Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/00523/2019
EA/01620/2019

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 22nd October 2019	**On 24th October 2019**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Sadia Tofique
Umair Aslam
(no anonymity direction made)

Appellants

And

Secretary of State for the Home Department

Respondent

For the Appellant: **Mr Shea, Counsel instructed by Whitefield Solicitors Ltd**
For the Respondent: **Mr McVeety, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellants in this linked appeal are a wife and husband, in what purports to be a genuine and subsisting marriage such that the 'family member' provisions of the Immigration (European Economic Area) Regulations 2016 ('the Regulations') would be engaged. The Respondent regards their marriage to be one of 'convenience', contrived for the purpose of circumventing immigration control. This was the matter in issue before the First-tier Tribunal.

Background and First-tier Tribunal Decision

2. The first Appellant is a national of Italy, born on the 25th June 1987. Her appeal to the First-tier Tribunal was brought against the Respondent's decision of the 17th January 2019 to remove her under the powers contained in section 10 of the Immigration and Asylum Act 1999, those powers being exercised pursuant to Regulations 23, 26 and 32 of the Regulations on the grounds that she is deemed to have 'misused the right to residence in the United Kingdom' by having entered into a marriage of convenience.

3. The second Appellant is a national of Pakistan, born on the 22nd January 1988. His appeal to the First-tier Tribunal was brought against the Respondent's decision of the 15th February 2019 to refuse to grant him a residence card as a family member.

4. It was the evidence of the Appellants that they had met in 2017 at a wedding in the United Kingdom. They had exchanged contact details and stayed in touch. They underwent an Islamic ceremony on the 27th April 2018 in front of close family and friends and the following day held a reception in a restaurant with 75 guests. They state that from that date on they have lived together at the same address in Bury; their time together has only been interrupted by the first Appellant's visits back to Italy to receive medical treatment for Lupus. Subsequent to their *nikah* they sought permission from the Home Office to marry according to English law which was granted. They were married at Bury Registry Office on the 5th January 2019. They then made an application under the Regulations for the second Appellant to be granted a residence card.

5. On the morning of the 17th January 2019 the two were awoken by the noise of eight immigration officers demanding entry to their property. The officers were admitted. The Appellants were separated and asked a series of questions, with no interpreter present. The first Appellant states that she informed officers that she was unwell and that she was in no fit state to be interviewed. The interview proceeded but neither Appellants had their answers checked or read back to them. The second Appellant was taken into custody (he was back at home within a week after a Judge granted bail).

6. The Respondent does not dispute that the interviews took place at 6.30am, or that no interpreters were present. It is however strongly denied that the first Appellant claimed to be ill, or that either Appellant was disorientated and unable to clearly answer questions. As to the Appellants' respective abilities to speak English, the Respondent points out that Mr Aslam was admitted to this country as a student, and that Ms Tofique has been working in a shop for some time so could be expected to have a basic understanding of the language. Reliance is placed on the transcripts of the interviews conducted that morning. The Respondent submits that the transcripts reveal discrepancies and admissions on the part of the Appellants such that the Respondent could reasonably form a suspicion that this was a marriage of convenience.

7. This was the competing evidence submitted to the First-tier Tribunal. Both Appellants, and their supporting witnesses, then gave oral evidence. Having heard

that evidence the Tribunal determined that this was indeed a marriage of convenience, contracted with the connivance of both parties. In reaching that finding the Tribunal gave significant weight to the interview transcripts but found there to be further discrepancies arising in the testimony of the parties at court. The appeals were thereby dismissed.

The Grounds of Appeal

8. The Appellants submit that in reaching its decision the First-tier Tribunal erred in approach in the following material respects:

    i) Perversity

    Mr Shea submitted that on any rational reading of the evidence the finding that this was a marriage of convenience was simply not one open to the Tribunal. He submitted that the deficiencies in the Respondent's case were such that no properly directed Tribunal could find the *Rosa* burden of proof to be discharged.

    ii) In failing to take material matters into account:

    The Appellants were woken at 6.30am by immigration officials who entered their home and questioned them. It is submitted that in its consideration of the transcripts the First-tier Tribunal erred in failing to have regard to the manner in which the 'interview' was conducted *viz*. early in the morning, when the Appellants were in a state of shock, in the absence of any interpreter or legal advisor. It is submitted that these matters were plainly relevant to the alleged discrepancies arising in the evidence given and should have been given due weight. It is further submitted that the Tribunal erred in failing to place any weight on the fact that both Appellants were asleep in the same house at 6.30am, a matter giving rise to a strong inference that they are living together as husband and wife.

    iii) Unfairness in refusing to admit relevant evidence:

    The First-tier Tribunal records [at its §4] that it refused to admit a evidence of 'whatsapp' communication between the Appellants because some of it was conducted in Urdu, and translations had not been provided. The Tribunal goes on to weigh against the Appellants the fact that there is no evidence of communication such as 'whatsapp' messages. It is submitted that in the circumstances that the Tribunal plainly considered the material to be directly relevant to its decision, the material should in fairness have been admitted and/or the final hearing adjourned to permit translations to be prepared.

Discussion and Findings

9. I deal first with the allegation of perversity. Before me Mr Shea began his submissions by stating that this error occurred in the determination of whether the Respondent had discharged the overall legal burden to demonstrate that this

marriage was a sham; he subsequently developed his grounds to submit that it had been perverse for the Tribunal to have embarked on its enquiry in the first place, since the Secretary of State had manifestly failed to discharge the evidential burden of showing sufficient cause to suspect that this marriage may not be genuine. I take each of these issues in turn.

10. The effect of the decisions in ECO Nicosia v Papajorgi (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC), Agho v Secretary of State for the Home Department [2015] EWCA Civ 1198 and Rosa v Secretary of State for the Home Department [2016] EWCA Civ 14 is as follows. There is no burden on a claimant to prove that his marriage is genuine. Where however the decision maker has reasonable grounds for suspecting that to be the case, such grounds must be put to the claimant to give him an opportunity to dispel the suspicions. In the final analysis the legal burden of proof lies upon the Secretary of State.

11. Did the Secretary of State in this case have reasonable grounds to suspect that the marriage was not genuine? The Secretary of State's case rests on the matters identified in the transcripts of the interviews, summarised in the refusal letter of the 15th February 2019 as:

    (i) Mr Aslam is said to have admitted that this was a marriage of convenience;

    (ii) Mr Aslam was unable to give the date of his wedding;

    (iii) That the Appellants were found to be sleeping in separate rooms at the property.

12. Mr Shea protests that the deficiencies in the transcripts themselves demonstrate that this evidence could not, and should not, have been relied upon. They are a typed version of a handwritten note which is not supplied; they confirm that no interpreter was present and that it was early in the morning. He submits that some of the answers recorded are highly unlikely to be the answers that the Appellants in fact gave, and that if they did give them it is highly likely that they did so misunderstanding what they were being asked.

13. The Respondent's case before the Tribunal was not particularly cogent. As I set out above, three reasons are given in the refusal letter. The first is wrong as a matter of fact. Nowhere in the interview transcript can Mr Aslam be seen admitting that this is a marriage of convenience. It seems likely that the author of the refusal letter had in mind this exchange that appears in Ms Tofique's transcript [for clarity I have identified the Q&As, missing from original]:

    Q Have you been paid to marry him?

    A Yes. – changed to say she paid for the ceremony – not paid to marry him

    Q How much?

    A £143 [*this being the figure she had earlier given as the fees of the registry office*]

As to Mr Aslam's failure to give a date for the wedding ceremony, it must be noted that his response "at Bury Council 3.45" should be read in the context that the ceremony had happened only days before. Since it is not contested that the ceremony did in fact take place, it is difficult to see how his failure to give the date, on the spot, first thing in the morning, is a factor of very much weight at all. That leaves the fact that Mr Aslam was found to be sleeping on the sofa when the officers arrived: hardly damning in itself. For those reasons, I agree that the refusal letter, in the terms in which it was framed, arguably fails to attain even the low threshold required for the Respondent to discharge that initial evidential burden of finding 'reasonable grounds to suspect' that this is a marriage of convenience.

14. That said, I am not prepared to find that Judge McAll acted perversely when he decided to proceed with the hearing.

15. First, because there is nothing at all to suggest that the submissions now made by Mr Shea were made by Mr Khan, the solicitor who represented the Appellants on the day. On the contrary the Appellants tacitly accepted that the Respondent had shown reasonable grounds, since they came to court prepared to offer their rebuttal evidence. They at no time took the position that they had no case to answer. Nor is there any indication that they sought to have the transcripts excluded from the evidence.

16. Second, because the refusal letter was not the sum total of the Respondent's case. The case rested on the actual transcripts, in which Mr Aslam was apparently unable to say very much at all about his wife beyond the fact that she likes fish and cars, the two gave markedly discrepant answers about where they went on their first date, and Ms Tofique is recorded as having said the following:

    Q Why marry someone you know nothing about?

