



IAC-FH-NL-V1

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

Appeal Number: IA/24243/2014

THE IMMIGRATION ACTS

**Heard at Bradford
On 14th July 2015, 8th September 2015 and
11th November 2015**

**Decision & Reasons Promulgated
On 10th December 2015**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ABDUL RASHID CHOUDHRY
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr M Diwnycz, HOPO

For the Respondent: Ms Khan of Counsel, instructed by Levi Solicitors LLP

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Hindson made following a hearing at Bradford on 14th October 2014.

Background

2. There is a complex history to this matter. The appellant came to the UK with his wife and children in 2003, originally as a visitor, and subsequently overstayed. One of his

children, [MR], married an EEA national. The claimant and other family members applied to remain as her family members.

3. [MR's] application was originally refused because the Secretary of State was not satisfied that the marriage was not one of convenience. However in a decision promulgated in September 2012 Judge Howard allowed the appeal, because he was satisfied that the marriage was not one of convenience. However, he dismissed the appeals of the present claimant and other family members on the grounds that they had to satisfy Regulation 8(2) of the EEA Regulations.
4. The claimant appealed against that decision and, on 25th March 2013 the then President of the Tribunal, the Hon. Mr Justice Blake sitting with myself set aside Judge Howard's decision and re-made the appeal by directing that, on the basis of the First-tier Judge's conclusions they were family members who were dependent on an EEA qualified person.
5. Subsequently residence cards were issued. However, on 8th April 2014, on the claimant's return to the UK following a visit to Pakistan, as a consequence of the answers he gave in the course of his interview on arrival, his residence card was revoked and he was refused permission to enter. It was the appeal against that decision which came before Judge Hindson.
6. Judge Hindson recorded that, whether [MR's] marriage was one of convenience or not had been previously determined in his favour by Judge Howard.
7. The judge said that in a letter dated 12th August 2014 the Secretary of State indicated that information had subsequently come to light showing that the EEA national and her husband had never lived at the same address and that no evidence had been provided that she was in fact exercising Treaty rights and was therefore a qualified person.
8. He considered the evidence provided by the Secretary of State. He noted that the EEA national was said to have been having an affair with another man and she was pregnant with someone from another relationship. He said it was unfortunate that she had not attended to give evidence but hardly surprising in the circumstances. The evidence of the Register of Electors could have been put before Judge Howard but was not. He accepted that the claimant had not deliberately hidden the breakdown of the relationship from the Secretary of State. Ample evidence of cohabitation had been provided. He gave weight to her written evidence, and to the witnesses called on the claimant's behalf. He said that he had carefully considered all of the evidence and could find no reason for coming to a different conclusion than Judge Howard.
9. So far as the second issue was concerned, namely whether the EEA national was a qualified person, he wrote as follows:

"The respondent also contends that [AK] is unemployed and not exercising Treaty Rights. I have been provided with evidence that she has been working, in the form of payslips, and a record of her PAYE provided by HMRC. The most recent evidence of

employment relates to October 2013 (payslips). [AK's] bank statements for early 2014 show her to be in receipt of Jobseekers Allowance. She makes no mention of her current employment status in her witness statement."

10. He then cited the relevant Regulations and concluded as follows:

"I have been provided with no evidence that [AK] is currently in employment. Indeed Miss Khan relied on the provisions that relate to jobseekers. The fact that she is in receipt of JSA indicates that the DWP is satisfied that she is seeking work. The fact that she had been able to obtain work over the four years prior to her pregnancy indicates that she has a genuine chance of being engaged. I am therefore satisfied that [AK] is a qualified person by virtue of being a jobseeker."

The grounds of application

11. The Secretary of State sought permission to appeal on three grounds.

12. First, the judge refused to allow cross-examination of the claimant or any of the witnesses in relation to their immigration history. The Presenting Officer had strongly protested to his course of action. Since additional evidence had come to light since the determination in 2012, the Immigration Judge was wrong not to allow further questioning on matters of credibility. Furthermore the judge erred by allowing ten unadopted witness statements into evidence and placed reliance on their contents when reaching his decision even though the EEA national failed to attend the hearing along with nine of the authors. She had also failed on two occasions to attend interviews when called by the Secretary of State. Given that the Secretary of State had not had any opportunity to question her, the fairness of the hearing was prejudiced.

13. Second the judge had failed to consider whether the EEA national was a qualified person as a jobseeker. She had been unemployed for a period of at least one year and one month at the date of the hearing and therefore failed to retain the status of jobseeker, let alone failing to provide evidence which could be considered compelling to demonstrate that she was continuing to seek employment.

14. Finally, the judge had failed to consider whether the claimant was a dependent on the qualified person. She was no longer in a relationship with the claimant's son. She had moved in with her current partner and had given birth to his child.

15. Permission to appeal was granted by Designated Judge Bird for the reasons stated in the grounds on 15th January 2015.

Consideration of whether there is an error of law

16. First, Ms Khan strongly argued that Immigration Judge Hindson refused to allow cross-examination in relation to the witnesses' immigration history, rather than the issue of the marriage of convenience, and the Presenting Officer was therefore going on a fishing expedition on matters irrelevant to the issue under appeal. Accordingly the judge was fully entitled to restrict cross-examination in the way that he did.

