



**Upper Tier Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/25222/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 11 August 2015**

**Determination Promulgated
On 17 August 2015**

Before

**Deputy Upper Tribunal Judge Pickup
Upper Tribunal Judge Jacobs**

Between

**Secretary of State for the Home Department
[No anonymity direction made]**

Appellant

and

Donovan Mark Stewart

Claimant

Representation:

For the claimant: Mr R Solomon

For the respondent: Mr J McGirr, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Secretary of State appealed against the decision of First-tier Tribunal Judge Suffield-Thomson promulgated 3.2.15, allowing the claimant's appeal against the decision of the Secretary of State, date 4.6.14, to refuse his application for an EEA Residence Card as confirmation of a right to reside in the UK, pursuant to the Immigration (EEA) Regulations 2006, on the basis of being a family member (spouse) of Dorota Machala, a Polish citizen, exercising Treaty rights in the UK. The Judge heard the appeal on 28.1.15.

2. First-tier Tribunal Judge Kelly granted permission to appeal on 26.3.15.
3. Thus the matter came before Deputy Upper Tribunal Judge Pickup on 13.5.15 as an appeal in the Upper Tribunal. Judge Pickup found an error of law in the making of the decision of the First-tier Tribunal, set the decision aside, and adjourned the remaking of the decision in the appeal, reserving it to himself in the Upper Tribunal on 2.7.15. However, on that date it transpired that neither party had received all the necessary documents. A further adjournment was granted to 11.8.15, when the appeal was listed before Upper Tribunal Judge Jacobs and Deputy Upper Tribunal Judge Pickup sitting as a panel of the Upper Tribunal.
4. The relevant history can be briefly summarised as follows. The claimant came to the UK as a family visitor in 2002. He never left and thus has been an illegal overstayer. In addition, he has been working illegally in the UK. He married Emma Stewart in 2007. They had a daughter, born in December 2007, with whom the claimant continues to have contact. By 2010 the claimant separated from his wife and they were divorced in November 2011. It is claimed that in either in 2009 or 2010, the evidence on this and a number of other issues is unclear, the claimant commenced a new relationship, with Dorota Machala, the mother of two children, whom he has known since 2006 when they worked for the same employer. Following his divorce from Ms Stewart, the claimant married Ms Machala on 27.4.12. The application the subject of this appeal was made on 20.11.13 and refused on 4.6.14.
5. The Secretary of State's case is that the marriage is one of convenience, relying on discrepancies and inconsistencies arising from a marriage interview on 8.5.14. Under the Immigration (European Economic Area) (Amendment) Regulations 2012 the definition of spouse specifically excludes a marriage of convenience.
6. The refusal decision of 4.6.14 sets out a number of discrepancies in the interview, including: the circumstances of their first date; the marriage proposal; the wedding; the post-wedding celebrations; their home; their respective families; and their respective faith.
7. It is not necessary to set out all of the discrepancies highlighted in the refusal decision, but in his error of law decision Judge Pickup found that they were more than mere trivial details. For example, the spouse had difficulty recalling the exact time or date of the claimant's marriage proposal, but said it was in the summer of 2011. On the other hand, he said it was in the winter, around December 2011. She said he proposed to her on the sofa at home, whereas he said it was by a fountain in Wembley.
8. In relation to the wedding, the spouse stated that they had both travelled to the ceremony together in a car with the claimant's cousin, whereas he said they travelled to the wedding in his work van and his cousin travelled in a separate car. According to the spouse, following the wedding they

visited the Harvester restaurant, whereas the appellant stated that they both went home and later visited his aunt's house for celebratory drinks. More telling were the discrepancies about the home. She stated that there was a smoke alarm in the living room above the door to the kitchen, whereas he said the house had no smoke alarm. They also both differed as to how many flats were in the building and on what day the bins are collected. She spoke of attending church at Christmas and Easter, whereas the claimant said she did not go to church.

9. Although the First-tier Tribunal Judge erred by a material misdirection as to the standard and burden of proof, we note that the judge found that there were a number of explanations for the discrepancies, none of which were due to dishonesty on the part of the claimant or the sponsoring wife. The judge took account of the stress of the interview, some confusion as to whether the sponsor should answer in English or Polish. The judge did not accept that there were any questions that a married couple should automatically know, noting that some have better memories than others and some place more significance on things other than dates of events. The judge did not accept that the lack of knowledge or apparent discrepancies demonstrated that that marriage was not genuine. As the judge misunderstood on which party the burden of proof lay, the conclusions are not necessarily sustainable.
10. We heard extensive oral evidence from the claimant, sponsor, the claimant's brother, the sponsor's sister, and the sponsor's two adult children, relying on the various letters and statements in the claimant's bundle.
11. We have carefully taken into account the 99 pages of the claimant's revised appeal bundle, served under cover of letter dated 22.6.15, and including his witness statement of 20.6.15, as well as that of his spouse, of the same date.
12. We note that in these witness statements, the claimant and Ms Machala have put forward explanations for at least some of their inconsistent interview answers. For example, he now states that he proposed to her on the sofa at home in the summer of 2011, having previously given her an eternity ring in April 2011 at a fountain in Wembley. He claims that his answer in interview was as to when he gave her an eternity ring and claims that both their accounts were in fact accurate. He now states that they had the wedding reception meal at the Harvester restaurant. She now states that they also went to his aunt's after the wedding reception at the restaurant.
13. We note that despite the discrepancies from the marriage interview highlighted in the refusal decision, the claimant's statement does not address several of the inconsistencies. For example, he does not address the circumstances of their first date, stating that it is a hard thing to remember. Neither did he refer to whether his cousin came with them in

