Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04943/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 June 2019	**On 3 July 2019**

Before

UPPER TRIBUNAL JUDGE BLUM
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THERESA [O]
(ANONYMITY DIRECTION NOT MADE)

Appellant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. A. Kaihiva, Counsel, instructed by A. Donamart Solicitors.
For the Respondent: Mr. I. Jarvis, Senior Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge P-J S White ('the Judge'), issued on 26 March 2019, by which the appellant's appeal against the decision of the respondent to refuse to issue an EEA residence card was refused.

2. The appellant appeals on all grounds with permission of First-tier Tribunal Judge Chohan by way of a decision dated 8 May 2019.

Anonymity

3. No anonymity direction was issued by the Judge and no application for such direction was made before us.

Background

4. The appellant is a Nigerian national who was born in 1970 and is presently aged 49. She asserts that she entered this country in 2004, utilising a visit visa arranged by an agent. The sponsor is Mr. Piotr [S], a Polish national, who was born in 1972. They married by way of a customary marriage conducted by proxy in Nigeria on 18 February 2010. The appellant was issued with a residence card as the spouse of an EEA national on 20 June 2011, valid until 20 June 2016.

5. On 27 July 2013, the appellant was stopped on re-entering the United Kingdom and interviewed by an immigration officer. Decisions were made on 30 July 2013 to refuse her admission to this country and to revoke her residence card. She lodged an appeal on 5 August 2013 against these decisions but on 7 October 2013 she withdrew her appeal.

6. On 11 October 2013 the appellant applied for a residence card as the spouse of an EEA national and the respondent refused this application on 25 November 2013.

7. The appellant made another application for a residence card on 2 January 2014 and this was refused by way of a decision dated 27 January 2014.

8. A further application for a residence card was made on 5 December 2014 and this was refused on 10 April 2015. The appellant filed an appeal on 23 April 2015 but subsequently withdrew her appeal.

9. The appellant applied for a residence card on 6 September 2016 and the application was refused by the respondent on 7 July 2017. She made further applications for a residence card on 14 September 2017 and 28 October 2017, both of which were refused.

10. An application for a residence card was made on 19 February 2018 and was refused by way of a decision on 29 June 2018. The respondent decided that the evidence submitted was insufficient to establish that the appellant's customary

marriage to Mr. [S] was valid. The second point taken was that in an interview conducted in July 2013, the appellant had admitted that the marriage was one of convenience. The respondent concluded that in such circumstances the appellant had not acquired any rights by virtue of her marriage. This is the appeal against that decision.

The hearing before the First-tier Tribunal

11. The appeal came before the Judge on 20 February 2019. The respondent was not represented and made no request for an adjournment was made. The Judge was satisfied that there was no reason to do other than proceed with the appeal in the respondent's absence. The Judge considered the validity of the marriage and noted that the decision letter spoke as to Ghanaian customary marriage law in circumstances where the appellant is a Nigerian national and the marriage was conducted by proxy in Nigeria. He decided that no evidential basis had been provided by the respondent for the assertion that the marriage was formally invalid and so held that it was not.

12. As to the allegation that the marriage is one of convenience, the Judge observed that the issue as to whether the marriage was entered into for immigration advantage is to be determined at the date the marriage is contracted. When considering whether the respondent had met the initial evidential burden placed upon him as to raising the possibility of the marriage being one of convenience, the Judge decided at [13] - [15]:

> *'The respondent relies effectively on what the appellant and Mr. [S] are alleged to have said in interviews in July 2013. I do not have contemporaneous notes of either interview. I have only the notice of decision from July 2013. This is over the typed signature for a named Immigration Officer. It records that the appellant admitted in interview that her marriage was one of convenience, that she has spent only 3 months with him after the marriage and that she was currently living with her sister. Mr. [S] was said to have told the respondent, in an interview in Polish, that he did not consider himself married to the appellant but considered her his girlfriend.*
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> *The notice is clearly less satisfactory as evidence than a detailed witness statement or the production of notes of the interviews. It seems to me however that it does have some evidential value as a signed account of what has been said by the appellant and Mr. [S]. That view is reinforced by two facts. One is that both she and he accept that some sort of interview took place at that time, although they dispute what was said. The other is that the appellant, having lodged an appeal, then withdrew it, thus leaving this decision and the assertions on which it relied unchallenged at the time, although that was when she and Mr. [S] might be expected best to remember and describe what was really said. I find that decision very*

