IAC-AH-LEM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38757/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 January 2016	**On 17 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS SASIPAT NILNATE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms S Sreeramam. Home Office Presenting Officer
For the Respondent: Ms C Record of Counsel

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against the decision of First-tier Tribunal Judge Phillips dated 23 June 2015. The First-tier Tribunal Judge allowed, under the Immigration Rules, the appeal of Mrs Nilnate against a decision dated 23 September 2014 by the Secretary of State. The appellant's application dated 2 April 2014 for variation of leave to enter or remain as a spouse under Appendix FM was refused by the Secretary of State and a decision was made to remove the appellant under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. Hereinafter, I will refer to Mrs Nilnate as the appellant and the Secretary of State as the respondent as they were in turn before the First-tier Tribunal.

3. The appellant is 32 years old born on 4 March 1983 and a national of Thailand and on 14 April 2008 she entered the United Kingdom with entry clearance as a student from 14 April 2008 until 30 June 2009. She was subsequently granted leave as a Tier 4 (General) Student from 22 June 2009 until 30 September 2010 and again from 12 October 2010 until 1 January 2012. She was then granted leave to remain as a Tier 1 (Post-Study) Migrant from 17 April 2012 until 17 April 2014 and on 2 April 2014 she applied for leave to remain as a spouse and it is the refusal of that application which is the subject of this appeal.

4. On 13 September 2014 the respondent carried out a marriage interview and found that there were many discrepancies between the appellant's account and that of her British national spouse Abdul Karim Ilyas and thus the respondent was not satisfied that the marriage was genuine and subsisting and the parties intended to live together permanently as husband and wife. The application was therefore refused under Appendix FM E-LTRP.1.7 (the relationship between the applicant and their partner must e genuine and subsisting). Consideration was also given to her private life under paragraph 276ADE but found that there would be no very significant obstacles to the appellant's integration in Thailand should she return. The reasons for refusal letter states that the majority of the questions posed in the interview were around recent events but she and her sponsor were unable to provide consistent answers about their situations when they were both together and this cast serious doubt that their marriage was genuine and they intended to live permanently as husband and wife. There was no question that the appellant met the income threshold under Appendix FM.

5. The Secretary of State made the application for permission to appeal on the basis that the judge had erred in law because she had reversed the burden of proof and applied the wrong standard of proof. The question before the judge was a simple one: had the appellant discharged the burden of proof to demonstrate this was a genuine and subsisting marriage? The judge's conclusions on the genuineness of the marriage were set out at paragraph 79 and were convoluted and although the balance of probabilities was mentioned the judge stated

> "Noting that a decision that the marriage is one of convenience is a matter of some moment".

The Secretary of State submitted that this appeared to have been lifted from a headnote in **Miah (interview's comments: disclosure: fairness [2014] UKUT (IAC)**. This decision was irrelevant because **Miah** was dealing with EEA cases where there was a burden on the Secretary of State to demonstrate reasonable grounds for suspicion that the marriage was not genuine but the question before this judge was not whether it was a marriage of convenience but whether it was genuine and subsisting.

The judge also referred to **Miah** in paragraph 57. **Miah** refers to procedural fairness in EEA marriages and this was not an EEA case and as the judge states at paragraph 58 there was no procedural unfairness.

6. The Secretary of State submitted that there was a lack of reasoning in the judge's analysis of the discrepancies referred to in the refusal letter. For example at paragraph 61 the judge recorded that the sponsor had stated that the appellant banks with HSBC when in fact she banked with Lloyds but he found no adverse weight could be attached to this in isolation.

7. Permission to appeal was granted by the First-tier Tribunal.

8. At the hearing before me Ms Sreeraman relied on the written grounds for permission to appeal averring that the judge had erred in law by reversing the burden of proof and applying the wrong standard of proof. The one question before the judge was whether the appellant had discharged the burden of proof to demonstrate that this was a genuine and subsisting marriage. It was submitted that the judge's conclusions set out at paragraph 79 were convoluted and although the balance of probabilities was mentioned the judge also states "noting that a decision that the marriage is one of convenience is a matter of some moment" and this was completely irrelevant and appears to have been lifted from **Miah (interviewers comments: disclosure: fairness) [2014] UKUT (IAC)**. **Miah** dealt with EEA cases where there is a burden on the Secretary of State to demonstrate that there are reasonable grounds for suspicion and also because the question before the judge was not if it was a marriage of convenience but if it was genuine and subsisting. That he had taken the wrong approach was reinforced by his reference to **Miah** in paragraph 57, this was not an EEA case and as the judge stated at paragraph 58, there was no procedural fairness issue.

9. In addition there was a lack of reasoning in the judge's analysis of the discrepancies referred to in the refusal letter. For example in paragraph 61 the judge recorded the sponsor had stated that the appellant banked with the HSBC where in fact she banked with Lloyds but found no adverse weight could be attached to this in isolation. Even if the sponsor did not ask the appellant private questions as a couple one would expect them to have some discussion of their finances as a couple living together. It would be expected for them to have some basic knowledge of each other and if the sponsor did not know who the appellant banked with he should have said so.

10. Ms Sreeraman reiterated that the judge placed reliance on **Miah** and misdirected herself in law as this was an appeal in relation to the Immigration Rules, not an appeal under the Immigration (European Economic Area) Regulations 2006. Paragraph 79 implied that the judge considered it was the respondent's responsibility to establish proof and that was not the case. In addition there was no real explanation for the judge's decision and as such the decision was legally in error.

11. Ms Record submitted that at paragraph 45 the judge had set out all the evidence and had the benefit of seeing and hearing the sponsor and the appellant. She referred to the consistent thread of evidence and although the judge may have expressed herself clumsily at paragraph 79, looked at as a whole, the judgment was sound.

12. In conclusion, I find it is clear from the decision of the First-tier Tribunal Judge that she was applying the Immigration Rules and *not* the Immigration (European Economic Area) Regulations 2006. At paragraph 45 she directed herself appropriately in relation to the standard and burden of proof. She stated

> "... in immigration appeals the onus of proof is generally on the appellant and the standard is on the balance of probabilities".

13. It is right to say that there is a certain amount of irrelevant material included in the determination particularly with reference to case law such as **JC (China) [2007] UKAIT 00027** and **RP (Proof of forgery) Nigeria [2006] UKAIT 00086** but the judge is nonetheless clear that the issue in this particular case is the Immigration Rules and focused on the subsistence and the genuineness of the relationship.

14. It could be argued that **Miah** was referred to on the basis that the interviewer's comments should be disclosed as a matter of course in relation to an interview in order that the appellant has a right to a fair hearing and at paragraph 57 the judge identified that **Miah** concerned the 2006 EEA Regulations but nonetheless considered that the

> "... same general principles apply in that there is a need to fight abuse but equally a need to ensure that the decision making process is procedurally fair and the decisions reached are the correct ones".

but, in this case, it was the responsibility of the appellant to obtain that interview record. The judge noted that the full transcript of the interview prior to the hearing was not provided by the respondent but by the appellant who managed to obtain a copy via a Subject Access Request. It appears that it is this that the judge is commenting. The judge ultimately accepted that there was no issue taken with procedural fairness here but not, it would seem, without comment on the process.

15. The judge did address her mind to the marriage interview because she stated this formed the substantive basis of the refusal and was the focus of the submissions on the appellant's behalf. In particular the judge noted at paragraph 59 the comment made by the interviewer, when asked by the sponsor if he had given the right answers, "there were a few differences but nothing major". As the judge pointed out it was not clear how this could be reconciled with a comment in the subject access papers that the marriage interview had been conducted and the marriage found to be one of convenience.

16. Although the judge uses the term "one of convenience" which was normally ascribed to EEA marriages there is no doubt that the judge was

considering this as a shorthand for whether the marriage was genuine and subsisting. The judge does address the discrepancies within the interview noting that with regards to the bank statements the sponsor confirmed that he did not ask the appellant private questions and therefore was not clear about how much she earned. The judge's reason for refusing to place weight on this was because this was a discrepancy in isolation. The judge also noted at paragraph 62 that the full and correct answer given by the sponsor in relation to the studies of his wife had not been given and that in fact the sponsor had not stated that she only came to the UK to study English but he also referred to her having "done erm like management business or something". The judge noted that she studied project management.

17. At paragraph 63 the judge also notes in relation to the fact that the sponsor did not know where the appellant's family lived in Thailand that the sponsor had in fact replied by adding further detail saying it was about eight hours from Bangkok and he could not remember the name of the city.

18. Once again at paragraph 64 the judge notes that the refusal had not recorded the full answer of the sponsor and that the sponsor gave the name of the restaurant and the fact that it was a Thai restaurant as to where he met his wife. The judge recorded at paragraph 64 that there was a further discrepancy in relation to the marriage but that the question was vague and appeared to have mixed up the question as to when the sponsor married and when his marriage ended.

19. At paragraph 68 the judge specifically found that the discrepancy as to when they began living together was inconclusive and further at paragraph 69 addressed the issue of the discrepancy in regards to where they lived and photographs had been provided to show that the description of the outside was ambiguous as to the number of windows because one of them was a bay window comprising three windows. One of them said it was four windows visible and the other said two and according to this, both could be correct. The judge also recorded further what he concluded to be minor discrepancies at paragraphs 71 and 72 but as an overarching conclusion at paragraph 73 stated

> "I have had the benefit of seeing and hearing the appellant and sponsor and had the benefit of studying the replies given at the marriage interview including those not replied upon in the refusal which were the large number of consistent answers, not simply the inconsistent ones. I note that there was a consistent thread in the answers at interview and the evidence at the hearing."

