



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

Appeal Number: IA/32765/2014

THE IMMIGRATION ACTS

**Heard at Manchester Piccadilly
On 6 May 2015**

**Decision Promulgated
On 22 May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

**NABEEL AKHBAR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Mair counsel instructed by Malik Legal Solicitors Ltd

For the Respondent: Ms C Johnstone Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Holt promulgated on 8 December 2014 which dismissed the Appellant's appeal against an application of a Residence card on the basis that the Appellant's marriage was a marriage of convenience for the purpose of the EEA Regulations.

Background

3. The Appellant was born on 20 November 1988 and is a national of Pakistan.
4. On 21 January 2014 the Appellant applied for a residence card as a conformation as his right to reside in the United Kingdom as the spouse of Ivona Dickanec an EEA national exercising treaty rights in the United Kingdom.
5. On 4 August 2014 the Secretary of State refused the Appellant's application. The refusal letter gave a number of reasons:
6. There were a number of inconsistencies between the answers given by the Appellant and Ms Dickanec in the marriage interview which took place on 29 July 2014.
7. The company that the Sponsor worked for could not be verified or contacted by phone and therefore the Respondent was not satisfied that it was a genuine business.
8. There were discrepancies in the wage slips produced.
9. The Respondent's records suggested that the EEA sponsor was married at the time of her marriage to the Appellant to an Egyptian male and not single.

The Judge's Decision

10. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Holt ("the Judge") dismissed the appeal against the Respondent's decision. The Judge found :
 - (a) The Respondent conceded that the sponsor was working and therefore exercising treaty rights.
 - (b) The Judge could not be satisfied by the evidence produced whether or not the sponsor was married at the time of her marriage to the Appellant to an Egyptian male.
 - (c) The Appellant was not the biological father of the Sponsor's child.
 - (d) The Appellant put his name on the baby's birth certificate as the child's father and claimed to be ignorant as to the need to give the correct biological father's name on the birth certificate and claimed it was a mistake. The Judge

found the explanations as to why they put the Appellant's name as the father on the birth certificate wholly unsatisfactory and did not accept that it was an innocent mistake.

- (e) The Judge found the circumstances of the commencement of the relationship were unusual: they were different religions; the sponsor was pregnant when they met and they met and married in less than a year.
- (f) The Judge found it unhelpful that she was not provided with a transcript of the interview but rather an interview summary sheet.
- (g) Ms Mair suggested that the document could be inaccurate as it may only highlight areas of inconsistency but not areas of consistency.
- (h) The Judge found that there were some areas of consistency but also many areas of inconsistency and listed them.
- (i) The Judge found that they Appellant and sponsor were sharing living accommodation.
- (j) The Sponsors child was apparently very familiar with the Appellant as the Judge saw him handling her.
- (k) The evidence of the discrepancies in the marriage interview raised the suspicion that this was a marriage of convenience and therefore the burden then shifted to the Appellant to establish that it was not a marriage of convenience.
- (l) The Judge found that the predominant or principle purpose of the marriage was to secure residence rights for the Appellant because the Appellant was prepared to give dishonest information to the Registrar in relation to being the child's father; there were significant discrepancies between the Appellant and the sponsor about the circumstances of their relationship at a time when they had been married for 8 months; the unusual circumstances of their relationship although these alone may not have persuaded the Judge but taken cumulatively with the other evidence they did.

11. Grounds of appeal were lodged arguing that :

- (a) I finding that the Appellant's predominant purpose was securing treaty rights the Judge applied the wrong test is assessing whether the marriage was one of convenience in that in the European Commission Handbook the definition is that it is '*an artificial contract entered into **solely** with the purpose of obtaining the right of free movement.*'(my bold)

(b) It was procedurally unfair to rely on an interview summary sheet rather than a transcript of the interview and therefore the Judge should have placed limited or no weight on the interview summary or alternatively considered the evidence in the round.

(c) The Judge placed undue weight on the fact that the Appellant had put his name on the child's birth certificate as his father.

