Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05159/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 September 2017	**On 5 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

MR FARHAN ASLAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Jegarajah, Counsel, instructed by Vision Solicitors Limited
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal brought by the Appellant against a decision of the First-tier Tribunal, Judge M A Khan, promulgated on 12 July 2017, dismissing the Appellant's appeal against the Respondent's decision of 24 May 2017 refusing to grant the Appellant a residence card under the Immigration (European Economic Area) Regulations 2016 (hereinafter "EEA Regulations 2016"). The Judge refers to the former, 2006 Regulations throughout, but it is not argued by either party that this amounted to an error of law.

2. The Appellant had initially entered the UK in 2009 with leave to enter as a student and had been granted a further period of leave to remain as a student valid until 31 May 2014. That leave was curtailed on 28 March 2012 to expire on 27 May 2012. The Appellant entered into a relationship with a French national of Ghanaian origin, named Andrea Soares Gomes. They entered into a marriage by proxy under Ghanaian law on 21 April 2012. There is a decree absolute at C1 of the Respondent's bundle indicating that they were divorced on 15 November 2016.

3. Prior to the most recent application, the Appellant had made a number of applications for residence cards in relation to his marriage to Ms Soares Gomes:

(i) An application dated 19 June 2012, refused in a decision dated 17 December 2012. The Respondent disputed that the document relied upon to evidence the Appellant's marriage was a valid document confirming customary marriage in Ghana; it was not accepted that the Appellant was in a genuine or subsisting relationship with the Sponsor; and the evidence (from 2012) that the Sponsor had been economically active in the UK was rejected. The Application was refused under EEA Regulations 2006, regulation 6 (qualified person), 7 (family members) and 8(5) (persons in a durable relationship with a qualified person).

(ii) An application dated 1 October 2013 refused in a decision dated 13 February 2014, against which the Appellant appealed. At the hearing before me, Ms Jegarajah confirmed, upon direct questioning from the Tribunal, that the appeal (ref IA/10223/2014) had come before Judge Monson, who had dismissed the appeal in a decision dated 27 October 2014, not accepting that the Appellant's marriage documents demonstrated that his marriage was valid, and not accepting the Appellant's oral evidence. Judge Monson's decision was not provided to Judge Khan by either Ms Jegarajah or her instructing solicitors at the hearing before the Judge on 23 June 2017, notwithstanding that it was in their possession (in electronic form, at least). I return to the issue of the decision of Judge Monson below.

(iii) Ms Jegarajah's grounds of appeal dated 24 July 2017 refer at paragraph 9 to a further application on 2 December 2014 refused on 22 December 2014.

(iv) An application dated 11 January 2015, refused on 12 May 2015 on grounds that certain evidence, from 31 July 2013 to 31 October 2013 relating to the Sponsor's employment, was rejected, and the Sponsor was deemed not to be a worker under Reg 6 of the 2006 Regulations. The validity of the Appellant's marriage was not raised.

4. The Appellant's most recent application is dated 11 January 2017. Although associated representations from the Appellant's former representatives Prestige Solicitors, dated 15th December 2016 are entitled "EEA(FM) permanent residence permit", the application was actually made on form EEA(FM), not EEA(PR). Although the letter refers to certain evidence being provided, the period covered by that most of that evidence was not stated. The form itself refers to evidence of the

Sponsor's earnings from 2014 'ongoing' (question 8.37). The application could not on that basis have supported an application for a certificate confirming a right of permanent residence.

5. The decision of the Respondent is contained in two separate documents, both stating on its face that it was served on 24 May 2017. There appears to have been some dispute about whether this decision was dated 19th, 24th or 30th May 2017, but I do not find the actual date of service material.