17. The difficulty in preventing a representative conducting cross-examination is that it is not possible to say what the effect of that cross-examination would have been had it been permitted to proceed. Although it is right to say that the judge did consider the evidence provided by the Secretary of State in relation to the marriage, had the Presenting Officer been allowed to cross-examine the claimant on his immigration history, which is clearly very poor, it is not possible to say whether the judge might have reached another conclusion. Credibility was clearly a central issue in the appeal and the refusal to allow the Presenting Officer to cross-examine on the claimant's conduct was not an irrelevant matter in the context of the issues in this appeal.
18. With respect to ground 2, under Regulation 6(2) subject to Regulation 7A(4) and 7B(4) a person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if -
 - “(a) He is temporarily unable to work as the result of an illness or accident;
 - (b) He is in duly recorded involuntary unemployment after having been employed in the UK for at least one year, provided that he -
 - (i) Has registered as a jobseeker with the relevant employment office; and
 - (ii) Satisfies conditions (a) and (b).”
19. Regulation (6) states that condition (b) is that the person can provide evidence that he is seeking employment and has a genuine chance of being engaged.
20. Regulation 6(7) states that a person may not retain the status of a worker pursuant to paragraph (2)(b) or jobseeker pursuant to paragraph (1)(a) for longer than the relevant period unless he can provide compelling evidence that he is continuing to seek employment and has a genuine chance of being engaged.
21. Regulation 6(8) states that the relevant period means -
 - “(a) In the case of a person retaining worker status pursuant to paragraph 2(b) a continuous period of six months.”
22. In this case there was evidence before the Secretary of State that the EEA national had worked between 2009 and 2012. Accordingly she was a person who was a worker and sought to retain that status. In order to meet the requirements of the Regulations she could only retain worker status for a continuous period of six months unless she could provide compelling evidence that she was continuing to seek employment and had a genuine chance of being engaged.
23. The evidence in the respondent's bundle, from Inland Revenue and Customs, was that she had not worked since 22nd June 2012. She had however also provided payslips for the period from July 2013 to the end of October 2013, together with evidence of her pregnancy and of the birth of a baby in June/July 2014.
24. Ms Khan argued that the claimant had satisfied the requirements of the Regulations by the production of the wage slips, which had been produced from an employer

that she had previously worked for. There was evidence that she was pregnant, which is why she had given up work. There were a number of reasons why the Inland Revenue records had not been updated. Furthermore the Secretary of State's own guidance confirmed that a failure to comply with tax and national insurance regulations did not mean that an EEA national could not be considered to be a qualified person.

25. Unfortunately none of those matters were considered by the judge in his determination. There was a clear inconsistency in the evidence before him, namely that from the Inland Revenue which was that the EEA national had not worked since 2012, and payslips which show that she had been working in 2013, which he was obliged to resolve and did not do so.
26. So far as Ground 3 is concerned, Ms Khan submitted that the issue of dependency had never been raised by the Secretary of State prior to the challenge to the determination but in any event he was able to show that he was a dependant on his son, the spouse of an EEA national which would satisfy the requirements of Regulation 7(1)(c).
27. Since the issue was not raised before the judge he can hardly be criticised for not dealing with it. Nevertheless in order to qualify for a residence card the claimant has to establish dependency; the Secretary of State will not issue one where dependency is not so established. It is clearly therefore in the claimant's interests for the issue to be resolved.
28. For the above reasons, I am satisfied that the judge erred in law. Accordingly the decision of Judge Hindson is set aside.

The resumed hearing on 8 September 2015

29. I heard oral evidence from the appellant Abdul Rashid Choudhry, his son [MR] and his brother-in-law [MH]. The appellant relied on the bundle of documents produced for the previous hearings, together with a further bundle of up-to-date witness statements and evidence relating to the various family's work history. There was also an up-to-date statement from the EEA national [AK].
30. Mr Diwncyz also produced further documentation, specifically evidence from HM Revenue and Customs in relation to [AK's] employment from 2009 to 2015, evidence from her employment at Three Way Solutions Limited and documents from the UK Border Agency, specifically the immigration report from Sarah Gallagher dated 18th January 2012 which was before Judge Howard and a document which has come into being since his determination was written, namely a report from Kent Police dated 14th December 2012 relating to [AK] who was encountered by them. It records that she was working for an escort agency as at that date and that she told them that she had previously been working for four months in London as a sex worker.

The Evidence of the Appellant

31. Mr Choudhry adopted his statement at the commencement of his evidence and said that it was accurate and correct.
32. At the heart of this case is the issue of whether the appellant's son [MR] entered into a sham marriage with an EEA national.
33. The family says that [MR] and [AK] met in 2007 in a local park. They got to know each other and, on 5th September 2009, they married. The marriage certificate shows that the marriage was solemnised according to the rights and ceremonies of the Church of England at St Augustines Church in the Metropolitan Borough of Calderdale. Mr Choudhry said that he wanted [MR] and [AK] to have an Islamic marriage, but she wanted to marry in the church. They were not happy with the decision and refused to attend the church wedding. Nevertheless following the wedding they organised a wedding party at the house and have accepted [AK] as one of the family members. She used to live with them at 10 [-], Halifax until the couple separated in 2013. However [AK] also used to regularly spend time at her mother's house, because there were a large number of people in 10 [-]. He became very confused about when he had last seen [AK] and how much time she had spent at their house and how much time she had spent with her mother. However he did finally say that his evidence was that before he went to Pakistan in March 2013 [AK] was living with them for most of the time.
34. Miss Khan sought to clarify his evidence during re-examination. It is the family's case that the couple split up around September to October 2013. However Mr Choudhry was clear that he saw [AK] on the last occasion in March 2014 and that prior to that date she was living at 10 [-]. When it was put to him that he could not have seen [AK] every weekday until March 2014 if the couple had split up in September/October 2013 he said that he was confused and he did not see her after the separation. He said that he saw her every day before the separation between 2009 and September 2013 but was unable to clarify his evidence about the period from September 2013 to March 2014.
35. Mr Choudhry was also asked about where he lived. In his statement he said that he and his wife and their four children have been living together in a four bedroomed house belonging to his brother-in-law [MH]. He and his wife shared one room, [MH], his wife and children shared another i.e. six people in all in a bedroom, his son [MR] shared a room with his wife [AK] and his three remaining children shared the last bedroom. He said that [MH] had two daughters, one aged 12 to 13 and another aged 5 to 6 and a son aged 11 to 12 who all shared a room together. [MH's] baby son slept in his parents' room. [MH] was the sole owner of the house which he had bought with a mortgage.
36. Mr Choudhry said that he was not working and did not give any contribution towards household expenses although his children worked and contributed to the bills and the groceries. He also said that his son [MR] paid him £50 each week. He

then contradicted his previous evidence and said that he contributed to the groceries. His two other sons, [HuR] and [HR] also gave him £50 every week or two.