> *curious, and the appellant's explanation, for reasons discussed below, unsatisfactory.*
>
> *In the circumstances I am satisfied that the initial evidential burden, of raising a case to answer, is discharged. It is then necessary to consider the appellant's account and reach a decision on whether, in the light of all the evidence, the legal burden is discharged.'*

13. The Judge proceeded to assess the evidence presented. He was not satisfied that either the appellant or Mr. [S] were reliable witnesses. He noted at [20] that after nine years of marriage the couple stated that they speak to each other in English, though Mr. [S] accepted that he speaks and understands the language 'a little'. He further observed that Mr. [S] only remembered during re-examination that he had taught the appellant some Polish. The Judge detailed the conflicting evidence of the appellant and Mr. [S] as to their living arrangements, concluding at [21] that '*the disagreement about the terms on which they occupy [their home] is almost total*.' He further observed as to Mr. [S]: '*Since his most recent tax statement shows a self-employed profit of some £7,500 it is not clear how he affords a rent of £650 per month.'* He was satisfied that the appellant had made admissions as to the marriage being one of convenience in her 2013 interview and determined that on the balance of probabilities the marriage was one of convenience and so no right of residence was conferred under Union law.

The grounds of appeal

14. There are three grounds of appeal before us. Ground 1 is that there was a failure to make proper findings. Ground 2 is entitled 'subjectivity' and details, *inter alia, '... the Judge had subjectively believed that the Immigration Officer at the interview on the day did not lie and that it was the appellant and her spouse who lied. It therefore seems that the Judge subjectively believed that so long as the documents were signed by an Immigration Officer, it stood to be correct and credible; and as such has therefore proved the allegation of marriage of convenience against the appellant. This is completely subjective judgement [and] is therefore wrong.'* Ground 3 details that the Judge acted unfairly by relying upon his subjective belief.

15. In granting permission, Judge Chohan observed:

> *'In short, the grounds argue that the judge failed to make proper findings in respect of the marriage of the appellant and her spouse. It is further stated that the judge placed weight on an interview record in respect of which a copy had not been provided.*
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> *The respondent relied on an interview record conducted by an immigration officer in which it is alleged that the appellant had stated that her marriage was one of convenience. During the hearing before the judge, the appellant denied ever making that statement. Nevertheless, the judge appears to have*

placed some weight on that interview record and it is striking to note that there was no presenting officer at the hearing.

It is open to argument that the judge may have erred by placing reliance on an interview record in respect of which the respondent had not provided a copy. It must be remembered that the respondent has an evidential burden of establishing a marriage of convenience. Had a presenting officer been present, matters may well have been clarified. Unfortunately, this was not the case.'

The hearing

16. Prior to the hearing, Mr. Jarvis made a formal application to adduce new evidence and relied upon Rule 15(2A) of The Tribunal Procedure (Upper Tribunal) Rules 2008. By way of the written notice, the respondent sought to adduce a GCID note dated 27 July 2013, summarising Mr. [S]'s telephone interview with an immigration officer in relation to his marriage to the appellant and the summary of a subsequent interview conducted by the same immigration officer with the appellant. The notice detailed that it was not known why the record was not included in the respondent's bundle before the First-tier Tribunal, '*but it is clear that due to operational difficulties there was no PO and therefore it could not have been provided at that late stage, equally the [appellant] had not pursued the appeal against the refusal of admission decision.*' The notice candidly observed, '*The SSHD asks the [Upper Tribunal] to note that the content of the record (it is not a transcript in respect of the [appellant's] oral responses to questions) could potentially corroborate some of the [appellant's] evidence to the FtT in respect of the marriage of convenience issues as well as being relevant to her claimed husband's evidence about the interview conducted with him at the same time. On that basis, and in fairness to the [appellant] and her partner, the SSHD asks that the [Upper Tribunal] admit the evidence for the purposes of the error hearing when considering the [appellant's] appeal.*' Mr. Jarvis pursued the application at the hearing, and it was not opposed by Mr. Kaihiva.

