



IAC-FH-AR-V1

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

Appeal Number: IA/34356/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 29 January 2016**

**Decision & Reasons Promulgated  
On 9 March 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE O'RYAN**

**Between**

**JAYESH SURESHBHAI PATEL  
(ANONYMITY DIRECTION NOT MADE)**

**Appellant**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the Appellant: Mr A Arayn, Farani-Javid-Taylor Solicitors  
For the Respondent: Miss J Isherwood, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal brought by the Appellant who is a national of India who had appealed to the First-tier Tribunal against a decision taken by the Respondent dated 29 August 2014 refusing to grant him a residence card under Regulation 17(1) of the Immigration (European Economic Area) Regulations 2006. The Appellant had

applied for such a residence card on the basis that he was the family member of Miss Ana- Maria Ramona, a citizen of Romania, they having married on 14 February 2014.

2. In respect of the Appellant's application for a residence card he and Miss Ramona were interviewed by the Respondent on 29 August 2014. As a result of that interview the decision refusing to grant the Appellant a residence card was made giving reasons as follows for the refusal.

“On 29 August 2014 you and your Sponsor were interviewed separately by the Home Office interviewers at the Liverpool Capital Building. The interviewing officer noted that there many inconsistencies in your accounts of events and discrepancies in the answers that both you and your Sponsor gave relating to:

- Meeting your Sponsor's mother
  - Your recollection of how many times you met her differ from your Sponsor.
- Your sponsor’s ex-husband
  - Your Sponsor said she is in good contact with her ex-husband
  - You claim that they do not speak
- Trips to Romania
  - The time your Sponsor spent in Romania and how many trips she has been on
- Sightseeing
  - Your spouse claimed to have been on the London Eye ride with you
  - You stated that you have never been on the ride
- Cooking
  - You claim that your Sponsor had not cooked a meal since your marriage
  - Your Sponsor states that you cook on alternate nights
- Friends
  - You state that you did not know who your wife went to the carnival with on the Sunday prior to the interview, which would be basic knowledge of a partner in a genuine relationship
- When you first went to a restaurant
  - Your Sponsor could not give an answer
    - You stated that it was on your wedding day. A person in a genuine relationship would be able to recall if they had been to a restaurant with their partner if it was on any other day than their wedding day.

On the balance of probabilities the reasons for your conflicting answers is because there has been a large element of deception used when you presented yourself to the Home Office.”

3. The Respondent's conclusion in that letter was that the Appellant's marriage was one of convenience and therefore that he did not meet the definition of spouse in accordance with the 2006 Regulations.
4. The Appellant appealed against that decision, electing to have a paper only appeal. There was a bundle of evidence prepared and submitted to the First-tier Tribunal in support of that appeal. There was also naturally a bundle of documents prepared by the Respondent. I shall specify the evidence that was contained in both bundles. The Respondent's bundle contained a copy of the EEA2 application form, a copy of the Appellant's passport and of the Sponsor's passport, the marriage certificate, some photographs of the wedding and at Annex G a document on form ICD.4604 entitled “Interview record sheet”. This appears to be the record of the interview which took place on 29 August 2014.
5. The copy of this document appearing within the Respondent's bundle is clearly incomplete. Questions 1 to 19 on the first page are completed but those merely identify the persons being interviewed. There is then some further pro forma information as to the interviewees set out on the second page and signatures on the third page. There are then two blank pages in landscape format setting out a table in which there are columns for questions, the applicant's reply and Sponsor’s reply. But the two landscape pages contained within the Respondent's bundle do not contain any questions or answers at all. There is then a final page at G7 of concluding questions which does not contain any substantive questions in relation to the genuineness of the marriage.
6. There is then a copy of the notice of decision to the Appellant and the Reasons for Refusal Letter together with the notice of appeal and grounds of appeal to the First-tier. The Appellant's bundle which was filed with the First-tier Tribunal under cover of 13 May 2015 from Farani-Javid-Taylor Solicitors contains representations which *inter alia* make reference to the reported cases of Miah (Interviewers comments - disclosure - fairness) [2014] UKUT 00515, Papajorgji (EEA spouse marriage of convenience ) Greece [2012] UKUT 38 and Goudey (Subsisting marriage evidence) Sudan [2012] UKUT 00041. Those submissions at paragraph 4 state as follows:

“4. It is submitted that in light of the above cases the burden to demonstrate that the marriage is one of convenience falls squarely on the Respondent and that the burden has not been discharged by the Respondent. The Tribunal is asked to note that the refusal contains merely allegations on pages 1 and 2. There is no interview record. There are no officer’s notes which conclude the interview. It is therefore submitted that the

Respondent has not discharged her burden. The Tribunal is asked not to give the refusal letter any weight as the refusal letter is not evidence.