37. When asked about his own finances he said that his wife used to get employment support allowance but that had been stopped because on assessment she had been told that she could work. He had been registered as a job seeker in the past but had not been registered as a job seeker since he went to Pakistan in 2014. Until he went to Pakistan he was receiving job seeker's allowance following registration in 2013 after he got his visa.
38. He was asked about [AK's] contribution to the household. He said that she used to contribute to household bills and with food and clothing but not cash and she never gave him any money. So far as he knew she never gave [MH] money for living in the house.

Evidence of [MR]

39. [MR] also adopted his witness statement. He said that he had been able to obtain a statement from his former wife in support of his father's appeal but he had not asked her to come to court to give evidence because he knew she would not attend.
40. Mr Diwncyz asked [MR] a number of questions about his wife. He said that he had known her for two years before they got married. Mr Diwncyz asked him about her religion. [MR] did not know what he meant. Mr Diwncyz asked him whether she was a Baptist or an Anglican or a Methodist or a Catholic. [MR] said that she was Catholic but he did not know whether she was from the eastern branch or a Roman Catholic. He was asked why they had therefore married in the Church of England and he said that it was up to her and he had agreed.
41. He was also extremely unclear about the dates in relation to the wedding. He did say that there was a gentleman interpreting the service for him and he spoke Punjabi and Lithuanian.
42. Mr Diwncyz asked [MR] repeatedly about how much contact he had had with [AK] following the wedding. He said that she had never gone away from the Halifax or the Sowerby Bridge area, where her mother lived and he saw his wife every day. He confirmed that he physically saw her each day.
43. The Kent Police report was put to him. Mr Diwncyz told [MR] that [AK] had not mentioned either her marriage or her address and had told the police that she had been in the London area working for five months as a sex worker. [MR] simply said that he had no knowledge in relation to this matter. His wife had told him that she might stay with a friend.
44. When it was put to him the obvious contradiction in his evidence that he could not have seen her everyday if she had been working as a sex worker in the London area [MR] maintained that he had not been lying to the court.

Evidence of [MH]

45. [MH] gave a different account of the family arrangements. He said that he had never had a mortgage and owned the house jointly with his wife. He lived there with his wife and their children and his brother-in-law's children but Abdul Choudhry and his wife slept at another property, 42 [-], Halifax, which they rented. It was a three bedroomed property. When asked why Mr Choudhry's children did not live with him in 42 [-] he said that they were very close to his own children and so they stayed with them.
46. So far as the contributions to the household were concerned he said that they were neither regular nor expected and he could manage without them although he sometimes struggled. He could not say how much they actually gave him but sometimes they bought things from town or from the local grocery.

Resumed hearing on 11 November 2015

47. At the commencement of the hearing Miss Khan applied for an adjournment to enable a friend of the family, Mr Stuart Hanson JP to give oral evidence in support of Mr Choudhry's appeal. He was abroad and unable to come to the Tribunal. He had attended the wedding of [MR] and [AK] and would be able to give important evidence about their relationship. She asked that the other witnesses give their evidence today but that the appeal be adjourned at that point in order to allow Mr Hanson to attend.
48. I refused the application. The solicitors have produced a full witness statement from Mr Hanson which I will take into account in reaching my conclusions. It is difficult to see what else could be added by his attendance. Furthermore this appeal has already been adjourned on one occasion. Evidence was taken on 8th September 2015. If the appeal was adjourned again there would be too long an interval between the hearing of the main evidence and the final resolution of the appeal.
49. Mr Diwncyz gave me some further information about the employment of the EEA national. According to the Inland Revenue she began work on 1st September 2015 but ceased on 11th September 2015. In time he would have been able to get that information in writing, but it was not challenged by Miss Khan and again there was no need to delay proceedings. I gave Miss Khan the opportunity of taking instructions from Mr Choudhry who was recalled to give evidence on that point. He confirmed that [AK] had only been employed for a little over a week at the Ocean Fast Food Takeaway. Mr Choudhry said that she had stopped work because her daughter was ill and there was no one else to look after her. Her own mother was not available because she was working. The daughter was now recovered and [AK] was trying to find a job near her house. She had also registered with an agency, Three Way Solutions, and requested part-time work. When asked if he intended to inform the court of the change of circumstances Mr Choudhry said that they were supposed to give the information today.

Evidence of [MbH]

50. [MbH] is the appellant's brother-in-law. Mr Choudhry's wife is [MbH's] sister. He confirmed that he supports his sister and her family financially and emotionally particularly since his sister has had a recent cancer diagnosis and her overall health and wellbeing has been affected considerably.
51. He was present at his nephew's wedding at St Augustine's Church in Halifax and said that it was a genuine marriage and not one of convenience.
52. Mr Diwncyz asked him if he was present throughout the whole ceremony and [MbH] confirmed that he was. He said that the ceremony was conducted in English and there was no interpreter present. It was put to him that [MR] had said that there was an interpreter who was able to translate both into Punjabi and Lithuanian. [MbH] said that the ceremony was conducted only in English and his nephew used alcohol and could not remember what went on. He had become depressed following the separation with his wife.
53. [MbH] said that he last saw [AK] at the family home in 10 [-] in September/October 2014 but had had no contact with her since then.

