



IAC-AH-KRL-V2

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

Appeal Number: IA/38791/2014

**THE IMMIGRATION ACTS**

**Heard at Manchester  
On 30<sup>th</sup> March 2016**

**Decision & Reasons Promulgated  
On 11<sup>th</sup> May 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS**

**Between**

**MR OLUSEGUN TIMOTHY KEHINDE  
(ANONYMITY DIRECTION NOT MADE)**

**Appellant**

**and**

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

**Respondent**

**Representation:**

For the Appellant: Mr Noor, Counsel

For the Respondent: Mr G Harrison, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Nigeria born on 11<sup>th</sup> October 1982. On 18<sup>th</sup> June 2014 the Appellant had applied for a residence card as confirmation as a right to reside in the United Kingdom. On 6<sup>th</sup> October 2014 his application was refused as set out within a reasons for refusal letter.

2. The Appellant appealed and the appeal came before Immigration Judge Cruthers and Immigration Judge Paul sitting as a panel at Manchester on 2<sup>nd</sup> March 2015. In a decision and reasons promulgated on 11<sup>th</sup> March 2015 the Appellant's application was dismissed under the EEA Regulations and on human rights grounds.
3. On 18<sup>th</sup> March 2015 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. On 8<sup>th</sup> May 2015 Judge of the First-tier Tribunal Kelly granted permission to appeal. Judge Kelly noted that the Secretary of State had refused the Appellant's application for an EEA residence card as the spouse of an EEA national who was exercising community treaty rights in the United Kingdom. He considered that it was arguable that it was unfair for the Tribunal to refuse the Appellant's application to adjourn the hearing in order to avoid possible prejudice as the result of the Respondent's late service, on the day of the hearing, of what purported to be an accurate and complete transcript of interviews conducted with the Appellant and his spouse. Although the Tribunal addressed the claim that the Appellant would otherwise be deprived of an opportunity for his spouse to comment upon the interview record it arguably failed to address the need for verification of the accuracy of the written record by reference to any audio recording of the interview that may have been in existence. Judge Kelly considered that this was arguably material, given that as the Tribunal itself had acknowledged the Appellant and his wife "strongly contested almost the entirety of the questions and answers in the transcript provided".
4. Judge Kelly considered the other grounds were difficult to separate from the principal grounds and may also be argued. These included the complaint that is made in the supporting statement of Counsel but only fleetingly referred to at the very end of paragraph 6 of the application that the Tribunal unfairly and/or inappropriately questioned the witnesses. However, contrary to the assertion in Counsel's statement, the Tribunal was not limited to clarifying the matters that had been raised by the representatives in their questions. That limitation applies only where an Appellant is unrepresented.
5. Within the grant of permission Judge Kelly indicated that in view of the contesting by the Appellant and his wife about the questions and answers in the transcript that it would be appropriate for any Rule 24 notice that the Respondent may choose to serve to specifically address the question of whether such a recording exists.
6. On 4<sup>th</sup> June 2015 the Secretary of State responded to the Grounds of Appeal under Rule 24. Therein the reporting officer states

*"The grant of permission requests that the Respondent should make it known if there is an audio recording of the marriage interview. I have made inquiries on the matter and have been informed that there is such a recording. It is likely that it can be provided in CD form in time for the next hearing. However the Secretary of State is firmly of the view that the transcript provided does not contain any inaccuracies and would reiterate that the Appellant was clearly on notice that the Secretary of State was of the view that his marriage was one of convenience".*

7. In addition the Rule 24 response notes that the grounds seek to argue that the judge should have granted an adjournment to the Appellant on the basis that the marriage interview transcript was only served by the Home Office on the day of the hearing. The Rule 24 reply points out that the Appellant was on notice from the refusal of 6<sup>th</sup> October 2014 that the Secretary of State was relying on the discrepancies that arose in the interview as these were outlined in the refusal.
8. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by Mr Noor. Mr Noor is only instructed in this matter at the very last minute. Indeed the court file indicates that the Appellant is acting in person. He advises that he appears by way of direct access as an advocate and not on instruction from solicitors. Mr Noor is familiar with this matter. He appeared before the First-tier Tribunal and he is also the author of a letter dated 19<sup>th</sup> March 2015 which sets out his record of the proceedings before the First-tier Tribunal panel. Albeit that it is written as a letter the document is a witness statement and attests the requisite paragraph that the content of this statement are true. The Secretary of State appears by her Home Office Presenting Officer Mr Harrison.

