



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

Appeal Number: IA/31368/2014
IA/31372/2014

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 2 June 2015

Promulgated

On 16 June 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**(1) MR MUHAMMAD NABEEL
(2) MRS CLAUDIA FILIPA HENRIQUES SOARES
(ANONYMITY DIRECTION NOT MADE)**

Respondents/Claimants

Representation:

For the Appellant: Miss Holmes, Specialist Appeals Team

For the Respondents: Mr Iqbal, Counsel instructed by N R Legal Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from a decision of the First-tier Tribunal (Judge Rastogi sitting at Hatton Cross on 17 February 2015) whereby the First-tier Tribunal allowed the claimants' appeals against the refusal to issue them with residence/registration cards as

confirmation of their right of residence in the UK under community law. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimants should be accorded anonymity for these proceedings in the Upper Tribunal.

2. The first claimant is a national of Pakistan, whose date of birth is 15 November 1985. The second claimant is a national of Portugal, whose date of birth is 3 January 1992. The first claimant applied to be issued with a residence card on the grounds he had a right of residence as the spouse of an EEA national who was exercising her treaty rights in the United Kingdom. The second claimant applied at the same time for a registration certificate as confirmation of her right to reside in the United Kingdom as an EEA national exercising treaty rights here.
3. The Secretary of State refused their applications on 23 July 2014. She refused the first claimant's application for two reasons. The first reason was that she concluded the marriage between the claimants was one of convenience, based on home visits made to the claimed marital home during which the investigating officer was told by the claimants' landlords that the second claimant was residing in Birmingham (whereas the claimed marital home was in Woking). The Secretary of State was also not satisfied that the submitted evidence showed that the second claimant was exercising treaty rights in the United Kingdom because her job was said to be in Woking, whereas the landlord said she was living in Birmingham. The second claimant's application for a registration card was also refused for this reason.

The Decision of the First-tier Tribunal

4. The claimants asked for their appeals to be determined on the papers. As well as the contents of the Home Office bundle, the judge said she had taken into account additional pay slips provided with the grounds of appeal, and the bundle of documents provided by the claimants for the appeal, which included witness statements from the claimants, a declaration from their landlords plus exhibits, additional utility bills, voter registration details, bank statements and an employer's letter.
5. In her subsequent decision, the judge set out the evidence at some length at paragraphs [14] to [25]. Her findings began at paragraph [26]. Relying on **Papajorgi (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC)**, the judge found that the Secretary of State had discharged the evidential burden of showing reasonable grounds for believing that the marriage was one of convenience. She had done so through the reports of the Immigration Officers in the Home Office bundle describing two visits which they had made to the claimed matrimonial home at an address in North Road, Woking.
6. The judge then went on to address the evidence from the landlords tendered by way of appeal. For the reasons which she gave in paragraph [27], she concluded in paragraph [28] that she was unable to attach any

weight to the declarations made by Mr Qureshi and Mrs Arif for the purposes of addressing the Secretary of State's reasonable suspicion. She indicated that their evidence did not assist in any way in rebutting the suspicion; but that the inconsistent information they had provided supported the suspicion that the marriage between the claimants was one of convenience.

7. At paragraph [29] she directed herself that she needed to examine the other evidence upon which the claimants relied to decide whether they were able to satisfy her that this was not a marriage of convenience. She held that the second claimant had provided a full compliment of wage slips, corroborated by payments into a bank account, a contract of employment and employer's letter so as to verify her employment at Woking Superstore. This satisfied her that the second claimant was so employed, and had been so employed since April 2013. Given that the address of Woking Superstore was in Woking, it was more likely than not that the second claimant was residing in or around Woking, and had been so throughout the relevant period. So, she held, this evidence did not support the suspicion of the Secretary of State that the second claimant resided in Birmingham.
8. At paragraph [30] she made observations about the two tenancy agreements relied on. There was no explanation as to why a second agreement was entered into before the expiry of the first agreement. She noted that both agreements had expired prior to the date upon which she was considering the appeals. Nonetheless, given the findings that she had made in paragraph [29], she found the totality of the evidence was sufficient to satisfy her that the claimants lived at the claimed marital home in North Road, Woking. For that reason, she concluded at paragraph [31] that it was probable that the marriage was not one of convenience.
9. At paragraph [32] she held that, applying her earlier findings at paragraph [29], the second claimant was exercising her treaty rights as a worker. She went on to allow both appeals under the Immigration (EEA) Regulations 2006.

The Application for Permission to Appeal

10. A member of the Specialist Appeals Team settled an application for permission to appeal to the Upper Tribunal.
11. Ground 1 was that the judge had failed to resolve a material conflict of fact. Given that the judge essentially concluded that Mr Qureshi and Mrs Arif did not tell the truth about the situation of the claimants, the judge failed to address her mind to the reasons for that, particularly given that the judge accepted that the inconsistent information provide by them supported the Secretary of State's suspicions. The judge failed to resolve a conflict in the evidence as to the claimants' whereabouts at the time of the visits, which was clearly material and capable of supporting the Secretary of State's suspicions. The judge had moved on to other

evidence in paragraph [29] without any reconciliation of the evidential conflict. The conclusion that it was more likely than not that the second claimant was residing in or around Woking was a conclusion that appeared readily open to the judge. But the judge wrongly focused on the question of whether the second claimant resided in Birmingham or not, when the issue was that the landlords of the address she claimed to live at in Woking gave inconsistent and untruthful answers about her situation, and that of her husband. Furthermore, the finding that she was more likely than not residing in or around Woking did not resolve the major conflict in the evidence, and arguably introduced further uncertainty.