Evidence of [HuR]

54. [HuR] is the eldest son of the family. He confirmed that the contents of his witness statement were true and correct. In that statement he said that he lived within his three brothers and his parents at 10 [-], Halifax. It was put to him that according to his uncle [MH], the appellant and his wife live at 42 [-], Halifax. [HuR] explained that they used to all live together but because his mother was not well, and the house was overcrowded, they had temporarily moved out about a year ago. He accepted that at the time he made his statement saying that they all lived at 10 [-] his parents were in fact at 42 [-].
55. [HuR] said that he had seen [AK] about a month ago when he had bumped into her in town. They spoke briefly.
56. He was asked when he had found out that she had left his brother. He said that when his father came back from Pakistan and was stopped by the immigration authorities the family discovered what the situation was. [MR] had not told them before.
57. [HuR] had difficulty in saying when he had seen her before his father returned from Pakistan but thought that it was about a month before he had embarked which would have been around February 2014.

Evidence of [HR]

58. [HR] is the third son of the family. He also accepted that although he had said in his statement that his parents were living at 10 [-] in fact they had moved out to 42 [-] about a year ago. However he said that they spent most of the day at 10 [-].

59. He had also met [AK] a few months ago in town and had a brief conversation with her.
60. [HR] said that [AK] had stopped living at 10 [-] in September 2013. He had asked his brother where she was and had been told that she was not well. He only became aware that they were no longer living together as man and wife when his father returned from Pakistan in April 2014.
61. He gave a little information about Stuart Hanson whom he described as a very close friend of his father who had been to the house on numerous occasions. He had taught English at the mosque.

Evidence of [AR]

62. The last of the brothers is [AR] who similarly accepted that his statement was inaccurate in that it described his parents as living at 10 [-] whereas in fact they had been in 42 [-] for about a year.
63. When asked when he had last seen [AK] he thought it was around February 2014 but ever since she had married she had stayed with her mother quite a bit. He said that he was aware that she was not living there between September and December 2013 but he did not remember any other occasion when she was not living at the house.

Evidence of [MfH]

64. [MfH] is another brother of [MB], the appellant's wife. In his statement he confirmed that the marriage was genuine and he said that he had met her once or twice at the family home in 10 [-]. He then said that he had met her once when she had attended at court. He had difficulty remembering any dates.

Evidence of [WD]

65. [WD] is the appellant's half brother. They have different mothers and share the same father. His family lives in Manchester but he sees his brother regularly.
66. He also said that he had met [AK] several times at 10 [-] and had last seen her there around September 2013. When he visited the family, she was there most of the time. He went three or four times a year and she was generally there.

Evidence of [ND]

67. [ND] is another brother and also lives in Manchester.
68. [ND] said that he visited 10 [-] at least once a month and [AK] was there for the majority of the time. He may have seen her up to twenty times. It was generally in passing because often [MR] and [AK] were either on their way in or out or asleep. He had never had a proper conversation with her because there was a language barrier. She spoke in broken English, but enough to communicate.

Evidence of Arshad Khan

69. Arshad Khan is a project worker at the Healthy Living Partnership in Halifax. In his written statement he gave a character reference for the appellant but added, in oral evidence, that [MR] and [AK] had enrolled on a healthy cooking course together. They attended all of the classes over an eight week period. He was able to confirm their attendance not because he had taught the course but because he had to administer the evaluation and he could see from the register that they had attended.

The Documentary Evidence

Witness Statements

70. [AK] has provided several witness statements. The first is dated 2nd June 2012. She said that she met [MR] through a mutual friend, [D] at Shibden Park in Halifax. She does not give a date.
71. She confirmed that the couple married on 5th September 2009 but that her mother did not want her to marry and did not attend the wedding. Following the ceremony they walked back to her mother's house and then on to 10 [-] where there was a wedding party. Her mother did not attend.
72. She said that they lived with [MR's] family but because there was not much room for her stuff at 10 [-] she kept a lot of possessions at her mother's house. She calls [MR's] parents mum and dad.
73. She gave part of her wages to [MR] who then passed the money on to the rest of the family.
74. At the time of the wedding she was working through an employment agency. She initially worked with S Sheard and Son Limited and she was aware that they had informed the Immigration Officer that she had given her home address as 22 [-] in May 2011. She did not remember that anyone at S Sheard and Son had ever asked her for her address. She noted that her payslips contained her mother's address and although she asked the supervisor to update it and he had said that it would be done in fact it never was.
75. She was aware that the Home Office had arranged an appointment for her and [MR] to attend their office on 7th November 2011 but she was not well and was staying with her mother because it was too busy and noisy at 10 [-].
76. She was interviewed on 16th January 2012 but the Home Office did not provide interpreters and the interview record was not read back to her. She was aware that she and [MR] had given different answers when describing the bedroom but explained that, following an earlier leak from the roof, new carpets had just been laid and at the same time a wardrobe was removed. She was not aware of this at the time of the interview.

77. On 16th January 2012 she informed her supervisor at S Sheard and Son that she would be leaving them but she did not hand in any written notice. [MR] was not aware of this before the interview with the Home Office. Her friends had informed her that there were jobs in Ramsgate. Her plan was to find a job there and for [MR] to join her once she had found employment. She did go to Ramsgate but only stayed there for a week and then returned to Halifax.
78. Once she had left S Sheard and Sons she registered with Three Way Solutions in Halifax and gets two or three days per week employment there. She confirmed that the marriage was genuine.
79. The final witness statement is dated 3rd September 2015. She confirmed that the marriage was genuine. She and her husband had their ups and downs mainly due to living in an overcrowded household. They split up in September/October 2013 after she had become pregnant by somebody else. She had just started part-time work as a cleaner in a takeaway in Halifax.
80. Witness statements have also been provided from Mr Stewart Hanson who describes himself as a family friend but who is also their representative having acted on their behalf when Mr Choudhry was stopped in April 2014 on re-entry to the UK.
81. Mr Hanson said in his statement that he had visited the family at 10 [-] approximately six times. He attended the church wedding on 5th September 2009 and as a practising Christian he would not have done so if he had thought at any stage that it was a sham marriage. He provided two photographs of the wedding. There are also half a dozen photographs of the wedding in the appellant's bundle. He makes no reference to his having actually seen [AK] in the family home on his visits.
82. The family have also produced a number of other witness statements from [ZB], [SB] and [KB] who were not able to give evidence and two witness statements from friends, and a number of character references from local councillors and from the general secretary of the local mosque.