    A I have nothing to hide

    Q So you nothing about him, do you not think it's a bit suspect that someone you hardly know proposes after a few dates then?

    A Bit suspect - yes.

    Q We have seen messages to show he does not live here permanently with you, is this correct?

    A Yes

    Q How often do you see each other?

    A Every month

17. Even if the Appellants could, in the final analysis, show this admission that the couple live separately to have arisen from a misunderstanding/extenuating

circumstances, I am satisfied that the interviews themselves were a sufficient basis for the Secretary of State to have taken the action that she has. It was therefore not perverse for Judge McAll to have proceeded to hear evidence in the appeals.

18. That brings me to his overall decision. The determination is long and detailed and numerous discrepancies in the Appellants' evidence is identified, but the crux of the reasoning is found at paragraph 49. Having directed himself to the jurisprudence on fairness and interview records Judge McAll says this:

> "Whilst the interviews in this case do not relate to an asylum claim the guidance is a useful reminder on the need to ensure that the interview process must be fair and the record as accurate as possible. I have carefully considered the interviews and the statements and oral evidence of the appellants and their witnesses. Had the interview records thrown up a handful of inconsistencies that the appellants had addressed in the oral evidence then I would have added less weight to the interviews regardless of the fact that I do find both appellants have an adequate enough command of the English language to have understood the questions being put with the exception of ST's understanding of the word 'subsisting'. **However their appeal statements and oral evidence have revealed a complete lack of knowledge of each other. They have both been inconsistent with each other and their witnesses regarding what was known about UA's immigration status and when that information was shared with them, they have given conflicting descriptions of ST's medical issues from June 2018 through to January 2019. They have given conflicting evidence as to who ST travelled to Italy with to receive treatment, who she stayed with whilst she was there, how long she stayed there and I find it totally incredible for a couple claiming to be newly-weds. To marry in April 2010 and on ST's account to be separated from June to August 2018 is something that should have stood out in UA's evidence but he described living with ST from April 2018 and seeing her "on a daily basis" and only when ST's visits Italy were put to him did he mention them and gave a totally inaccurate account of them. They could not have been living together in a genuine relationship at that time because he would have known far more about ST than he has been able to describe**".

19. Although Mr Shea made detailed submissions on how the judge could have found otherwise, his case fell fall short of establishing this reasoning to be perverse. As this passage illustrates, the hearing revealed a number of significant discrepancies from which Judge McAll drew negative inference: I am satisfied that he was rationally entitled to do so. That there were more than one explanation for all the matters arising did not preclude Judge McAll from taking a view; indeed that is what he was there to do.

20. I now turn to the remaining grounds.

21. There was no arguable unfairness in the Judge refusing to admit, on the morning of the hearing, 'whatsapp' messages exhibited on Mr Aslam's mobile telephone. It was wholly inappropriate of Mr Khan, representing the Appellants, to suggest this. Admitting the evidence at that stage would have deprived the Home Office presenting officer of a reasonable opportunity to consider it; many of the messages were untranslated from the Urdu; it was not in compliance with directions. Having

made that perfectly legitimate decision to exclude the evidence the Judge cannot be criticised for failing to take it into account. On the evidence before him there *was* a lack of evidence of 'intervening devotion'. Mr Shea accepted that Mr Khan had not made an application for an adjournment, but suggested that fairness required that the Tribunal adjourn of its own motion so that the 'whatsapp' messages could be evidenced in proper form. I reject that submission. The refusal letter was served on the Appellants in February. The hearing was in June. They therefore had plenty of time to prepare their case, knowing full well what the evidence against them was.

22. I am not satisfied that the Tribunal failed to take into account the circumstances surrounding the interviews. Judge McAll was plainly aware of the manner in which the 'raid' took place on the property, and the fact that no interpreters were present: he expressly addresses that matter in the passage I have cited above [at his §49]. In any event, it is clear from his decision that the interviews played only a small part in his final decision, which was primarily based on the evidence that was given at hearing, some five months after the shock of that visit had receded, and with the Appellants having had the benefit of legal advice.

23. Accordingly I reject the grounds of appeal and find no error of law.

Decisions

24. The determination of the First-tier Tribunal contains no material error of law and it is upheld.

25. I was not asked to make an order for anonymity and on the facts I see no reason to do so.

Upper Tribunal Judge Bruce
23rd October 2019