12. Ground 2 was that the judge had failed to provide adequate reasoning. The judge failed to explain how the documentary evidence referred to at paragraph [30] (bank statements, utility bills and other documents), which was evidence which could be “managed”, displaced the problems elsewhere in the account.

The Grant of Permission to Appeal

13. On 16 April 2015 Judge Colyer granted the Secretary of State permission to appeal on all grounds raised.

Reasons for Finding an Error of Law

14. As I ruled at the hearing, I am persuaded that the decision of the First-tier Tribunal is vitiated by a material error of law such that it should be set aside and remade.
15. The essential flaw in the judge’s line of reasoning was that she addressed two overlapping areas of evidence separately, and did not bring to bear the implications of her findings on the first area of evidence (the evidence of what the Immigration Officers found on the home visits, and what they were told by the landlords) when considering the probative value of the second area of evidence, which was the documentary evidence supportive of the second claimant working at premises close to the claimed matrimonial home at all material times.
16. It was not the Secretary of State’s case that the second claimant resided in Birmingham, rather than Woking. This is what the landlords had said.
17. As noted at paragraph [16] of the decision, on a visit to the claimed matrimonial home on 18 June 2014 the landlords told IO Cope that neither claimant was currently residing at the address. This was because the second claimant had been staying in Birmingham for the last three to four months, as she was pregnant with her first child, and the first claimant was visiting her.
18. As noted at paragraph [17] of the judge’s decision, on a second visit to the claimed matrimonial home on 9 July 2014, Mrs Arif gave a different explanation as to why the claimants were not to be found at their claimed matrimonial home. Mrs Arif told IO Hussein that the first claimant had

been staying with friends in Woking for the past month, and that he worked at a grocery shop in Woking. When he asked Mr Qureshi about the second claimant, he covered his head with a blanket. Mrs Arif said the second claimant had gone to stay with friends in Birmingham two months earlier. She claimed that the couple lived in a room upstairs in the house, but the room was currently occupied by her son. Although Mrs Arif said she would telephone the first claimant and ask him to return to the home from the grocery shop where he worked, the first claimant failed to return.

19. As is acknowledged in the permission application, the documentary evidence relating to the second claimant's employment at Woking Superstore throughout the relevant period had prima facie credibility *when viewed in isolation*. But it did not in itself prove that the second claimant was residing at the claimed matrimonial home, let alone that she was residing there with the first claimant. On the occasion of the second enforcement visit referred to in paragraph [17] of the decision, Mrs Arif had said that the first claimant was residing with friends *somewhere else in Woking*. Moreover, if it were true that the second claimant was working at all material times at the Woking Superstore while living at the claimed marital home nearby, the judge needed to ask herself why both landlords had said on both enforcement visits that the reason she was not to be found at the claimed marital home was that she was living in Birmingham.

The Remaking of the Decision

20. After giving my error of law ruling, I indicated that the appropriate course was for the decision to be remade on the evidence that was before the First-tier Tribunal. After taking instructions, Mr Iqbal submitted that the claimants should be given the opportunity to give oral evidence in support of their appeal at a remitted hearing in the First-tier Tribunal. I informed him that I was not going to accede to that request. The claimants had elected to have their appeals decided on the papers, rather than having an oral hearing so their evidence could be tested in cross-examination and/or at which they would have had the opportunity to answer any questions posed by the judge by way of clarification of their case. Since that was the election which the claimants had made, there was no procedural unfairness in the decision being remade on the papers.

Discussion and Findings

21. There was no cross-appeal against the finding that the evidential burden had shifted to the claimants to prove that their marriage was not one of convenience.
22. Although there is documentary evidence consistent with the claimants residing at the claimed marital home in Woking, including an abundance of documents supportive of the second claimant working nearby at Woking Superstore, I find that the claimants have not done enough to rebut the cogent evidence against them contained in the reports of the two enforcement visits.

23. It is simply not credible that if the claimants were genuinely residing in the marital home at the time of the visits, and the second claimant was genuinely working at Woking Superstore at the same time, that the Immigration Officers would not have been shown evidence of the claimants residing at the premises in the same room; and it is simply not credible that on both occasions the landlords would, on the claimants' case, have told bare-faced lies about their actual whereabouts.
24. Due to the discrepancy between the information given to, and gleaned by, the Immigration Officers at the enforcement visits and the information contained in the employment documents, I am also unable to find that the second claimant has discharged the burden of proving that she has been exercising treaty rights as a worker at Woking Superstore.
25. Accordingly, I dismiss both appeals under the Immigration (EEA) Regulations 2006. I note that there is an alternative claim under Article 8 ECHR, but, following **Lamichhane [2012] EWCA Civ 260**, I do not propose to entertain this claim. The claimants are not facing removal and they were not served with a Section 120 notice. Alternatively, questions one and two of the **Razgar** test should be answered in favour of the Secretary of State, as the interference consequential upon the refusal is nugatory in that it is open to the claimants to make fresh applications under the Regulations, if so advised. In the further alternative, the decisions were plainly proportionate, having regard inter alia to Section 117B of the 2002 Act.

Conclusion

26. The decision of the First-tier Tribunal allowing the claimants' appeals contained an error of law, and accordingly the decision is set aside and the following decision is substituted: these appeals of the claimants are dismissed under the Immigration (EEA) Regulations 2006.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Monson