Documentary Evidence in Support of [AK's] Residence at 10 [-]

83. There are a number of bank statements addressed to [AK] at 10 [-] from Santander Bank dating from March 2010 to August 2010 and February 2011 to September 2011. There is also a letter from Calderdale Interface Council addressed to her at that address dated 28th February 2011, a letter from Voluntary Action Calderdale dated 28th March 2011, a second letter from Calderdale Interface Council dated 3rd June 2011 and a letter from the Healthy Living Partnership dated 22nd June 2011. There is also a letter from Talk Talk dated 7th November 2011.
84. Amongst the 859 pages of documents there is extensive evidence of Abdul Rashid Choudhry's residence at 10 [-] together with the residence of his wife and four children which is uncontentious.

Evidence of [AK's] Work in the UK

85. There is some evidence of [AK's] employment in the UK in the appellant's bundle which is confirmed by a letter from HM Revenue and Customs dated 4th September 2015. In the tax year 2009 to 2010 she earned £2,437 gross with S Sheard and Sons Limited and £1,547 with Eton Payroll Services Limited.
86. In 2010 to 2011 she earned £16,243 with S Sheard and Sons Limited.
87. In 2011 to 2012 she earned £50 with Three Way Solutions Limited and £13,685 with S Sheard and Sons Limited. She also earned £153 with Vital Recruitment Peterborough Limited.
88. In 2012 2013 she earned £1,558 with Three Way Solutions Limited.
89. In 2013 to 2014 she earned £4,922 again with Three Way Solutions Limited and the Inland Revenue notes that records show a claim to benefits.
90. In 2014 to 15 she was shown as earning a nil income.
91. She also provided an accountant's letter dated 2nd September 2015 confirming her employment as a cleaner at £104. It is not disputed that that employment only lasted just over a week.
92. So far as the issue of dependency is concerned there is documentary evidence of a payment from [MR] to the appellant of £50 on 3rd March 2015, 30th March, £75 on 24th April and £50 on 5th May. It was the appellant's oral evidence that [MR] gave him around £50 every week. He was emotionally dependent upon his son and he helped him with his medicine. He was also supportive during his wife's illness.

The Respondent's Evidence

93. The respondent has not provided a transcript of the interview which took place upon the appellant's arrival in the UK on 8th April 2014. She has provided the notes of the interview which took place on 6th May but not of any attendance notes on 8th and 12th May. In that interview the appellant confirmed that his son was married to an EEA national and he gave her name and nationality and the date of the wedding. He said that he had not attended because he was busy at the mosque and he had not attended because his son had married with his own choice. He confirmed that his son and daughter-in-law lived at 10 [-].
94. The respondent has also provided the letter of 29th April 2014 inviting Mr Choudhry and [MR] to interview. The letter points out that [AK] is not legally required to attend as she is not the subject of enquiry but without her support it is not difficult to see how the applications would be prejudiced and likely to fail.
95. There are extracts from [AK's] Facebook page which revealed a timeline going back several years but did not mention her husband anywhere. They show several photographs of a man who is believed to be her current partner.

96. The respondent also made a check on the register of electors which showed [AK] as an occupant of 22 [-] and was never registered at 10 [-].
97. The respondent relies on the Immigration Officer's report dated 18th January 2012 which led to the respondent's refusal to grant the appellant a residence card on 20th February 2012. It was this decision of course which was the subject of the appeal to Judge Howard and, following it being allowed, was reversed and the residence card issued on 22nd July 2013.
98. The Immigration Officer recorded that she had contacted [AK's] employer and had been told that her next of kin was listed as her mother and her address was given at 22 [-].
99. She noted that [AK] could only name her husband's parents and one of his brothers but not his other brother's aunt or uncle or their three children despite having claimed to have lived with them for two years. There were discrepancies between the two of them in relation to how much time [AK] spent at the house, about her employment and they each gave a different description of the bedroom they were supposed to be sharing.
100. Finally, there is the report from Kent Police dated 17th December 2012 and therefore after Judge Howard's determination which records an interview with [AK] who told the interviewing officer that she had been a sex worker for four months working in London as an escort previously and with the present agency for about a month. She gave her address as 22 [-], Halifax.

Findings and Conclusions

101. The starting point for the consideration of the findings of fact is the determination of Judge Howard promulgated on 13th September 2012. Judge Howard heard oral evidence from many of the same witnesses as I have heard today but, significantly, also from [AK].
102. Judge Howard records her evidence that she had never given her employer her address and that any address that they had been given would have been by the agency which sent her. They had only ever sought a contact telephone number from her. She said that she had seen her mother's address on the wage slips and at least twice asked them to update their records. There was a clear conflict between what she said and what the respondent was told. Since he had not heard from the maker of the statement, and there were a number of reasons why the records may not have been updated he accepted the evidence of [AK] on the point.
103. He then wrote as follows

"Further, during the conversation with the employee of Sheard and Son the respondent was told that [AK] had handed in her notice and was to look for work in Ramsgate, Kent. This was confirmed in evidence. Apparently she has friends there. Her plan was to find work and for her husband to join her thereafter. The plan died when she

was unable to find work. The dates suggest [AK] handed in her notice on the day of the interview.”

