



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/06036/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 22 June 2018

Decision & Reasons Promulgated  
On 11 July 2018

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

VINITRAV PREMJIT CHHANIYARA  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms H Masood instructed by Law Dale Solicitors  
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of India. He appealed to a Judge of the First-tier Tribunal against the Secretary of State's decision of 11 May 2016 refusing his application for a residence card under the EEA Regulations under Regulations 2 and 20B(5) of the Regulations.
2. Although it is not immediately obvious from the decision letter, Mr Clarke confirmed that the refusal under Regulation 2 was with reference to the definition of "spouse" in

Regulation 2 of the Immigration (European Economic Area) Regulations 2006 which states where relevant:

“‘spouse’ does not include –

(a) a party to a marriage of convenience;”.

3. Regulation 20B(5) is applicable in a case where the Secretary of State has reasonable doubt whether a person has a right to reside, and invites them to attend an interview, and that without good reason they fail to attend an interview on at least two occasions if so invited, in which circumstances the Secretary of State may draw any factual inferences about their entitlement to a right to reside as appear appropriate in the circumstances and, specifically under (5), the Secretary of State may decide following an inference under paragraph (4) that the person does not have or ceases to have a right to reside.
4. It is made clear under sub-paragraph (6) that the Secretary of State must not decide if the person does not have or ceases to have a right to reside on the sole basis that they failed to comply with this Regulation.
5. The judge noted that the decision to draw an adverse inference was proceeded by observations relating to the appellant’s immigration history and the fact that he had provided very little evidence of cohabitation. The respondent was also concerned that photographs that had been produced appeared to be staged and therefore deemed it appropriate to call the parties to an interview. The appellant had given an explanation as to why he had failed to attend both interviews and the judge gave the appellant the benefit of the doubt and accepted that e-mails and not letters inviting him to interview were sent, so that he may have failed to read the e-mails, partially because it was his expectation that the interview letters would be posted. The judge went on thereafter to consider the evidence and concluded that the respondent had established on a balance of probabilities that the appellant did not have a right to remain in the United Kingdom under the EEA Regulations, and more particularly that he was not in a genuine and subsisting relationship with the sponsor and in short that the marriage was a sham.
6. In grounds of appeal which were subsequently refined in her skeleton argument by Ms Masood, the appellant (the original grounds were not drafted by Ms Masood) challenged the judge’s decision on the basis that there had not been a fair hearing, there had been evidence of communication via social media, that the sponsor was in fact from Moldova and only received her second citizenship, that of Romania, in July 2014, and that the issue of it being a sham marriage was not the issue at the hearing.
7. In her helpful amended grounds Ms Masood relied on the following:
  - (a) The appellant was wrongly deprived of an opportunity for a marriage interview and the First-tier Judge ought to have found that the Secretary of State’s decision was vitiated by procedural unfairness and/or remitted the matter to the Secretary of State for a marriage interview/new decision.

