



IAC-AH-CJ-VI

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/30439/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 21st March 2016**

**Decision & Reasons Promulgated
On 25th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MR MEHDI NADJAR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Lam (Counsel)
For the Respondent: Ms A Brocklesby-Weller (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge M A Khan, promulgated on 23rd September 2015, following a hearing at Hatton Cross on 25th August 2015. In the determination, the judge allowed the appeal of Mehdi Nadjar,

whereupon the Respondent subsequently applied for and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Algeria, who was born on 15th August 1985. He appealed against the decision of the Respondent refusing his application for a residence card alleging that this decision was in breach of his European Community law rights under Regulation 7 because his marriage was genuine and was not one of convenience.

The Appellant's Claim

3. The Appellant's claim is that his friend Georgois, who was a witness in the case before the Tribunal, attended his wedding and he pointed to some photographs showing him, his wife, and Georgois. The Appellant said that he and his wife had been living together for more than two years. He said that after their wedding they went to a restaurant called Fredrick to celebrate. His marriage is genuine and they have been together for three years. They intend to live permanently together.

The Judge's Findings

4. The judge observed how the Appellant and his EEA national Sponsor were interviewed on 29th May 2014 and they were asked questions about their relationship, each other's families, and their marriage. There were many inconsistencies between the answers given by the Appellant and his EEA Sponsor. It was a long interview. The judge accepted that there were inconsistencies and found no credible explanation as to why personal details about each other were not known to the parties involved (see paragraph 27).
5. Another striking issue in the appeal was that the Appellant had put an advert in Gumtree in 2003 for a European girl, in order to assist him and his fellow students, as he claims, to secure a tenancy agreement. He said that his landlord wanted a European to provide evidence for the tenancy agreement to be given. The judge held that he did not accept the Appellant's evidence as credible or consistent. This was, "especially in the light of the fact the Appellant and his fellow students were lawfully resident in the UK, they did not need pay slips or any other evidence to secure a tenancy agreement" (paragraph 28).
6. The judge then relied upon the case of **Miah (Interviewer's comments: disclosure: fairness) [2014] UKUT 00515** where the president of the Tribunal referred to Rule 13 of the Procedure Rules requiring there to be disclosure of, "any other unpublished document which is referred to in a document mentioned ... or relied upon by the Respondent". The reliance upon this case was because, as the judge observed, "the Respondent has failed to produce these interviews in evidence. The Appellant's representatives wrote to the Respondent on two occasions asking for a record of these interviews. The Respondent failed to respond" (paragraph 32).

7. The judge went on to conclude that since it was the Respondent who was alleging that the Appellant has entered into a marriage of convenience with his EEA national spouse in order to secure his leave to remain in the United Kingdom, and since the burden of proof rested upon the Respondent, that burden had not been discharged, “despite his representative’s request” (paragraph 34).
8. Accordingly, the Appellant’s appeal was allowed.

Grounds of Application

9. The grounds of application state that whilst it was unfortunate that the complete marriage interview transcript was unavailable, the parties did have access to the refusal letter which highlighted the discrepancies considered by the Secretary of State to have been important, and of particular significance was the Appellant’s advert on Gumtree in which he offers to pay £1,800 to a European girl in return for an unspecified favour. The reasons given by the judge were inadequate.
10. On 10th February 2016, permission to appeal was granted.

Submissions

11. At the hearing before me, Ms Brocklesby-Weller submitted that the judge had erred because at paragraph 27 of the determination the judge had found serious credibility shortcomings in the evidence. If the Appellant were to complain that the transcript of the interview had not been disclosed, he nevertheless had the refusal letter which highlighted the relevant issues. In these circumstances, the reliance upon **Miah** was misconceived and did not automatically lead to the conclusion that the Secretary of State had failed to discharge the burden of proof that was upon her.
12. For his part, Mr Lam submitted that the judge had considered all the evidence in its entirety. There was no interview record. Therefore, the source of the suspicion could not be checked. The judge accepted the refusal letter. The Appellant and the Sponsor attended court. They gave evidence. The judge gave comprehensive reasons for his decision. The decision could not be challenged because the onus was upon the Secretary of State to show that this was a marriage of convenience and this could not be done if there had not been full disclosure of the documents relied upon.
13. Second, however, Mr Lam submitted that if the Tribunal was not with him, then the matter should be remitted back to the First-tier Tribunal for the interview record. At the moment, all one had was a “summary interview record sheet” but this was culled from the interview record itself and could not be wholly reliable. Mr Lam relied upon the Appellant’s Rule 24 response of 15th March 2016. At the moment what one had was not a verbatim summary. It was secondary evidence. Directions should be given for the interview record to be produced.
14. In reply, Ms Brocklesby-Weller submitted that this was a most unusual decision because the judge had found there to be inconsistencies and found the Appellant’s

account in relation to why he had advertised for a European girl on Gumtree to be unconvincing, and yet had allowed the appeal.