6. One of the documents is entitled "refusal to issue a residence card" and is subtitled "Immigration (European Economic Area) Regulations 2016 Regulation 10(5) with reference to 2 & 7", and provides in the body of the notice of decision as follows:

> "You have applied for a retained right of residence on the basis that you are the former family member of an EEA national who was exercising treaty rights at the time of divorce and subsequent to divorce you have been residing in the United Kingdom as a qualified person**. However, you have not provided sufficient evidence that you have retained a right of residence following divorce from an EEA national in accordance with Regulations 10(5) and 10(6) of the Immigration (EEA) Regulations 2016."** (Emphasis added)

7. It is to be noted that the part of Regulation 10(5) relevant to the present case is as follows:

> "(5) The condition in this paragraph is that the person ("A") —
> (a) ceased to be a family member of a qualified person or an EEA national with a right of permanent residence on the termination of the marriage or civil partnership of A;
> (b) was residing in the United Kingdom in accordance with these Regulations at the date of the termination;
> (c) satisfies the condition in paragraph (6); and
> (d) either —
> (i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership, the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration; .."

And further, Regulation 10(6) provides:

> "(6) The condition in this paragraph is that the person — (a) is not an EEA national but would, if the person were an EEA national, be a worker, a self employed person or a self-sufficient person under regulation 6;..."

The notice of decision is not specific as to which element or elements of Regulations 10(5) and 10(6) were deemed not to be satisfied, due to the alleged insufficiency of the Appellant's evidence.

8. Accompanying that notice of decision is a Reasons for Refusal Letter of the same date. The letter contains the following:

> "**Reasons why you application has been refused**
>
> The following information is stated as follows:
>
> (Details of the Appellant's earlier immigration history)
>
> - You made an application for a Residence card on 19th June 2012. The application was refused on 17th December 2012 as your Ghanaian proxy marriage was not accepted as a valid marriage by this department and as such proof of your relationship to the EEA national.
> - You made another application for a Residence card on 1st October 2013. The application was refused on 13th February 2014 again as your Ghanaian proxy marriage was not accepted as proof of your relationship.
> - You made a further application for a Residence card on 11th January 2015. The application was refused on 12th May 2015 as you failed to demonstrate you were the unmarried partner of an EEA national
>
> You have made your current application under retained rights claiming that you are the ex-spouse of an EEA national. However, it is stated that this department has never accepted your Ghanaian marriage as being valid and as such you cannot qualify under retained rights.
>
> Furthermore, you attended a credibility interview on 19 May 2017 to establish the validity of your relationship to the EEA Sponsor, Andrea Soares Gomes. Due to various discrepancies throughout the interview the Immigration Officers deemed your relationship to the EEA national to be one of convenience. Consequently, even if it is accepted that your marriage was valid under Ghanaian law, which it is not, you would not meet the criteria for a residence card under retained rights as it is submitted you have entered into a relationship with Andrea Soares Gomes in an attempt to gain a basis of leave in the UK.
>
> As a result it is stated you are unable to qualify for a residence card under the Immigration (EEA) Regulations 2016."

9.. Notice of appeal was filed on 30th May 2017 by Prestige Solicitors. A Respondent's bundle was prepared, bearing the date 14 June 2017, and is addressed to Prestige Solicitors. The Appellant was detained on 19 May 2017, and he also changed representation, on either 20th or 21st June 2017, to Vision Solicitors (who still act for

the Appellant) who had gathered together 'as many documents as they could' (decision, para 6) prior to the hearing on 23 June 2017.

10. On 21 June 2017 Visions Solicitors applied to adjourn the hearing of 23 June on the basis *inter alia* that the no Respondent's bundle had been received by the Appellant or his previous representatives. In a decision made the same day, the application was refused on the following grounds (the reference to judicial review proceedings was, I understand, to some associated challenged against his detention):

> "i. The judicial review proceedings are not relevant to the claim for adjournment of the appeal.
>
> ii. If the Respondent does not supply a bundle the Respondent cannot rely on the documents which might be in it. The disadvantage is to the Respondent not the Appellant.
>
> iii. It is not for the Appellant to make good the Respondent's case.
>
> iv. The Appellant must file and serve all documents which are relevant and in the possession of the Appellant, not wait for the Respondent to do so.
>
> v. Adjournment refused."