### **Submission/Discussion**

9. Mr Noor acknowledges that the Grounds of Appeal were drafted by solicitors and that the main thrust of the Grounds of Appeal was the refusal of the First-tier Tribunal panel to grant an adjournment. The marriage interview was not disclosed to the Appellant prior to the hearing. He points out that whilst there is an acknowledgement that interview records can be disclosed late, each case turns on its own facts and there were 170 questions which he contends were far too many for the Appellant and/or his legal representatives to digest immediately prior to the hearing. He relies on *Miah (interviewers' comments; disclosure: fairness) [2014] UKUT 00515 (IAC)*. He acknowledges that the issue has been addressed at paragraph 11 of the First-tier Tribunal Judge's decision and points out that it was only at 10:30 a.m. that the Secretary of State served the interview record on him. He emphasises the difficulty in getting instructions from the Sponsor. It was clear she had only just seen it. Further there had been no previous requests for a Czech interpreter and he submits that it was impossible for the Sponsor to know that the interview would be in dispute and she would be questioned and that the situation would not have arisen had disclosure taken place at an earlier and proper time. He asks me to find that there is an error of law which is material and to remit the matter back to the First-tier Tribunal for rehearing.
10. Mr Harrison takes an extremely sensible and pragmatic approach. Whilst he relies on the Rule 24 and admits it is unfortunate that the interview record was not provided earlier, he agrees that there is procedural unfairness which must impact on the ability of the Sponsor and the representative to have known what was recorded and to prepare for the hearing. He notes what is said at paragraph 13 and 14 of the decision but actually (albeit that he represents the Respondent) disagrees with it.

## The Law

11. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
12. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

## Case Law

13. The law with regard to disclosure and fairness is succinctly set out in the authority of *Miah (interviewers' comments; disclosure: fairness)* [2014] UKUT 00515 (IAC). This states

### Conduct of pre-decision interviews

- (i) *A decision that a marriage is a marriage of convenience for the purposes of regulation 2(1) of the Immigration (European Economic Area) Regulations 2006 is a matter of some moment. Fairness requires that the affected person must be alerted to the essential elements of the case against him.*
- (ii) *In addition, those involved must be alert to the question of whether, in an unusual or exceptional case, anything further is required in the interests of fairness. There may be difficult, borderline cases in which fairness will require identification of the third party. These do not admit of general guidance or resolution and will have to be addressed on a case by case basis, guided by the overarching requirement of fairness and balancing all interests in play.*

### 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.*

14. In *Nwaigwe (adjournment: fairness)* [2014] UKUT 00418 (IAC) The President, the Honourable Mr Justice McCloskey, said

*“If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party’s right to a fair hearing?”*

## Findings

15. I start by reminding myself that the issue extant before me is whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. I am not rehearing the matter. The issue is whether or not there was procedural unfairness, in the failure of the first-tier panel not to adjourn the hearing. I am well aware that the panel gave time as set out within Mr Noor’s statement (which is not challenged by Mr Harrison as being an accurate record) and this is alluded to within paragraphs 13 and 14 of the first-tier panel’s decision for the Appellant to consider the interview transcript. Whilst I accept that there is an argument for saying that the failure to grant the adjournment has been fully and properly considered by the First-tier Tribunal and what is being put forward amounts to nothing more than disagreement, I take into account:-
- (i) The acceptance on behalf of the Secretary of State by Mr Harrison that the Secretary of State accepts that it was procedurally unfair not to adjourn.
  - (ii) That the general principles set out in *Miah* need to be followed and addressed.
  - (iii) That whilst considerable criticism can be levied at the Secretary of State at the late service of the interview record, that in itself may not necessarily require an adjournment because other factors need to be considered, in particular the issues involved and the number of questions involved. In this instant case the issues are highly contentious. In addition the number of questions total 170. It is not, I accept, reasonable even with the latitude of the Tribunal in putting the case back in the list to expect an Appellant and Sponsor to digest a document running to 170 questions at the door of the court.

- (iv) I acknowledge further that the position of the Appellant was made more difficult by the failure to have requested a Czech interpreter. It is difficult not to be critical of the Appellant's instructing solicitors for having failed to do so. I can well understand the lack of sympathy that this created within the panel and it was strongly emphasised by Mr Noor in his previous submissions that an adjournment would be beneficial for the interests of justice for both the Appellant and the Sponsor so they could see their solicitor in the presence of a Czech interpreter and prepare thereafter a schedule of exactly which questions and answers they disagreed with and which they accepted.
16. When looked at in the round and considering all these factors particularly bearing in mind the agreement/consent of the Secretary of State through her representative Mr Harrison, I find that there is a material error of law in the failure of the First-tier Tribunal to grant the adjournment on the basis of procedural unfairness and I set aside the decision and give directions for the rehearing of this matter. The parties will of course appreciate that the Secretary of State maintains her position with regard to the marriage being one of convenience and the questions and answers set out in the interview record.

#### **Notice of Decision and Directions**

- (1) The decision of the First-tier Tribunal contains a material error of law and is set aside. The matter is remitted to the First-tier Tribunal sitting at Manchester with none of the findings of fact to stand.
- (2) The matter is to be reheard before any Immigration Judge other than Immigration Judges Cruthers and Paul on the first available date 42 days hence with an ELH of two hours.
- (3) That there be leave to either party to file additional witness statements and supplemental documentary evidence in support of their positions, such statements/evidence to be served on the other party and filed at court at least fourteen days prior to the restored hearing.
- (4) That a Czech interpreter do attend the restored hearing.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT  
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris