



IAC-AH-SAR-V1

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

Appeal Number: IA/29277/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 3 and 24 November 2015**

**Decision & Reasons Promulgated
On 14 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR KASHIF SHAHZAD
(ANONYMITY DIRECTION NOT MADE)**

Respondent/Claimant

Representation:

For the Appellant: Mr I. Jarvis, Senior Presenting Officer

For the Respondent/Claimant: Mrs H Price, Counsel instructed by Pioneer Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Eban) sitting at Richmond Magistrates' Court on 29 May 2015) allowing the claimant's appeal against the decision of the Secretary of State to refuse to issue him with a residence card on the ground that his marriage to an EEA national was one of convenience. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant requires to be accorded anonymity for these proceedings in the Upper Tribunal.

The Reasons for Granting Permission to Appeal

2. On 14 September 2015 First-tier Tribunal Judge Ford granted the Secretary of State permission to appeal for the following reasons:
 - “3. It is arguable that Judge Eban may have erred in finding there were insufficient grounds for the respondent to suspect the marriage was one of convenience. The appellant was the subject of a previous decision that he provided false documents in support of an application (recorded at paragraph 20 of the refusal letter).
 4. It is also arguable that the evidence may have been lacking on which to make a finding that the interviews amounted to a systemic check by the respondent prohibited by the Community treaties.”

The Hearing Before, and the Decision of, the First-tier Tribunal

3. In the hearing before Judge Eban, the claimant was represented by Mrs Price of Counsel, and there was no appearance on behalf of the Secretary of State. The judge received oral evidence from the claimant and his EEA sponsor.
4. In her subsequent decision, she summarised the Secretary of State’s case as being based on an assessment of the marriage interviews which had been conducted with the claimant and his EEA sponsor on 12 June 2014. She went on to pose this question: was there enough evidence to support suspicion that the marriage was one of convenience? She said that Mrs Price argued that the parties’ interview should never have been undertaken, because there was no well-founded suspicion of abuse which warranted investigation. The Secretary of State did not set out any basis for seeking to verify the authenticity of the parties’ relationship. The judge continued:
 - “7. Mrs Price drew my attention to the Guidance quoted at Appendix A of **Papajorgji** which provides that:

‘The Directive does not prevent Member States from investigating individual cases where there is a well-founded suspicion of abuse. However, Community law prohibits systematic checks.’Mrs Price urged me to find that as there was no well-founded suspicion of abuse, the parties’ interview was a systematic check based solely on the appellant’s nationality, and was prohibited. As a result the interview should not have taken place and should not be taken into account, and the appellant is not required to prove that his marriage is not one of convenience.
8. The European Commission’s Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens deals with investigation techniques. It formulates the threshold for interviewing suspected spouses in the following terms:

‘As any other investigation technique, interviews of suspected spouses should only be launched where national authorities – on the basis of the information available and using the double-lock safeguard mechanism – consider that their serious doubts about the genuineness of the marriage have not been sufficiently dispelled.’

9. I have also noted that regulation 20B of the EEA Regulations provides as follows (emphasis added):

'Verification of a right of residence

- 20B. (1) This regulation applies when the Secretary of State –
- (a) has reasonable doubt as to whether a person ('A') has a right to reside under regulation 14(1) or (2); or
 - (b) wants to verify the eligibility of a person ('A') to apply for documentation issued under Part 3.
- (2) The Secretary of State may invite A to –
- ...
- (b) attend an interview with the Secretary of State.
- (3) If A purports to be entitled to a right to reside on the basis of a relationship with another person ('B'), the Secretary of State may invite B to –
- ...
- (b) attend an interview with the Secretary of State.
- ...
- (7) This regulation may not be invoked systematically.'

10. The parties supplied the respondent with all the relevant documents which had been requested and the respondent referred to no factors whatsoever, based on these documents or on other information received concerning the parties, which supported suspicions for believing that the marriage was one of convenience. Accordingly based on the refusal letter, the respondent did not have the basis for a reasonable suspicion of abuse before the marriage interview took place, and should therefore not have invited the parties to interview. In the light of **Papajorgji**, the Handbook and regulation 20B I agree with Mrs Price's submission that the interview should not have taken place.
11. Notwithstanding that the decision to interview was arguably taken with a view to detect and prevent possible abuse, without evidence to justify it, the decision raises questions about whether it was taken on a discriminatory or automatic basis. If so this would be an unjustified and disproportionate intrusion into the private life of the parties. I accept Mrs Price's submissions that absent indicative criteria that the marriage was one of convenience, there should not have been an investigation into the circumstances of the appellant's marriage in the form of an interview. I find that in this case based on the evidence before me, the interview amounted to a systematic check, prohibited by Community law.
12. Accordingly I find that the respondent has not satisfied the evidential burden of showing that the marriage is one of convenience and as a result there is no burden on the appellant to demonstrate that his marriage is not one of convenience."

The Application for Permission to Appeal

5. In the application for permission to appeal, it was pointed out that at paragraph 20 of the decision letter it was asserted that this was not the first instance in which the claimant had been deemed to have made false representations to an immigration department of the United Kingdom. In a refusal for his application for leave to remain under Tier 1 (Post-Study Work) dated 27 September 2012, he submitted a document purporting to have been genuinely issued by Kensington College of Business, confirming his completion of a course at the college. The college was contacted by a representative of the Secretary of State and the document was confirmed as a fraudulent document which had not been issued by the Kensington College of Business.
6. But even if it was true that no reason had been given in the decision letter which would justify interviewing the claimant and the sponsor, there was still nothing to indicate that Regulation 20B was being invoked systematically. It was not sufficient simply to assert the Regulation was being invoked systematically, without a solid basis of evidence with which to back up that assertion. To prove such an assertion, it would be necessary to make reference to more than one case. The judge had not provided adequate reasons for finding that the interview amounted to a systematic check.

The Error of Law Hearing

7. At the hearing before me to determine whether an error of law was made out, Mrs Price mounted a robust defence of the judge's decision. Although the judge had not referred to paragraph 20 of the refusal letter, the allegation made in that paragraph had not been proved by the Secretary of State, and therefore the judge was entitled to ignore it.
8. There was also no material error of law for another reason, which was that the judge had heard oral evidence from the claimant and his EEA sponsor, and had clearly found it to be credible. The judge had also taken into account her submissions about the unsatisfactory nature of the questioning in the marriage interviews, which were a memory test rather than a test of genuineness. Mrs Price referred me to her skeleton argument before the First-tier Tribunal Judge in which this point had been taken.
9. On behalf of the Secretary of State, Mr Jarvis submitted that Judge Eban had misunderstood the guidance contained in Appendix A of **Papajorgji**. Anyway, of greater relevance was the domestic guidance in the EEA Marriage Casework IDIs of 2 July 2014, a copy of which he produced for my perusal.

Reasons for Finding an Error of Law

Timing

10. When the claimant and his wife were invited to attend a marriage interview, they were informed that the reason for the invitation was, “to dispel concerns that the Home Office has as to whether your relationship is genuine or not as well as to investigate the full details of your pending application”.
11. If it was going to be argued that there were not reasonable grounds to justify an investigation into the genuineness of the relationship, arguably it was at this juncture that the point needed to be taken by way of judicial review, rather than taking it after the event when the Secretary of State was relying on the couple’s performance in interview as engendering suspicion that their marriage was one of convenience.

Triggers for investigation versus grounds for suspicion

12. Another preliminary observation is that the guidance contained in Appendix A of **Papajorgji** is misleading, in that some of the indicative criteria which are to be considered as possible triggers for investigation are criteria which would only emerge as a result of the interview, and would not in the ordinary course of events be apparent *before* the interview. Criteria in this category include:
 - the couple are inconsistent about their respective personal details, about the circumstances of their first meeting, or about other important personal information concerning them;
 - the couple do not speak a language understood by both.

