Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: EA/07380/2017

THE IMMIGRATION ACTS

At **Royal Courts of Justice**	**Decision & Reasons Promulgated**
on **26.11.2018**	on **04.12.2018**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Jahangir SHAHZAD

appellant

and

Secretary of State for the Home Department

respondent

Representation:
For the appellant: *Amanda Jones* (counsel instructed by Farani Taylor, Ilford)
For the respondent: Mr Nigel Bramble

DETERMINATION AND REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Rita Sethi), sitting at Taylor House on 20 June, to dismiss an EEA appeal by a citizen of Pakistan, born 1985. The appellant was here with leave as a student from 2010 – 14; but in 2011 he met a Romanian lady some 17 years older than him, with whom he went through an unrecognized religious ceremony of marriage in December 2015, and lived together, according to him, at least since then. That ceremony was followed by a duly registered civil marriage on 25 August 2016.

2. In 2016 the appellant applied for a residence card on that basis, which was refused. In 2017 he applied once more; but, following interviews with both him and his wife on 22 August, that was refused the same day, on the basis that theirs was a marriage of convenience, and on the 24th he gave notice of appeal. The refusal letter had set out the interview passages

NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.
(2) persons under 18 are referred to by initials, and must not be further identified.

relied on; but on 16 October the First-tier Tribunal gave directions for the filing and service of evidence, including the full transcript of the interviews.

3. This never happened, despite requests from the appellant's solicitors: there was a handwritten summary at annex E in the appeal bundle, but this gave the answers, without the questions. Quite rightly, the judge began the hearing by taking this up with the presenting officer: the presenting officer had taken the trouble to go into her office early to find out what had happened to the transcript; but there was nothing to be found. The judge expressed her surprise, and referred to *Miah* (interviewer's comments: disclosure: fairness) [2014] UKUT 515 (IAC). That decision, as the long title makes obvious, involved specifically the disclosure of the document recording the interviewer's comments, but the general importance of having a full transcript is clear, and was clear to all concerned at the hearing.

4. However, there was no application for an adjournment by either side, and the hearing went on its way. As a result of questions asked in cross-examination (see paragraph 16), the judge took the point up again with the presenting officer, who asked for, and was given a short adjournment to consult a senior case-worker. The presenting officer came back and told the judge that audio recordings had been found, but not transcribed: she asked for an adjournment for that to be done. Miss Jones opposed that, given the stage which the hearing had reached, and suggested that a similar application by an appellant would have been refused. The judge went on to record (paragraph 17) that

> She considered that the respondent's summary transcript of the marriage interviews together with the matters particularised in the [refusal letter] served to identify the respondent's key points against the appellant and accordingly the hearing could justly proceed.

5. The judge went on at 18 to say that she agreed with counsel: an adjournment was inappropriate at that stage, especially given what had happened following the directions given, and her own inquiry. The judge noted that counsel "… did not seek to contend that the appellant had been deprived of an opportunity to know the '*essential elements of the case against him*'", since only the points referred to in the refusal letter, based on the summary, were to be relied on, and she refused the application.

6. The case went on its way, with oral evidence from both the appellant and his wife. In due course the judge gave her decision. At 36 she noted this from the judicial head-note to *Miah,* from which the phrase she referred to at 18 had been drawn)

> *(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.*

7. At 37 the judge considered for herself what had happened, with obvious care, and came to the view that she could fairly go on to decide the case. At 38 she began, quite understandably, by dealing with the discrepancies in the appellant's evidence and hios wife's, as identified by the

respondent. She gave full weight to the explanations put forward, and, as Mr Bramble pointed out, made a number of other reasoned credibility findings against the appellant, not dependent on the contents of the interview.

8. Miss Jones did not criticize the judge's decision to go on with the hearing (which would certainly have been hard, since she had encouraged her to do so), nor the way she had decided the case, given the basis on which it had proceeded. The grounds of appeal (paragraph 13) say in terms "Miss Jones in opposing the late adjournment application considered the appeal could justly proceed without the full transcript of the couple's respective interviews".