...

8. It is therefore respectfully submitted that the appeal should be allowed as the decision is not in accordance with the law. The Appellant relies on the evidence within the Appellant's and the Respondent's bundle and submits that despite the Respondent not being able to meet the standard of proof the Appellant has evidence to show that he is in a genuine relationship.
  9. If the Tribunal does not deem fit to allow the appeal outright it is submitted that the appeal should be allowed to the limited extent that it should be remitted back to the Respondent."
7. In addition to the representations I have just quoted from the Appellant's bundle contained a witness statement from the Appellant dated 11 May 2015, who remained in the United Kingdom and the witness statement from Miss Ramona also dated 11 May 2015 but who in that witness statement explained that she had herself filed notice of appeal which was pending. She stated that she had returned back to her home country to visit her father who was extremely sick. When she returned back to the United Kingdom she was stopped at the airport. She was told that she could not enter as her application had been refused and they wanted to send her back. "I tried to explain to them that my appeal had been submitted but they would not listen to me."
  8. From that it seems (although it was not clear until today), that Miss Ramona herself had received an adverse immigration decision. As is sometimes the case when a third country national receives a refusal of a residence card, the EU national can also receive a removal notice on the basis that s/he has engaged in an 'abuse of rights' under the Citizens Directive.
  9. Thus Miss Ramona was not present in the United Kingdom at the time that the judge heard the appeal.
  10. Also in the Appellant's bundle were a series of further photographs.
  11. In his decision at paragraphs 7 and 8 the judge summarises the contents of the witness statements of the Appellant and sponsor. The judge records that both witnesses accepted that there had been some inconsistencies and discrepancies in the marriage interview, but that they asserted that the marriage was not one of convenience. He set out in summary the explanations that they gave for apparent differences in their account.
  12. The judge went on in his findings from paragraph 15 to direct himself as follows:

“The burden of proving that a marriage was not a marriage of convenience for the purposes of the EEA Regulations rests on the Appellant: but he is not required to discharge it in the absence of evidence of matters supporting suspicion that the marriage is one of convenience (i.e. there is an evidential burden on the Respondent); see IS (Marriages of convenience) Serbia [2008] UKIAT 00031.”

13. At paragraph 16 the judge stated:

“Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC) reminds me that there is no burden at the outset of an application on a claimant to discharge that the marriage to an EEA national is not one of convenience. IS (Marriages of convenience) Serbia 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.”

14. The judge then provides as follows at paragraphs 17 to 18 which it is appropriate to set out in full:

“17. Clearly in this case the Respondent has provided evidence in the form of the interview record supporting the suspicion that the marriage is one of convenience. I find that this is so given the number of the discrepancies that arose in the two accounts of the Appellant and the sponsor and also given the nature of those discrepancies which included matters which touch upon ordinary aspects of daily life such as cooking and trips out and to knowledge of and contact with family and close friends.

18. Given the above evidence I find that the burden to establish that the marriage is not one of convenience now effectively shifts to the Appellant. I therefore considered what if any evidence has been produced by the Appellant to discharge the burden now upon him. I find that the Appellant has produced little evidence.”

15. It suffices to say that the judge then held that the evidence contained in the Appellant's and sponsor's witness statements were not in his view sufficient to discharge the evidential burden which he said now fell upon the Appellant to demonstrate that his marriage was not one of convenience. Accordingly the judge dismissed the appeal.

16. The Appellant sought permission to appeal against that decision in grounds dated 24 July 2015, arguing that there had been an error of law in the finding that the Respondent had produced an interview record whereas she had clearly not done so. The Appellant refers to the case of Papajorgji highlighting that the Respondent bore the burden of proof and the IJ had referred to that at his paragraph 16.

