IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004862

First-tier Tribunal No:
EU/56461/2023
LE/02673/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 24 January 2025

Before

UPPER TRIBUNAL JUDGE RUDDICK

Between

BERNARD TETTEH

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R. Layne, instructed by BWF Solicitors
For the Respondent: Ms N. McKenzie, Senior Home Office Presenting Officer

Heard at Field House on 15 January 2025

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Freer ("the Judge") dismissing his appeal against the respondent's decision to refuse him leave to remain under Appendix EU.

Background

2. The appellant is a citizen of Ghana, born in Ghana in 1981. On 2 October 2020, he married Abigail Opoku Mensah, an Italian citizen born in Ghana in 1970. The couple were residing in the UK at the time, and their marriage

was performed by proxy in Ghana, in accordance with Ghanaian law. There is no dispute as to the legal validity of their marriage.

3. On 2 February 2021, the appellant applied for leave to remain as a spouse under Appendix EU. On 20 July 2021, the respondent interviewed the couple via Skype, and the respondent's interviewing officer formed the view that the marriage was one of convenience. He set out the reasons for this view in an ICD.4605 Interview Summary Sheet:

> "The applicant and the sponsor were questioned at length and in detail on numerous topics [11 topic were listed]. The applicant and the sponsor answered all questions put to them at interview. Whilst […they] were able to provide some consistent responses to the questions put to them, they were unable to provide consistent responses on the following:"

4. The interviewing officer then summarised in his own words the couple's conflicting answers to questions about where the sponsor was on 31 December 2020, whether they had locked the door when they had left their home that morning, whether the sponsor had family members in the UK, who else they were living with, the applicant's immigration history, who attended their customary marriage ceremony in Ghana, and whether they had received their marriage certificate from Ghana.

5. On 2 August 2021, the respondent refused the appellant's application for leave to remain under Appendix EU, relying on summaries of the discrepancies noted by the interviewing officer. The appellant applied for Administrative Review of the decision, submitting representations from his solicitor explaining that he had misunderstood the question about his wife's whereabouts on 31 December 2020, and that, more generally, the couple's ability to answer questions had been affected by "misunderstandings" they had had with each other two days before the interview and because they had "struggled to understand most of the questions" they were asked.

6. On 5 November 2023, the respondent upheld the decision, citing in general terms the "numerous discrepancies" in the couple's answers at their interview.

7. The appellant appealed and asked for his appeal to be decided on the papers. On 2 December 2023, his wife passed away.

8. In support of his appeal, the appellant submitted a skeleton argument in which it was pointed out that the respondent bore the burden of proving that the marriage was one of convenience and argued that in the absence of the marriage interview record "the Respondent's case cannot even 'get off the ground'." His bundle of evidence included the representations in support of his Administrative Review application, various Ghanaian documents attesting to the legal validity of his marriage, his wife's death certificate, a seven-sentence long appeal statement consisting of a series of bare assertions, seven items of official correspondence addressed to him or to his wife at the same address between February 2022 and

February 2024, 15 payslips addressed to him at that address between August 2023 and February 2024, his bank statements from August 2023 through March 2024, 23 photographs of the couple together on what appears to be at most three separate occasions, four pages of photos of his wife lying in her casket, three photos of a funeral service, and eight photographs of a graveyard.

9. The respondent's bundle included various letters from the respondent to the appellant, the appellant's online Administrative Review application form, various documents the appellant had submitted in support of his application, the representations in support of the AR application, and the ICD.4605 Interview Summary Sheet. It also included a document entitled "Interview Record Sheet," but this consisted only of the title page, a page recording the couple's confirmation of their names, dates of birth and address, the interviewer's pro forma opening statement, and three pro-forma concluding pages.

The Judge's decision

10. In a decision dated 29 August 2024, the Judge dismissed the appellant's appeal. At [3], he identified the issues in dispute as:

> "(a) Is the marriage one of convenience? (Burden of proof on respondent)
>
> (b) Is the proxy marriage effective?
>
> (c) Were the interview answers of appellant and the late sponsor consistent or inconsistent?
>
> (d) Is there sufficient other evidence of weight to support the appellant's contention that the marriage was not for immigration advantage but based on a genuine relationship, at the date it was entered into?"

