



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

Miah (interviewer's comments: disclosure: fairness) [2014] UKUT 00515 (IAC)

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham

**Determination
Promulgated**

On 12 September 2014

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Before

The President, The Hon. Mr Justice McCloskey

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABUL MIAH

Respondent

Representation:

Appellant: Mr Smart, Senior Home Office Presenting Officer
Respondent: Mr N Ahmed (of Counsel), instructed by Eurasia Legal Services.

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 – 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.*

DETERMINATION AND REASONS

Introduction

1. By a decision made on behalf of the Secretary of State for the Home Department (the "Secretary of State") the Appellant herein, dated 02 July 2013, the application of the Respondent, a national of Bangladesh, aged 44 years, for a right of residence in the capacity of spouse of a EEA national exercising Treaty rights in the United Kingdom was refused. The basis of the refusal was the assessment of the Secretary of State's officials that the marriage under scrutiny was considered to be one of convenience. The Respondent's ensuing appeal to the First-tier Tribunal (the "FtT") succeeded. The Secretary of State appeals with permission to this Tribunal.
2. The main question raised by this appeal is an interesting one, the answer whereto could potentially affect the conduct of interviews in contexts other than that under consideration. It may be summarised thus: is a decision by the Secretary of State under the Immigration (European Economic Area) Regulations 2006 ("*the EEA Regulations*") that a marriage is one of convenience vitiated by procedural unfairness and, thereby, erroneous in law where the decision making process includes comments, or opinions, of the interviewing officer adverse to the subject's case which

are conveyed to the decision maker but are withheld from the subject? Thus formulated, this appeal raises a classic question of common law procedural fairness. This is essentially the issue on which the FtT allowed the appeal and upon which permission to appeal was granted.

3. The subsidiary question raised by this appeal is also of some interest, as it bears on the Secretary of State's duty to the First-tier Tribunal under Rule 13 of the Asylum and Immigration Procedure Rules 2005. It may be framed thus: does the duty under Rule 12 encompass a requirement to disclose Form ICD4605, the "Interview Summary Sheet", in every case of this nature? The consequences of the new FtT procedural rules are addressed in [20] *infra*.

The EEA Regulations 2006

4. For present purposes, it suffices to note that one aspect of the scheme of the Immigration (European Economic Area) Regulations 2006 is to confer a right of residence in the United Kingdom on spouses, if certain conditions are satisfied. Under Regulation 7, a spouse falls within the definition of "*family member*". Pursuant to Regulation 11(2), where the spouse is not an EEA national he/she has a right to be admitted to the United Kingdom if married to an EEA national. The spouse thus admitted has the opportunity to pursue acquisition of a permanent right of residence in the United Kingdom in accordance with the provisions of Regulation 15. In the context of the present appeal, one of the key provisions is Regulation 2(1):

“ ‘Spouse’ does not include

(a) A party to a marriage of convenience

The phrase "*marriage of convenience*" is not defined. The purpose of this discrete provision is clear: it is designed to prevent abuse of the rights and privileges available under the 2006 Regulations by those who contract sham marriages.

5. Directive 2004/38/EC, the relevant measure of EU law, regulates the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Thus it is underpinned by citizenship of the Union and the associated right of free movement. It seeks to promote family unity by facilitating the free movement of family members who are not nationals of a Member State. It creates a right of residence, subject to a series of conditions and qualifications. The Directive balances a variety of aims, including that of avoidance of the imposition of unreasonable burdens on the social assistance system of the host Member State. Notably, marriages of convenience are addressed under the rubric "Abuse of Rights", in Article 35, which 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. Any

such measures shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31."

The topic of marriages of convenience has been considered by the Upper Tribunal in Papajorgji (EEA Spouse - Marriage of Convenience) Greece [2012] UKUT 00038 (IAC). There it was held that there is no initial burden on a claimant to demonstrate that a marriage to an EEA national is not one of convenience. 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.

The European Commission Handbook

6. The mischief of marriages of convenience in the EU is highlighted in the European Commission Handbook addressing this topic. The stated aim of this guidance is to assist national authorities to " *fight abuses of the right to free movement addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens.*" It contains the following definition, which seems to be harmonious with Article 35 of the Directive:

"For the purposes of Directive 2004/38/EC, the notion of abuse refers to an artificial contract entered into solely with the purpose of obtaining the right of free movement and residence under EU law which, albeit formally observing the conditions laid down by EU Rules, does not comply with the purpose of those rules."

In this respect, the new Handbook replicates the earlier Commission guidelines of 2009.

