



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/01761/2017

THE IMMIGRATION ACTS

Heard at: Field House  
On: 3<sup>rd</sup> December 2019

Decision & Reasons Promulgated  
On 14<sup>th</sup> January 2020

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Nilam Shrestha  
(no anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

For the Appellant: Ms Malhotra, Counsel instructed by Capital Solicitors  
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Nepal born on the 14<sup>th</sup> July 1988. She appeals with permission the decision of the First-tier Tribunal (Judge JHL Shepherd) to dismiss her appeal under the Immigration (European Economic Area) Regulations 2016 ('the Regs').

### **The Appeal in the First-tier Tribunal**

2. The matter in issue before the First-tier Tribunal was whether the Appellant's marriage to her Portuguese husband Mr Paulo Freitas Soares was one of convenience. If it was, then it was common ground that the appeal fell to be dismissed. If it wasn't, or rather the Respondent could not prove that it was, then the appeal fell to be allowed on the basis that the Appellant was the family member of an EEA national exercising treaty rights, and so entitled to a recognition of her right of residence under the Regs.
3. The Appellant did not appear before the First-tier Tribunal to give evidence, having elected to return to Nepal in order to get out of immigration detention. The Tribunal nevertheless had before it the following competing evidence. The Appellant relied upon the live testimony of her husband, and two additional witnesses, who averred that they knew the couple and believed them to be genuine. She further produced money transfer orders showing Mr Soares to be supporting her financially, transcripts of online text and video chats between the two of them, photographs, and evidence of cohabitation in London consisting of the tenancy agreement on the property the couple claimed to share, and utility bills etc. The Appellant herself provided a sworn witness statement. For the Respondent the Presenting Office relied upon a transcript of a 'marriage interview' which took place on the 9th February 2017. This transcript, submitted the Respondent, revealed that the parties to this marriage gave inconsistent evidence on key matters, and were ignorant of important facts about each other, such that it revealed this marriage to be a sham.
4. The First-tier Tribunal found that the interview record contained sufficient discrepancies for the initial evidential burden upon the Respondent to be discharged. Having heard the evidence for the Appellant it was not satisfied that the suspicion raised by the Respondent had been allayed. It dismissed the appeal on the ground that the marriage was one in which the predominant purpose had been to secure an immigration advantage for the Appellant. For good measure it added that the Sponsor had given evidence that he had not been working "for some considerable period of time" and so was, in any event, not exercising treaty rights.

### **The Appeal to the Upper Tribunal**

5. Permission to appeal was granted by First-tier Tribunal Judge PJM Hollingworth on the 13<sup>th</sup> March 2019.
6. When the matter came before me on the 14<sup>th</sup> May 2019 the Appellant advanced the following grounds:
  - i) The Tribunal erred in fact/took immaterial considerations into account when it stated that the Appellant's witness statement was not certified as properly translated, because it wasn't: the Appellant speaks fluent English.

- ii) The Tribunal erred in fact/took immaterial considerations into account when it drew adverse inference from the Appellant's failure to arrange a video link to enable her to give evidence at the hearing.
- iii) There was a procedural unfairness/disadvantage in that the sponsor Mr Soares was at no stages in this process provided with an interpreter in his native - and only fluent - language, Tetum. Mr Soares originates from East Timor and although he speaks some English and Portuguese, he speaks neither language well enough to give evidence in it. The interpreter he had at the Home Office interview, and at the hearing, was an Indonesian speaker. Indonesian and Tetum have commonalities but are distinct languages. This was a material factor that the Tribunal should have considered in the round when deciding what weight to place on the discrepancies arising in his evidence. It gave rise to material inaccuracies in the evidence, an example being the Tribunal's understanding that Mr Soares said he was not working. Mr Soares has been working at all material times and in fact there are payslips and P60s in the bundle to demonstrate that this is the case.