11. The Judge's findings are set out across 14 unnumbered paragraphs. They begin by noting the "five separate discrepancies in the two interview records" before turning to the appellant's evidence.

12. The Judge noted that the appellant had made "no effort to prove" how the relationship had begun. There was documentary evidence showing that the appellant and the sponsor "may have shared the same address", but the Judge noted that "it is possible to register a billable account at an address, with help from the occupier, and to mislead thereby." The appellant had been living in a different city in 2024, after the sponsor had died.

13. The rest of the Judge's reasons consist of comments on the absence of evidence: there were no photographs of the couple outside their accommodation, no witness statement from the sponsor (which could have been provided in 2021, 2022 or 2023), and no explanation for its absence, no messages or cards exchanged between the couple, no evidence of pregnancy or children of the family, no details about the history of the relationship in the appellant's statement, no statements of support from any friends or relatives, no evidence of the sponsor's illness, and "very

little" evidence of when the appellant changed his address. The "full bank history" of the couple had not been disclosed.

14. The Judge also noted that the sponsor's death had been reported by her brother, not by the appellant and considered that this was not consistent with their having been in a genuine relationship.

15. At [7]-[8], the Judge addressed what he had identified as "Issue (c) interview answers".

> 7. "The interview answers were frequently inconsistent. There is no need to repeat here what has already been set out. The interview record and decision letters are disclosed.
>
> 8. The appellant has sought to explain this by poor communication; but he had no difficulty in contradicting the answers of his wife and vice versa. He and his wife are both from the same culture in Ghana and were both from Accra. I conclude that this is far from being a satisfactory explanation. He has also sought to say the differences were minor but the Court finds that they related to a major event in the previous year and a relationship then said to be only a year old. This is far from persuasive evidence of his case. It is inconsistent with the marriage being an important relationship apart from its legal advantage."

16. At [9], the Judge noted the absence of any evidence that the sponsor was ill at the interview and at [10], he concluded that "I therefore must assume that she was reasonably well when she attended the interview" and that the "most likely explanation" for the discrepancies was that they were "never in any serious romantic relationship."

17. The Judge then, for the second time, considered the evidence that the appellant had submitted. He noted that there were no bills in joint names, although he was satisfied that the sponsor was living at the claimed address [11]. He repeated that the official correspondence addressed to the appellant could have been obtained by giving "misleading" evidence to the organisation in question and expressed the view that it was therefore not "compelling evidence" [12]. He summarised his view of the appellant's evidence at [13]: "There is a striking void of evidence to show any relationship" above and beyond having "possibly" lived at the same address.

18. At [15], the Judge found that there was "no compelling evidence to support the claims of the appellant" and "sufficient evidence to support the claims of the respondent" and pronounced himself satisfied that the marriage was one of convenience. He dismissed the appeal.

The grounds of appeal

19. The appellant applied for permission to appeal on two grounds.

20. Ground One: "Failure to consider important evidence." Under this heading, the appellant argued that the complete interview records were never disclosed, and if they had been disclosed, the Judge would not have

made the findings he did. It was asserted that the Judge's finding that the respondent had not discharged her burden of proof was "not reflective of the complete interview records" and "if the judge had had the benefit of the contemporaneous interview notes, he would have come to a different conclusion." This is because it was "more likely" that in a two-hour long interview, there would have been "very detailed discussions about the appellant and his deceased spouse".

21. Moreover, the Respondent had been required to disclose the records, in accordance with Rule 24(1)(c) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and had not done so.

22. Ground Two: Irrationality. Three points are put forward here. First, it was argued that it was irrational for the Judge to note that it was "possible to register a billable account at an address, with help from the occupier, and to mislead thereby", because there was no evidence that the appellant was "misleading the court". Secondly, it was procedurally unfair for the Judge to take credibility points against the appellant in a paper appeal, because he had no opportunity to respond. Third, it was irrational for the Judge to note the absence of a witness statement from the appellant's wife between 2021 and 2023, because, "Why would an appellant's witness produce a statement 3 years before the appeal?"

23. In a decision dated 21 October 2024, First-tier Tribunal Judge O'Garro granted the appellant permission to appeal on the grounds that it was arguably procedurally unfair that the full interview records had not been disclosed.