On analysis, criteria of this type engender reasonable grounds for suspecting a marriage of convenience. They are not merely triggers for an inquiry into whether the marriage is one of convenience.

The domestic guidance

13. The guidance given in the domestic IDIs is superior in this regard in that both the core criteria and additional criteria for assessing a marriage as one of convenience are more clearly focused on what would be apparent to a caseworker from the contents of the application and from the applicant’s immigration history, as distinct from what might become apparent to the caseworker *after* the couple have been interviewed.
14. Paragraph 3.5 of the guidance states that in deciding whether a case can be investigated as a possible marriage of convenience, caseworkers must proceed by a process of elimination, using the criteria set out in section 3.7; and the section goes on to detail various types of case which should be discarded from consideration as marriages of convenience, including where there is a child of the relationship.

15. It was not part of the claimant's case before the First-tier Tribunal that the Secretary of State had failed to follow her own published guidance in deciding that the appellant's marriage required investigation.

The errors of law

16. The judge has not given adequate reasons for finding at paragraph [10] that the Secretary of State did not have a basis for reasonable suspicion of abuse before the marriage interview took place, and should therefore not have invited the parties to interview.
17. The implication of paragraph 20 of the refusal letter is twofold. Firstly, the implication is that the claimant does not have any extant leave to remain, and has been an overstayer since the refusal of leave to remain. Secondly, and more importantly, as is spelt out in paragraph 20, the ground of refusal of leave to remain was that he had employed deception in order to obtain leave to remain, and therefore this engendered reasonable grounds to suspect that he was employing deception now, by putting himself forward as being in a genuine marital relationship with an EEA national when in fact the marriage was entered into for the predominant purpose of securing residence rights.
18. There is no merit in the argument that the judge was entitled to ignore paragraph 20 of the refusal letter because the Secretary of State had not provided proof of the allegation that the claimant had provided a false document.
19. On the evidence available to the judge, the claimant did not take issue with the account of his adverse immigration history. His witness statement before the First-tier Tribunal only addressed the basis on which he had first entered the country. The claimant was completely silent on the topic raised in paragraph 20 of the letter. In any event, unless the claimant had successfully appealed the refusal decision referred to in paragraph 20, the mere fact that he had been refused on deception grounds was enough to justify the claimant and his spouse being asked to attend a marriage interview.
20. The judge also did not have a proper evidential basis for finding in paragraph [11] that the interview amounted to a systematic check, prohibited by Community law. There was no evidence before her that the decision to interview the couple had been taken on a discriminatory or automatic basis. In order to make out a case that the interview came about as a result of a systematic check, rather than being triggered by the claimant's particular circumstances, it would have been necessary to show that the Secretary of State had not followed her own guidance in the IDIs which is expressly designed to prevent couples being systematically invited to marriage interviews; or that the domestic guidance is so flawed that it achieves the opposite purpose to that which is intended: that is, instead of preventing systematic checking, it encourages it.
21. Although not raised in the grounds of appeal to the Upper Tribunal, there is also a **Robinson** obvious point of procedural unfairness and irregularity. The grounds of

appeal to the First-tier Tribunal made no mention of an argument that the couple should not have been invited to an interview in the first place. The battleground sketched out in the grounds of appeal was whether the outcome of the marriage interviews reasonably sustained the charge that the marriage was one of convenience. The Secretary of State did not have notice of the distinct line of argument upon which the judge decided the case against the Secretary of State. This was procedurally unfair, as the Secretary of State was thereby deprived of the opportunity to be heard on this issue.

