



IAC-CH-AP-V1

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

Appeal Number: IA/21400/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 16<sup>th</sup> July 2015**

**Decision & Reasons Promulgated  
On 24<sup>th</sup> July 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE**

**Between**

**AMER SHAHZAD GONDAL  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr S Khan, Counsel

For the Respondent: Mr L Tarlow, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant appeals with permission a decision of the First-tier Tribunal promulgated on 29<sup>th</sup> October 2014 dismissing his appeal against a refusal to issue him a residence card on the basis of his marriage to an EEA national. The judge found that the Appellant had failed to establish he was a spouse of an EEA national because the marriage was one of convenience.
2. The challenge is brought on the basis that the judge reached his conclusion placing a heavy reliance on a summary of an interview

conducted by an Immigration officer despite the Respondent's failure to adduce the transcript.

3. I am satisfied that the decision reveals a material error of law making it appropriate to set the decision aside and remit it to the First-tier Tribunal for a rehearing *de novo*.
4. I do so because the Appellant has not had a fair opportunity to argue his case. The unfairness arises because of the Respondent's failure to serve the record of interview. That is the evidence which forms the basis of the case that there is a reasonable suspicion that the marriage is not a marriage at all, being one of convenience in the context of regulation 2 of the Immigration (EEA) Regulations 2006.
5. The judge is plainly uncomfortable about the Respondent's failure to provide more than the interview summary. He indicates that if the previously issued directions had been in mandatory terms he would have held that the document was not produced in compliance with directions and excluded it all together. Whilst it is not clear on what basis he would have done so, it is clear that he would have given it little or no weight. In the event he considered that as the direction was expressed in general terms sufficient to encompass a summary but insufficient to require the transcript he did not think the direction breached.
6. It is unfortunate that no one drew attention to the Asylum and Immigration Tribunal (Procedure) Rules 2005, appertaining at the time of hearing, because rule 13(1)(b)(ii), in mandatory terms, requires the Respondent to file a record of any interview with the Appellant. The current version of the Procedure Rules carry the same rule set out at rule 24(1)(c). It is trite law that absent the transcript the Appellant is unfairly deprived the opportunity of any exculpatory evidence.
7. Whilst the position may be amenable to amelioration through weight, as the judge identified, the issue of weight needs to be assessed in light of whether it is a requirement to produce the interview or not. Here the judge erroneously concluded that it was not, and so the issue of weight started off on the wrong footing, and it follows that the assessment of weight is infected by error.
8. I was invited by the Appellant's representative, in the event that I found a material error of law, to set aside the decision and remake it allowing the appeal outright. I decline to do so. The issue here is a question of fairness. The Appellant has been deprived of a fair hearing at the First Tier so that the appropriate remedy is to provide the Appellant with such an opportunity now.
9. Mr Tarlow sought to persuade me that the error was not material on the basis that there were other matters including discrepant evidence at the hearing which sustained the dismissal of the appeal. However that

submission does not adequately answer an error of law arising from an unfair process where the correction must be to afford a fair process.

**Decision**

10. The decision of the First-tier Tribunal contains a material error of law such that it is set aside and the case remitted to the First-tier Tribunal for a rehearing de novo.
11. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Davidge