7. The Respondent opposed the appeal on all grounds.
8. By my written decision of the 24<sup>th</sup> June 2019 I dismissed the appeal on grounds (i) and (ii) but upheld ground (iii).
9. In respect of ground (i) I found no material error in the Tribunal's commentary at its §23 that the Appellant's statement was not accompanied by a certified translation. Whilst I accept it was an error of fact, and that she gave her statement in English, it does not appear that any adverse inference was in fact drawn from the point.
10. Similarly ground (ii) identifies an error, but not one such that justifies any interference with the First-tier Tribunal decision. The First-tier Tribunal recorded that the Appellant had returned to Nepal and could not therefore give live evidence in her appeal. It records that her representative on the day, a Mr Kumar, had made no submissions to the effect that she had somehow thereby been the victim of unfairness. The Tribunal agreed with Counsel for the Home Office that the Appellant could have chosen to give evidence via skype if she wished to. Reliance is placed on the Family Division decision in ML (Use of Skype) [2013] EWHC 2019. The Appellant takes issue with this comment, not least because the use of media such as Skype has been deprecated in this jurisdiction: R (Mohibullah) v Secretary of State for the Home Department (TOEIC-ETS-judicial review principles) [2016] UKUT 00561 (IAC). Whilst that is true, I am not satisfied that anything turns on that. The fact is that this was an appeal under the EEA Regs and that the Appellant could therefore have sought entry clearance in order to give live evidence had she so wished. Nor does it appear that the Tribunal in fact weighed her absence against her.
11. Ground (iii) was not so straightforward.

12. Before the hearing had even begun the First-tier Tribunal was plainly aware that the ability of the Sponsor to understand what was being asked of him, and to make himself understood, had already become an issue in the proceedings. At §6 the determination records that an earlier hearing in the appeal, listed at Taylor House in April 2018, had to be abandoned because the Sponsor was unable to give evidence through the Indonesian interpreter provided by the Court. It was decided nevertheless to proceed for a second time in the absence of the correct interpreter.
13. It then became clear during the hearing itself that there were ongoing issues with the lack of a Tetum interpreter. At §29 the Tribunal records Mr Soares stating, at “various points” in his evidence that there had been a misinterpretation of the evidence he had given at the marriage interview, which had not been face to face but over the telephone. It acknowledges that Mr Soares was raising his difficulty in understanding what was being said to him, and in making himself understood, at the centre of his evidence. At §33 the determination records the concern raised at the hearing by a Mr Mavrantonis, Counsel for the Respondent, who “asked for guidance from the bench as to how to structure questions given that, he submitted, Mr Soares did not appear to understand”. Finally, at §52, the Tribunal gives its evaluation of Mr Soares as a witness: “he either gave evasive answers or appeared not to understand the question put, and this was his response overall to most questions put”. It was for these reasons that the appeal was dismissed.
14. Responding to the Appellant’s complaints about that, Senior Presenting Officer Mr Melvin pointed out that it was Mr Soares who wanted to proceed with the hearing, ostensibly because he was keen for his wife to rejoin him. In the absence of any objection from either him or his representative on the day, the Tribunal could do nothing else but proceed on the footing that it did. Tetum is an obscure language in the United Kingdom, and it would seem that the IAC has now failed on three occasions to find a registered Tetum interpreter (one was also requested for the ‘error of law’ hearing). If one does not exist, it would follow that Mr Soares would have to make do with what there was, i.e. an Indonesian whom he could substantially understand.
15. I have checked with the Tribunal’s interpreter service and I can confirm that as far as they are concerned, there are no registered Tetum interpreters working in the United Kingdom today. Does that mean that Mr Melvin is correct and that Mr Soares had no option but to “make do with what he’s got”? Whilst that is a less than satisfactory state of affairs it would seem that this was indeed the case.
16. That it was a less than satisfactory state of affairs does not appear, however, to have been taken into account by the Judge. To the contrary, under the heading ‘Findings and Conclusions’ the Tribunal expressly weighs against Ms Soares the fact that he appeared “evasive” or “appeared not to understand the question put”. It rejects his contention that the lack of Tetum interpreter at the Home Office interview led to inaccuracies in the evidence, whilst at the same time inaccurately recording the evidence given before it, i.e. whether Mr Soares claimed to be exercising treaty rights. I accept the submission made on behalf of the Appellant that although the findings

are detailed and reasoned, the Tribunal makes no reference to, or allowance for, the obvious defects in the way that the evidence was forthcoming.