(d) The Judge gave undue weight to what she described as the unusual commencement to the relationship

12. On 2 February 2015 Designated First-tier Tribunal Judge Macdonald gave permission to appeal on all grounds.

13. At the hearing I heard submissions from Ms Mair on behalf of the Appellant that:

(a) The overarching issue in the case was whether this was a marriage of convenience.

(b) The findings that the Judge made in relation to the parties domestic life did not support her conclusion that this was not a genuine marriage.

(c) The Judge applied the wrong test which is whether the sole purpose of the marriage was to secure treaty rights.

(d) The Judge should have placed little or no weight on the interview summary given that the failure to produce it breached the Tribunal Procedure Rules which require any party to produce the document on which they intend to rely.

(e) The Judge should have factored in that the parties answers were consistent at the date of hearing.

(f) She relied on the case of Miah(interviewers comments: disclosure: fairness) [2014] UKUT 00515(IAC)

(g) The Judge placed undue weight on what she described as the unusual features in relation to how their relationship started. This involved her in making value judgements not founded in the evidence or legal principles.

14. On behalf of the Respondent Ms Johnstone submitted that :

- (a) In relation to the weight to be given to the various aspects of the evidence this was a matter for the Judge.
- (b) The Appellant and the sponsor had the opportunity to address the alleged discrepancies in the interview and did not deny what they are alleged to have said but rather stated that they were pressured into saying it .
- (c) The case of Miah was not placed before the Judge.
- (d) The Judge took into account all of the relevant factors reached conclusions that were open to her.

15. In reply Ms Mair on behalf of the Appellant submitted:

- (a) Neither of the words used by the Judge, 'predominant' or 'principal' are the same as 'sole.' The test is a high one. The words predominant or principal allow for other less weighty reasons for entering into the marriage.
- (b) In relation to the case of Miah that was post hearing and it was possible that an error of law was based on a change in the legal authority after the date of hearing. The issue of procedural fairness was raised at the hearing.
- (c) The Appellant and sponsor did respond to issues raised in the summary.

Finding on Material Error

16. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law.
17. This was an application for a residence card where the only issue in the case at the appeal hearing was whether the Appellant's marriage to an EU citizen was a marriage of convenience.
18. Ms Mair advanced the argument that the Judge in describing the 'predominant' purpose of the marriage (paragraph 39) or 'principal' purpose (paragraph 40) as securing treaty rights had applied the wrong test and that she should have assessed whether it was the sole purpose of the marriage ie one that admitted no other purpose.

19. There is no definition of marriage of convenience or sham marriage within the Rules and therefore the Judge was directed to the case of Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038(IAC) by Ms Mair.

20. In setting out the law the case refers to the Citizens Directive (EP and Council Directive 2004/38/EC) which sets out the basic rules of European Union law regulating the admission of spouses of EU citizens who are not such citizens themselves (third country nationals).

21. Preamble 28 is as follows:

“To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures.”

22. Article 35 which is headed ‘Abuse of Rights’ then provides:

“Member States may adopt the necessary measures to refuse , terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience.”

23. In paragraph 5 of her grounds Ms Mair quotes from the European Commission Handbook which was written to assist national authorities in addressing this topic and is indeed referred to in paragraphs 6-7 of Miah. The Handbook has a ‘Definition’ section and at section 2.1 and there is a definition of ‘sole purpose’ which includes the following as highlighted in the document:

*“Therefore, the notion of ‘sole purpose’ should not be interpreted literally (as being the unique or exclusive purpose) but rather as meaning that the objective to obtain the right of entry and residence must be the **predominant purpose** of the abusive conduct.”*

24. Thus in the case of Miah at paragraph 5 when the President of the Tribunal summarised the ratio of Papajorgji and stated that *“However there is an evidential burden on the Claimant to address evidence justifying reasonable suspicion that the marriage in question was undertaken for the predominant purpose of securing residence rights”* he was using a definition that was entirely

consistent with the Council Directive and the definition provided in the guidance in relation to the issue of marriages of convenience which Ms Mair relies on. The Judge in this case therefore in using the term 'predominant' or 'principle' purpose was using the correct test in accordance both with United Kingdom caselaw and European law and guidance.