24. On 29 October 2024, the respondent submitted a Rule 24 notice, resisting the appeal on the grounds that there was no procedural unfairness because the appellant elected to have a paper appeal and made no application to the First-tier Tribunal for the disclosure of the interview records. It was open to the Judge to put the weight he did on the evidence before him, including the fact that the appellant was not named as the informant on his wife's death certificate and that they were "living in different towns when the death was registered".

25. On 6 November 2024, Upper Tribunal Judge Stephen Smith issued directions for the Respondent to file and serve any marriage interview records within 21 days. She did not do so.

The hearing

26. At the hearing before me, I had two bundles from the appellant. These were a composite bundle of 242 pages containing the challenged decision, the grounds and grant of appeal, and the evidence both sides had relied on below, and a supplementary bundle from the appellant containing Judge Smith's directions and the Rule 24 response.

27. Ms McKenzie confirmed that the respondent had not complied with the directions and that she could not explain this. She asked for an

adjournment of 14-21 days on the grounds that this would assist the Tribunal. Mr Layne resisted the application. I refused the adjournment on the grounds that the issue before me was not what was in the interview records, but whether the Judge made an error of law in deciding the appeal without them. Without the interview records, the respondent would be unable to argue that their absence was not material, but that was not the basis on which she was defending this appeal.

28. I then heard submissions from both representatives. Mr Layne relied on Miah (interviewer's comments: disclosure: fairness) [2014] UKUT 00515 (IAC) for the proposition that the respondent was required to disclose the interview records, while Ms McKenzie relied on Nimo (appeals: duty of disclosure) [2020] UKUT 00088 (IAC) for the proposition that she was not. Both submissions were misconceived. In Miah at [22]-[23], the Upper Tribunal held that the respondent's "duty of candour" required the disclosure of the ICD.4605 "Interview Summary Sheet", while in Nimo at [22], the Upper Tribunal held that the "duty of candour" did not apply in First-tier Tribunal appeal proceedings and fairness did not require that the ICD.4605 be disclosed in every case. In this case, the ICD.4605 was disclosed, but the interview records were not.

29. It is Rule 24(1)(c) of the First-tier Tribunal Procedure Rules that dictates disclosure of the interview record.

30. Mr Layne's submission was, in essence, that the Judge could not have allowed the appeal in the absence of the interview records because this was the evidence that the respondent relied on. It was procedurally unfair for the Judge to decide the appeal in the absence of this evidence. It was also simply impossible for the respondent to meet her burden of proof if she had produced no evidence. With regard to Ground Two, he conceded that it was not unfair for the Judge to come to conclusions on the basis of the evidence without putting these to the appellant, because the appellant had chosen to have the appeal decided on the papers.

31. Ms McKenzie submitted that the Judge's conclusions were open to him on the basis of the evidence that was before him, and that it was possible for the Judge to conclude that the burden of proof was met without having sight of the interview records.

Legal framework

32. In deciding whether the Judge's decision involved the making of a material error of law, I have reminded myself of the principles set out in a long line of cases, including Ullah v Secretary of State for the Home Department [2024] EWCA Civ 201, at [26], Yalcin v SSHD [2024] EWCA Civ 74, at [50] and [51], Gadinala v SSHD [2024] EWCA Civ 1410, at [46] and [47], and Volpi & Anor v Volpi [2022] EWCA Civ 464, at [2-4] and of the danger of "island-hopping", rather than looking at the evidence, and the reasoning, as a whole. See Fage UK Ltd & Anor v Chobani UK Ltd & Anor [2014] EWCA Civ 5 [114].

33. As a general rule, applications made under Appendix EU are governed by the same principles as those made under the Immigration (European Immigration Area) Regulations. To adopt a more restrictive approach could breach the Withdrawal Agreement, which is designed to preserve the residence rights of EU citizens and certain of their family members, if those rights had arisen under EU law before the end of the transition period on 31 December 2020. Celik v SSHD [2023] EWCA Civ 921 [54-55]; see also The Independent Monitoring Authority for the Citizens' Rights Agreements v SSHD [2022] EWHC 3274 (Admin) [131-150].

