The Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/10919/2015
IA/10921/2015
IA/10926/2015

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 21 June 2016	**On 05 July 2016**
Prepared on 4 July 2016	

Before

DEPUTY UPPER TRIBUNAL JUDGE HOLMES

Between

E. C.
R. C.
O. H.
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Rogers, Immigration Advice Centre Limited
For the Respondent: Ms Petterson, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are mother, and two sons, who are citizens of Slovakia.

2. On 12 October 2013 the First Appellant undertook a ceremony of marriage with S, a national of India who had at the time leave to remain in the UK as a post study work migrant. S duly applied for a residence

card as the spouse of an EEA national, but his application was refused because the Respondent considered theirs was a marriage of convenience, so that he did not meet the definition of "spouse" in the Immigration EEA Regulations 2006. That decision followed an interview of both the First Appellant and S, in February 2014. Although S brought an appeal to the Tribunal, his appeal was dismissed in a decision of 12 September 2014. Both S and the First Appellant gave evidence to the Tribunal during the course of that appeal, and their evidence that this was a genuine and subsisting marriage was rejected as untrue. Their evidence about one another when interviewed together was found to be inconsistent in relation to matters that a genuinely married couple could be expected to be consistent about, and indeed the Judge found that she was not satisfied that they had ever cohabited together.

3. As a result of that decision, and the subsequent exhaustion of the appeal rights of S in relation to it, the First Appellant was interviewed again on 10 March 2015. As a result of the answers that she gave during that interview the Respondent took the decision to remove from the UK both her, and her two children, by reference to Regulations 19(3), and 21B(2), on the basis that this course of action was justified because of her abuse of her Treaty rights by entering into, and assisting another person to enter, a marriage of convenience.

4. The Appellants appealed that refusal decision, and their appeals were heard and dismissed by Immigration Judge Fisher in a decision promulgated on 15 October 2015.

5. In the course of that decision Judge Fisher made specific findings of fact against the credibility of the First Appellant's evidence, and he specifically rejected as untrue her account of how her interview on 10 March 2015 had been conducted by the Respondent. By the date of the hearing the Respondent had served evidence to rebut the Appellant's description of how she had been handled during that interview, and what she had said at it, which included contemporaneous notes from the immigration officers who had conduct of the interview. The First Appellant had however persisted during her oral evidence with a description of the interview that was quite inconsistent with the contemporary documents. The Judge concluded that the First Appellant had been frank with the Respondent during the course of that interview, and that she had given the information that had been recorded by immigration officers, unaware that her very candour could lead to the decision that was then taken. He concluded that her subsequent evidence about both the conduct of that interview, and the money that she had admittedly received from S, was no more than a desperate attempt to avoid the consequences of the information that she had given at that interview. The interview was described as "*damning from her perspective*", and the Judge went on to note that it had included the admissions by her that she believed that everyone present at the

wedding ceremony had known that it was a sham, and, that she entered into it in return for payment by S.

6. The Appellants sought permission to appeal that decision to the Upper Tribunal. Permission was granted by the First Tier Tribunal by way of decision of Judge Ford on 19 April 2015. There were two limbs to the grounds, and the grant, but both rested on the premise that the Judge had arguably failed to demonstrate that he had given due weight to the First Appellant's alcoholism. First, that he had thus failed to consider whether she had the cognitive ability to form the necessary intention to enter into a marriage of convenience. Second, that he had thus failed to consider whether she could adequately care for her children in Slovakia.

7. The Respondent served a Rule 24 response to the grounds of appeal on 28 April 2016 in which she asserted that the Judge gave adequate regard to the First Appellant's alcoholism, and that his assessment of her evidence was demonstrably a holistic one, and that since the evidence showed that she was the primary carer for both of her two children there was no reason to suppose that she would be unable to continue to perform that role in Slovakia.

8. Thus the matter comes before me.

Error of Law?

9. Ms Rogers confirmed for me that there was no evidence to suggest that the father of the Second and Third Appellants was in the UK, or that he had ever left Slovakia.

10. Ms Rogers also confirmed for me that she accepted that the evidence of the First Appellant concerning her marriage to S had been rejected as untrue by both Judge Kempton, and by Judge Fisher, and that she accepted that Judge Fisher had properly taken the decision of Judge Kempton as only his starting point before considering the evidence that was now before the Tribunal. She therefore accepted that although the issue of the First Appellant's alcoholism was not one that was apparently raised before Judge Kempton, it was one that was raised before Judge Fisher, and, that he had quite properly taken it into account in the course of both his decisions as to how to manage the appeal [4], and, his approach to the evidence. She accepted that it was plain that he had done so, because his decision contains a number of references to her problems with alcohol.

11. Ms Rogers' argument, as advanced, was that the effect of the First Appellant's alcoholism upon her thinking and decision making processes was an issue that went to the issue of the proportionality of the decision to remove all of the Appellants. As to this first ground, Ms Rogers did not however seek to argue that the First Appellant was not mentally competent to enter into a valid marriage as a result of the effect of her alcoholism upon her thinking and decision making processes. Nor

did Ms Rogers seek to argue that the First Appellant was not mentally competent to care for her children. Nonetheless she argued that there should have been an evaluation by the Judge of whether the First Appellant was capable of understanding the implications of the decision to enter into the marriage with S, at the date of the marriage. As Ms Rogers put it, whether or not the First Appellant had lied in the course of her evidence, alcohol must still have played a part in the decision that she had taken in October 2013, and it was an issue that ought to have been taken into account when considering the proportionality of the removal.