- (b) In paragraphs 10(iv) and (v) of the determination the judge in drawing adverse inferences proceeded on the mistaken basis that the sponsor was an EEA national at the time the couple met on a social dating site, "Topface" in 2013, and at that time she was a national of Moldova, only having become a Romanian national in July 2014.
- (c) The judge failed to give any or any proper consideration to all the evidence submitted by the appellant and/or the conclusion that the marriage was a "sham marriage" was not justified or open to the judge on the evidence before him.
8. Drawing on points asserted in her skeleton argument, Ms Masood argued that the main reason for the refusal was the failure to attend interviews and the findings of the judge in this regard were unclear. The respondent had not made express what precise factual inferences she was drawing about the appellant's right to reside from his failure to attend the interviews and had not expressly alleged that the marriage was a marriage of convenience. She quoted remarks of Underhill LJ in Agho [2015] EWCA Civ 1198 concerning the need for people to know clearly what was being said against them in respect to an allegation that a marriage of an applicant under the Regulations was a marriage of convenience and needs to be made in effect, in explicit terms. The judge had accepted the explanation but did not say how it factored into the decision.
9. The appellant and the sponsor had gone to the hearing expecting essentially to address the issue of whether there were good reasons not to attend the interview. The judge had accepted what they said but had not accepted all the evidence with regard to the substantive issues. The legal burden was not on the appellant. Things had not been done as they should have been done and perhaps having accepted the explanation given for non-attendance the judge should have given the parties the opportunity to get their cases in order or suggest that the Home Office withdrew its decision and facilitate an interview or find the decision was vitiated by procedural unfairness or find that the initial evidential burden had not been discharged.
10. In response Mr Clarke argued that it was unclear why the parties could have thought that the only issue was the failure not to attend in light of the refusal under Regulation 2. This was a live issue. A further interview would be unnecessary given the favourable findings that had been made. It was quite clear what the issues at large were. The issue of a sham marriage could not only be raised in a case where there was non-attendance at an interview. There had been a paucity of evidence before the judge.
11. Ms Masood argued that it was not suggested that the appellant had had no idea of the concerns about the genuineness of the marriage but the focus of the refusal letter was on the failure to attend the interviews. They were not required to provide evidence of the marriage with the application and there was no burden on the appellant for a family permit to show that they were not a party to a marriage of convenience, as had been held in Papajorgji [2012] UKUT 00038 (IAC). There was an issue of procedural fairness. The appellant had never been given the opportunity to assuage the concerns about his marriage. Though the judge could not require the Home Office to interview

the appellant the opportunity could have been given to address the Secretary of State's concerns. Cross-examination was not the same as an interview. Though there was no obligation to have a marriage interview there should have been the opportunity to get their cases in order.

12. With regard to the other grounds, on instructions, though the appellant's solicitor recalled that the appellant had said to the judge that his wife only attained remaining citizenship in July 2014, neither the sponsor nor the appellant recalled telling the judge that and that was as far as Ms Masood could take the matter.
13. Otherwise it was argued that the judge had failed to consider all the evidence. Production of official letters was surely a good thing rather than bad as seemed to be the implication from the judge. There was no reference to the Jobcentre letter in the bundle at page 36 and the tenancy agreements. There were also the letters from the bank and the letters about voting. It was unclear on what basis the judge had thought it would be easy to produce corroborative evidence about the use of a social dating site. As regards the lack of marriage guests and witnesses at the hearing, neither of the couple had ever been asked why no-one attended and they had thought they were coming to argue about the marriage interview and not bringing witnesses. The issue about giving of presents was a bad point made by the judge. He had accepted there were no serious inconsistencies. He had not really addressed the photographs in the bundle, which were not just of the marriage but were taken at various locations. It was not suggested that the judge had erred with regard to the burden despite what was said at paragraph 8, in light of paragraph 11 of his decision.
14. Mr Clarke argued that the point made at paragraph 2(a) of the skeleton was not in the grounds on which permission had been granted concerning wrongful deprivation of a marriage interview. The right of appeal was the opportunity to put the house in order. It was argued that the evidential burden had shifted. The judge's decision was very balanced, having found some matters favourable and others not and the factual findings were in respect of the evidence that could be expected to be before the judge. The benefit of the doubt had been given to the appellant with regard to non-attendance at the interviews. The concern was that there was a lack of evidence of day-to-day transactions concerning the kind of matters that you would expect there to be evidence of, given the period of time during which the couple had lived together. In particular, the judge's paragraph 10(iv) was weighty with regard to the immigration history of the appellant. The judge found that he did not intend to study. These were indicative criteria as set out in the appendix in Papajorgji. None of these matters had been treated as determinative but were all considered together. The judge was entitled to say that if the relationship was relied on there would be evidence of the kind that was lacking produced. With regard to evidence produced in an earlier case, that could have been produced before the judge but it had not been and he had been professionally advised and represented. It went to a core issue of credibility. The totality of the evidence has been considered and no error had been identified.
15. By way of reply Ms Masood made the point that the sponsor had only come to the United Kingdom in April 2015 and the couple had only begun to live together then

and married in November 2015, so she was new to the United Kingdom and that issue with regard to the presence of friends had not been really addressed by the judge. The ground concerning failure to take into account Facebook posts was not pursued as they had not been before the judge, although they probably should have been.