the van to the wedding. He states that their answers as to when the bins were collected varied because they place their rubbish in a depot by the car park, rather than bins being collected immediately outside the house. As far as the smoke alarm is concerned he said they didn't have one because it is disconnected.

14. Both claim that they were really nervous at the marriage interview and felt under pressure and complain that they were given little time to answer the questions.
15. His explanation as to why he said that he proposed to her in the winter of 2011, around December, at a fountain in Wembley is not entirely satisfactory. His present account of April 2011 is inconsistent with his interview account. The date of the proposal he gave in interview is several months after the date she gave. His present account means that the presentation of the ring in April 2011 preceded the marriage proposal in the summer of 2011. One view of these late explanations is that they are after the fact rationalisations to try and explain away the discrepancies.
16. Given the extent of the discrepancies between the claimant and the sponsor, we are satisfied that the Secretary of State has discharged the initial burden of proof to demonstrate reasonable grounds for suspicion that the marriage is one of convenience. The burden therefore falls on the claimant to demonstrate on the balance of probabilities that his is not a marriage of convenience.
17. We found both the claimant and the sponsor relatively poor witnesses in their own cause. They seemed to be unwilling or unable to answer simple questions without giving a long circumlocutory explanation; both were repeatedly advised to answer the questions asked. In our view, their evidence was unnecessarily and perhaps deliberately vague, making it very difficult to extract any hard facts about their relationship and history. The other witnesses were significantly worse and we reached the view that no reliance could be placed on their evidence as to the chronology of the claimant's relationship with the sponsor.
18. Further, on their oral evidence before us, it is clear that there were at least some deliberate lies told in the marriage interview and both, in our view were being less than straightforward with the tribunal. For example, in relation to the discrepancy as to which vehicle was used to convey them to the marriage ceremony, the claimant now states that the sponsor did not tell the truth, which was that they had travelled in his van, because he was not permitted to drive; in effect she was covering for him. However, when she was asked questions about this same issue in evidence she did not give the same explanation as the claimant. She agreed that they had travelled in the sponsor's van, but went on at length in her answer about her husband going to pick up the ring and leaving his mobile phone on the car seat, resulting in the window being broken to steal the phone. None of this was mentioned in interview, nor was it relevant to the question asked.

She then said that because of the interviewing officer's negative attitude she thought she would say that they travelled in the car. Eventually, she said she was so stressed that she was not thinking straight and could not explain why she said what she did. If the claimant is right that the sponsor lied in interview, it follows that she is still being untruthful as to why she said they had travelled in his cousin's car. This conduct serves to undermine the credibility of the claimant's case.

19. Much of the hearing was given over to extensive questioning about where the claimant and the sponsor lived at various times from 2009 onwards. Despite the attempts of both Judge Pickup and Judge Jacobs to try and clarify the issue, it was not possible to determine any clear history and matters seemed more confused than they were before. For example, the claimant said that at the time of a previous application made in July 2011 for leave to remain on the basis of family life with his then wife and child, he was living between 5 [-] Court, the matrimonial home, and Ms Machala's address. Mr McGirr did not pursue the issue of an apparent inconsistency between that application and his present account and thus we make no finding in respect of the same. However, the claimant said that he had been in immigration detention from July to August 2011 and when he was released he went to live with Ms Machala at 29 [-], Northolt. He then produced from his personal file, not in his appeal bundle, a tenancy agreement dated 9.11.11, suggesting that from that date he and Ms Machala began to reside at that address together, which seems inconsistent with moving in with her at that address in August 2011. The agreement shows no existing address for the claimant, but states that her address prior to this tenancy was at 14 [-], Hanwell. The claimant insisted he did not live at 29 [-] prior to August 2011, but could not provide any satisfactory explanation as to why the tenancy is dated in November 2011. In her evidence, Ms Machala varied between insisting that they had moved in together at that address from November 2010, and then, in light of the tenancy agreement, stating that it must have been November 2011. However, she was quite sure that at the time the claimant was detained, which was July 2011, they were both already living at 29 [-]. She was also adamant that there was only ever one tenancy agreement and that there had not been, as was suggested as a possible explanation, a prior 12 month agreement of which the 9.11.11 document was merely a continuation of the tenancy. Although she fluctuated between 2010 and 2011, she was very sure it was November when they moved in together and that they had gone into this tenancy together. Her account is significantly inconsistent with the claimant's account.
20. A further complication on this issue arose in two council tax bills, also produced at the hearing by the claimant and dated May 2011 and June 2011. It is clear from these documents that both the claimant and Ms Machala were registered as living at 29 [-] in May 2011. The bills were chasing unpaid council tax for a flat at 15 [-], Ealing, which appears to have been occupied by one or other, or both, of them between April 2009 and the end of December 2010.

