident in Poland through the time of her claimed relationship and marriage to the appellant.

113. In conclusion, we find that the appellant entered into a marriage of convenience and the respondent has discharged the legal burden of establishing this on the balance of probabilities. In so finding, we have not needed to have recourse to any information arising from the enforcement visit on 27 February 2015, none of which was in the appellant's favour.

Enforcement visit of 27 February 2015: Immigration (PACE Codes of Practice) Direction 2013

114. As has been explained, the Upper Tribunal has found that, without regard to any evidence arising from the enforcement visit which may support the respondent's

case, she has amply discharged the burden of showing that the appellant's marriage was one of convenience. Should, however, that evidence be excluded from consideration?

115. Section 66 of the Police and Criminal Evidence Act 1984 provides as follows:-

"**66. Codes of practice**

(1) The Secretary of State shall issue codes of practice in connection with—

(a) the exercise by police officers of statutory powers -
(i) to search a person without first arresting him;
(ii) to search a vehicle without making an arrest; or
(iii) to arrest a person.
(b) the detention, treatment, questioning and identification of persons by police officers;
(c) searches of premises by police officers; and
(d) the seizure of property found by police officers on persons or premises.

(2) Codes shall (in particular) include provision in connection with the exercise by police officers of powers under section 63B above.
…"

116. Section 145 of the Immigration and Asylum Act 1999, so far as material for present purposes, provides:-

"**145 – Codes of Practice**

(1) An immigration officer exercising any specified power to—
(a) arrest, question, search or take fingerprints from a person,
(b) enter and search premises, or
(c) seize property found on persons or premises,
must have regard to such provisions of a code as may be specified.

(2) Subsection (1) also applies to an authorised person exercising the power to take fingerprints conferred by section 141.

(2A) A person exercising a power under regulations made by virtue of section 144 must have regard to such provisions of a code as may be specified.

(3) Any specified provision or a code may have effect for the purposes of this section subject to such modifications as may be specified.

(4) "Specified" means specified in a direction given by the Secretary of State.

(5) "Authorised person" has the same meaning as in section 141.

(6) "Code" means -
(d) in relation to England and Wales, any code of practice for the time being in force under the Police and Criminal Evidence Act 1984.
… "

117. Part VII of the 1999 Act is entitled "Power to arrest, search and fingerprint". Its provisions largely involve amendments to the Immigration Act 1971, in the form of new provisions relating to powers to arrest and search and to take fingerprints.

118. The Explanatory Notes to Part VII say the following:-

"The White Paper explains that immigration officers currently have to rely on the police to perform certain tasks relating to the enforcement of immigration law and announced that in order to reduce this dependency … the government intended to extend the existing powers of arrest to immigration officers and to provide immigration officers with powers of search, entry and seizure in respect of immigration offences equivalent to those the police already have. Part VII gives effect to this but imposes certain limitations on the exercise of these powers. The new powers – and associated safeguards – have been modelled on those contained in the Police and Criminal Evidence Act 1984 …"

119. The Explanatory Notes to section 145 state as follows:-

"This section allows the Secretary of State to direct that immigration officers must have regard to relevant provisions of the existing PACE Codes of Practice in England, Wales and Northern Ireland when exercising its specified powers to arrest, question, search persons, enter and search premises, take fingerprints or seize properties. The direction issued under this section must specify which powers are covered, which provisions of the existing PACE Codes of Practice are relevant and list any modifications necessary to ensure consistency of approach. The section will reinforce the existing commitment under section 67(9) of PACE which requires any person charged with a duty to investigate offences to have regard to the relevant PACE Codes of Practice. It will extend this commitment to immigration officers when they are exercising specified powers under Schedule 2 to the 1971 Act and also to any authorised person exercising the power to take fingerprints conferred by section 141 of this Act."

120. In exercise of the powers conferred by section 145 of the 1999 Act, the Secretary of State made the Immigration (PACE Codes of Practice) Direction 2013. A copy of this Direction is to be found in the second Appendix to this decision.

121. It is common ground that, in the present case, the provision of the table in Schedule 1 to the Direction which is of material significance is that in which the words in the left hand column are "Interview under caution to establish an offence or breach". The right hand column provides that, in this situation, certain provisions of Codes C, E and F apply. Code C deals with the detention, treatment and questioning of persons. Code E deals with audio recording of interviews with suspects. Code F concerns the visual recording with sound of interviews with suspects.

122. The case for the appellant is that the questioning of the appellant during the enforcement visit comprised an "interview … to establish an offence or breach" and that IO Hale failed to administer a caution to the appellant, as required by PACE Practice Code C paragraph 10.