7. Given the subject matter of this judgment, the section in the Commission's Handbook dealing with investigation techniques is of interest. It describes simultaneous interviews or questionnaires (involving the two parties to the marriage), document and background checks, inspections by relevant authorities and Community-based checks as the main investigation techniques employed throughout the Union. Interestingly, it formulates the threshold for interviewing suspected spouses in the following terms:

*"As any other investigation technique, interviews of suspected spouses should only be launched where national authorities - **on the basis of the information available and using the double-lock safeguard mechanism** - consider that their serious doubts about the genuineness of the marriage have not been sufficiently dispelled."*

Interviews are considered to be "*the most effective technique*" available for verifying whether a spouse has provided non-conflicting, consistent and correct information about the other spouse, their past relationship and future plans. National authorities are encouraged to deploy questionnaires in this process. Notably, the guidance contains the following statement:

“Contradictions, inconsistencies, lack of detail and implausible statements which are relevant for the decision making should be identified and explicitly put to the interviewed spouses.”

Here one finds clear echoes of the common law principle that decision making processes of this *genre* must be procedurally fair, reflecting the latin maxim *audi alteram partem*. The guidance, unsurprisingly, is not prescriptive regarding the necessary level of disclosure to suspects.

The Secretary of State’s Decision

8. In the “Notice of Immigration Decision” [Form ECD.3125], the Respondent was informed that his application had been refused because his EEA family member (viz his spouse) had failed to provide evidence of being a qualified person under regulation 6 of the EEA Regulations. The Notice further stated that this refusal was not considered to violate the Respondent’s rights under Article 8 ECHR. It was accompanied by a document entitled “Reasons for Refusal Letter”. This rehearses a lengthy series of the questions put to the Respondent and his asserted spouse during separate interviews and their recorded answers, followed by this assessment:

“It is evidently clear from the information that you and your EEA Sponsor provided during your interview with this department that you are not in a genuine or subsisting relationship with your EEA Sponsor and your marriage to her is one of convenience.”

In the next paragraph, the inconsistent answers given by the Respondent and the spouse to questions about their employment status were instanced as a further justification for doubting their credibility.

The First Issue

9. The first of the two questions identified above raises an issue of fairness. In this context, the fairness under scrutiny is of the procedural, not the substantive, variety. In a celebrated passage, Lord Mustill, having described the requirements of fairness in any given context as “*essentially an intuitive judgment*”, formulated the following six general principles:

“(1) Where an Act of Parliament confers an administrative power, there is a presumption that it will be exercised in a manner which is fair in all the circumstances.

(2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.

- (3) *The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision and this is to be taken into account in all its aspects.*
- (4) *An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.*
- (5) *Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both.*
- (6) *Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."*

(R - v - Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531, at [14]) Throughout this passage, there is a strong emphasis on context, prompting reference to the memorable and pithy formulation of Lord Steyn:

"In law context is everything."

(R (Daly) - v - Secretary of State for the Home Department [2001] 2 AC 532, at [28])

10. The reach and potency of the requirement of procedural fairness in the realm of administrative decision making are a reflection of the citizen's right to a fair hearing, which is one of the strongest principles of the common law. R - v - Secretary of State for the Home Department, ex parte Fayed [1996] EWCA Civ 946, which concerned a naturalisation decision, provides a graphic illustration. The impugned decision was made under section 6 of the British Nationality Act 1981. Section 44(2) of the Act provides:

"The Secretary of State, a Governor or a Lieutenant-Governor, as the case may be, shall not be required to assign any reason for the grant or refusal of any application under this Act the decision on which is at his discretion"

The Applicants' applications for naturalisation were refused. The refusals were unreasoned. In their judicial review challenges, they complained that they were entitled to a fair decision making process which had been vitiated by a failure to alert them to the case against them and the absence of reasons for the impugned decisions. Their challenges succeeded and they secured the remedy of orders quashing the Secretary

of State's decisions. The Administrative Court ruled that section 44(2) did not displace the common law requirement of procedural fairness. Lord Wolff MR stated, at 238:

"English law has long attached the greatest importance to the need for fairness to be observed prior to the exercise of a statutory discretion

It would be surprising if it was the implied intention of Parliament that the lack of a requirement to give reasons should have the effect of avoiding the requirement to give notice of a possible ground for refusing an application

In many situations, the giving of notice of areas of concern will do no more than identify possible rather than the actual reasons."

Phillips LJ, the second member of the majority, coined the "duty of disclosure" in describing the right of the subject to be alerted to the case against him: p 252. The Court held that section 44(2) did not over-ride this duty. Per Phillips LJ, at 253:

"The duty of disclosure is calculated to ensure that the process by which the Minister reaches his decision is fair. It enables the party affected to address the matters which are significant and thus help to ensure that the Minister reaches his decision having regard to all the relevant material."