17. This is a significant omission given the case history. The Tribunal convened in April had already abandoned one hearing because Mr Soares could not make himself understood. In those circumstances all concerned with the second hearing should have proceeded with extreme caution in the way that this witness was questioned, and the way in which his answers were understood. That was particularly so where his evidence was put centre stage, in the absence of the Appellant herself. I was therefore satisfied that this ground was made out, and that the findings of the First-tier Tribunal must be set aside.

### **Disposal**

18. For reasons I have already alluded to, it was not easy to remake this appeal. No fewer than four hearings followed the 'error of law' hearing in May, each an opportunity wasted as the parties and the Tribunal tried to accommodate the Appellant and her case. By December it became clear that the Appellant herself was not going to be able to participate in person, an application for entry clearance having been refused and the logistics of securing a video link proving too complex for her representatives to deal with. In the end the Appellant was able to voice her evidence through the production of what was described as a detailed witness statement. As for Mr Soares, there was no solution to his interpreter conundrum and he too elected to give evidence by way of a witness statement only, which I am told (by his solicitor) was prepared with the assistance of his friend, who speaks Tetum and English. At the hearing on the 3<sup>rd</sup> December 2019 I heard submissions from Counsel and Mr Melvin and I reserved my decision.

### **The Re-Made Decision**

19. There is no burden of proof on the Appellant to prove that her marriage is genuine. Where however there is evidence justifying a reasonable suspicion that the marriage has been entered into for the predominant purpose of securing residence rights, there is an evidential burden on the Appellant to show that her marriage is not one of convenience. The final burden of proof rests with the Secretary of State: see Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC), Sadovska v Secretary of State for the Home Department [2017] UKSC 54.
20. In this case the Secretary of State submits that there is evidence justifying her reasonable suspicion that this marriage has been entered into for the predominant purpose of securing the Appellant the status of 'family member' under the Immigration (European Economic Area) Regulations 2016 and thus an immigration advantage. The Secretary of State's evidence is in the main drawn from the answers given by the Appellant and Mr Soares at an interview conducted on the 9<sup>th</sup> February

2017. Each party was asked a series of questions related to the marriage, and each other. In a letter written that same day the Secretary of State identifies a series of discrepancies which she says arose from the interviews.

21. I have divided those allegedly discrepant answers into three groups. In the first I place the matters which I regard as warranting an explanation by the Appellant and/or Mr Soares. In the second I place those matters which do reveal inconsistencies, but which could reasonably result from an innocent lack of knowledge on the part of the other person. The third group do not seem to me to reveal discrepancies at all, or if they do they are inconsistencies which could easily arise in any marriage, or in any interview.
22. In the first group I place the following problematic questions and answers:
  - i) The Appellant stated that she has no brothers and 5 sisters; he thought that she only had one of each.
  - ii) The Appellant said that they did not have a wedding cake; Mr Soares said that they did have one, which was square with pink icing.
  - iii) The Appellant said that they had gone to Nandos for their wedding meal; he said that they went to a Nepalese restaurant.
  - iv) The Appellant said that their home has two windows in the front; Mr Soares says that there are six.
  - v) She said that their bins are green and black; he thought they were blue.
  - vi) She described their kitchen floor as having black tiles; he said it was "lino".
  - vii) She said that their microwave is silver, he said it was black.
  - viii) Asked what they had done on their day off that week the Appellant had said that they got up between 10.30 and 11.00am, had bread and coffee for breakfast and gone into town where they went to McDonalds; they had chicken curry for dinner. Mr Soares gave a completely different account, saying they had got up at 8.00am, eaten omelettes that he had cooked, then they had stayed in and did their laundry. He said that they had eaten fried rice and noodles for dinner.
  - ix) The Appellant said that her husband had given her a jumper for Christmas; he said that it was money.
  - x) She did not know what brand of cigarettes he smokes.
  - xi) She thought he liked to gamble; he denied that he does so.
23. The second group of answers are those which I regard as true inconsistencies, but inconsistencies that have a perfectly rational explanation. For instance, the Appellant said that when her husband goes to work in a restaurant he wears casual clothes; he said that in the kitchen he wears a uniform. This could easily result from his dressing for work when he gets there. Similarly, I attach little weight to the fact that the