123. The relevant provisions of paragraph 10 are as follows:-

"(a) When a caution must be given

10.1 A person whom there are grounds to suspect of an offence, see *Note 10A,* must be cautioned before any questions about an offence, or further questions if the answers

provide the grounds for suspicion, are put to them if either the suspect's answers or silence, (i.e. failure or refusal to answer or answer satisfactorily) may be given in evidence to a court in a prosecution. A person need not be cautioned if questions are for other necessary purposes, e.g. -

(a) …
(b) to obtain information in accordance with any relevant statutory requirement, see *paragraph 10.9*;
(c) in furtherance of the proper and effective conduct of a search, e.g. to determine the need to search in the exercise of powers of stop and search or to seek co-operation while carrying out a search; or
(d) to seek verification of a written record as in *paragraph 11.13*.

10.2 Whenever a person not under arrest is initially cautioned, or reminded they are under caution, that person must at the same time be told they are not under arrest and informed of the provisions of paragraph 3.21 which explain how they may obtain legal advice according to whether they are at a police station or elsewhere. See *Note 10C*.

…

(b) Terms of the caution

10.5 The caution which must be given on:

(a) arrest; or
(b) all other occasions before a person is charged or informed they may be prosecuted; see *section 16*,

should, unless the restriction on drawing adverse inferences from silence applies, see *Annex C*, be in the following terms:

"You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence."

…

Notes for Guidance

10A There must be some reasonable, objective grounds for the suspicion, based on known facts or information which are relevant to the likelihood the offence has been committed and the person to be questioned committed it.

10B An arrested person must be given sufficient information to enable them to understand that they have been deprived of their liberty and the reason they have been arrested, e.g. when a person is arrested on suspicion of committing an offence they must be informed of the suspected offence's nature, when and where it was committed. The suspect must also be informed of the reason or reasons why the arrest is considered necessary. Vague or technical language should be avoided.

10C The restriction on drawing inferences from silence, see Annex C, paragraph 1, does not apply to a person who has not been detained and who therefore cannot be prevented from seeking legal advice if they want, see paragraph 3.21."

124. In her submissions, Miss Broadfoot made reference to a number of Home Office instructions. The first is entitled "Enforcement interviews". This guidance "tells immigration enforcement officers about interviewing suspects and witnesses". It includes information as to "the different kinds of enforcement interview and when and how they should be conducted". At page 5, we find the following:-

"Types of enforcement interview

Immigration enforcement officers may choose to try and engage any person they encounter in normal conversation but, where the purpose of a conversation is to gather information for a law enforcement purpose it is a formal interview and must be conducted in accordance with this guidance. An enforcement interview is distinct from a normal conversation in that its purpose is to seek out and evaluate information for a specific purpose.

The different types of enquiry or investigation commonly conducted by Immigration Enforcement officers are:

Administrative enquiries – interview(s) that follow 3 distinct stages:

- Exploratory questioning.
- Initial examination under paragraphs 2 or 2A of Schedule 2 to the Immigration Act 1971.
- Further examination – usually away from the scene.

Formal criminal enquiries – an interview conducted under PACE where it is intended to actively pursue prosecution – a criminal caution is given and the person is notified that they are entitled to free legal advice. Usually conducted in a police station following criminal arrest – recorded via electronic audio recording: see: Investigation of criminal offences in assessing harm.

This guidance concerns investigative interviews in connection with administrative enquiries."

125. At page 11, we find the following:-

"Initial administrative interviews: purpose and conduct

The purpose of an initial administrative interview is formally to:

- establish whether a person has committed a breach of the immigration law and/or
- gather evidence or supporting information in relation to (1) from a third party …
- identify whether a person is liable to be detained and removed under administrative powers.

…

The following principles must be observed or considered during an initial administrative interview:

- A caution should not be given for an initial administrative interview where questioning is intended to establish basic facts such as identity, relationships or ownership of property – but you must identify yourself and your purpose.

- Where an initial examination leads to reasonable suspicion that an administrative breach or criminal offence may have been committed by the person, he must be arrested and immediately given the administrative explanation or criminal caution as appropriate as per instructions given within "arrest and restraint" guidance."

126. The guidance on "arrest and restraint" "tells Immigration Enforcement officers when and how they may make an arrest using administrative immigration or criminal powers". At page 8, there begins a section of the guidance entitled "Making an administrative arrest". The most common power of administrative arrest is under paragraph 17 of Schedule 2 to the Immigration Act 1971. Immigration Enforcement officers are told that:-
"You must reasonably suspect that the person in question is liable to be held in immigration detention under paragraph 16 of that Schedule. This suspicion may arise as a result of known information, the person's actions or information discovered during the course of an enquiry.

