Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07859/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 May 2019	**On 24 June 2019**

Before

UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

VALENTYNA ANDRUSHKIV
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Rashid, Legal Representative from Smart Immigration Solutions
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge O'Rourke ("the judge"), promulgated on 22 March 2019, in which he dismissed the Appellant's appeal against the Respondent's decision of 27 November 2018, refusing to issue her with a residence card as a family member of an EEA national, pursuant to Regulations 7 and 18

of the Immigration (European Economic Area) Regulations 2016 ("the Regulations").

2. Having arrived in the United Kingdom in 2017, the Appellant intimated to the Respondent a desire to marry a Lithuanian national ("the sponsor"). A marriage interview was arranged for 23 March 2018 and the couple both attended. Following this event, and despite the apparent concerns raised by the Respondent immediately following the interview, the Appellant was permitted to marry the sponsor on 6 April 2018. An initial application for a residence card was then made and rejected by the Respondent on 14 August 2018. A second application was made on 4 October of that year. Refusing that application, the Respondent relied on evidence given by the couple at interview, as apparently set out in the report of an Immigration Officer, and concluded that the marriage had been one of convenience. Therefore, in light of Regulation 2 of the Regulations, it was said that the Appellant was not the family member of the sponsor and so could not be issued with a residence card.

3. The particular matters raised against the appellant included discrepancies in the evidence given at interview and the timing of the marriage itself.

4. For reasons unknown to us, the Appellant elected to have her appeal against the Respondent's decision determined without an oral hearing. The grounds of appeal contained in Form IAFT read as follows:

> "I am married to my EEA national husband and our marriage is not one of convenience. I wish to continue my life with my husband legally in this country as I have a right to be in the UK as my husband is currently in the UK working here and therefore exercising treaty rights. I have explained the various discrepancies to the Home Office which they have ignored and they did give us the authority to get married."

5. We note at this stage that the Appellant was legally represented at the time the appeal is lodged, and this representation has continued to date.

The judge's decision

6. The judge confirmed that he was taking account of the documentary evidence before him, this consisting of: a bundle from the Respondent containing the decision letter, the Appellant's application form, and items of supporting evidence; and a bundle from the Appellant including witness statements from her and the sponsor, additional supporting letters, correspondence from her representatives, and various items of supporting evidence.

7. Having included what appears to be a standard paragraph stating that the burden of proof rested with the Appellant, the judge goes on to set out what he describes as the "disputed facts". In essence, these are the points

taken against the Appellant in the reasons for refusal letter. The judge then summarises the contents of the witness statements from the Appellant and sponsor.

8. At [7] the judge finds that the discrepancies and other concerns raised by the Respondent were sufficient to "challenge the validity of the marriage and to refuse the application." In the following paragraph the judge states that the burden of proof rested with the Appellant satisfy him that the Respondent's conclusion was wrong. Significant emphasis is placed on the fact that the Appellant had chosen not to have an oral hearing of her appeal and, as a result, none of the witness statements or documentary evidence could be tested. The judge then states as follows:

> "I conclude, therefore that the Appellant has failed to discharge the burden of proof upon her, to counter the Respondent's concerns and that accordingly, in the absence of satisfactory evidence the Respondent was entitled to come to the decision they did and refuse the application. I can only conclude, therefore, on the evidence before me that the Appellant and sponsor are in a marriage of convenience."

9. The appeal was duly dismissed.

The grounds of appeal and grant of permission

10. The grounds of appeal are handwritten, although we infer that they were in fact drafted by the Appellant's representatives. In the context of this appeal, it is worth setting the grounds out in full:

> "The refusal notice has been relied on by the First-tier Tribunal judge regarding this interview. The Respondent has not provided any evidence of this interview transcript or an audio recording to which they refer to in their refusal notice. We have looked through the Respondent's bundle but we have merely come across the application form, supporting documents (some) and the refusal notice. Our client is more than happy to attend an oral hearing if required. We feel this appeal has been judged unfairly and biased opinion siding towards the Respondent without any evidence of this interview they keep referring to in their refusal and this appeal decision. Therefore we conclude there is an obvious error of law and we should be granted permission to appeal to the Upper Tribunal."