20. It is quite clear that the judge noted that there is a consistent thread in the answers at the interview and at the evidence at the hearing. The judge addressed her mind to the question as to whether these were two incredible witnesses who had fabricated a claim or whether they had entered into a genuine and subsisting marriage and intended to live permanently together. It was also noted that

> "It was not suggested to them that they are not living together at the moment and they did attend to provide oral evidence with the two additional witnesses noted above whose evidence I have been given no reason to doubt."

21. Therefore the judge clearly accepted the evidence not only of the appellant and the sponsor having analysed the discrepancies but also the evidence of the other witnesses.

22. The judge also addressed the concerns of the respondent in relation to the differences between the appellant and sponsor and noted that it did seem strange that the sponsor's children were not at his wedding but I note that the sponsor had identified that he did not invite his children to the wedding because one of the children was hyperactive and could not be left alone and he did not have a good relationship with his son's wife. I do not find that because the judge found it strange that the sponsor continued to pay council tax for his second wife or that the sponsor took sugar when the appellant was not aware that he did, fundamentally undermined the findings of the judge. Indeed at paragraph 76, she found that there were significant *consistencies* in the evidence and the interview notes did not show evidence that the appellant and sponsor were not making their best efforts to answer the questions.

23. At paragraph 77 the judge correctly identifies that the issues of concern in the refusal letter and the submissions should be balanced against the weight of the other replies during the lengthy interview and, answers given at the hearing, where detailed questions were asked and about which no discrepancy issues had been taken. Specifically the judge noted that the documentary evidence was not anything other than consistent with the couple living together and "enjoying a close and loving relationship which shows a genuine and subsisting marriage". Further, at paragraph 78 the judge recorded that the sponsor was taken ill when the appellant was at home within 2011 and there was a past history and a bond because of the heart attack and that they were also making plans for the future.

24. Lord Justice Richards in the Court of Appeal emphasised in **Rosa v SSHD** [2016] EWCA Civ 14, the difference between the tests to be applied regarding relationships under the Immigration Rules (genuine and subsisting marriage) and those under the EEA Regulations (marriage of convenience) by stating at paragraph 41

> "I accept that the tribunal's language was loose. It may be useful to contrast a marriage of convenience with a "genuine" marriage (indeed, Underhill LJ treated them as antonyms at paragraph 6 of his judgment in Agho), but the focus in relation to a marriage of convenience should be on the intention of the parties at the time the marriage was entered into, whereas the question whether a marriage is "subsisting" looks to whether the marital relationship is a continuing one. I am satisfied, however, that the tribunal understood that the ultimate question was whether it was a marriage of convenience, not whether the marriage was subsisting, and that its findings provided a proper basis for the conclusion it reached that the marriage was one of

> convenience. The tribunal was correct to look at the evidence concerning the relationship between the appellant and her husband after the marriage itself (both before, during and after the husband's period of imprisonment), since that was capable of casting light on the intention of the parties at the time of the marriage. The tribunal's finding that "it is a marriage of convenience and always has been" (paragraph 26) covered the position at the time of the marriage. The wording suggests that the tribunal had in mind the possibility that a marriage of convenience might turn into a genuine marriage in the course of time, but the finding that it had always been a marriage of convenience makes it unnecessary to consider that potentially interesting issue in the present case."

25. The approach by the judge as outlined above did address the nature of the relationship both before the marriage [62] and after the marriage and whether it was genuine and subsisting using the correct test. I accept that paragraph 79 is inelegantly phrased stating that

> "... the inconsistencies and circumstances identified in the refusal and submissions are sufficient to raise a suspicion but this is not enough"

and it does suggest the judge might be reversing the burden of proof. When reading the decision as a whole, however, and bearing in mind this was the last paragraph in a relatively detailed analysis and conclusion, reached at paragraph 77, and prior to the unfortunate phrasing at paragraph 79, I am not persuaded that there is an error of law and I find that the judge further to **Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085** (IAC) has given sufficient reasoning for his findings and resolved the discrepancies raised in the reason for refusal.

26. This was the only challenge in relation to the decision and I therefore dismiss the Secretary of State's appeal and challenge.

27. The decision of the First-tier Tribunal Judge contains no material error of law and shall stand.

No anonymity direction is made.

Signed Date 10th February 2016

Deputy Upper Tribunal Judge Rimington