…

In general, reasonable suspicion for the purposes of arrest requires facts or circumstances that would lead a reasonable person to suspect that the individual requires leave under the Immigration Act 1971 and either:

- the individual has no leave;

- there are grounds on which the individual's leave should be curtailed.

The arrest must be necessary to progress the case, this could include:

- establishing identity in order to determine status;

- interviewing further to determine status;

- searching for documents post-arrest to establish status and progress removal;

…

When it is not appropriate to administratively arrest

It is important to consider whether arrest and detention is necessary … for the operation of effective immigration control. Officers must consider whether an arrest is necessary to determine a person's status and to consider whether the person should be removed from the UK.

It is unlikely to be appropriate to arrest a person if we already know their immigration status and no progression on the case will be made by arresting them. … Where administrative arrest powers are not available, officers must consider whether it would be appropriate to "criminally arrest the individual" (original emphasis). There follow guidance on:

Information to be given on administrative arrest

A person who is administratively arrested under paragraph 17 of Schedule 2 to the Immigration Act 1971 as a person who may be removed from the UK must also be informed that:

- they are under arrest and not free to leave;
- the reason for the arrest;
- why it is necessary to arrest them.

You must give the following explanation to the person:

"I am an immigration officer. I am arresting you on suspicion that you are a person liable to immigration detention. This is because I suspect you [give reason] e.g. "have entered the UK illegally", "have overstayed your leave", "have breached the condition of your leave", and so on". This is not an arrest for a criminal offence.

Do you understand?"

127. At page 41, the guidance begins on "Criminal arrest". It is said that "This page tells Immigration Enforcement officers about compliance with the Police and Criminal Evidence Act 1984 (PACE) Codes of Practice, following an arrest for a criminal offence". On the same page, there is the following:-

"Compliance with PACE

The Police and Criminal Evidence Act 1984 (PACE), and its associated Codes of Practice, applies to all those arrested for a criminal offence. Where immigration officers (IOs) use criminal powers to make an arrest they must comply with PACE Code of Practice on Powers of Entry Search and Seizure and Code of Practice G on Powers of Arrest.

Persons arrested or detained under Schedule 2 to the Immigration Act 1971 (the 1971 Act), including those who were taken to a police station, are not subject to PACE. Such persons must be notified of their detention and reasons for detention under the 1971 Act by an immigration officer, either verbally or in writing. Where a detention is authorised verbally, the person and detaining authority must be provided with written confirmation as soon as practicable."

128. At page 42, an explanation is given of the circumstances in which an immigration officer can exercise a criminal power of arrest:

"To exercise a criminal power of arrest, you must:

- be investigating an immigration related offence and have a genuine intention to prosecute the individual:
  - if you have no intention of investigating a criminal matter or referring it to the Crime Prosecution Service (CPS) then use administrative powers (see making an administrative arrest)
- be investigating an offence for which a power of arrest exists;
- have reasonable grounds to suspect that the person:

- º has committed or attempted to commit the offence

- º is committing or attempting to commit the offence

…

In England and Wales you must caution the subject as follows:

"You do not have to say anything but it may harm your defence if you do not mention, when questioned, something which you later rely on in court. Anything you say may be given in evidence".

129. Separate Home Office Guidance has been published on "Marriage investigations". Page 3 is said to provide "A summary of the various removals pathways for individuals involved in sham marriages or civil partnerships, and marriages or durable partnerships of convenience". In the table, against the words in the left hand column "Marriage of convenience. EEA residence card issued" we find the following in the right hand column:-

"**Administrative removal decision**

EEA administrative removal procedures under EEA Regulation 23(6)(a) – which automatically invalidates the extant EEA card".

130. Before engaging with Counsels' submissions on this issue, it is necessary to mention previous Home Office guidance on what was known as "Caution + 2". The caution could be used when an immigration officer was exercising administrative powers. It consisted of the criminal caution and the "+ 2" reference was to the need to add to that caution, first, the words "You are not under arrest" and, secondly, "You are free to leave at any time".

131. Importantly, however, the use of "Caution + 2" was not mandatory, even in the circumstances described in the previous guidance when it might be appropriate to give it. This was where during initial questioning an individual "states something that suggests that they may be a person to whom removal directions can be given". In particular the "Caution + 2 interview is only appropriate in straightforward immigration cases where the sole intention is to administratively remove".