11. Permission to appeal was granted by the First-tier Tribunal judge Robertson on 24 April 2019. The grant refers to the issue of fairness and cites the case of Miah (interviewer's comments: disclosure: fairness) [2014] UKUT 00515 (IAC).

The hearing before us

12. Ms Rashid relied on the grounds of appeal. We asked her if there were any particular reasons for the Appellant's decision not to have had an oral hearing and why no request had ever been made by her firm for production of the marriage interview record and/or the Immigration Officer's report. In respect of the first point, she indicated that she had been on maternity leave and that the Appellant had wanted her (Ms Rashid) to continue to have conduct of the case notwithstanding her absence from the office. In respect of the failure to request the evidence, Ms Rashid informed us that she had only received Respondent's bundle relatively late in the day and had apparently only fully appreciated the fact that the marriage interview record was not before the judge upon receipt of his decision. We state our views on these explanations, below.

13. During the course of argument, we also raised what might have appeared to be an error on the judge's part in respect of the location of the burden of proof in a case concerning an alleged marriage of convenience. Notwithstanding this, there was no application to amend the grounds.

14. Mr Melvin relied on his rule 24 response, dated 30 May 2019. In essence, he submitted that the allegations against the Appellant must have been obvious upon receipt of the Respondent's decision and it was significant that no attempt had been made by the Appellant or her representatives to obtain the interview record. It was also said that the judge had been fully entitled to take the absence of any live evidence into account.

Decision on error of law

15. After careful consideration, we conclude that there are no material errors of law in the judge's decision. The judge's conclusion that the Appellant's marriage to the sponsor was one of convenience is sustainable.

16. At first glance, the judge's decision appears to disclose certain shortcomings. He does not make specific reference to the fact (and fact it was) that neither the marriage interview record nor the Immigration Officer's report had been provided by the Respondent. Connected with this first point is a failure of the judge to refer to the decision in Miah, in which the relevant part of the headnote reads:

> "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."

17. In the present case, the adverse points taken by the Respondent in the reasons for refusal letter had been based upon the relevant Immigration Officer's report of the marriage interview. In light of Miah, the fact that the Respondent relied on this source did not of itself render his decision or that the judge, unsound.

18. What then of the Respondent's failure to provide either the marriage interview record or the Immigration Officer's report? In the grounds of appeal as pleaded, the Appellant takes this omission as the centrepiece of her case against the judge's decision. Superficially at least, there would appear to be merit in the challenge.

19. However, on closer examination we conclude that the judge has not erred in law. Our reasons for this are as follows.

20. The failure of the Respondent to provide the marriage interview record did not *of itself* preclude the judge from taking account the points raised in the Respondent's reasons for refusal letter. There is nothing in Miah to suggest the contrary. Furthermore, at para. 23 of that decision, we find the following observation:

> "23. While, there may be cases where it can be demonstrated that non-disclosure of this document [the Immigration Officer's report] did not contaminate the fairness of the tribunal's decision making process, one would expect these to be rare."

21. At least four considerations lead us to the conclusion that this is an example of the rare cases alluded to in the passage cited above. First, despite the abundantly clear nature of the case against the Appellant as set out in the Respondent's reasons for refusal letter, at no stage had her representatives requested a copy of the marriage interview record or the Immigration Officer's report: nothing was done following the Respondent's original refusal of the previous application in August 2018; nothing was done when the second application was made 4 October 2018; nothing was done immediately following receipt of the latest decision notice; nothing was done after the notice of appeal was lodged; nothing was done in the months following lodgement.

22. We are, frankly, somewhat astonished as to the complete inaction on the part of the Appellant's representatives. We found Ms Rashid's explanation provided at the hearing to be unsatisfactory, to say the least. If it was being said that the interview and/or the Immigration Officer's report contained material inaccuracies, or suchlike, we simply cannot see why no

attempt was ever made to obtain the evidence in question, either by way of a direct request to the Respondent or through a direction issued by the First-tier Tribunal.