104. The judge analysed the interview record. He was not satisfied so far as the answers to the description of the bedroom were concerned and said that he found the evidence to be wholly unconvincing. A reasonable suspicion had been raised. However set against the remainder of the interview where consistent answers were given he was satisfied that the evidential burden had been met and that the colour of the carpet was no more than a genuine mistake.

105. Devaseelan (Second Appeals - ECHR - Extraterritorial Effect) Sri Lanka* [2002] UKIAT 00702 sets out the proper approach to a second adjudication. The Tribunal holds

“The First Adjudicator’s determination stands (unchallenged, or not successfully challenged) as an assessment of the claim the appellant was then making, at the time of that determination. It is not binding on the Second Adjudicator; but, on the other hand, the Second Adjudicator is not hearing an appeal against it. As an assessment of the matters that were before the First Adjudicator it should simply be regarded as unquestioned. It may be built upon, and, as a result, the outcome of the hearing before the Second Adjudicator might be quite different from what might have been expected from a reading of the first determination only. But it is not the Second Adjudicator’s role to consider arguments intended to undermine the First Adjudicator’s determination.

The Second Adjudicator must, however be careful to recognise that the issue before him is not the issue that was before the First Adjudicator. In particular, time has passed; and the situation at the time of the Second Adjudicator’s determination may be shown to be different from that which obtained previously. Appellants may want to ask the Second Adjudicator to consider arguments on issues that were not – or could not be – raised before the First Adjudicator; or evidence that was not – or could not have been – presented to the First Adjudicator.”

106. The Tribunal then set out the approach to further evidence. The First Adjudicator’s determination should always be the starting point. However facts happening since the First Adjudicator’s determination can always be taken into account by the Second Adjudicator. If matters which could have been before the First Adjudicator but were not should, in the assessment of credibility, be treated with the greatest circumspection.

107. Applying those principles to the facts of this case, Miss Khan argued that the evidence from the electoral roll could have been presented to Judge Howard but the respondent chose not to do so. She asked therefore that it be given little weight.

108. The submission is misconceived. The credibility of the evidence from the electoral roll is not in doubt. There may be a question mark as to why it was not produced earlier, but the answer to that question cannot be that the evidence itself is suspect.

109. So far as the evidence from Kent Police is concerned, that is plainly a matter arising since the determination of Judge Howard. It is clearly highly relevant. It wholly

undermines the evidence given by [AK] at the hearing when she apparently told the judge that she planned to find work in Kent and for her husband to join her thereafter. Given the nature of the work in which she was engaged, this is most unlikely.

The Law

110. Under the Immigration EEA Regulations 2006 “spouse” does not include a party to a marriage of convenience. Accordingly, the appellant would not be entitled to a residence card as the dependent direct relative in the ascending line of his son [MR] if his marriage to [AK] is a marriage of convenience.

111. Marriages of convenience are defined for the purposes of the directive as

“Marriages contracted for the sole purpose of enjoying the right of free movement and residence under the directive that someone would not have otherwise. A marriage cannot be considered as a marriage of convenience simply because it brings an immigration advantage, or indeed any other advantage.”

112. In Papajorgji (EEA Spouse – Marriage of Convenience) Greece [2012] UKUT 00038 the Tribunal held

“(i) There is no burden at the outset of an application on a claimant to demonstrate that a marriage to an EEA national is not one of convenience.

(ii) IS (Marriages of Convenience) Serbia [2008] UKAIT 31 establishes only that there is an evidential burden on the Claimant to address evidence justifying reasonable suspicion that the marriage is entered into for the predominant purpose of securing residence rights.”

113. In IS the Tribunal said

“Not every applicant needs to prove that his marriage is not one of convenience. The need to do so only arises where there are factors which support suspicions for believing that the marriage is one of convenience. Translated into the technical language of the English law of procedure and evidence, that means there is an evidential burden on the respondent. If there is no evidence that could support a conclusion that the marriage is one of convenience, the appellant does not have to deal with the issue.”

114. Again, in Papajorgji the Tribunal said

“This passage indicates that the AIT concluded that there was no burden on an applicant in an EU case until the respondent raised the issue by evidence. If there was such evidence it was for the applicant to produce evidence to address the suspicions. In our judgment such an approach can be described as one of an evidential burden in the first place on the respondent and then shifting to the Claimant in the light of the relevant information rather than a formal legal burden. We agree with that approach.”

115. It was Miss Khan’s first submission that the initial burden on the respondent to provide evidence justifying reasonable suspicion had not been discharged. She

reminded me that the information before the Immigration Officer on 8th April 2014 was that which was before Judge Howard and which had been accepted by him.

116. When the appellant and his son were stopped at the airport they could not provide [AK's] date of birth or a contact number for her and that they did not know if she worked or what she did for a living. No transcript of that conversation has been provided, but the appellant accepts that they did not know her date of birth or her telephone number. He maintains that they were not asked any questions about her work and the interview only lasted for a few minutes.
117. For reasons which are outlined later in this determination, although there is no direct evidence from the respondent, I have had the opportunity of assessing the evidence of the appellant and I find it to be wholly lacking in credibility. I therefore prefer to rely on the assertion made in the IS125 that the appellant and his son did not know if [AK] worked or what she did for a living and that the appellant is not truthful when he says that they were not asked any questions.
118. Subsequently [MR] was asked to attend at interview on 29th April 2014. A fax was received from Stuart Hanson described as an immigration advisor querying the need for attendance, and the interview was postponed.
119. The IS125 states that the appellant attended for further interview but was not accompanied by his son or [AK]. Nor had he brought any evidence with him to demonstrate cohabitation, [AK's] occupation or that the marriage was otherwise genuine.
120. In his rebuttal statement the appellant says that he was not asked to bring any evidence to demonstrate co-habitation. I have a copy of the letter dated 29th April 2014 which makes it clear what the purpose of the interview was. By this stage the appellant had the benefit of legal advice from Mr Hanson.
121. I do not accept that he did not bring the evidence because he did not realise that he had to do so.
122. The IS125 criticises the appellant for not being able to spell or pronounce [AK's] name. He says that this is correct and he provided [AK's] name twice but it is difficult to spell. It is clear from the interview record that the appellant did give [AK's] name and I accept that its spelling is complicated. I also accept that the characterisation in the IS125 that the whole family were dependent on [AK] is not a wholly accurate reflection of the interview notes, but nothing hangs on this. It is after all the appellant's case that he is dependent on her.
123. It is correct and regrettable that there is no transcript of the attendances on 8th and 12th May. The encounter on 8th May appears simply to have been the filing of documentary evidence by the appellant.
124. So far as the interview on 12th May is concerned neither the appellant nor his son [AR] challenge the assertion on page 2 of the IS125 that they were asked if they were