Both members of the majority highlighted the elevated importance of this requirement in the particular decision making context, considering it more important than a requirement to provide reasons. Thus the fifth and sixth of Lord Mustill's precepts were given full effect.

11. In another context not far removed from that of the present case, namely the decision making of Entry Clearance Officers in visitors' visa applications, the Upper Tribunal has recognised the importance of a fair decision making process. In T (Entry Clearance) Jamaica [2011] UKUT 00483 (IAC), it was held that, as a prerequisite to a lawful decision, Entry Clearance Officers may, in certain circumstances, have to undertake enquiries, resolve disputed issues of fact and, possibly, conduct interviews: see [34] - [37]. As this decision demonstrates, there are close bonds between the citizen's right to a fair decision making process and the authority's duty to take into account all material information and considerations. Due enjoyment of the right facilitates fulfilment of the correlative duty.
12. What are the main features of the context of the decision making under scrutiny in the present appeal? Fundamentally, what is at stake is the entitlement of the person concerned to be admitted to the United Kingdom, where the status of permanent residence can be pursued. If the decision is in the affected person's favour, this entitlement is given effect. If the decision is otherwise, this entitlement is negated and the person

must leave the United Kingdom. The decision also has a direct impact on the other party to the marriage. Furthermore, an assessment that the marriage was one of convenience is a matter of some moment. It is tantamount to a decision that the marriage was undertaken for improper motives, designed to secure, dishonestly, a status and associated advantages to which the affected person was not legally entitled. This will be a significant blot on the person's immigration history and could operate to his detriment in the future.

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. This will entail putting to the subject the essential elements of any evidence upon which such suspicions are based. In this way the subject will be apprised of the case against him and will have the opportunity to make his defence, advancing such representations and providing such information, explanations or interpretations as he wishes. Adherence to these basic requirements should, in principle, ensure a fair decision making process in the generality of cases. In order to cater for the unusual or exceptional case, those involved in the decision making process must always be alert to the question of whether, in the interests of fairness, anything further is required.
14. Where there is a legitimate requirement to protect the identity of a third party, for example an informant (in the general sense), this should be capable of achievement without compromising the basic requirements of a fair decision making process. Thus the substance of the information supplied by the third party will normally have to be disclosed to the interviewed person. There may be difficult, borderline cases in which fairness might require identification of a third party. It is conceivable that the interviewee may find it difficult to make a worthwhile response in ignorance of the identity of the third party. This could arise, for example, where the response would be that the allegations in question are unreliable or fabricated, for whatever reason, or ill motivated. A response of this kind could, conceivably, be directly related to the identity of the third party concerned. Furthermore, there may be cases in which the precise words of a report, or allegation, may have to be disclosed. I draw attention to these issues because they were debated briefly during submissions at the hearing. They 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.
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. It is not argued that, when interviewed, the substance of the case against the Respondent was not put to him. Rather, the complaint is that the interviewer's comments and opinions, which were critical of and adverse to the Respondent, should not have been conveyed to the decision maker. I consider that the merits of this contention are to be evaluated by applying the test of whether this rendered the decision making process procedurally unfair. In the abstract, one can conceive of cases where comments of this kind might distort what had been transacted during the interview. For example, the Respondent's responses might not be fairly summarised. Alternatively, the comments might relate to some information or evidence adverse to the Respondent but not brought to his attention. In each of these illustrations, the safeguard for the Respondent is that it will be possible to demonstrate subsequently to a tribunal, on appeal, that the misdemeanour in question occurred and there will be independent judicial adjudication of whether the decision making process was fair and, hence, lawful. None of these illustrations applies in the present case.
17. Insofar as Mr Ahmed submitted that the comments and opinions of the interviewing officer should never be considered by the decision maker, I cannot agree. The interviewer will normally be well equipped and placed to express relevant views, particularly where the same person has, separately, interviewed the two parties to the marriage. More specifically, the interviewer will be uniquely placed to comment on the subject's presentation, reactions and demeanour generally. This is illustrated in the present case, in the interviewing officer's description of his "*impression*" that the wife was evading certain critical questions. There is no challenge to the *bona fides* of the interviewer. Where the interviewer elects to include comments and/or opinions in the materials conveyed to the decision maker, the latter will not, of course, be bound by them. I consider that the duty on 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.
18. It is also important to recognise the public interest in play in cases of this kind. It is contrary to the public interest that marriages of convenience should go undetected. The public interest requires that such marriages be exposed where possible and that the parties be denied the rights flowing from genuine marriages. The fulfilment of these public interests is promoted by ensuring that the decision maker is as fully equipped as possible. This discrete goal is, in turn, promoted by the mechanism of conveying to the decision maker the interviewer's assessment of the interviewees.