11. The appeal proceeded before Judge Khan on 23 June 2017. No renewal of the adjournment application was made. Ms Jegarajah appeared for the Appellant. She was then in possession of a copy of the most recent refusal letter but, according to the Judge "would not let the court view it, because she submits (*the*) Immigration Judge refusing a written adjournment request on 21/6/2017 stated that if the respondent did not serve a bundle on the appellant's representatives, they could not later seek to rely on any documents with that bundle". There was no Appellant's bundle, or witness statement (decision, paragraph 9); the Appellant was not called to give oral evidence (para 17). It was submitted that the Appellant had provided all the necessary documents to establish that he is (or was) in a genuine relationship with his EEA partner (para 14). The Respondent provided a copy of the refusal letter to the Judge (para 7). It is also apparent that the Judge had a copy of a Respondent's bundle before him (para 18).

12 It is clear from the Judge's decision that he found in favour of the Appellant on the issue of whether he had entered into a marriage of convenience. The Presenting Officer before the Judge, Mr Williams, accepted that there were not in fact any discrepancies in the interview which took place with the Appellant on 17 May 2017, and the Judge held at paragraph 27 that the Respondent had failed to shift the burden of establishing that his marriage was not one of convenience onto the Appellant. The Respondent had failed to show that the Appellant had entered into a marriage of convenience under Regulation 2 of the EEA Regulations. There is no challenge by the Respondent before this Tribunal to that finding.

13. However, the Respondent also submitted before Judge Khan that the issues raised in the previous decision letters, relating to the Sponsor not having provided adequate evidence of her economic activity in the United Kingdom, were also issues which were to be determined in the present appeal.

14. The Judge discussed the validity of the marriage, but made no finding on it (para 25).

15. The Judge further found as follows at paragraphs 26 and 28:

> "26. The Appellant made an application for a residence card on 11 January 2015. This was refused on 12 May 2015. The reason for the refusal was that the Appellant had failed to provide evidence that his EEA Sponsor was exercising treaty rights under Regulation 6 of the EEA Regulations 2006. On 12 May 2015, the EEA national Sponsor's employer confirmed that she had only worked for a three months' trial period between July 2013 and October 2013 and had not worked thereafter. On 11 January 2017, the Appellant applied under Regulation 10(5) the EEA Regulations based on his EEA national's employment record during the time that they were said to be in marriage and up to the time of the divorce proceedings. I have not been provided with any evidence that the Appellant relied upon in his application. However, all the evidence in relation to his EEA national Sponsor's employment has been previously rejected.
>
> 28. It is for the Appellant to show that his EEA national Sponsor was exercising her treaty rights up to the time when divorce proceedings started. The history of the Appellant's applications and time and again his failure to provide evidence of the EEA national's employment shows that she was not exercising her treaty rights in the UK. The EEA national's registration was revoked in 2012. In the circumstances, I find that the Appellant has failed to establish his case under Regulation 10(5) of the EEA Regulations 2006 (sic). The fact that the EEA national can continue to reside in the UK does not assist the Appellant to establish his case.
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> 29. On the evidence before me, on the balance of probabilities, for the above-mentioned reasons, I find that the Appellant has established that the Appellant has failed to establish his case under Regulation 10(5) of the EEA Regulations 2006 (as amended)."

16. The Appellant has appealed to this Tribunal in grounds dated 24 July 2017. The grounds recite the history of the appeal and assert at paragraph 15 that:

> "The decision under appeal raised *one* issue only. That is that the marriage was a marriage of convenience. Although documentary evidence was submitted to show that the A's former partner had not been exercising treaty rights during

the relevant period, the R did *not* take any issue with the evidence concerning this matter in the decision letter."

17. The Appellant's first ground at paragraphs 16 to 18 is, in summary, that given that the Appellant had satisfied the Judge that his marriage was not one of convenience, and this, in the Appellant's assertion, being the sole point in dispute between the parties, the Appellant's appeal should have been allowed. The second ground argues that the Judge in raising at paragraphs 27 and 28 the question of whether the EEA national spouse was exercising her EEA rights, proceeded unfairly, this not being a matter which was raised in the Respondent's decision.