17. We decided at the hearing to admit the evidence, observing that it would aid in our consideration as to whether the Judge erred in proceeding in the absence of the relevant interview records: Rule 24(1)(c) of The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2004 ('the First-tier Tribunal Procedure Rules'). Upon admission of the document, Mr. Jarvis candidly and appropriately observed that the respondent wished to act fairly and favoured a pragmatic resolution of the case. He accepted that though the appellant had initiated an appeal in 2013 against the refusal of leave to enter and the revocation of her residence card, such decisions being consequent to her interview on 27 July 2013, the appeal had been withdrawn and so the First-tier Tribunal had not previously considered the interview record. He conceded that in such circumstances, the respondent was required to provide the interview record and failed to satisfy the obligation placed upon him.

Decision on error of law

18. We allowed the appellant's appeal on the day of the hearing, confirming that our reasons would follow. We have much sympathy for the Judge who sat in the absence of a presenting officer and was not asked by the appellant to adjourn the hearing so that the records of interview could be secured. He was required to consider a decision letter, much of which erroneously considered the position of proxy marriages conducted in Ghana, which is of no relevance to this appeal. He took care to consider the evidence before him, some of which was clearly inconsistent and unsatisfactory, and made careful findings of fact on the evidence before him. We observe that there was no specific challenge by way of appeal as to the findings at [20] - [23]. Rather, the focus of the challenge concerns the Judge's approach to the interviews conducted in July 2013. We find that as the interviews were relied upon by the respondent in the decision letter of June 2018, he was required to provide copies of these interview records to the Tribunal and the appellant. Though the appellant did not request an adjournment and an accompanying direction that the respondent file and serve the interviews, the Judge was required to observe that Rule 24(1)(c) of the First-tier Procedure Rules is mandatory in nature and it was unfair to proceed in circumstances where the appellant and Mr. [S] sought to assert their recollection of events in the absence of the interview records.

19. We observe that the respondent's decision of June 2018 expressly relied upon the appellant's interview detailing, '*During that interview you were asked whether your marriage was a genuine one or a marriage of convenience and you replied - "yes - a marriage of convenience, it is easy for me."*' The Judge adversely relied upon this element of the decision letter. We observe that consideration of this question and answer requires an assessment of the interview as a whole, the context in which the question was advanced and consideration as to whether the appellant understood the technical question she was being asked. In the absence of the interview record, we find that the Judge could not fairly answer such questions.

20. We therefore find that the failure to adjourn the hearing and direct that the relevant records of interview be filed and served was a material error of law and though various other findings were carefully made, we are in agreement with both representatives that the failure was so fundamental that none of the findings can stand.

Remittal to First-Tier Tribunal

21. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25 September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

22. In this case we have determined that the adverse credibility findings cannot stand. The appeal will be remitted to the First-tier Tribunal so that a new fact-finding exercise can be undertaken. None of the findings of fact are to stand and a complete re-hearing is necessary.

Notice of Decision

23. For all of these reasons, the decision discloses an error on a point of law such that it must be set aside. We set aside the Judge's decision promulgated on 26 March 2019 pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.

Direction

24. We remit the matter to the First-tier Tribunal sitting at Taylor House to be heard before any First-tier Judge other than Judge White.

Signed: *D. O'Callaghan*

Upper Tribunal Judge O'Callaghan

Date: 23 June 2019