Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: EA/03329/2018
EA/03331/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral determination given following hearing	**On 8 July 2019**
On 18 June 2019	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

LULZIME [C]
[RM]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr P V Thoree, Solicitor, Thoree & Co Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Immediately following a hearing on 16 April 2019 I found that there had been an error of law in the decision of the First-tier Tribunal and also gave directions. I gave detailed reasons for so finding. Of necessity much of what appeared within that decision will be repeated below.

2. The appellants are mother and son who now appeal against a decision of First-tier Tribunal Judge L K Gibbs, who in a decision promulgated in 23 November 2018, following a hearing before her at Hatton Cross on 12 November 2018 refused their renewed applications for EEA residence cards as family members of the first appellant's husband, Mr [S], who is an EEA national who was said to be exercising treaty rights in this country.

3. In my error of law decision I summarised the history of this appeal. The first appellant is a national of Albania who was born in May 1980 and the second appellant is her older son who is also a citizen of Albania. He was born in September 2005. The first appellant arrived in the UK in July 2012 and applied for a residence card on 24 May 2013 as a spouse of Mr [S], who is a national of Latvia, whom she had married on 22 March 2013. The couple have a son together, Jason, who is accepted as the biological son of Mr [S], but the application was refused in a decision dated 26 January 2014, essentially on the basis of inconsistencies in the marriage interviews which were conducted with Mr [S] and the appellant by the respondent.

4. The first appellant appealed against this decision together with her son, the second appellant, but the decision was upheld by First-tier Tribunal Judge O'Keefe on the basis of the material which was then before her in evidence.

5. By the time of this decision Jason had been born but the judge still did not accept for the reasons which she gave that the marriage had been a genuine marriage from its inception as was required. She in particular had regard to some inconsistencies which were contained within the answers given by the parties in their interviews with the respondent but when considering these inconsistencies also had regard to the lack of sufficient evidence on behalf of the appellants to counter this evidence. As I noted within my error of law decision Judge O'Keefe's decision was within the range of reasonable decisions open to her at that time. For the purposes of this decision I add that what was particularly apparent at the time of the hearing before her was how ill-prepared the appellants' case was at that time.

6. Subsequently, however, matters moved on in that the couple have continued to live together; the first appellant continued to reside together with Mr [S], in the same household, together with both her sons, that is her older son, the second appellant and also Jason who is the son of Mr [S] and the first appellant. In 2015 Jason was registered as a British citizen, it being accepted by the respondent (the Passport Office coming under the respondent's area of responsibility) that Jason was indeed the biological son of Mr [S] as claimed.

7. As time went by the appellants decided it was appropriate to make a new application for a residence card on the basis that the evidence now available, which included evidence that they had continued to live together with Mr [S] as a family and also evidence from Mr Khan, a social worker, was sufficiently strong and different from the evidence which had

been before Judge O'Keefe that although Judge O'Keefe's decision would be the starting point before any decisionmaker, the evidence now available was sufficient to demonstrate to the necessary standard of proof, which is the balance of probabilities, that Judge O'Keefe had (largely because the evidence now available was not before her) reached a decision which was as a matter of fact incorrect.

8. I recorded in my previous decision one other factor which makes this case rather unusual, which is that on 24 June 2015 the appellants were granted limited leave to remain in the United Kingdom outside the Immigration Rules under Article 8. That leave expired on 21 December 2017, but the appellants have subsequently been granted a further period of two and a half years limited leave and absent any factors such as criminal offending or the like, it would be anticipated that in due course, once a further two periods of leave have been granted, the appellants will be eligible to apply for indefinite leave to remain under current Rules.

9. Leaving this aside however, on 22 December 2017 the appellants again applied for residence cards on the basis of the first appellant's marriage to Mr [S], an EEA national exercising treaty rights in the UK, the basis of her application being, as already noted above, that the evidence now available was sufficiently strong that even though Judge O'Keefe's decision would be the starting point for a decisionmaker, nonetheless on the basis of the material now available, she had established that the marriage was not in fact a marriage of convenience. The respondent refused this application as well and it was the appeal against this decision which was dismissed by First-tier Tribunal Judge Gibbs. The appellants have appealed against that decision, permission having been granted by Upper Tribunal Judge McGeachy on 26 March 2019.

10. In my error of law decision I found that Judge Gibbs' decision had contained a material error such that it would be set aside. It is not necessary to repeat the reasons I gave in that decision in detail. It is sufficient if I note that the judge relied on what she regarded as the absence of evidence of cohabitation whereas in fact there had been such evidence before her. In particular I noted that there had been a letter from the first appellant's doctor addressed to the first appellant at the same address as that which the family was claimed to have been living at and this was the same address as shown on a P60 for Mr [S] showing that he was recorded living at that address. There are further documents in the bundle to the same effect and I refer to these within my earlier decision.