18. It was also asserted that the Appellant's application of 11 January 2017 included *different* documents to the previous applications. It was argued that if the Respondent had properly raised the Sponsor's exercise of her treaty rights as an issue in the decision, the Appellant would have asked for a direction from the Tribunal that the Respondent contact HMRC to provide the Appellant with his ex-wife's HMRC tax records for the relevant period.

19. In a Rule 24 reply the Respondent argues, in summary, that the Judge did not misdirect herself in law in dismissing the appeal.

20. At the outset of the hearing before me, I indicated to Ms Jegarajah that the position set out in the grounds of appeal, that the only issue before the Judge was whether the Appellant's marriage was one of convenience, was highly questionable, given that the refusal letter of 24 May 2017 clearly also raised the question of the validity of the Appellant's Ghanaian marriage.

21. In relation to the issue of the validity of the Appellant's marriage Ms Jegarajah asserted that the fact that the Family Courts in the United Kingdom had on 15 November 2016 issued a decree absolute confirming that the marriage between the Appellant and Ms Soares Gomes had been dissolved was categorical evidence of the fact that the marriage must have been deemed to have been valid in the first instance, otherwise the Family Court would not have issued such a decree absolute. I asked Ms Jegarajah if she relied upon any authority in support of the proposition that a decree absolute must be taken as categorical proof of the validity of the marriage which it purported to dissolve. She was unable to provide me with any such authority. It was at this point that Ms Jegarajah conformed that she was in possession of Judge Monson's decision of 27 October 2014, and had been at the time of the hearing on 23 June 2017.

22. I remark at this point that I find it extraordinary that any party who has in their possession a decision of a Judge addressing an issue directly in point with an issue that is raised in a later appeal should not provide a copy of that decision to the Judge seized with the present appeal. Mr Clarke, for the Respondent, did not have that document in his possession and could not find it on his file. That decision should, according to long established principles (Starred SSHD v D (Tamil) [2002] UKIAT

00702 ('Devaseelan') have been the starting point of the Judge's decision on the issue of validity of marriage, and any other matter set out in Judge Monson's decision which was also raised in the present appeal.

23. The essence of Ms Jegarajah's submission is that whatever findings had been made by Judge Monson in 2014 relating to the validity of the Appellant's marriage, these had been overtaken by the decree absolute from November 2016, and she reiterated her argument that such decree absolute must be taken as confirmation that the Appellant's marriage was a valid one.

24. I have no hesitation rejecting that proposition. As the Judge pointed out in his decision at paragraph 25, "I have not been provided with any documentation in relation to the divorce proceedings in the County Court. It is not known on what basis the Family Court reached its decision." There is no evidence to suggest that either party to the marriage raised as an issue before the Family Courts the potential that the marriage was not a valid one in the first instance. Ms Jegarajah pointed out that the Family Courts must have had a copy of the Ghanaian marriage certificate in order to be satisfied that there was any marriage at all, and the issuing of the decree absolute meant that the marriage certificate must have been taken to have been invalid.

25. I find that, absent any authority to support Ms Jegarajah's proposition, that where there is no evidence that the validity of a marriage was raised as a point before the Family Courts, the issuing of a decree absolute, without more, cannot be taken as determinative of the validity of that marriage in the first instance. This is especially the case in the present appeal where the Appellant has been aware that the Respondent has rejected the validity of his marriage to Ms Soares Gomes on a number of occasions, including in the present decision, and the Appellant and his representatives were in possession prior to the hearing of 23 June 2013 of a decision of a previous Judge finding that the documents on which the Appellant relied to evidence his marriage were not reliable.

26. I must regrettably observe that those acting for the Appellant have failed to approach the hearing before the Judge on 23 June 2017 with any kind of appropriate candour. The principles in the case of Devaseelan would clearly have applied in a case such as this, where a key issue in dispute between the parties, raised in the Respondent's decision letter of 24 May 2017, has been adjudicated upon within the last three years. It was not appropriate for the Appellant to withhold from Judge Khan the decision of Judge Monson merely on the supposed basis that the decree absolute dated November 2016 made any previous finding of an earlier Judge irrelevant. Nor was it appropriate for Ms Jegarajah to have purposely withheld another document in her possession, being the refusal letter of 24 May 2017.

27. As is noted by Judge Scott-Baker, granting permission in this matter on 26 July 2017, the Judge failed to make any findings in his decision as to the validity of the marriage. There is nothing within paragraph 25 of the decision or any other part of

the decision which amounts to a clear finding one way or the other as to whether the Appellant's marriage was valid. I find that this matter remains to be determined.

28. Turning to the Appellant's principal complaint that it was procedurally unfair for the Judge to have considered whether the Sponsor had been economically active, Ms Jegarajah refers me to the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, Rule 24 in particular, which reads as follows:

> "24.- (1) Except in appeals to which Rule 23 applies, when a Respondent is provided with a copy of a notice of appeal, the Respondent must provide the Tribunal with -
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> (a) the notice of the decision to which the notice of appeal relates and any other document the Respondent provided to the Appellant giving reasons for that decision;
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> (b) any statement of evidence or application form completed by the Appellant;
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> (c) any record of an interview with the Appellant in relation to the decision being appealed;
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> (d) any other unpublished document which is referred to in a document mentioned in subparagraph (a) or relied upon by the Respondent; and
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> (e) the notice of any other appealable decision made in relation to the Appellant.
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> (2) The Respondent must, if the Respondent intends to change or add to the grounds or reasons relied upon in the notice or the other documents referred to in paragraph (1)(a), provide the Tribunal and the other parties with a statement of whether the Respondent opposes the Appellant's case and the grounds for such opposition."

29. Ms Jegarajah explains to me the difficulties which she and those who instruct her had in the run up to the First-tier hearing in obtaining a copy of the Respondent's decision and bundle. However, Ms Jegarajah confirmed that by the time of the hearing, they were in possession of that bundle.

30. There is within that bundle at pages D1 to D2 a letter from the Appellant's former representatives Prestige Solicitors dated 15 December 2016 which was a letter accompanying the Appellant's application for the residence card which he made at that time. The letter specifies seven items of evidence said to accompany the application form including the completed form, the decree absolute document, Lloyds bank account statements for the past three months, payslips for the applicant,

ex-partner's wage slips (and it is to be noted that this letter of 15 December 2016 does not specify the period of those wage slips), previous tenancy agreement and utility bills. The application form itself specifies at paragraph 8.37 that the Sponsor's employment had been at a salary of £725 (presumably, per month) from 2014, ongoing.

31. Ms Jegarajah points out that even though the notice of immigration decision makes reference to the non-satisfaction of Regulations 10(5) and 10(6) (the latter being the requirement that the Appellant evidence his own earnings) those points were not raised explicitly in the Reasons for Refusal Letter accompanying the decision. It was on this basis that she had framed her case to suggest that upon demonstrating that his marriage was not one of convenience, all of the issues in the appeal had been determined in the Appellant's favour. I have already found above that the Judge had failed to make any relevant finding as to the validity of the Appellant's marriage.

32. I accept that whereas the Judge refers at his paragraph 26 to the reasons stated in the Respondent's earlier decision of 12 May 2015 that the Respondent had not accepted the evidence from July to October 2013 about the Sponsor's alleged employment at that time, this was not determinative of whether the Sponsor was gainfully employed or self-employed from 2014 onwards, as asserted in the application form in the present application.

33. However, Mr Clarke argues that in the history of the Respondent's decision-making regarding his various applications for a residence card under the EEA Regulations, the reliability of the evidence the Appellant has relied upon in relation to the Sponsor's employment has been challenged on every occasion, even if not specifically challenged in the present decision. Mr Clarke asserted that Mr Williams, Presenting Officer before the Judge, was entitled to raise the issue of whether the Appellant's ex-partner had been economically active up to the point of divorce, and Mr Clarke further argued that the Judge had been entitled to find at paragraphs 26 and 28 that that requirement was not satisfied in the present appeal.

34. Mr Clarke also pointed out that if the Appellant and his representatives felt that they had been prejudiced on the day of the hearing, 23 June 2017, in the Respondent seeking to raise the issue of the Sponsor's employment, then it was open to them to have applied for an adjournment again, before the Judge on the day of the hearing, but they had not done so.

35. I find there was a degree of ambiguity about what issues were actually raised in the notice of decision, and the letter giving reasons for refusal, both dated 24 May 2017. The reasons for refusal letter undeniably refers to the Appellant's past history of applications, and the reasons for the refusal of those applications, which includes reference to decisions in both 2012 and 2015 rejecting the Sponsor's financial evidence. However, as the reasons decision letter did not thereafter raise the reliability of the Sponsor's financial information from 2014 onwards, I accept that there may have been procedural unfairness to the Appellant in the Respondent

seeking to open the issue of whether his ex-spouse had been economically active in the United Kingdom from 2014 onwards.

36. Further, the reasons given by the Judge at his paragraph 26 for finding that the Appellant had not satisfied him that the Sponsor had been economically active, were principally reasons which related to the evidence dating from 2013, whereas the application form states that the Appellant relied upon evidence from 2014 onwards in support of his present application. It is clear that that evidence was not contained within the Respondent's bundle before the Judge, which was in breach of Rule 24 of the Procedure Rules.

37. However, I arrive at the conclusion that the Appellant was caused procedural unfairness by a narrow margin only. The Appellant was directed on 21 June 2017 to provide all documents which are relevant and in the possession of the Appellant. I was not informed exactly what documents were in the possession of the Appellant at that time, but it seems the Appellant's attitude, in filing no bundle at all, was somewhat cavalier. Further, no renewed adjournment application was made on the day of the hearing when it became clear that the Respondent was raising the issue of the sponsor's economic activity.

38. However, on balance, I am of the view that the decision must be set aside, save for the finding at paragraph 27 that the Appellant's marriage, whatever its validity, was not one of convenience.

39. I am of the view that the appropriate course of action to take in this appeal is to remit the matter to the First-tier Tribunal.

40. Clear findings will need to be made on the validity of the Appellant's marriage. For the avoidance of doubt, I am of the view that mere reference to the existence of a degree absolute in relation to that marriage, unless contrary authority can be provided by the Appellant, is not determinative of the question of whether that marriage was valid.

41. I direct the Appellant to file and serve a copy of the decision of Judge Monson dated 27 October 2014, reference IA/10223/2014. The findings made in that decision will be the starting point of the findings to be made by the First-tier rehearing this present appeal, applying the ordinary principles set out in Devaseelan.

42. I also find, even though it may have been procedurally unfair for the Respondent to seek to open the question of whether the Appellant's Sponsor was economically active in the UK at the hearing of 23 June 2017, it is now clear that the Respondent does raise such a challenge.

43. On remittal to the First-tier, therefore, both parties are under a duty to file with the Tribunal any and all evidence on which they rely. Insofar as he wishes to assert that any part of the EEA Regulations on which he relies is satisfied, he must produce his

positive evidence. For the avoidance of doubt, this should include the evidence which he relies upon to demonstrate his own economic activity, as per Regulation 10(6).

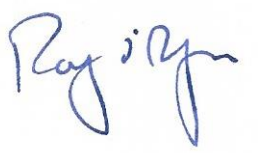
Notice of Decision

I therefore find that the making of the Judge's decision involved the making on one or more material errors of law.

I allow the Appellant's appeal to the extent that I set aside Judge's decision, save for the findings at paragraph 27, and I remit this appeal to the First-tier Tribunal, to be determined in accordance with this decision. If the Appellant wishes to obtain a direction that the Respondent disclose records from HMRC, an application for such a direction is to be made to the First tier Tribunal.

No anonymity direction is made.

Signed Date 4.10.17



Deputy Upper Tribunal Judge O'Ryan