22. Mrs Price submits that there is no material error of law as the judge would have reached a decision in favour of the claimant in any event, having regard to the contents of the marriage interviews and taking into account the credible oral evidence which she had received from the claimant and his wife as to the genuineness of their marriage. I cannot infer this as the judge has made no findings about the evidence of the witnesses, or about the import of the marriage interviews. On the face of it, her finding in favour of the claimant was solely based on the proposition that the couple should not have been interviewed in the first place, and thus the content of the marriage interviews was irrelevant - as was the oral evidence which she had received from the couple. They were irrelevant because, on the judge's (flawed) reasoning, the interviews were unlawful, and thus the case based on the contents of the interview did not need to be addressed.
23. The judge ought to have engaged with the contents of the marriage interviews and the oral evidence of the witnesses before reaching a decision on whether the marriage was one of convenience or not, and she erred in law in failing to do so.
24. Accordingly, the decision of the First-tier Tribunal is vitiated by a material error of law, such that it should be set aside and remade.

The resumed Hearing to remake the decision

25. I directed that none of the findings of fact of the First-tier Tribunal should be preserved. For the purposes of the remaking of the decision, both parties served further evidence.
26. The claimant's solicitors filed with the Upper Tribunal an additional bundle containing an additional witness statement from the claimant in which he addressed the allegation that he had relied on a false document, and the decision pertaining to his appeal made by the First-tier Tribunal. The decision was made by Designated Judge Campbell and Judge Bird. The panel dismissed the appellant's appeal against the decision of the Secretary of State dated 28 September 2012 to refuse to vary the appellant's leave to remain as a Tier 1 (Post-Study Work) Migrant on the ground that he had submitted a letter dated 2 March 2012 from Kensington College of Business (KCB) showing he had been granted a qualification from the University of Wales, and KCB had subsequently informed the Home Office that the document submitted by the claimant was not genuine. The decision of the panel records that the claimant appealed against the decision, arguing that the documents he submitted were genuine and he should have been granted the relevant points. He provided a

witness statement made on 3 May 2013, but he did not attend to give oral evidence. The claimant's case was heard with a number of other similar cases in the autumn of 2013, with a final hearing taking place on 15 January 2014. The decision dismissing the claimant's individual appeal was promulgated on 23 October 2014.

27. Mr Jarvis produced Section E of the Home Office bundle that had been compiled for the purposes of the claimant's appeal against the decision of the Secretary of State to refuse to vary his leave to remain as a Tier 1 (Post-Study Work) Migrant. In an email sent on 26 September 2012, Irwin Stagg, administrator of KCB, informed an UKBA caseworker that the letter dated 2 March 2012 was not a genuine document and was not issued by the college. The claimant was not known to the college. The ID number given on the letter did not exist in their records. The visa letter contained notable differences in formatting content from genuine documentation issued by the college.
28. The email was sent in response to an earlier email from the caseworker stating that the claimant had provided evidence he was awarded a Masters in Business administration on 24 February 2012. She asked for confirmation from KCB that this was correct.
29. Mrs Price informed me that having taken instructions from her client, who was present in the courtroom with his sponsor, she had decided not to call either of them to give evidence. She was also not proposing to put in evidence the claimant's additional witness statement in the supplementary bundle. I pointed out that the Secretary of State would have been expecting to cross-examine the claimant and his sponsor on the witness statements which they had provided for the hearing in the First-tier Tribunal. Mr Jarvis said he did not object to these witness statements being taken into account for the purposes of the remaking of the decision, although (as he later developed in his closing submissions), he invited me to attach little weight to them, precisely because the claimant and the sponsor had not been tendered for cross-examination.
30. I invited Mr Jarvis to draw my attention to the passages in the interview transcripts upon which he relied as showing that the parties were not in a genuine marital relationship. In reply, Mrs Price submitted that on a fair reading of the interviews, there was a significant degree of consistency. The alleged inconsistencies either did not stand up to scrutiny, or they were simply reflective of poor memory. She criticised the interviews as being essentially a memory test. The credibility of the marital relationship was shown *inter alia* by the photographs of the wedding, at which other people apart from the claimant and the sponsor were present. It was also significant, she submitted, that both of them had given evidence before the First-tier Tribunal, and they were prepared to give evidence today. It was her decision not to call them as she was not *au fait* with the claimant's previous appeal. The issue for me was not whether the claimant's previous appeal had been rightly dismissed, but whether the marriage was one of convenience. She submitted that on the balance of probabilities it was not a marriage of convenience.