still residing with [AK] and they said “sometime” but they would not elaborate. By this point the Immigration Officer had spoken to [AK] who had told them that she and [MR] had split up a year earlier. She was expecting a baby but it was her boyfriend’s. When told that the Immigration Officer had spoken to [AK] who had said that she had not been in a relationship with [MR] for over a year [AR] said that they had not known about it but then said that he was aware that the relationship had broken down.

125. Whilst the appellant does not address the issue at all, [AR] says in his rebuttal statement that he had told the Immigration Officer that he did not know that [AK] and [MR] had split up let alone that this had happened over a year ago. He said that he and his father were in shock when the Immigration Officer informed them about it and they actually did not believe him.
126. That is wholly inconsistent with the oral evidence today which was that [AR] was aware that [AK] had not been living at 10 [-] from September to December 2013 and he could not remember any other periods when she was not there.
127. Accordingly, by the date of the decision, on 13th May 2014 to refuse the appellant admission under European Community law and the subsequent revocation of the residence card on 8th September 2014 the respondent had the following information in front of her
 - (i) The determination of Immigration Judge Howard and his finding that the marriage between the EEA national and [MR] was genuine.
 - (ii) The failure of the appellant, on 8th April 2014 to give [AK’s] date of birth or contact number or any details of where and whether she worked.
 - (iii) The failure of the appellant to bring evidence of co-habitation on 6th May 2014, except for some bank statements, Talk Talk bills and a few letters.
 - (iv) The information provided on 12th May 2014 that [AK] was expecting a baby by another man and that the couple had split up a year earlier.
 - (v) The failure of [AK] to come forward despite repeated requests for her to do so.
 - (vi) The register of electors indicated that she and her husband had never lived at the same address.
 - (vii) Evidence from Facebook which did not mention her husband and no mention that they had ever been in a relationship.
128. Miss Khan submitted that Facebook histories could be changed and, given that [AK] had moved on with her life it was quite likely that by the time of the print-out her previous marriage had been deleted.
129. That may or may not be right but even leaving that aside, the evidence before the respondent at the time the decision was made was sufficient to discharge the burden of proof upon her that there were reasonable suspicions that this was a marriage of convenience.

130. The evidential burden therefore shifts to the appellant to prove that the marriage is not one of convenience.
131. Whilst cohabitation is not strictly necessary, since it is the appellant's case that the couple cohabited in her house for four years clearly, if that was found to be untrue it would severely damage the credibility of this claim.
132. In the appellant's favour there is a certain amount of documentary evidence, mainly Santander bank statements sent to the address between March 2010 and September 2011. There is also a letter from Talk Talk dated 7th November 2011 and a couple of letters addressed to her at that address. Amongst those letters is one from the Healthy Living Partnership and the oral evidence from Arshad Khan that the couple did a cookery course together for eight weeks.
133. There is no documentary evidence that [AK] was registered with a GP at that address, although there is evidence that [MR] was. The evidence from the electoral register and from her employer is that she was living with her mother. There are also a few photographs and witness statements from family members and supporters.
134. The evidence from Kent Police is unchallenged. [AK] was clearly in London and Kent from around August to December 2012.
135. There is no reason to doubt Mr Hanson's bona fides but the evidence which he could give as to the genuineness of the marriage is limited to the instructions which he was given as their representative and to a few visits to the family home when it is not said that [AK] was present.
136. I turn to the oral evidence.
137. Sadly much of what has been told to me in this Tribunal is demonstrably untrue. The appellant started by telling Mr Diwncyz that he slept in one of the rooms at 10 [-] and described which other members of the family slept in each room. It was only when [MH] gave evidence that it transpired that in fact the appellant and his wife lived at 42 [-], a three bedroomed house and had not been living at 10 [-] for the last year. Each and every one of the sons signed a witness statement in August 2015 stating that they and their parents had all lived together at their present address since 2003. None were telling the truth.
138. The appellant had great difficulty in saying when [AK] lived at the house. He was vague and confused but finally stated definitively that it was his evidence that [AK] was living at the house most of the time until he went to Pakistan in March 2014. In re-examination he said that he saw her almost every day. It was put to him that in his witness statement he had said that the couple split up in September/October 2013. He then said that after the separation he did not see her. However he also said that he was not aware of the separation until he came back from Pakistan. He did when it was put to him that there was a difficulty with his evidence he said that he did not know what had happened to her between September 2013 and March 2014.

He said that [MR] had told him that [AK] was spending most of the time with her mother.

