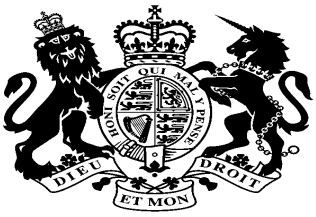

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/28183/2014**

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 26 March 2015	**On 26 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MADDASAR MEHMOOD

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr J Wells, M&K Solicitors
For the respondent: Mr S Kandola, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a national of Pakistan, appealed to the First-tier Tribunal against a decision made by the Secretary of State to refuse his application for a residence card as confirmation of a right to reside in the UK as the spouse of Agnieska Paszko, who is Polish and therefore an EEA national. Due to a number of discrepancies in a marriage interview carried out in 18 June 2014 the respondent was satisfied that the appellant was a party to a marriage of convenience and the application for a residence card was refused with reference to regulation 2 of the Immigration (European Economic Area) Regulations 2006 (The EEA Regulations).

2.The respondent had produced an interview summary sheet in relation to the interview on 18 June 2014 but did not produce the interview record. At the hearing in the First-tier Tribunal the presenting officer asked for an adjournment to obtain the record. The Judge refused to grant an adjournment. The Judge records in his determination on a number of different occasions that the appellant's

representative raised the issue of fairness in that the appellant did not know the extent of the respondent's case in the absence of the interview record. The appellant's representative advised the First-tier Tribunal Judge that the appellant and his wife would not adopt their witness statements or be put forward for cross-examination in the absence of the interview record. The hearing therefore proceeded by way of submissions only.

3.The Judge found that the interview summary was *'wholly one-sided'* and that the respondent had deprived the appellant of an opportunity to refer to positive aspects of the interview and that this diminished the weight which he gave to the discrepancies reported [20]. However the Judge took into account that it was accepted by the appellant that there were some conflicts in the answers given. The Judge concluded that the respondent had produced *'enough credible evidence to justify a reasonable suspicion that the marriage was entered into for the predominant purpose of securing residence rights'* and that the evidential burden therefore shifted to the appellant [24]. The Judge decided that he could not attach much weight to witness statements which had not been adopted and where the witnesses had not been subject to cross-examination. He therefore concluded that the appellant had not discharged the burden upon him to displace the reasonable suspicion raised by the respondent.

4.The grounds of appeal to the Upper Tribunal make three main submissions. It is contended that the Judge's decisions to proceed without the interview record and to refuse to give a preliminary ruling as to whether the Secretary of State had discharged the burden on her gave rise to procedural unfairness in that the appellant did not know the whole of the evidence against him. It is further contended that the Judge erred in giving little weight to the witness statements in considering whether the appellant had discharged the burden upon him [26] yet he did take them into account in drawing the adverse inference that the appellant accepted that there were some conflicts in the answers given at interview [21]. It is further contended that, given that he attached little weight to the interview record, the Judge failed to give reasons why he found that the respondent had discharged the burden on her to justify a reasonable suspicion that the marriage was one of convenience.

5.At the hearing before me Mr Wells also relied on the decision of the Upper Tribunal in Miah (interviewer's comments: disclosure: fairness) [2014] UKUT 00515 (IAC). The Secretary of State in the Rule 24 response submitted that as this decision was issued on 10 November 2014, after the First-tier Tribunal hearing, the Judge cannot be criticised for failing to have regard to it. Mr Kandola submitted that the evidence set out by the respondent in the summary was enough to discharge the burden and that it was therefore open to the Judge to find that the appellant had not discharged the burden upon him in light of his decision not to give oral evidence. He submitted that there had been no unfairness looking at the decision as a whole.

6.It appears that the decision in Miah dealt with the opposite scenario from that in this case in that the interview record had been produced but not the interviewer's comments, which are contained in the interview summary. In his decision in Miah the President gave the following guidance in relation to fairness and disclosure;

> "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.
> …
> 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.
> …
> 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."

7.Although issued after the hearing in this case the decision in Miah reiterates the general principle of fairness with particular reference to case law including the decision in R – v – Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531, which was cited to the First-tier Tribunal in his case. It is clear from the analysis in Miah that the failure to disclose the interview record in this case did amount to a procedural unfairness. The appellant did not know all of the case against him in order to prepare a properly informed response. Further, the absence of a full transcript led the Judge to conclude that this diminished the weight he could attach to the summary. This in turn led to a lack of clarity as to what evidence the Judge relied on to support his finding that the respondent had discharged the initial burden upon her.

8.Accordingly I am satisfied that the Judge permitted a procedural irregularity in proceeding without the interview record, this made a material difference to the fairness of the proceedings. In these circumstances I set aside the decision of the First-tier Tribunal.

9. I am satisfied that the appellant has not therefore had his case properly considered by the First-tier Tribunal. The parties were in agreement with my view that the nature and extent of the judicial fact finding which is necessary in order for the decision to be remade is such that (having regard to the overriding objective in Rule 2 of the Upper Tribunal Procedure Rules 2008) it is appropriate to remit the case to the First-tier Tribunal. Mr Kandola said that he ahs requested a copy of the interview record and it should therefore be available for the fresh hearing.

Decision
The Judge made an error on a point of law and the determination of the First-tier Tribunal is set aside.
The appeal is remitted to the First-tier Tribunal to be remade.

Signed Date: 26 March 2015

A Grimes
Deputy Upper Tribunal Judge