34. It is trite the under EEA law, the respondent had the burden of proving that a legally valid marriage was a marriage of convenience. Nor could she demand evidence that a marriage was genuine unless she had reasonable grounds to suspect that it was not. Papajorgji (EEA Spouse: Marriage of Convenience: Greece), Re [2012] UKUT 38 (IAC) [33-38]; Sadovska v SSHD [2017] UKSC 54 [28]. If she did have reasonable grounds for suspicion, however, the parties to the marriage could be asked to provide evidence, and, as set out in Papajorgi at [39] and endorsed in Sadovska at [16]:

> "where the issue is raised in an appeal, the question for the judge will […] be 'in the light of the totality of the information before me, including the assessment of the claimant's answers and any information provided, am I satisfied that it is more likely than not this is a marriage of convenience?"

Moreover, once "grounds for suspicion have been raised", inferences can be drawn from a person's failure to provide evidence of the genuineness of the marriage. Agho v Secretary of State for the Home Department [2015] EWCA Civ 1198 [13]. This is consistent with the general principle that it is permissible to draw adverse credibility inferences from a person's failure to provide evidence that should be reasonably available to them.

Discussion

35. Although the respondent's failure to comply with Rule 24(1)(c) or with Judge Smith's directions was unfortunate, I do not consider that it resulted in any unfairness to the appellant. The respondent did disclose the document on which she relied in the refusal decision, namely the ICD.4605, and that is the document the appellant responded to in his application for Administrative Review. The Judge then considered the contents of the ICD.4605 and the appellant's response in the Administrative Review to what was recorded there, before finding that the appellant's explanation was unpersuasive and that the discrepancies were significant.

36. Notably, the appellant has not said at any time that the ICD.4605 is not an accurate reflection of what was actually said at the interview. Nor did he ask the First-tier Tribunal to direct the respondent to disclose the complete interview records so that he could put these discrepancies in context. It was not until his application for permission to appeal to the Upper Tribunal that he suggested that the complete interview records might perhaps have provided evidence in his favour, namely, detailed

answers that were consistent. However, even then he did not request disclosure of the record, and he was content to proceed without it.

37. Instead, the appellant's approach (perhaps on the basis of poor legal advice) has been to assert that in the absence of the interview record, his appeal must succeed because the respondent has provided no evidence. This approach fails, for two reasons. First, because the ICD.4605 is not no evidence. As noted in Miah at [17],

> "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."

38. Secondly, I consider that the appellant's strategy in this appeal has been based on a misunderstanding of what it means for the respondent to bear the burden of proving that a marriage is one of convenience. What it means is that the Judge deciding his appeal had to ask himself whether it was more likely than not that his marriage was one of convenience, not whether it was more likely than not that it was genuine. It does not mean that he was required to answer that question only by looking at the evidence adduced by the respondent.

39. Reading the Judge's decision as a whole, I consider it clear that he was entitled to decide that the marriage was more likely than not to be one of convenience based on the entirety of the evidence before him. As noted above, it is trite that adverse credibility inferences can be drawn from the absence of evidence that should be reasonably available. In this case, the Judge noted the complete lack of detail in the appellant's statement and the absence of any one of a wide range of types of evidence that could be reasonably expected to be available to a person who had been in a genuine relationship. He also noted that the appellant was not the informant on his wife's death certificate, and that he was living in a different city very shortly after her death. In addition, as noted above, he took into account the contents of the ICD.4605, which he was entitled to do, and the appellant's response to it.

40. Nor do I consider that that Judge's adverse credibility inferences were not reasonably open to him. He did not find that there was evidence that the cohabitation evidence was obtained in order to mislead, as suggested in the appellant's grounds; he simply noted that this is a possibility and explained that he put limited weight on it for that reason. Nor is it irrational to note the absence of a statement from the sponsor in 2021, either in support of the application or in support of the Administrative Review; she could have supported the initial application, and the appellant himself responded to the refusal letter at the time of the Administrative Review in 2021, via his solicitors.

41. For these reasons, the decision of the First-tier Tribunal did not involve the making of a material error of law.

Notice of Decision

The determination of First-tier Tirbunal Judge Freer is upheld, with the consequence that the appellant's appeal is dismissed.

E. Ruddick

Judge of the Upper Tribunal
Immigration and Asylum Chamber

22 January 2025