19. Thus I answer the first of the questions raised in this appeal in the following way:
- (a) In the present case, the communication to the decision maker of the interviewer's assessment of the genuineness of the Respondent's marriage did not render the decision making process unfair. Hence the impugned decision was lawful.
 - (b) In the generality of cases, this practice will not contaminate the fairness of the decision making process.

The Rule 13 Issue

20. I turn to consider the second of the question raised by this appeal. Rule 12 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 ("*the 2005 Rules*") provides that upon receipt of a Notice of Appeal, the First-tier Tribunal ("*the FtT*") shall serve same upon the Respondent (the Secretary of State) as soon as reasonably practicable. Rule 13 provides:

"(1) When the Respondent is served with a copy of a Notice of Appeal, it must ... file with the Tribunal a copy of -

(a) the notice of the decision to which the Notice of Appeal relates and any other document served on the Appellant giving reasons for the decision;

(b) any -

(i) statement of evidence form completed by the Appellant; and

*(ii) record of an interview with the Appellant,
in relation to the decision being appealed;*

*(c) **any other unpublished document which is referred to in a document mentioned in (a) or relied upon by the Respondent;** and*

(d) the notice of any other immigration decision made in relation to the Appellant in respect of which he has a right of appeal under section 82 of the 2002 Act."

[My emphasis.]

By Rule 13(2), the Secretary of State must also file any additional documents required by directions given by the Tribunal. All documents filed must also be served on the Appellant.

21. The requirement to make disclosure (formerly discovery) of all material documents in a party's possession, custody or power is a long established feature of most litigation contexts. It is an integral part of the administration of justice. It is a duty owed to both the other party and the court or tribunal concerned. It is rooted in fairness and the rule of law itself. In the particular context of judicial review proceedings, Sir John Donaldson MR stated in R - v - Lancashire County Court, ex parte Huddleston [1986] 2 All ER 941, at 944:

*“Certainly it is for the applicant to satisfy the Court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. **But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands**”.*

[My emphasis.]

This has also been formulated as a duty of candour: see Tweed - v - Parades Commission (Northern Ireland) [2006] UKHL 33, at [54], per Lord Brown. Asylum, immigration and kindred appeals are a species of public law proceedings, in which the parties are the citizen (on the one hand) and the State (on the other). I consider that these duties apply with full force in the context of such appeals. To suggest otherwise would be inimical to the administration of justice. Rule 13 of the 2005 Rules is to be construed and applied accordingly.

22. The representatives of both parties were agreed that the document enshrining the interviewer's comments - Form ICV.4605 - is not routinely disclosed in appeals of this kind. The practice appears to be irregular and inconsistent. I consider that fulfilment of the duties identified above requires disclosure of this Form as a matter of course. The Claimant's right to a fair appeal 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. It will also enable mechanisms such as redaction, which in practice one would expect to arise with extreme rarity, to be considered.
23. While, there may be cases where it can be demonstrated that non-disclosure of this document did not contaminate the fairness of the tribunal's decision making process, one would expect these to be rare.
24. The rules governing proceedings in the FtT have just changed, with the introduction of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, in operation from 20 October 2014. Within the new regime, rule 24 is the equivalent of the former rules 12 and 13. While there are some linguistic adjustments, these are slight. The essence and substance of the new rule are unchanged. Accordingly, the approach set out in [22] above will apply. I also draw attention to the new rule 23,

which subjects the Secretary of State to specific disclosure obligations in cases involving appeals against refusal of entry clearance. The main difference is that the Secretary of State's response to a Notice of Appeal must include "*a statement of whether the Respondent opposes the Appellant's case and, if so, the grounds for such opposition*". Otherwise, rules 23 and 24 are materially indistinguishable. The principles rehearsed above will apply to this discrete class of appeals also.

Decision

25. I have rejected the contention that the Secretary of State's decision making process was unfair and, hence, unlawful by virtue of the interviewer communicating adverse comments and opinions to the decision maker. Thus the Secretary of State's decision was in accordance with the law, from which it follows that the decision of the FtT to allow the Respondent's appeal cannot be upheld.
26. Thus I set aside the decision of the FtT and remit the appeal to a different constitution of the FtT for the purpose of deciding on the merits the issue of whether the marriage in question is one of convenience and making a fresh decision.

Seamus McCloskey

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE

UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 01 October 2014