17. The Appellant then complains that at paragraph 17 of his decision the judge had quoted "clearly in this case the Respondent has provided evidence in the form the interview record supporting the suspicion that the marriage is one of convenience."
18. It was then pointed out as I have already above that Annex G of the Respondent's bundle which is entitled "Marriage interview record" actually contains no information whatsoever about what questions and answers were given at that interview of 29 August 2014. It was then asserted that in accordance with the case of Miah (Interviewers comments - disclosure - fairness) the Appellant had also not been provided with any copy of the interviewer's comments, on form ICD4605. It was submitted that the judge had procedurally erred and had erred in finding that the burden of proof had been discharged. Permission to appeal was granted by Judge Osborne in an undated grant of permission to appeal acknowledging the merit of those grounds.
19. In a Rule 24 response dated 17 November 2015

"The Respondent resists the appeal asserting that the Respondent opposes the appeal. In summary the Respondent will submit that the judge directed himself appropriately and that the judge also took into account the witness statements provided by the Appellant and Sponsor when considering the evidence. The judge gives adequate reasons for finding that there were discrepancies in the statement. This is set out at paragraph 18 of the decision."
20. I have heard submissions from Mr Arayn on behalf of the Appellant today and from Miss Isherwood for the Respondent. Mr Arayn adopts and amplifies upon grounds of appeal. It is also appropriate to note that Miss Ramona attended the hearing today notwithstanding the information within her own witness statement of May 2015 that she was at that time excluded from the United Kingdom.
21. I am informed that she returned to the United Kingdom in January 2016. It also became clear from a document on the Respondent's file that on 29 August 2015 Miss Ramona herself had indeed been served with a removal notice by the Secretary of State on form IS151B on grounds, contained within form IS151A, that she was a person suspected of being guilty of abuse of rights and who is therefore a person removable under Regulation 21B(2) of the 2006 Regulations.
22. I understand that she filed a notice of appeal against that decision but left the United Kingdom in the circumstances set out in her witness statement.
23. The IS151B informed her that she would be excluded from the United Kingdom for a period of twelve months. A period of greater than twelve months has clearly passed since the date of that notice of decision and she is now present again in the UK.

## Discussion

24. My decision in this matter is informed by two authorities familiar to those involved in marriage of convenience cases. Those are the case of Miah and Papajorgji. The President of the Upper Tribunal, Mr Justice McCloskey, provides the following guidance in the case of Miah

“ Conduct of pre-decision interviews

- (i) A decision that a marriage is a marriage of convenience for the purposes of Regulation 2(1) of the Immigration (European Economic Area) Regulations 2006 is a matter of some moment. Fairness requires that the affected person must be alerted to the essential elements of the case against him.
- (ii) In addition, those involved must be alert to the question of whether, in an unusual or exceptional case, anything further is required in the interests of fairness. There may be difficult, borderline cases in which fairness will require identification of the third party. These do not admit of general guidance or resolution and will have to be addressed on a case by case basis, guided by the overarching requirement of fairness and balancing all interests in play.

The making of the decision on the application

- (iii) The Secretary of State's decision making process includes a process whereby comments, or opinions, of an interviewing officer are conveyed to the decision maker. In the generality of cases, this practice will not contaminate the fairness of the decision making process. The duty of the decision maker is to approach and consider all of the materials with an open mind and with circumspection. The due discharge of this duty, coupled with the statutory right of appeal, will provide the subject with adequate protection.

Disclosure

- (iv) However, the document enshrining the interviewer's comments - Form ICV.4605 [*in fact the President there misquotes the title of the document - it is called ICD.4605*] must be disclosed as a matter of course. An Appellant's right to a fair hearing dictates this course. If, exceptionally, some legitimate concern about disclosure, for example, the protection of a third party, should arise, this should be proactively brought to the attention of the Tribunal, for a ruling and directions. In this way the principle of independent judicial adjudication will provide adequate safeguards for the Appellant. This will also enable mechanisms such as redaction, which

in practice one would expect to arise with extreme rarity, to be considered.”