9. While this is not made clear at that stage, which may have involved a summary of the judge's decision, the grounds go on at 21 to say this:

> The Appellant's submissions, which are not fully included in the determination, were not that the matter could proceed on the limited Home Office evidence, but that the hearing ought to proceed on the basis that the Secretary of State had failed to make prompt and proper disclosure of the relevant material, and that selected elements could not properly be considered as evidence against him.

10. Further general points about the importance of disclosure, in the light of *Miah*, were made at 22 – 26. Permission to appeal was given on the basis that it was "… open to argument that the judge should have adjourned the matter in order to obtain the marriage interview transcript or otherwise placed little or no weight on the summary".

11. Miss Jones argued before me that the judge had misled herself, in considering *Miah*, into thinking that paragraph 1 of the judicial head-note referred to the hearing, whereas it is headed 'Conduct of pre-decision interviews', to which it clearly refers. So far the judge may have been wrong.

12. There was no request for a transcript of the judge's record of proceedings, and the permission judge may not have appreciated from paragraph 21 of the rather prolix grounds that one would be desirable. However, if counsel really was arguing before the judge that the hearing should proceed, not on the evidence before her as it was, but by excluding any reference to the interviews at all, then it was her responsibility to make this quite clear at the time.

13. If counsel had made the submissions suggested at paragraph 21 of the grounds, then it should have been clear when the judge dealt with them whether the hearing was to go ahead with or without reference to the interviews. If it was not, then it was counsel's responsibility to ask the judge to make it clear.

14. The judge was obviously under the impression that the hearing was to go ahead on the basis of the evidence before her, including the interview summary and the references to it in the refusal letter, and that is what happened. It is clear from the judge's decision (see 19) that the appellant

was cross-examined about the contents of both interviews. If counsel had been under the impression that the hearing was to go ahead without any such reference, then again it was her responsibility to object at that point, so that the judge had an opportunity to consider what she had really argued.

15. Counsel clearly said nothing of the kind at any of these stages, but took the point, as she understood she had made it, in her grounds of appeal. Whatever counsel understood had happened, this laid her open to suspicion of what may politely be described as opportunism, in taking the point at that stage.

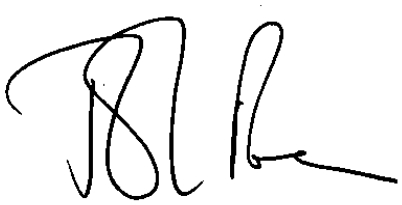
16. While the judge may have been wrong to consider what was said about '*essential elements of the case against him*', in paragraph 1 of the judicial head-note to *Miah*, as applying to disclosure for the hearing, as opposed to disclosure for the interview, she was faced with a situation where the Home Office had been in serious default of their obligations, which they were making a late attempt to put right by asking for an adjournment for a full transcript.

17. Miss Jones for the appellant, on the other hand, was asking the judge to go ahead with the hearing. The judge was well aware that this would involve doing the best she could in the circumstances, and made a fair decision on what was before her. She was not wrong in law to consider the extracts from the interviews, since it was never properly made clear to her that she was being asked not to.

18. It follows that this appeal is dismissed; but that is not to run down the importance of the Home Office paying proper attention to directions from the Tribunal, and providing the appellant's representatives with a full transcript of any interview relied on in good time before the hearing. It ought to be standard practice for one to be made, as soon as a notice of appeal is received.

19. While the Procedure Rules provide no specific sanction for failure to comply with directions, if on another occasion a transcript had not been provided, it would be fully open to those acting for the appellant to ask that the Home Office should be forbidden to rely on extracts. They might however like to consider whether that should be done by way of an application in advance of the hearing, so that the hearing judge was not presented with the difficult potential task of considering a case on its merits, after excluding evidence they had already seen.

Appeal dismissed



(a judge of the Upper Tribunal)

Date 30.11.2018