11. Further within the respondent's own bundle there was a document from the TV Licensing Authority addressed to the first appellant in September 2017 at that address and also there were utility bills which in her decision Judge Gibbs had said were lacking, although they had not been. One of these bills is a Southern Electric bill addressed to both the first appellant and Mr [S] covering a period from August 2017 to November 2017 and also an electricity bill of similar date. This evidence was in the judgment

of this Tribunal material because the judge ultimately deciding this matter would need to reconsider the apparent discrepancies in the interview in the light of the evidence that the parties had continued (if they were originally cohabiting as they claim) to cohabit; certainly there is evidence that for several years now they have been cohabiting. That might have been sufficient to cause a judge to depart from the findings which had previously been made by Judge O'Keefe, before whom such material had not been placed. For that reason I set aside Judge Gibbs' decision but because I considered this appeal had been going on far too long and the matter should be resolved finally one or the other it was retained in the Upper Tribunal. I noted in this decision that because the appellants are now here with leave and in due course might be expected to obtain indefinite leave to remain in the usual way this appeal might not be as vital to the appellants as it would otherwise have been (because they have the right to remain in any way) but nonetheless they are entitled to residence cards if the marriage was indeed a genuine marriage from its inception and they are entitled to a fair hearing on this issue.

12. Following that decision Mr Thoree on behalf of the appellants has prepared a detailed bundle which has been of great assistance to this Tribunal and I heard a limited amount of evidence this morning and also submissions.

The Hearing

13. The appellants relied on the witness statements previously before the Tribunal both from the first appellant and Mr [S], and also the other statements which had been before the court. None of the witnesses were cross-examined apart from the appellant and Mr [S]. I shall not set out below the record which I have made of this hearing, in which I set out to the best of my ability everything said before me, but I have had regard when reaching my decision to all the evidence given and the submissions as well as all the documents contained within the file, whether or not the same is specifically set out below. I have also given independent consideration to the answers which were contained within the interviews which as already noted do contain some inconsistencies although on review and especially given what I find to be the strength of the relationship between the appellant and Mr [S] I consider are less significant than at first blush absent such evidence might have appeared.

14. It is accepted on behalf of both the appellants and the respondent that the test for me is whether or not I consider on the balance of probabilities the marriage was a genuine one from its inception. If I find on the balance of probabilities that it was, then the appellants are entitled to residence cards. If on the other hand I find on the balance of probabilities that it was not a genuine marriage from its inception, then this appeal must be dismissed.

15. On behalf of the respondent Ms Cunha did not seek to persuade the Tribunal that the marriage between the first appellant and Mr [S] was not at any rate now a genuine and subsisting marriage. She accepted having heard all the evidence that it was now a genuine and subsisting relationship, but nonetheless submitted that on the balance of probabilities given that there had been some disparities between the answers given by the first appellant and Mr [S] in interview it was more likely than not that at its inception the marriage had not been intended to be a permanent one. On behalf of the appellant Mr Thoree submitted that the evidence now was strong and that the Tribunal should make a finding on the balance of probabilities that the marriage at its inception was a genuine one.

Discussion

16. As I indicated would be likely when giving my decision as to error of law I cannot say I am certain one way or the other. There must in my judgement be an element of doubt in this case. However, having considered all the evidence very carefully, I am satisfied that it is much more likely than not that the marriage was a genuine one from its inception. Having analysed the interviews given by the parties although there are some discrepancies within them, there are also a number of answers which are consistent and it was also quite clear to me by reason of the replies given within cross-examination that both the appellant and Mr [S] had some difficulty in understanding precisely what they were asked and they then had some difficulty remembering things which is by no means unusual.

17. Referring to the most recent refusal letter in which the present application was refused the respondent had noted first that the first appellant and Mr [S] had spelt their address differently. Given that Mr [S] is from Latvia and the first appellant (who needed the assistance of an interpreter during the hearing, although she does speak some English) is from Albania, it is not perhaps the strongest point against them that the spelling of an address in English was different. Much weight is also given within this letter to the supposed discrepancies within their respective descriptions of the uniform worn by the first appellant's son to school, whether or not Mr [S] ever picked the older son up from school, whether or not any other children were living in the building they lived in and whether they could name any of that child's friends. Again, looking at the respective answers given by the parties, in light of the fact that there is strong evidence now that they have been living together since the date of the marriage, I do not find these answers sufficiently discrepant to raise doubts of sufficient significance in my mind as to the genuineness of the relationship at its inception. Similarly, I do not consider that the answers with regard to how the parties met, the proposal, the wedding or what they do at Christmas were as different as the respondent maintained within the refusal letter. I also do not regard it as particularly significant that the first appellant could

not give a very detailed account of precisely what it is that Mr [S] did in regard to his employment. These are matters which have a greater weight in the absence of competing evidence; certainly before this Tribunal there was sufficient evidence that the couple were a close and loving one who cared for each other as to make the relatively small discrepancies within the interviews of less significance than they might at first have appeared.

18. Accordingly, having regard to all the evidence I consider that it is more likely than not that the relationship, which I accept now is very likely to be a genuine one was a genuine one at its inception. It follows that this appeal must be allowed and I will so find.

Notice of Decision

I set aside the decision of First-tier Tribunal Judge Gibbs, dismissing the appellants' appeal, and substitute the following decision:

This appeal is allowed, under the 2016 EEA Regulations.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Date: 30 June 2019