139. [MR] said that he saw his wife every day between 2009 and 2013. Mr Diwncyz asked him repeatedly if he physically saw her every day during that period and he said that he did.
140. When the Kent Police report dated December 2012 was put to him he said that he had no knowledge of [AK] having been away for five months working as a sex worker. He had thought that she was staying with a friend.
141. The police report is wholly inconsistent with the evidence given to the Tribunal that, apart from spending time with her mother, between 2009 and the claimed date of the break up of the marriage in September 2013, [AK] was living at 10 [-].
142. The appellant also stated that the news that [AK] had split up with [MR] and was pregnant by another man came as a shock to them when they were informed of it in April 2014. It appears that he was aware of her pregnancy because he told the Immigration Officer that she was ill as a consequence.
143. If the baby was born in June/July 2014 he/she would have been conceived at about the time that it was said that [MR] and [AK] were splitting up, in September 2013, which is unlikely. Moreover [AK] had spent at least five months of the previous year working as a sex worker in Ramsgate. I do not accept that the family believed that [AK] was pregnant with [MR's] child, and to suggest that the Immigration Officer in effect broke the news to them that the marriage had ended is frankly ridiculous.
144. [MR] also struggled with the evidence of his wife's religion. Eventually he said that she was a Catholic and she attended the church where they got married. On the marriage certificate it says that St Augustines is a Church of England. When asked why they had chosen that church if [AK] was Catholic he said that she could get coffees there and they look after you.
145. He agreed that he was a strict Muslim and attended the mosque but said that he had married in church because [AK] did not want an Islamic wedding. He also, somewhat surprisingly, said that there was an interpreter in the church interpreting into both Punjabi and Lithuanian, a claim flatly contradicted by his uncle who was the only member of the family in attendance.
146. The person who could give the most relevant evidence is of course [AK] herself. She has chosen to be absent. I was informed that she was not willing to attend court.
147. She did of course attend before Judge Howard and Miss Khan submitted that I should be very slow in disagreeing with his assessment of her credibility. However matters have moved on since then. Some of what she said to Judge Howard has been shown to be plainly wrong, for example, in relation to her plans for her husband to join her when she had found work in Kent.

148. It is quite clear that the family are in contact with her. She cooperated with them in September 2015 in providing an accountant's letter and a payslip in relation to her week's work at a takeaway. I have no reason to disbelieve the evidence of two of the brothers when they said that they had run into her by chance on a couple of occasions.
149. I accept that she was in a friendly relationship with the family. There is no reason to doubt Mr Khan's recollection of their having attended a cookery course together.
150. Neither do I doubt the evidence of the [D] brothers who said that they saw her from time to time when they visited Halifax. [WD] said that he saw her several times. [ND's] estimate that he had seen her twenty times is exaggerated because if he saw her three or four times a year for the four years when it is being said that the couple were together it does not add up to twenty. He was keen to say that he only saw her in passing and that often the couple were on their way out or asleep. If they were asleep it would have been in their bedroom. The inconsistencies given to the Immigration Officer about the bedroom were found to be damaging by Judge Howard and he found the evidence of a leaking roof and damaged carpet to be wholly unconvincing.
151. The fact that [AK] was friendly with the family and that she was occasionally present at their home is not at all inconsistent with her having entered into a marriage of convenience with [MR].
152. I do of course accept that the fact that the marriage has broken down and that [AK] is now in a relationship with somebody else and has his child is not evidence in itself which establishes that she entered into a marriage of convenience in 2009. Genuine marriages break down and the fact that this marriage broke down does not mean that it was one of convenience.
153. There is evidence from Santander Bank, and from Talk Talk and from the local community of [AK] living at 10 [-] but the most important evidence, from her employer and from the electoral register, and the absence of evidence from a GP is against her. There is also evidence that she was present in the home, but the people who could give the most accurate picture of her living there were all untruthful to the Tribunal.
154. Taking into account the evidence as a whole I conclude that the burden on the appellant has not been discharged.
155. Accordingly I conclude that the appellant has not established that he is the family member of an EEA national.

The Qualification Issue

156. Although strictly it is not necessary to determine whether [AK] is a qualified person within the meaning of the Regulations I do so for the sake of completeness.

157. The evidence from the Inland Revenue is that [AK] worked in the tax year from 2013 to 2014 but has not earned anything since. She had a baby in June/July 2014. She also worked for a single week in September 2015.
158. In order to satisfy Regulation 6, she has to establish that she is continuing to seek employment with a genuine chance of being engaged. According to her own evidence she last worked in October 2013 and aside from that has only worked for a single week. She has of course had a baby in June 2014.
159. I do not accept the oral evidence that she was unable to work as the result of her daughter's illness. It is clear to me that, had enquiries not been made of the Inland Revenue, the fact that [AK] had only worked for a single week would not have been disclosed. I place no weight upon the claim that her daughter's illness prevented her working, in the absence of any documentary evidence, but in any event it is clear that she recovered from that illness and yet [AK] did not return to work. There is no evidence that she has registered as a job seeker with the relevant employment office.
160. The print-out from Three Way Solutions dated 23rd July 2015 running from 6th April 2010 to 5th April 2016 do not show any hours worked after December 2013 nearly two years ago. She therefore ceased work well before her baby was born and has only done one week since in the last two years. That pattern of work is insufficient to meet the requirements of Regulation 6.
161. There is no evidence of any other basis upon which the EEA national could be considered to be a qualified person.
162. Finally, the appellant has to establish dependency. The sole documentary evidence relating to dependency consists of a few transfers of £50.
163. Until March 2014 the appellant was receiving job seeker's allowance and his wife used to receive employment support allowance. He said that he was supported by his children who all worked.
164. In the 800 pages of documents which have been produced very few relate to Mr Choudhry's finances and only cover a two month period. They do show that his sons, including [MR], make some transfers into the account but a total of £225 over a three month period from March to June 2015 is not a sufficient basis to establish financial dependency.

Notice of Decision

The decision of the original judge has been set aside. It is re-made as follows. The appellant's appeal is dismissed.

No anonymity direction is made.

Signed
Upper Tribunal Judge Taylor

Date