Discussion and Findings on Remaking

31. The legal burden rests with the Secretary of State to prove that the marriage is one of convenience, and the standard of proof is on the balance of probabilities.
32. As asserted in the refusal letter, there are “a litany of discrepancies” between the answers which the claimant and the sponsor gave to a range of questions, including questions on the topic of their engagement, their wedding, a return trip to Lithuania, their respective immigration and employment histories, and the claimant’s observance of his Muslim faith.
33. The interviews took place on 12 June 2014. The marriage had taken place on 6 December 2013, following an engagement which was said to have taken place on 17 July 2013, the sponsor’s birthday. So neither of them was being asked to recollect crucial details about the development of their relationship which lay in the distant past.
34. On the topic of their engagement, the claimant told the interviewing officer that he proposed to the sponsor on her birthday while shopping and that they went to a restaurant thereafter. She said that he had proposed to her in Nando’s in Stratford when they were having lunch on her birthday. Asked further questions about the proposal, she said that they were both sitting at the table eating and he had taken out a ring box and had asked her to marry her, and he had then given her an engagement ring. But when the claimant was asked about this, he said he had not proposed over lunch and he had not given her a ring. They were doing some shopping when he proposed, and after she said yes they went to a restaurant. The interviewing officer informed him that his sponsor had shown them a ring. He insisted he had not given her this ring and that it must have been given to her by her family. She had been wearing the same ring “before we met” (Q&A 220).
35. The interviewing officer noted that neither the claimant nor his sponsor was wearing a wedding ring to the marriage interview. When asked about this, the sponsor stated that they wanted to choose rings to exchange, but they could not decide which one(s) (Q & A 181-182). But the claimant gave a different explanation which was that it was contrary to family tradition to exchange rings when getting married because it was a bad omen or brought bad luck, and so they had no plans to exchange rings (Q& A 231-232).
36. With regard to the wedding, the claimant was asked why his sponsor’s parents were not present at the wedding. He said it was because the sponsor’s grandmother was ill at the time. But his sponsor said it was because her parents were working. Her father was working in Germany, and her mother did not like travelling.
37. The claimant was asked about a deposit of £500 made by W Shahzad into his sponsor’s bank account on 13 December 2013. The claimant said this was a payment made by his brother for rent and other things for the wedding. But the sponsor said that the payment was for her holiday in Lithuania. She said she had gone back to Lithuania in February 2014 for a few days to visit her family and for her

grandmother's funeral (Q&A 92-105). When questioned about whether his sponsor had recently gone back to Lithuania, the claimant initially stated that she had gone back in March (2014), before retracting this and asserting that she had gone back to Lithuania for a week before the wedding for her grandmother's funeral. He did not know which airport she had flown from. At the time she was living in Barking.