25. The second ground advanced by Ms Mair was that it was procedurally unfair for the Judge to place weight on the interview summary rather than an interview transcript and she relied on the case of Miah. In that case however the ratio was that the Appellant was entitled to a copy of what is referred to as 'the interviewers comments' which in paragraph (iv) of the headnotes is referred to as Form ICV.4605. This is clearly a typographical error as in paragraph 3 in the body of the decision it is referred to as ICD4605. Although the Judge in this case does not refer to the document number at paragraph 31 she refers to 'an interview summary sheet.' The document is in the file and it bears the form number ICD.4605. Miah states that an Appellant is entitled to be 'alerted to the essential elements of the case against him' and is therefore entitled to have a copy of form ICD.4605 which summarises the contents of the interview. It does not state that he is entitled to a transcript of the interview.

26. I am satisfied that at paragraph 31-32 the Judge fairly considered the submissions of Ms Mair about the limitations of proceeding with an interview summary rather than a transcript and taking account of those issues concluded that while there were areas of consistency in the interview she identified seven questions which were answered inconsistently and concluded at paragraph 36 that these inconsistencies were capable of pointing to a conclusion that this was a marriage of convenience and therefore the evidential burden shifted to the Appellant to show that this was not a marriage of convenience.

27. Against this background the Judge then found at paragraph 39 that the marriage was entered into for the predominant purpose of securing residence rights and sets out three reasons for that conclusion. She gave as her first reason (paragraph 39 (i)) the fact that the Appellant and the sponsor had both lied to the registrar in naming the Appellant as the father of the sponsor's child in the birth certificate. Her assessment of this evidence is challenged but I am satisfied that

having heard the Appellant and the sponsor give evidence she was entitled to reject the explanations they gave for this behaviour and her reasons are set out in detail and cogently reasoned at paragraphs 24-29. The next reason given by the Judge (39 (ii)) are the discrepancies in the marriage interview which took place as she sets out when they had already been married for 8 months. She was entitled to conclude as she clearly did that accurate answers were to be expected about issues that ought to have been fresh in the minds of the Appellant and sponsor so soon after they were married. I see no reason why she should attach more weight to responses given before her when by the time of the hearing the Appellant and sponsor were alive to the challenges made.

28. The final reason she gives at paragraph 39 (iii) are the unusual circumstances of their relationship: that they met when the sponsor was pregnant with another man's child, they had different religious and cultural backgrounds including linguistic differences with no common language and they met and married within a relatively short period of a year. This finding is challenged as being value judgements not founded on the evidence. I am satisfied that the Judge was entitled to conclude that these were unusual features of the case but she makes clear that alone they may not have tipped the balance towards this being a marriage of convenience but she stated that she had looked at the evidence cumulatively with the other findings she made.

29. I am satisfied that these conclusions were not contrary to the findings that the Judge had made about their domestic life and the Appellant's familiarity with the Sponsor's child. The Judge did make clear she accepted that they lived in the same household but the mere fact of cohabitation is not determinative of whether a marriage is genuine or a sham and I am satisfied that when read as a whole that is the thrust of the Judge's conclusion.

30. I remind myself of what was said in Shizad (sufficiency of reasons: set aside) Afghanistan [2013] UKUT 85 (IAC) about the requirement for sufficient reasons to be given in a decision in headnote (1) : *"Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge."*

31. I was therefore satisfied that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning. I find that the reasons given were adequate and the Appellant cannot be in any doubt about why the appeal was dismissed: having heard evidence from both the Appellant and the sponsor the Judge believed that the predominant purpose of the marriage was to secure treaty rights for the Appellant .

CONCLUSION

32. I therefore found that no errors of law have been established and that the Judge's determination should stand.

DECISION

33. The appeal is dismissed.

Signed

Date 17.5.2015

Deputy Upper Tribunal Judge Birrell