Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/15526/2013
IA/15533/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 July 2014	**On 21 July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE GIBB

Between

AQEEL KHAN ABBASI
VALENTINA DINABURSKA
(NO ANONYMITY ORDERS MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: None (and the appellants did not attend the hearing)
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DETERMINATION AND REASONS

1. These two appeals were listed for a remaking hearing. This followed my decision that there had been an error of law in a determination dismissing their appeals. My error of law decision and directions was as follows.

ERROR OF LAW DECISION AND DIRECTIONS

1. *The appellants, who are citizens of Pakistan and Latvia respectfully, applied for a registration card, in the case of the first appellant, and a registration certificate in the case of the second appellant. These applications were refused on 27 April 2013. The applications had been made on the basis that the second appellant was an EU citizen exercising treaty rights in the UK, and the first appellant was her husband, following a civil marriage conducted in the UK. The applications were refused on the grounds that the marriage was one of convenience, and that there was insufficient evidence to establish that the second appellant was exercising treaty rights.*

2. *The appellants opted for consideration of their appeals on the papers, without an oral hearing. The appeals were dismissed by First-tier Tribunal Judge Abebrese, in a determination promulgated on 18 February 2014.*

3. *Permission to appeal was granted by First-tier Tribunal Judge Parkes, on 14 April 2014. The main ground seeking permission to appeal was that the judge had erred in not applying the correct burden of proof, which was on the respondent to establish that the marriage was not genuine. In granting permission to appeal it was noted that it was correct, as asserted in the grounds, that the burden was on the respondent in respect of the assertion that the marriage was one of convenience. It was not clear what finding the judge had made on the point, or on what basis the couple had failed to meet the requirements for the documents applied for.*

4. *A Rule 24 response from the Secretary of State opposed the appeal, arguing that the judge had directed himself appropriately. Paragraph 12 of the determination showed that the judge had in fact taken the correct approach to the burden of proof. The judge noted that the evidence provided by the appellants did not address the issues raised by the Secretary of State arising from the interview. The judge was entitled to dismiss the appeal.*

The Hearing

5. *The appellants did not attend the hearing. Both representatives made submissions. The key points that were considered were whether the correct burden of proof had in fact been applied. It was accepted by Mr Tarlow that the judge had not stated the burden of proof explicitly, and that this was a legal error, but it was not a material one because the judge had summarised the interview record, and therefore had identified the differences in the appellants' answers that were relied on in the refusals. The*

judge had looked at the appellants' side at paragraph 12. Although the paragraph 12 reasoning could have been better, it was adequate in the circumstances. Mr Benton, for the appellants, submitted that paragraph 12 was inadequate, in that it did not make clear whether some of the discrepancies relied on in the refusal letter have been accepted as being explained or not. In addition the judge had not dealt properly with the explanation in the witness statements for the home visit, and other matters.

Error of Law Decision

6. *As I indicated at the hearing I have decided that the judge did err in law, in a manner that was material to the outcome.*

7. *The judge's treatment of the statements provided by the appellants would have been adequate if those statements had been brief. As it was, however, the statements in the appellants' bundle were relatively detailed. They responded at length to the circumstances of the interviews conducted with both appellants, and they also responded at length as to the explanation for the second appellant not being present on the date of the home visit. There were also some detailed complaints as to the manner in which the visit was conducted.*

8. *Given the detailed nature of the statements I accept the submission made on behalf of the appellants that paragraph 12 of the determination did not provide adequate reasoning for rejecting the explanations put forward. Paragraph 12 does contain a conclusion, namely that the contents of the witness statements fell short of what was required by way of an explanation, but it is well-established that a conclusion or finding requires reasoning to be regarded as legally adequate. It may be that the judge, in a case of this sort, would not have been expected to deal at great length with every detailed point, but there was a need to engage with the central thrust of the witness statements, and provide some reasoning for the conclusion that the appellants' explanations were inadequate.*

9. *It appeared to me that this was the central issue, rather than the burden of proof point. Having said that, however, I note that the judge did not identify, in his determination, the nature of the burden of proof. If the rejection of the case put forward by the appellants had been adequately reasoned the burden of proof point could have been argued either way. As it is, however, I have decided that there was a material error of law in relation to inadequacy of reasoning, and the decision falls to be set aside for that reason.*