38. The sponsor was asked why the claimant's brother had paid him money in December if she was not going to Lithuania until February 2014. She said she was not working, her grandmother had passed away and she wanted to see her family. When asked which airport she flew from, and she said she had flown from Glasgow Prestwick. She was asked why she had flown from Scotland to Lithuania, when she lived in London. She said it was because she had lived in Scotland before. She took a train up to Glasgow, and a train back from Glasgow. When she flew back into Glasgow from Lithuania, she stayed with her friend there. Her husband did not accompany her, as he was working at KFC.
39. Earlier in her interview she was asked whether she had spent any nights apart from the claimant since their marriage, and she said no. They had gone to Scotland together (Q&A 33-34). They had stayed a hotel in Glasgow for four days between 21 and 25 January 2014 (Q&A 234-240).
40. As submitted by Mr Jarvis, the sponsor's explanation for taking a tortuous route via Scotland in order to return to Lithuania for a visit lacks credibility, and is much more consistent with her continuing to habitually reside in Scotland after the marriage, as she had done in the past. But the main blow to the couple's credibility lies in the fact that when the claimant was asked to confirm she had gone back to Lithuania in the spring of 2014, he said no, she had gone back before their marriage. As her alleged visit to Lithuania in February 2014 was only a few months earlier, it is not credible that the claimant could have forgotten as if he was in a genuine relationship with her.
41. The claimant also initially lied to the interviewer about the outcome of his application for a post-study work visa. In answer to question 173, he told the interviewer that he did not get any answer to the application. As Mrs Price points out, the claimant then corrected his answer saying that his application had been rejected and he was waiting for a result on his appeal. As the decision was not promulgated until October 2014, this was true. But it does not change the fact that the claimant gave answer which he knew to be untrue. As for the sponsor, when questioned about the claimant's immigration history, she displayed complete ignorance about the claimant's current situation. In answer to question 135 she said that he had got a good qualification from his final course of study. If she was in a genuine relationship with the claimant, she would have known that the qualification relied on by the claimant was asserted by the college and the Home Office to be false, and that claimant had been pursuing an appeal against the decision to refuse him leave to remain.
42. On the topic of the claimant's religious observance, the sponsor said that the claimant and his brother shared a prayer mat which he kept in the bedroom. It was green, and

also red “sometimes”. He kept a copy of the Koran by the bed in a bedside drawer (Q& A256-268). The claimant said he had a red prayer mat which was kept in a cupboard in the sitting room. He did not have a copy of the Koran (Q&A 288-294).

43. Her husband’s birthday was in November. She just got him a card as she was not working at the time (Q&A 340-342). The claimant said his wife gave him a sweater as a present, although he could not recall the colour (Q&A 362-363).
44. She would like to have children by him and they had talked about having children (Q& A364-365). The claimant said they had not talked about having children (Q&A 381).
45. She said she had finished her previous employment at Tesco in the summer of 2013 (Q&A 52) and had begun her current employment at KFC in January 2014 (Q&A 39). He said she had worked at Tesco until November 2013, and had begun working at KFC in February 2014 (Q&A 57-63).
46. The sponsor said that about fifteen people joined them to celebrate the wedding, but the photographs only show two people being present with the couple at the registry office, one of whom was, I infer, the claimant’s brother. There are no photographs showing a wedding celebration attended by a larger group of people.
47. They agreed that they had first met on New Year’s Eve, 31 December 2012, and that she had moved into the house he shared with his brother after their wedding. They agreed that they had gone to Scotland in January 2014 for a honeymoon (although there is no documentary evidence of them staying together in a hotel in Glasgow for four nights between 21 and 25 January 2015). There was also a reasonable degree of consistency in the information which they gave about each other’s current daily routines.
48. The respects in which the claimant and the sponsor were in agreement in their accounts are merely consistent with them being friends and with them living from time to time under the same roof. I consider that the discrepancies which I have highlighted above are strongly indicative of them not being in a genuine and subsisting *marital* relationship, and that the marriage is one of convenience.
49. In his witness statement before the First-tier Tribunal, the claimant asserted that some of his answers were incorrectly recorded. He insisted, for example, that he kept a copy of the Koran and his prayer mat in a drawer beside his bed, and had not said anything different in his interview. However, the interview was recorded, so it was always open to the claimant to apply for a copy of the recording if he challenged the accuracy of the transcript. In any event, it is inherently unlikely that the stark discrepancies in the answers given are accounted for by errors in transcription.
50. In conclusion, having assessed the evidence in its totality, including the documentary evidence of cohabitation and the rebuttal evidence of the claimant and the sponsor in their respective witness statements, I find that the Secretary of State has discharged the burden of proving that the marriage between the couple is one of convenience.

On the balance of probabilities the claimant paid the sponsor to marry him as he knew that he had used a false document and so he was likely to lose his appeal against the decision to refuse to vary his leave.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: this appeal is dismissed.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Monson