132. As we have seen from the written and oral evidence, IO Hale said he administered a "Caution + 2", recording this as C+2 in his notebook. His written statement makes plain that this "was not done for the purposes of any criminal proceedings".

133. For the appellant, Ms Norman puts the case in the following way. The immigration officers who conducted the enforcement visit fell, in her submission, within section 67(9) of PACE, which provides:-

"(9) Persons other than police officers who were charged with the duty of investigating offences or charging offenders shall in the discharge of that duty have regard to any relevant provision of … a code."

134. According to Ms Norman, the fact that IO Hale and his colleague considered that they were not investigating a possible criminal offence did not matter. Once they had reasonable cause to suspect that the appellant may have entered into a marriage

of convenience, they should have given the appellant a "criminal" caution. At that point, there were reasons to suspect that the appellant may have committed an immigration criminal offence under the 1971 Act, by being in the country without leave, and that he may have committed an offence of perjury.

135. Ms Norman submitted that, so far as the Home Office guidance materials attempted to circumscribe the circumstances in which a criminal caution needed to be administered, these materials were simply wrong.

136. In support of her submission that section 67(9) falls to be interpreted widely, Ms Norman relied upon a number of authorities; in particular, R v Gill and Another [2003] EWCA Crim 2256. In Gill the Inland Revenue had undertaken a so-called "Hansard interview" with two brothers, regarding their tax returns for a business that they jointly ran. Those interviewing the brothers were three officers "all of whom work for the Special Compliance Office … which is the Revenue's investigation branch charged with investigating serious fraud" (paragraph 12). Later, the brothers were convicted of six counts of cheating the Inland Revenue. They appealed against the convictions on the basis that the trial judge ought not to have admitted into evidence material arising from the Hansard interview. They relied upon section 78(1) of PACE, which states:-

"**78 Exclusion of unfair evidence**

(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

137. The Court of Appeal held that the interviewing officers fell within section 67(9) of PACE. The Hansard interview was not, as the Revenue claimed, "part of a civil process designed to gather in money and not a criminal investigation:-

"37. While we fully understand the importance of the Revenue being able to recover the tax owed to it and the value of the Hansard procedure in that regard, we are unable to accept the Revenue's submission. The statement of the Chancellor of the Exchequer made in Parliament on 18 October 1990 makes it quite clear that, while in cases of tax fraud the Revenue will be influenced by a full confession in deciding whether to accept the money settlement (including presumably an appropriate penalty), it gives no undertaking to do so or to refrain from instituting criminal proceedings. Tax fraud involves the commission of a criminal offence or offences, so that it is in our view evident that the role of the SCO investigating tax fraud involved the investigating of a criminal offence.

38. Although we recognise that a caution had not been administered in the past to the Hansard Interview because such an interview has not been regarded by the Revenue as subject to Code C, in our judgement, that is to give too narrow an interpretation of the expression "charged with a duty of investigating offences" in section 67(9) of PACE. The officers of the SCO were charged with investigating serious fraud and, since serious fraud inevitably involves the commission of an offence or offences, it seemed to us to follow that they were charged with a duty of investigating offences.

39. … Thus we cannot see why a caution should reduce the chances of a taxpayer making a full confession, which was the purpose of the process. However that may be, since the

Revenue expressly reserved the right to prosecute for fraud, it appears to us that one of the purposes of asking the questions must have been the "obtaining of evidence which may be given to a court in a prosecution", even if the Revenue's main ain was to arrive at a monetary settlement."

138. We do not find that Gill compels the conclusion which Ms Norman contends. The fact that immigration officers have powers of investigation, administrative arrest and criminal arrest does not mean that all three functions are to be regarded as a single entity, for the purposes of section 67(9). It is, in our view, quite apparent that, in carrying out the enforcement visit of 27 February 2015 and the questioning which followed, the immigration officers were not acting "in the discharge of" any duty they might have "of investigating offences or charging offenders". By contrast, the Revenue's officers were, as the Court of Appeal held at paragraph 38, "charged with investigating serious fraud". When they interviewed the brothers, this is what they were doing. The fact that they reserved the right not to prosecute, if they achieved what they regarded as a satisfactory outcome from the interview, was immaterial.

139. In the present case, there is no corresponding inevitability between the appellant having entered into a marriage of convenience and his having committed a criminal offence. The most obvious potential offence under the 1971 Act is that created by section 24(1)(b), which provides that it is an offence for a person knowingly to remain in the United Kingdom beyond the time limited by his or her leave. The prosecution would, accordingly, have to prove beyond reasonable doubt the person's state of mind. There is, in any case, a great deal of difference between "serious fraud" and "entering into a marriage of convenience". Serious fraud is criminal conduct, *per se*, whilst entering a marriage of convenience only may involve the commission of some offence.

