



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/07824/2016

THE IMMIGRATION ACTS

Heard at Field House
On 03 July 2018

Decision & Reasons Promulgated
On 7 September 2018

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

CHINONSO NKEM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr S. Nwaekwu of Moorehouse Solicitors
For the respondent: Ms A. Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 16 June 2016 to refuse to issue a residence card recognising a right of residence as the family member (spouse) of an EEA national on the ground that the marriage was considered to be a marriage of convenience contracted for the predominant purpose of securing residence rights.
2. First-tier Tribunal Judge Cameron ("the judge") dismissed the appeal in a decision promulgated on 04 January 2018. The judge outlined the respondent's reasons for refusing the application, which were based on the outcome of a visit to the appellant's home by immigration officers on 24 October 2015 [7-10]. He recognised that the burden of proof is initially on the respondent to show that the marriage is one of convenience [5]. The judge went on to outline the submissions made by both parties at the hearing [14-32]. He noted that the appellant's representative stated that the respondent "must

show evidence of a reasonable suspicion and the burden is on the respondent. The evidence in relation to the visit is insufficient and the respondent has not produced the interview record.” [23]. He also noted that the appellant’s legal representative accepted that they had not asked for a copy of the interview record [23]. The judge directed himself to the relevant principles outlined in *Papajorgji (EEA spouse – marriage of convenience) Greece* [2012] UKUT 00038, *Rosa v SSHD* [2016] EWCA Civ 14 and *Sadovska v SSHD* [2017] UKSC 54 [34-38].

3. The judge summarised the evidence relied upon by the Home Office as follows:

- “39. The respondent has relied principally on a visit by immigration officers to the appellants address which took place on 24 October 2015. The respondent has not provided in full the interview which took place during that visit although there is a minute provided by IO Dismore. This appears at document K1 of the respondent’s bundle.
40. The minute states that the officers obtained entry by consent and that an officer spoke to Mr Halilu in his room. It notes that he was very nervous and advised that the appellant was on her way to work but phoned her to come back to the house.
41. It is stated that the appellant took the officer to her room which was separate to that of Mr Halilu. It is stated that there was no evidence to suggest that they sleep in the same room as all their belongings were in separate rooms.
42. It is also noted that some of the answers from the appellant did not match those given by Mr Halilu in particular there were two discrepancies in relation to who paid the rent with the appellant stating that Mr Halilu paid it, but he stated that she paid her own rent. Mr Halilu stated that the appellant worked weekends and studied during the week, but she stated that she had finished her studies and was awaiting her results.
43. There is also reference to questions about a previous relationship however the immigration officer then refers to additional notes which have not been provided.
44. It is however clear from the minute that the appellant and Mr Halilu were able to provide a number of answers which were consistent in particular where they met and how long they had known each other and where he had proposed.
45. It would therefore appear from the respondent’s own minute of the visit that the decision was based on the fact that the officers state they were shown to separate rooms and that there were two discrepancies in relation to the rent and also her work and studies.”

4. The judge went on to consider the evidence given by the appellant and the EEA sponsor at the hearing. He noted several inconsistencies in their evidence, which he outlined in the decision [46-52]. The judge then made the following finding relating to the respondent’s evidential burden of proof:

- “53. As indicated above it is for the respondent to show on a balance of probabilities that there is sufficient evidence to raise an issue as to the genuineness of the marriage. The respondent has been able to point to inconsistencies with regard to both the visit and in oral evidence. I am satisfied on a balance of probabilities when taking into account the inconsistencies within the evidence that the respondent has discharged their

burden of proof and that the burden therefore shifts on to the appellant to provide a reasonable explanation for those inconsistencies.”

5. The judge then went on to conduct further analysis of the evidence, including the witness statements prepared by the appellant and the EEA sponsor in response to the points outlined in the minute of the immigration officers’ visit [54-57]. He also took into account the evidence produced by the appellant to show that she lived at the same address as the EEA sponsor and the evidence of a witness, Mr Y A [59-62]. Having considered the evidence for and against the appellant, and having heard and assessed the evidence of the witnesses at the hearing, the judge concluded that the evidence produced by the appellant was not sufficiently reliable to show that the marriage was genuine [63-69].
6. The appellant’s grounds of appeal essentially argue a single point. It is argued that the respondent’s failure to produce a copy of the ‘notes of the interview’ that took place during the visit to the appellant’s home was unfair. The appellant relied upon the decision in *Miah (interviewer’s comments’ disclosure; fairness)* [2014] UKUT 515. The First-tier Tribunal erred in finding that the respondent had discharged the initial burden of proof to show that there were reasonable grounds for suspecting that it was a marriage of convenience in the absence of a copy of the interview record.