25. The judge also considered in the body of that decision that not only was it procedurally necessary to provide a copy of the interviewer’s comments on form ICD4605, but that it is equally if not more important to provide the interview transcript itself (which is on form ICD4604). See:

“13. These features of the context point decisively to the proposition that the affected person must be alerted to the essential elements of the case against him. This places the spotlight firmly on the pre-decision interview which, it would appear, is an established part of the process in cases of this nature. The interview is the vehicle through which this discrete duty of disclosure will, in practice, be typically, though not invariably or exclusively, discharged. In this forum, the suspicions relating to the genuineness of the marriage must be fully ventilated. ...

15. The analysis above demonstrates that, in the context of a marriage of convenience enquiry under the 2006 Regulations, the key requirement of a fair decision making process is disclosure to the ‘suspect’ of the substance of the case against him. This means, in practice, that the interview will invariably occupy a position of pivotal importance in the process.

16. In the present case, there is no complaint about disclosure.”

26. For my part I find it readily apparent that disclosure was an issue in the present appeal. The Appellant's representations provided in support of his paper appeal complained about the absence of the ICD4604 interview transcript and any interview’s comments thereon. It seems to me that the judge should have been alive to the potential procedural unfairness which might be experienced by the Appellant in those circumstances.

27. It is to be acknowledged that the Appellant and Sponsor accept in their witness statements that some of their answers in their interview contained inconsistencies or discrepancies. However a consideration of both of those witness statements establishes that at least in two respects they make a positive assertion that there was no discrepancy in their evidence: in relation to the frequency with which the Sponsor saw her mother, and in relation to the occasion on which they first attended a restaurant - they assert that they gave consistent evidence and that the discrepancy alleged in the notice of decision had not arisen.

28. I am also conscious of the guidance in Papajorgji which is effectively approved in the recent Court of Appeal case of Rosa [2016] EWCA Civ 14 which confirms that the legal burden of establishing that there are grounds for suspecting an individual to have engaged in a marriage of convenience is one faced by the Secretary of State. If the Secretary of State provides evidence which meets that legal burden then it is



recorded that the evidential burden to counter that allegation may then fall on the Appellant.

29. I find that the judge erred procedurally. Given that the witness evidence before him specifically asserted that the Respondent was incorrect in her notice of decision by alleging inconsistencies, then I do not see how the judge could have properly resolved the conflict of evidence before him other than by requiring the transcript of the interview to be filed with the Tribunal. It had not. It was, with respect to the judge, clearly not the case as he asserted at paragraph 17 that the Respondent had provided evidence in the form of the interview record. I find that that interview record was not contained at Annex G of the Home Office bundle and I have examined the Tribunal file and there is no copy of any interview transcript to be found there.
30. It is also to be noted that Miss Isherwood cannot find a copy of the interview transcript on her own file aside from the incomplete version at Annex G of the Home Office bundle.
31. I find that it was procedurally unfair for the judge to have held against the Appellant a matter which was in dispute in circumstances where the Respondent had not in fact provided the evidence in support of her case.
32. That is the fundamental error which I find is material in the way that this appeal was dealt with by the judge. I find that it is necessary for this decision to be set aside and for the decision to be remade. Both parties agree that that should take place in the First tier, as all relevant findings of fact will need to be re-made in this appeal.

### **Notice of Decision**

33. The making of the decision by the First tier Tribunal involved the making of an error of law.

I set aside the decision of the First-tier Tribunal.

I remit the appeal to be heard by the First-tier Tribunal Judge, other than Judge Monaghan.

I also issue the following directions

### **Directions**

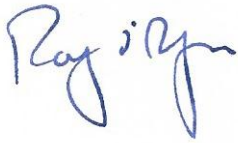
- (1) The appeal is not to be listed for hearing by the First tier Tribunal prior to 29 April 2016.

- (2) The Respondent do file and serve a complete copy of the interview record sheet of the interview of 29 August 2014, on form ICD.4604, and any interviewer's comments on form ICD.4605, not less than 28 days prior to the date of hearing

No anonymity direction.

Signed

Date 4.3.16

A handwritten signature in blue ink, appearing to read 'P. O'Ryan', written in a cursive style.

Deputy Upper Tribunal Judge O'Ryan