23. Second, it is of course the case that the Appellant and sponsor accepted that discrepancies had arisen out of the evidence provided at the marriage interview. Whilst we appreciate that explanations provided subsequently for these would constitute relevant evidence, it is not the case that the Appellant was clearly asserting that the specific points relied on by the Respondent in the reasons for refusal letter were based on a factually inaccurate reading of the interview record. In turn, the judge was fully entitled to take the admitted discrepancies into account when assessing the evidence before him in the round.

24. Third, the Appellant's grounds of appeal to the First-tier Tribunal (quoted earlier in this decision) make no reference whatsoever to any alleged inaccuracies in the points relied on by the Respondent in the reasons for refusal letter (we note in passing that the same applies to the grounds of appeal with which we are concerned). The failure of those original grounds to even raise the issue of alleged inaccuracies makes it all the more difficult for the Appellant to now argue that the judge acted unfairly in proceeding to determine the appeal without having the marriage interview and/or Immigration Officer's report before him.

25. Fourth, we have taken into account the contents of the witness statements of the Appellant and sponsor, both of which were before the judge. Para. 15 of the Appellant's statement asserts that she suffered from anxiety and depression and this had an effect on what she said at the interview. No medical evidence has ever been provided and any alleged inaccuracies contained in the reasons for refusal letter are not particularised in any way. At para. 17 of the sponsor's statement, he claims that the interview was conducted in an unfair manner and/or that evidence cited in the reasons for refusal letter was inaccurate. Again, no particulars are provided.

26. In our view, the judge took the witness statements into account, together with the rest of the evidence before him. The weight attributable to the evidence was a matter for the judge. In making that attribution, he was fully entitled to take account of the fact that the Appellant had elected to have her appeal decided without an oral hearing. The negative impact that this choice had on the evidence before him was a matter to which the judge was entitled to have regard. In addition, although the judge did not specifically refer to the two paragraphs from the statements of the Appellant and sponsor, the clear implication is that he was decidedly unimpressed. That, we find, is entirely unsurprising.

27. Taking all of the above into account, the particular circumstances of this case do not disclose any procedural unfairness on the part of the judge.

28. We add three further observations. First, we found Ms Rashid's explanation for why the Appellant had opted for her appeal to be determined without an oral hearing (or at least, why the Appellant had not been dissuaded from taking this route) to be unimpressive. A case involving an allegation that a marriage is one of convenience would, on the face of it, clearly merit the election of an oral hearing. This would be the case whether or not the particular caseworker at the firm of representatives was on some form of leave.

29. The second matter is this. We have already commented that on one view the judge might be said to have impermissibly placed the legal burden of proof upon the Appellant. However, not only was this point not raised in the grounds of appeal, but there was no application at the hearing before us to amend those grounds. It is not for us to make the Appellant's case for her. As such, there is no challenge on the issue of the burden of proof before us.

30. The final point to be made is this. We have found that the judge did not make any material legal errors. We have also commented on what we consider (at least on the information before us) to be the very poor standard of legal representation afforded to the Appellant. We make it clear that we have in no way "blamed" the Appellant for the actions (and perhaps more specifically, inactions) of her representatives. Our focus has been solely on the judge's consideration of the materials before him and the application of the law thereto. Any concerns held by the Appellant about the quality of her representation is a matter she may, if she wishes, raise with Smart Immigration Solutions.

Anonymity

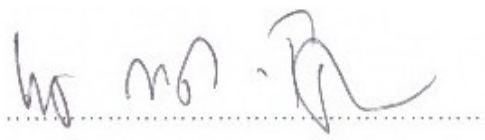
31. We make no anonymity order.

Notice of Decision

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

The decision of the First-tier Tribunal shall stand.

The Appellant's appeal to the Upper Tribunal is dismissed.



Signed Date: 18 June 2019
Upper Tribunal Judge Norton-Taylor