Error of Law

15. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.
16. First, there is the issue of compliance with the Procedure Rules. In the case of **Miah (Interviewer's comments: disclosure: fairness) [2014] UKUT 00515**, the president explained (see paragraph 20) how under Rule 13 of the Procedure Rules, once the Respondent is served with a copy of the Notice of Appeal by the First-tier Tribunal, "it must ... file with the Tribunal a copy of ... any other unpublished document which is referred to in a document mentioned ...". The language of this provision is mandatory. It suggests that the Respondent Secretary of State, insofar as it chooses to place reliance upon a document in the refusal letter, must serve on the other side any unpublished document, upon which it relies.
17. In this case, the Respondent relied upon the interview notes. These interview notes have sadly gone missing and all we have is simply a transcript of the notes to the interview. Whereas the judge was right in holding that the mandatory nature of this provision requires service of the unpublished document, failing which, the Respondent cannot be said to have discharged the burden of proof that is upon her, that is not the end of the story.
18. Second, the reason for this is that there was additional evidence before the judge. That evidence was equally available to the Appellant's side as well. This was in the form of an advert placed by the Appellant himself, prior to his getting married, where he asked for a "European girl for a favour in London" stating that he is willing to pay £1,800 for this favour. This advert was shown to the Appellant and his sponsoring spouse. In the determination (see paragraph 16) it is recorded that, as far as the Appellant was concerned, "he admitted that he had placed the advert on Gumtree but could not give any explanation why". The judge found the Appellant's explanation in relation to this advert (see paragraph 28) to be unconvincing holding that, "I do not accept the Appellant's evidence as credible or consistent". That would have been enough for the judge to come to the firm view that the Respondent Secretary of State had indeed discharged the burden of proof that was upon her.
19. There is, however, a third reason. This is the judge's own finding in relation to the credibility of both the Appellant and the Sponsor. Here the judge observes that, "having read the interview, I do not find it credible the Appellant would not know why his wife came to the UK, when she entered this country and his spouse did not know what he had been studying" (see paragraph 27). It could be said that this was a matter that was drawn directly from the interview notes, and because the interview notes were not disclosed to the Appellant, and because there had been no compliance with the Procedure Rules, the judge cannot rely upon this evidence.

20. However, if one looks at the findings of the judge to the effect that, “I find that if the Appellant and his spouse were in a genuine relationship, they would be aware of each other’s circumstances”. This conclusion is at odds with the judge having allowed the appeal. It is an error of law.

Remaking the Decision

21. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. Mr Lam, in his eloquent, clear, and measured submissions, has suggested that this appeal be remitted back to the First-tier Tribunal Judge with a direction that the interview notes be disclosed. Ms Brocklesby-Weller on her part, however, submits that the interview notes are not available any longer and have been mislaid. All that there is is a “summary interview record sheet”. Under Practice Statement 7.2, the Upper Tribunal “is likely on each occasion to proceed to remake the decision, instead of remitting the case to the First-tier Tribunal” unless it is a case that the nature or extent of the fact-finding exercise is such that it is appropriate to remit the case to the First-tier Tribunal.
22. I do not find that to be the case here. Clear findings of fact were made by the judge. He did not find the Appellants to be in a genuine relationship. He did not find their answers to be consistent to the questions put to them. But most importantly, the Appellant admitted having placed the advert in Gumtree and the explanation he gave before the Tribunal was considered to be singularly unconvincing to the judge, on a balance of probabilities.
23. In these circumstances, notwithstanding Mr Lam’s valiant efforts to persuade me otherwise, I find that the Appellant’s appeal cannot succeed, notwithstanding the fact that there has not been compliance with the Procedure Rules, because the matters that I have referred to in the determination stand separately from the Procedure Rules.

Notice of Decision

24. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is dismissed.
25. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

21st April 2016