> *10. Having heard from both parties I decided that the matter should be listed for a remaking hearing before me in the Upper Tribunal. As I indicated at the hearing this appears to me to be an appeal where oral evidence is required. The appellants should attend. In a case of this sort, where the matter turns on credibility, and the assessment of contested allegations that there has been a marriage of convenience, a negative inference is likely to be drawn from a decision by the appellants not to engage with attending the hearing and giving evidence. I was informed that the appellants were willing and able to attend a hearing.*

2. On 7 July 2014 two typed letters were received, from both appellants. These were dated 2 July 2014. The appellants stated, amongst other things, that they could no longer afford legal representation for the remaking hearing, having paid to be represented at the error of law hearing. The letters are silent on whether the appellants were intending to attend their hearing, even if unrepresented. The letters both close with a request that the judge should consider their case carefully.

3. A telephone call was made to the former representatives (Farani Javid Taylor Solicitors LLP). They confirmed that they were no longer representing the appellants. They did not have any further contact telephone numbers. The only number for the appellants on the file was a mobile number for the second appellant. A call was made to this number, which went to the answering service. A message was left about an hour before the hearing, but there was no response.

4. Having considered the situation, and heard from Mr Bramble, I decided to proceed with the hearing in the absence of the appellants. It was clear, first of all, that the appellants were aware of the hearing, because they referred to it in their letters. They had been given an opportunity to attend, and had not done so. I have considered the possibility that they might have been under the false impression that it was not open to them to attend if not legally represented, but it appears to me to be very likely that they would have been advised by their representatives that, even if no longer represented, they were nevertheless able, and indeed expected, to attend the hearing. If there had been any doubt on this point it could not have remained given the clear indication that I made at the error of law hearing, and in the error of law decision. At paragraph 10 above I noted that oral evidence would be required; that the appellants should attend, and that a negative inference was likely to be drawn if they did not do so. I was also informed by their then representative that they were willing and able to attend the hearing.

5. The letters from the appellants explain the circumstances in which they were no longer represented, but do not say anything about any possible reason for the appellants being unable to attend the hearing themselves. There is nothing in the letters that could be said to amount to an adjournment request.

6. Having considered all of these matters I decided to proceed with the hearing in the absence of the appellants. I was satisfied that they had been notified of the hearing, and I considered that it was in the interests of justice to proceed (Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

7. Mr Bramble, for the respondent, made submissions as follows. There were two issues. The first was whether the second appellant had established that she was working in the UK, and therefore exercising treaty rights. The second was the sham marriage allegation. The couple had not attended the First-tier hearing, and neither had they attended the error of law hearing. Mr Bramble relied on the refusals of 27 April 2013. There were difficulties with the documents provided to show that the second appellant was working. The address on financial documents was the same as that provided for First Contact Property Services. There were invoices for hotel cleaning work, but there was no correlation with bank statements. The second appellant had said at interview that she had been paid in cash. She had also said that she had only been at a particular address for one month (Plasket Road) but invoices featuring that address submitted with the application covered a significantly longer period. There were other invoices at different addresses put forward covering the same period. There was a discrepancy between the second appellant being described as a student on the marriage certificate (20 March 2012) when, according to other evidence submitted, she was at that time said to be working for hotels as a cleaner. There was no evidence to show that tax or national insurance contributions had actually been paid, even if there was evidence to show registration. The letter from City View Hotel was the only document in support of her claim to have been working.

8. In relation to the second issue, the sham marriage allegation, it was accepted that the burden was on the respondent. This had been satisfied by the detailed interviews with the two appellants, and the home visit. It was also correct to draw a negative inference from the failure of the appellants to attend the hearing today. The lack of proper evidence to establish that the second appellant was working was also significant in relation to the marriage point.

Decision and Reasons

9. In remaking the decision I have decided to dismiss the appeals.

10. The appellants provided reasonably detailed statements in response to the allegations based on the interviews and home visit. It appeared to me that these were capable of rebutting the allegations. In particular I noted the observation by an Immigration Officer that the first appellant's accommodation had the appearance of a place where a female partner was cohabiting with the first appellant. The nature of the comment from the Immigration Officer suggested that this was taken to amount to a

pretence, but it is of note that it was not said that there was no sign of the seoncd appellant's presence at the address. The appellants both provided an explanation, in their statements, for the absence of the second appellant on the morning of the visit. This was that she had attended a party, and had stayed overnight, with the agreement of the first appellant. There was then a comment in the first appellant's statement that he had received a later telephone call from an Immigration Officer. The second appellant had been at home on that occasion, but when the first appellant had offered to put her on, the Immigration Officer had rung off. In addition there were a number of complaints which suggested that the Immigration Officers involved in the investigation had formed a negative impression from the start, and were unwilling to listen to explanations. The witness statements also put forward detailed accounts of how the couple met, through the second appellant applying for work at a hotel where the first appellant was working, and of how they started their relationship, and came to be married.