Decision and reasons

7. In *Miah*, the decision also involved an allegation that the marriage was one of convenience. However, in that case the appellant and the EEA sponsor were asked to attend a formal interview. The record of the interview was disclosed, but the issue before the Upper Tribunal was whether the respondent’s failure to disclose the interviewing officer’s notes and comments was unfair. The central plank of the decision was firmly rooted in the principles of procedural fairness:

“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."
8. The President of the Upper Tribunal concluded that it was open and indeed necessary for the decision maker to take into account the interviewer's comments, but it was in the interest of a fair hearing for those comments to be disclosed in order to ensure a fair hearing at appeal stage.
9. In *Miah* a formal interview had taken place with Home Office officials. The usual format is for the Home Office official to create a record of the questions and answers during the interview. The decision maker will consider the substance of the answers given by an applicant and the EEA national sponsor and may take into account any comments made by the interviewing officer who was in a good position to assess the credibility and demeanour of those being interviewed.
10. The circumstances of this case are somewhat different to those in *Miah*. Immigration officers visited the appellant's home to conduct a 'pastoral visit'. This is a different form of assessment to a formal interview. In a formal interview the respondent is primarily exploring the parties' knowledge of one another and testing the consistency of their evidence. In a 'pastoral visit', the respondent is primarily seeking to make observations about the applicant's claim that they are living together with their spouse. If a marriage is one of convenience, and there is no physical evidence to suggest that the parties are living together as a married couple, it is an effective way for the respondent to test the credibility of the application.
11. In this case, the immigration officers were able to speak to the appellant and her sponsor. Although they were inevitably asked some question, the purpose of the visit was primarily to make observations about their domestic circumstances. Mr Nwaekwu asserts that process has been unfair because the respondent has not disclosed the interview notes; yet admitted at the First-tier Tribunal hearing that no

steps had been taken to ask for copies of the notes or even to establish if any existed. As a judge of some years standing in an expert tribunal I take judicial notice of the fact that the records of such enforcement visits are usually produced in the same format that has been produced in this case. Although it is reasonable to assume that the immigration officers may have taken some notes, the purpose of the visit was not to conduct a formal interview of the kind that would generate a question and answer record. The usual procedure is for the immigration officer to summarise his or her observations of the visit and any other reasons to support their conclusion that the marriage is likely to be one of convenience.

12. The notes of the 'pastoral visit' are in effect the summary produced by the immigration officer. In this case the summary set out the immigration officer's observations about the appellant's living arrangements with the EEA sponsor. He observed that they had separate rooms in a shared house. There was no evidence to suggest that they slept in the same room. All their belongings were in separate rooms. The immigration officer observed that the EEA sponsor appeared to be "very nervous". The immigration officer noted that some of the answers to his questions were consistent and summarised the information. He went on to note that there were two discrepancies. The appellant said that she paid her own rent, while the EEA sponsor said that he paid the rent. The EEA sponsor said that the appellant works weekends and studies during the week, while the appellant said that she had completed her studies and was awaiting her results. The summary went on to note:

"I asked Ms NKEM what happened with regard to her previous relationship. She simply stated "IT DIDN'T WORK OUT". Ms NKEM appeared panicked when I asked her this question (see notes for Admin Removal case raised 5/12/2011)"

13. The last reference appears to relate to information held on the respondent's file about an earlier application. Nothing seems to have turned on the comment. The decision letter does not mention it and it did not form part of the reasons for refusal.
14. Arguments relating to procedural fairness only gain some traction if the appellant can show that she was disadvantaged in some way by the failure of the respondent to disclose any underlying handwritten notes. In this case the summary of the visit is the usual format in which the immigration officer makes his notes. It is clear from the summary that the appellant was informed of the substance of the issues that formed the basis of the respondent's decision. She was able to respond to the comments and the alleged discrepancies in her witness statement. It is difficult to see what disadvantage there was to the appellant when she was clearly aware of the alleged discrepancies and the reasons why the immigration officer had doubts about the relationship. She had an opportunity to address those points before the hearing.
15. The judge referred to the correct legal framework. The fact that the respondent did not produce underlying notes (if they existed), and was never asked to, does not obviate the need for the judge to consider whether the evidence that was produced was nevertheless sufficient to give rise to a reasonable suspicion that the marriage was one of convenience. The judge took into account the fact that there were no underlying

notes, but was entitled to consider what was said in the summary of the 'pastoral visit' prepared by the immigration officer.

16. Once the evidential threshold giving rise to reasonable suspicion has been met it was open to the judge to consider the other evidence before him, including the oral evidence of the appellant and the EEA sponsor. At that point, it was open to the judge to make his own assessment of the credibility of the evidence given by the witnesses and what weight could be placed on the other evidence produced by the appellant in support of the appeal. The grounds do not particularise any specific challenge to the judge's credibility findings. It is understandable that the appellant disagrees with the decision, but the judge's findings were within a range of reasonable responses to the evidence. The failure of the respondent to produce any underlying notes of the visit did not render the hearing unfair in circumstances where the appellant was fully aware of the substance of the case against her and had been given a fair opportunity to respond.
17. For the reasons given above, I conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law. The decision shall stand.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

The decision shall stand

Signed  Date 03 September 2018
Upper Tribunal Judge Canavan