140. The subject matter of the other cases referred to by Ms Norman, which she provided as case summaries, likewise do not disclose a material similarity in subject matter with the carrying out by immigration officers of marriage investigations.

141. We accordingly find that Miss Broadfoot was entitled to ask the Tribunal to place weight upon the distinction drawn in the Home Office Instructions and Guidance between administrative enquiries and formal criminal enquiries. The articulation in the instructions and guidance as to where and when PACE requirements apply is, we find, compatible with section 67(9). It reflects the correct legal position. It also acknowledges the important fact that, in the immigration field, relatively very few of those who are adjudged to be illegal entrants or overstayers find themselves subject to criminal prosecution. The respondent's main aim is to ensure such persons are recognised as having no immigration status and, where appropriate, to remove them from the United Kingdom.

142. Having made these findings, we address the submissions on what is meant by "interview under caution to establish an offence or breach" in Schedule 1 to the PACE Codes of Practice Correction 2013. Miss Broadfoot submitted that an offence must mean a criminal offence. We agree. She also submitted that the same must be true of the word "breach", although she accepted that the respondent has, in the past, used the word "loosely".

143. At page 11 of the Enforcement Interviews General Instructions, it is stated that where an initial administrative examination leads to a reasonable suspicion that an administrative breach or criminal offence may have been committed by a person "they must be arrested and immediately given the administrative explanation or criminal caution as appropriate as per instructions given within the 'arrest and restraint' guidance".

144. The statement that reasonable suspicion of an administrative breach should lead to immediate administrative arrest under paragraph 17 of Schedule 2 to the Immigration Act 1971 appears somewhat curious, given what is said at pages 8 and 9 of the Arrest and Restraint guidance (see above). It is, nevertheless, manifest that on page 11 of the Enforcement Interviews Instructions an administrative breach is being contrasted with a criminal offence. This means, we find, that when one looks at the PACE entry "Interview under caution to establish an offence or breach", the word "breach" must be interpreted in the way Miss Broadfoot says. If it were otherwise, then there will be no scope for an "administrative explanation" as opposed to a "criminal caution". It is the failure to give a criminal caution upon which Ms Norman relies.

145. We have set out the wording of 10.1 (Caution) of Code C above. A close examination of that wording favours the respondent's stance. The words "If either the suspect's answers or silence … may be given in evidence to a court in a prosecution" highlight the fact that there needs to be a real likelihood of prosecution. As we have said, reality in the immigration field is otherwise. Secondly, 10.1 specifically records that a person "need not be cautioned if questions are for other necessary purposes". The list which is then given is non-exhaustive.

146. For these reasons, we find that the immigration officers on the occasion of the enforcement visit did not breach PACE by failing to give the appellant a criminal caution.

147. Miss Broadfoot submitted that, if the position were otherwise, then we should nevertheless admit the evidence. She pointed to the fact that, by reason of section 85(4) of the Nationality, Immigration and Asylum Act 2002, as applied by paragraph 1 of Schedule 1 to the EEA Regulations, the Tribunal may consider any matter which it thinks relevant to the substance of the decision.

148. Ms Norman submitted that, where evidence have been obtained in contravention of PACE, the Tribunal should be disinclined to admit the evidence.

149. We have no hesitation in accepting Miss Broadfoot's submission. The admissibility in criminal proceedings of evidence obtained contrary to PACE is to be determined in accordance with section 78 of that Act (see above). What fairness demands is highly context-specific. The fact that a judge in a criminal trial may decide that certain evidence ought to be excluded, as having an adverse effect on the fairness of the proceedings, has little to say about the task facing a Tribunal, in civil proceedings, which must determine a person's entitlement under the EU Treaties to be in the United Kingdom. Plainly, a grossly abusive set of failures may incline the Tribunal, in such proceedings, to the view that – for *its* purposes – admission of the

evidence would be inappropriate; for example, if admission would be seen as endorsing highly problematic behaviour on the part of immigration officers.

150. That is not, however, the position in the present case. We have taken account of the criticisms levelled at IO Hale. We also note that a similar criticism was made of him in the Administrative Court (Ait-Rabah v Secretary of State for the Home Department [2016] EWHC 1099 (Admin). Having heard the appellant's witnesses (and the appellant himself), we do not find them to be reliable on this issue. Having made our own assessment of IO Hale, we consider that, at best, the criticisms made have been substantially exaggerated.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date 29th January 2018

Upper Tribunal Judge Jackson