12. As to the second ground, Ms Rogers accepted that neither the Second nor the Third Appellant were "qualified persons" in their own right, and that to date their right to remain in the UK was only ever a right that was subsidiary to the exercise of treaty rights by their mother. She accepted that their mother had not acquired a right of permanent residence, and that the Judge had been correct to proceed on that basis [24]. Ms Rogers argued however that neither of the two children were party to any decision by their mother to commit an abuse of treaty rights, and argued that there had been an inadequate assessment of the proportionality of the decision to remove them. They had lived in the UK, and had been educated here, since 2006, although there was no evidence placed before the Tribunal to suggest that education would not be accessible to them in Slovakia.

13. Whilst Ms Rogers confirmed that she did not therefore seek to argue that the evidence was insufficient to ever permit a proportionate decision to remove this family, she argued that the assessment that was undertaken by the Judge was deficient and should therefore be set aside and remade.

Conclusions

14. The decision that the First Appellant and S had entered into a marriage of convenience was plainly one that was well open to both Judge Kempton, and, Judge Fisher, on the evidence that was before them. Ms Rogers did not seek to challenge that decision before me.

15. It is quite clear that the evidence that was placed before Judge Fisher was not sufficient to have allowed him to find that the First Appellant did not have the mental capacity to enter into a legally valid marriage on 12 October 2013. Although Ms Rogers argued that her alcoholism must have affected the First Appellant's ability to understand the implications of her actions, there are (at least) two serious problems with that argument.

16. First, it is quite clear that the decision to enter into a marriage of convenience was not a split second decision, but one that was taken by her over a period of time. Thus she had ample opportunity to reconsider,

and to refuse to proceed with the agreement. On her own account, as given at the interview on 10 March 2015, the First Appellant had made it perfectly clear that this was an arrangement she had entered into for payment, and, that she had been perfectly well aware that she was not entering into a genuine and subsisting marriage. Thus, whilst the decision may well be one that at some later point she regretted making, she knew perfectly well what she was doing at the time. It is perfectly clear from the Judge's decision that this was not a case in which only party to a marriage had entered into it without a genuine intention to enter a genuine and subsisting marriage – both had done so, and they had done so deliberately to obtain for S an immigration advantage to which he was not entitled.

17. Second, although the medical evidence is not complete (only excerpts from the First Appellant's medical notes were contained in the bundle of evidence produced for the hearing before the Tribunal), it is by no means clear that the First Appellant was abusing alcohol during the operative period of time. In June 2013 she was requesting help for her abuse of alcohol, and obtained it. By the end of July 2013 she was telling her GP she had reduced her consumption, and on 8 September 2013 she reported that she had stopped drinking alcohol two months earlier. Whilst notes from spring 2014 show she was then drinking again, the notes produced in evidence do not record what occurred during the intervening period.

18. Whatever the true situation with the First Appellant's alcohol consumption in October 2013, it is plain from the terms in which the decision is written that the evidence concerning the First Appellant's problems with alcohol were at the forefront of the Judge's mind [4, 19, 24].

19. The second ground assumes that the Second and Third Appellants were exercising Treaty rights on their own account, when it is accepted before me that they were not. Their right to reside has always been subsidiary to that of the First Appellant, as her children, and thus her "family members". It is accepted before me that none of the Appellants has ever acquired a permanent right of residence in the UK.

20. As her March 2015 interview exposed, the First Appellant had always understood what she was doing when she agreed to enter into a sham marriage with S; she was doing so in return for payment in order that he should gain some immigration advantage. The evidence concerning the degree to which she abused alcohol consisted essentially of her own claims advanced after the decision to remove her had been made, and she had been shown to be quite prepared to lie in the course of the evidence she had offered since that date. There was no suggestion that she was unable to care for either her children, or her mother, in the evidence before the Judge, and as he noted, the contrary was the case [24].

21. Ms Rogers accepted that the abuse of Treaty rights was a very serious matter that would weigh heavily in the assessment of the proportionality of the decision to remove. It is plain that this was the approach that the Judge also took. I am satisfied that his decision shows that he did consider all of the relevant material, and that he did not introduce into his assessment irrelevant considerations. Given the scant evidence placed before him he did all that he could be expected to have done in relation to his assessment of the best interests of the children; to conclude simply that their interest were served by continuing to live with their mother the First Appellant. Thus I am satisfied that the grounds amount to no more than a disagreement with the Judge's findings and his conclusion upon proportionality. In the circumstances they disclose no error of law in the approach that the Judge took to the evidence. The conclusion that it was proportionate for the Appellants to be removed was one that was well open on the evidence, as Ms Rogers accepted, and I am satisfied that it was adequately reasoned.

Decision

The decision promulgated on 15 October 2015 did not involve the making of an error of law in the approach taken by the Judge to the evidence relied upon by the Appellants sufficient to require the decision upon the appeal to be set aside and remade, and that decision is accordingly confirmed.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellants are granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify them. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Deputy Judge of the Upper Tribunal JM Holmes
Dated 4 July 2016