Appellant thought her husband had had that job for 9-10 months, when in fact it was only 7. There was some discrepancy as to who had introduced the couple in Shepherds Bush: she said that the friend's name was Pinto [F], he had said that his name was Pinto [S]. Having had regard to the witness statements I am satisfied that there is a reasonable explanation in that the gentleman is known by both names. The pair gave inconsistent evidence about the terms of their tenancy agreement, but given that the agreement itself is produced, and there is no challenge that it is genuine, this apparently arises from simple ignorance of the details. I am further satisfied that there is an innocent explanation for the pair naming different people as their landlord: their flat is owned and let by a couple "Jeroslow" and "Martha". I attach no weight to the fact that the couple had each given different examples of things that they have discussed in their future: it is perfectly possible that they have discussed both.

24. In the third group are matters picked out by the Secretary of State which I regard as adding nothing to her case. There is no real discrepancy between Mr Soares working as a "kitchen assistant" or a "bus boy", nor between the words "razor" and "electric shaver". Nor do I find any discrepancy in the Appellant's understanding that her husband gets 4 x £150 per month and his evidence that he receives £600 in one go.
25. For the purpose of this appeal I am therefore only interested in whether the Appellant can offer an innocent explanation for the matters raised at 22 i) – xi) above, which I am satisfied can rationally give rise to the Secretary of State's suspicions that this is not a genuine relationship. The discrepant answers given by the pair are capable of supporting the conclusion that a) there were in fact no post-wedding celebrations, b) the couple do not know each other well and c) they were not living together as claimed.
26. The Appellant's rebuttal evidence consists of witness statements from herself and Mr Soares, additional witness statements from friends Ms Mary [A] and Ms Chin [S], and a bundle of additional documents including: photographs of the two together, phone cards, greeting cards, money transfers, the tenancy agreement, correspondence placing them both at the same address and print outs of 'whatsapp' messages between the two.
27. In respect of the documentary evidence I find that this *prima facie* indicates that after marriage the Appellant and Mr Soares lived together at the same property. I accept that there is some evidence of intervening devotion such as whatsapp chats. I have therefore placed some weight on this evidence. Additional witnesses Mary [A] and Chin [S] both aver that this is, to the best of their knowledge and belief, a genuine relationship, and I have placed some weight on those statements, although I must bear in mind that this evidence was untested and so there is a limit that can be placed on the statements. I note that Pinto [S], who appeared before the First-tier Tribunal, had further supported the account of the couple's first meeting etc.
28. The parties and their witnesses have given wholly consistent evidence about how they met. They were introduced by mutual friends Mary and Pinto in Westgate

shopping centre near Shepherds Bush. They all went for a Chinese and the two got talking and got along well. They subsequently chatted by text message, arranged to go on a date and the rest is history. The account is supported before me by a statement from Mary [A]. The difficulty I have with the statements before me is that they are drafted in near identical terms, making it very difficult to imagine that they represent the actual words used by the deponent. For instance, the Appellant, Mr Soares and Mary [A] all say of that first meeting “whilst talking the time ran so quick that was around one hour had passed”; the Appellant and Mr Soares both state “it felt like we know each other for long time within a week”. This limits the weight that I can place on the statements because they have obviously been drafted by the same person who simply repeated the account of the first deponent and asked the others to sign.

29. The parties claim to have been introduced on the 8<sup>th</sup> February 2016, and state that by Valentine’s Day, the 14<sup>th</sup> of February, Mr Soares had proposed. I appreciate that there is such a thing as love at first sight; I also accept that people from different cultures have different approaches to marriage and that there is nothing inherently suspicious about a marriage appearing to have been ‘arranged’ by friends Mary and Pinto. I do not however consider it likely that two people with no prior connection (i.e. by family or culture) would be discussing marriage within a week of first meeting. The speed with which the arrangement was made is a matter that weighs against the couple.
30. By April 2016 it is said that the pair were living together, in the Appellant’s rented room in Ipswich. There, they claim, their relationship grew “deeper and deeper”. It is against this background that I must assess the answers that they gave an interview, some ten months later, in February 2017.
31. A good number of the issues that arose at interview concerned the parties’ respective knowledge about their home. The two did not agree about how many windows their house had, the colour of the bins, microwave or kitchen floor. I accept that not everyone pays attention to such details. That was not however the explanation that is offered. I am sorry to say that the explanations given in the witness statements made very little sense to me.
32. Of the number of windows the Appellant says this:

“In total there are six windows. 2 can be seen from the front. Husband confirmed that there are 6 in total: 2 inside and 4 outside. My husband was asked how many windows in the house. He answered six, which is absolutely right”

I do not understand how some windows can appear on the “inside” and some on the “outside”. This was left unexplained.
33. Similarly, the Appellant’s explanation given as to how he came to say the words “lino/vinyl” instead of “black tiles” is incomprehensible:

“The kitchen floor is black. Husband said it is black colour. He doesn’t know what lino/vinyl is. Translated into Portuguese the words are the same, and husband doesn’t know words”.

34. Of the microwave’s colour Mr Soares is said to have confused the microwave at home with his microwave at work, which seems on its face unlikely. In respect of the bins the Appellant conveniently elides the various answers given by herself and her husband by saying that they have bins of all of these colours.
35. In respect of the personal questions, relating to their knowledge of each other and the time they had spent together, the evidence is also difficult to follow. Asked to explain why the two had given completely different accounts of their day on the Monday before the interview the Appellant says this:

“Normally we waked up late on day offs. We waked up around 11am on day offs and when he had work they he waked up at 8.00am for work ...

Paulo said he made omelette, tomato and bread with coffee. This cannot be for every day or every Mondays. Different one on every Monday so cannot remember”.

No explanation is offered as to whether they ate curry or noodles for dinner, nor whether they went to McDonalds in town during the day or actually stayed at home to do their laundry. The Appellant’s inability to give a plausible response to these matters weighs against her.

36. I am not satisfied that the parties’ respective and contrasting responses about their wedding day can now be reconciled. Mr Soares stated that their wedding cake was square with pink icing on it. Even allowing for the difficulties he had with translation it is hard to understand why he would have said this if in fact they had decided not to get a cake because his wife does not like icing, the explanation she gives in her statement. The simpler answer to “did you have a cake” would have been “no”. Having given completely different answers about where they ate their wedding meal and who paid for it the Appellant now states that they went to Nandos immediately after the ceremony, and to a Nepalese restaurant the next day: if that were the case I would have expected this information to have been forthcoming at the interview.
37. Another fundamental difficulty with the interview was that Mr Soares did not know how many siblings his wife had. The explanation offered is that he gave the correct details, but his answer was mistranslated by the Indonesian interpreter. I have taken that into account, but I do note that (despite my suggestion at case management stage) no evidence has been offered as to how these most basic words - the numbers 0 to 5, ‘brother’ and ‘sister’ - could have been misunderstood. For instance I have not been provided with any expert evidence about whether the words “five sisters” are substantially different in Tetum and Indonesian. Such evidence would have enabled me to place greater weight on the complaints raised about interpretation.
38. Overall I bear in mind that there is some evidence about the relationship between these two people. They clearly know each other, and I accept that they entered into a

tenancy agreement together. They may well have lived in the same house for a time. I accept that they were introduced by Mary and Pinto and that this meeting may well have taken place in the Westgate shopping centre. As to the motivation for the marriage, I am on balance satisfied that a material part of it was to secure an immigration advantage for the Appellant. The decision to marry was taken in great haste when they hardly knew each other; although they had allegedly been living as husband and wife for almost a year at the date of interview it was clear that their knowledge of each other, and the marital home, was extremely limited. It is also clear from the interview that the claimed marriage celebrations did not take place as described. I have given what weight I can to the fact that Mr Soares has had real difficulty in securing an interpreter in his mother tongue. I accept that this placed him - and the Appellant - at a significant disadvantage. I also bear in mind that he has now had two years to submit his witness statement, and that every attempt has been made to assist him in giving that evidence. The reality is that the explanations offered, whether in writing or live evidence, simply do not offer a plausible answer to the very substantial discrepancies in the marriage interviews.

### Decisions

39. The determination of the First-tier Tribunal contains a material error of law and it is set aside.
40. There is no order for anonymity.
41. I remake the decision in the appeal by dismissing the appeal.



Upper Tribunal Judge Bruce  
17<sup>th</sup> December 2019