21. We reached the conclusion that the claimant was certainly not being transparent about when he was living with Ms Machala and from when. Their accounts were generally inconsistent as to dates, but generally supportive as to the extent of their relationship. There may be a number of reasons why the claimant and the sponsor have made the matter so confusing and unclear. For example, they may have been trying to avoid being caught out about the timing of his previous application for leave to remain. However, in the light of the documents from the council, together with the general evidence from the other witnesses, we reach the conclusion that they must have moved into 29 [-] in November 2010 and have been living together at least since that time. The other witnesses, including the sponsor's two children were completely unable to provide any exact dates, but confirmed that the sponsor and the claimant were living together at a number of addresses, including 29 [-], at least from 2010, which is substantially prior to the date of marriage. All the other evidence demonstrates continued cohabitation from that date. There are numerous letters of support and other documents in support, including bank, utility statements, photographs, etc. We do not ignore or overlook the remaining discrepancies from their marriage interview, not all of which have been explained, even now, but in the context of the evidence as a whole we find those discrepancies insufficient in quantity and overall significance to outweigh the considerable weight of the evidence supporting the conclusion that on the balance of probabilities the marriage is genuine.
22. We reach the conclusion that the claimant and the sponsor are currently living together, and have been together for some time prior to their actual marriage. We also note that there was a significant delay between marriage and the application for an EEA Residence Card, as well as a delay between cohabitation and marriage and between proposal of marriage and marriage. Whilst cohabitation is relevant to the issue as to whether the marriage is one of convenience, we bear in mind that it is not necessarily determinative of that issue, as a couple can cohabit for the purpose of falsely establishing the appearance of a genuine and subsisting relationship. We also take into account that the claimant and his spouse have now had a considerable amount of time to rehearse and try to get their stories straight, without successfully being able to do so. It is also arguable that the fact they have not given identical accounts demonstrates that the marriage and relationship is genuine, and that a rehearsed account may have been more consistent even if not factually true.
23. However, taking the evidence as a whole, in the round, we reach the conclusion, despite the various concerns set out above, that the claimant and the sponsor are in a genuine relationship and that he has demonstrated on the balance of probabilities that the marriage entered into is not one of convenience.
24. In reaching that conclusion we take into account the evidence as a whole,

including but not only the following matters. First, evidence as to how they communicate in partly English and Jamaican patois, and that the claimant and the sponsor have known each other since 2006 and that they have worked together for some years. The claimant explained that he has some knowledge of Polish, not just because of his relationship with Ms Machala but because he has worked (albeit illegally) in premises with a number of Polish workers. There were details of their evidence that indicated a good knowledge and involvement with each other. For example, the sponsor explained that she visited the claimant each day he was in detention in 2011, stating that on each occasion her photograph and fingerprints were taken, which she invited us to check. We also heard evidence that the claimant had introduced his brother to the sponsor long before they were living together. Ms Grabowska, the sponsor's sister who came from Poland to give evidence, explained that she had come to visit and work in the UK during two successive summers three years ago, staying with the claimant and the appellant at 29 [-], Northolt. One of the sponsor's children gave evidence that the claimant had been living with them since she was about age 12. We found that all of this evidence, taken together, was inconsistent with the marriage being one of convenience and supportive of the claim that it is not. Ultimately, we find that the claimant has discharged the burden of proof to demonstrate that the marriage is not one of convenience.

25. No issue has been taken as to the sponsor's exercise of Treaty rights and thus it follows that on the basis that they have discharged the burden of showing that the marriage is not one of convenience the claimant is entitled to the EEA Residence Card sought.

Notice of Decision

26. The appeal is allowed under the Regulations.



Signed

Deputy Upper Tribunal Judge Pickup

Dated

1 December 2015

Anonymity

We have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier

Tribunal did not make an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chambers) Rules 2014.

Given the circumstances, we make no anonymity order.

Fee Award Note: this is not part of the determination.

In the light of our decision, we have considered whether to make a fee award (rule 9 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chambers) Rules 2014 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

We have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

However, we make no fee award.

Reasons: For various reasons, we find that the claimant has not been straightforward with the Secretary of State and with the Tribunal as to the true history of his relationship with the sponsor and has not assisted himself.



Signed

Deputy Upper Tribunal Judge Pickup

Dated

1 December 2015