11. The various points made in the witness statements had the potential, in my view, to rebut the allegations about the home visit. I also took into account, in reaching the error of law decision, that it may have been the case that the appellants were unable to afford representation at the initial hearing, and that it may have been for that reason that they did not attend.

12. In **Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC)** it was established that there is no burden at the outset of an application on a claimant to demonstrate that a marriage to an EEA national was not one of convenience. In this case, however, the respondent has put forward significant reasons for making the allegation, following investigations, which included interviews of the two parties, and a home visit. In **IS (marriages of convenience) Serbia [2008] UKAIT 31** it was held that there was an evidential burden on a claimant to address evidence justifying reasonable suspicion that the marriage had been entered into for the predominant purpose of securing residence rights.

13. This appears to me, in essence, to be a situation where evidence has been put forward to justify a reasonable suspicion that this was a sham marriage. I nevertheless regarded the evidence to be of a nature, given that the point was disputed, as to be potentially rebuttable. There will be cases where evidence appears to point towards the conclusion that a marriage is not genuine, but on closer examination the suspicions turn out not to be justified. Having decided that there had been an error of law in the earlier determination dismissing the appeals the remaking hearing represented an opportunity for the appellants, as a couple, to attend a hearing for the first time, and give evidence, which could have been tested in cross-examination. I made clear at the error of law hearing, and in writing in my error of law decision, that a failure to take up this opportunity would lead to a negative inference.

14. For the same reasons set out above for deciding to proceed with the hearing in the appellants' absence I do make such a negative inference. The various points raised in the witness statements, including the explanations offered in the second appellant's witness statement for incorrect answers given at interview, had the potential to rebut the allegations. In themselves, however, even engaging in detail with all of the points made in the witness statements, it appears to me that the evidence presented by the appellants, not backed up by any oral evidence, is not sufficient to rebut the sham marriage allegations, even taking careful note of the fact that the burden of proof in relation to such an allegation is on the respondent.

15. There was room for the giving of the benefit of the doubt to the appellants in relation to not attending the initial hearing to give oral evidence, in view of the explanation offered and the detailed statements provided. There was also room to give the benefit of the doubt to the appellants not attending the error of law hearing, in that appellants will often be advised that these are hearings where they will not be giving evidence, and I was also informed that the appellants were both able and willing to give evidence if required. Following the error of law hearing, however, and my comments at the hearing and in the written decision there remains no room for extending the benefit of the doubt. It appears to me that the appellants must have understood that they were required to attend if they wanted to rebut the allegations that had been made.

16. I therefore find that the matters referred to in the refusal letters, relating to the answers given at interview, and relating to the home visit, are sufficient to justify the sham marriage allegation, and that the respondent has satisfied the burden of proof on her, and has shown, on the balance of probabilities, that the marriage between the appellants is one of convenience. The witness statements provided by the appellants are insufficient to rebut the allegations, and the appellants have failed to take up an opportunity extended to them to give oral evidence, that might have been capable of rebutting the allegations made.

17. In addition I find that the various discrepancies raised about the second appellant's financial documents have not been adequately addressed in the witness statements. The appellants have therefore not provided sufficient evidence to establish, on balance, that the second appellant has been working in the UK, and is therefore a qualified person.

18. I therefore remake the decisions in these appeals by dismissing both appeals under the 2006 Regulations, on the basis that the decisions taken in respect of both appellants were in accordance with those Regulations.

19. It was not suggested at any stage that there was any need for anonymity in these appeals, and I make no such orders. Having dismissed the appeals there can be no fee awards.

Decision

20. The decision dismissing the appeals is set aside, an error of law having been found, for the reasons given above. On remaking the decisions in the appeals, however, the outcome remains the same.

21. The appeals under the 2006 Regulations are dismissed.

TO THE RESPONDENT
FEE AWARD

Having dismissed the appeals there can be no fee awards in these appeals.

Signed Date

Deputy Upper Tribunal Judge Gibb