16. I reserved my decision.
17. I have set out above the terms of Regulation 20B of the EEA Regulations where relevant. It is essentially a matter of the respondent being entitled to draw factual inferences about an appellant's entitlement to a right to reside in light of a failure to attend an interview on at least two occasions without good reason.
18. It appears from paragraph 10(ii) of the judge's determination that he accepted the appellant's explanation for his failure to attend interview. An issue that I raised with the parties was a concern I had that the judge did not go on to factor into his evaluation of the appeal the implications of that, in effect, positive finding. It is clear that the decision maker based his decision on the reasons for inviting the appellant and the sponsor for interview combined with his failure to attend two interviews to verify his right, implied that he did not have a right to reside under Regulation 14(1) of the EEA Regulations.
19. In effect, in light of the judge's finding, the respondent was not entitled to draw any factual inferences about the appellant's entitlement to a right to reside. The decision must therefore stand on the quality of the reasoning with regard to the right to reside without any element of inference from the failure to attend the interview being drawn.
20. In effect I consider that that was what the judge did. Having decided that he accepted the appellant's explanation for not attending the interview, he did not refer thereafter to any inference being drawn but simply went on to evaluate the evidence before him.
21. The first adverse comment was that the evidence of cohabitation was slight, bearing in mind that the appellant had been in employment and the only evidence provided consisted mainly of official letters from the Home Office, the bank and the voting registry. The judge was concerned that there was little evidence to demonstrate the day-to-day transactions that would be reflected in correspondence addressed to a person's place of residence over a period of cohabitation claimed.
22. I do not see any legal error in this point. It was not so much a question of being surprised that there was official documentation but rather the absence of any other kind of relevant documentation over the period and that was a finding to which the judge was entitled to come.
23. The next paragraph, paragraph 10(iv), is the one to which Mr Clarke attached particular weight. There the judge evaluated the appellant's immigration history and noted such matters as the fact that he did not attend any lessons, having come to the United Kingdom as a student, claiming that the college had turned out to be bogus. The judge was satisfied that he had not made any effort to enrol on an alternative

course and it was likely that he had engaged in employment and he did not contact the respondent in order to obtain leave on the basis of a different Tier 4 sponsor. He had made an application after the expiry of his leave on 28 June 2014 for leave to remain on human rights grounds, on 17 July 2015, that application being declined later that month. Thereafter he made the EEA application. The judge's conclusion on this, which again I think was open to him on the evidence, was that the appellant's immigration history strongly suggested from the outset it was never his intention to study in the United Kingdom.

24. The next point is with regard to the judge's view that the appellant would have given careful thought to the immigration status of the partner he was seeking in order to facilitate his leave to remain. He denied that he was looking for an EEA national. Ms Masood very properly accepted that the question of whether the judge was told that the sponsor only attained Romanian citizenship in July 2014 was, according to the sponsor and the appellant, not put to the judge. I think the judge was entitled to regard this as a relevant matter, but as he noted it was clearly not determinative. It was relevant thereafter to note that no evidence to support the claim that the couple had met on a social dating site in 2013 had been produced. He considered it would have been relatively easy for them to do so, and, although the point again very properly was not relied on by Ms Masood any longer that they had talked on Facebook, as that was enclosed in the first EEA application which was not before the judge, it is clear that evidence in that regard was produced and that bolsters the judge's view that such evidence could have been produced in this case.
25. Further matters of concern to the judge were the fact that the only people who attended the wedding ceremony were witnesses and that the appellant had only one friend in the United Kingdom whom he could have invited but this friend had returned to India and all his friends had otherwise returned to India. The judge did not accept that a person who had been residing and probably working in the United Kingdom would not have invited friends to the wedding. He made similar observations with regard to the sponsor. In that regard Ms Masood made the point the sponsor had not been in the United Kingdom as long, but in any event the judge's comment went no further than saying it was a consideration that did not enhance the credibility of the claim to be in a genuine relationship and that was a conclusion open to the judge.
26. Again, the judge did not consider to be determinative the fact that no witnesses or friends had been produced to support the claim as to the genuineness of the marriage. Clearly, even if the main assumption of the couple was that they were going to the hearing to address the issue of the failure to attend the interview, it was properly accepted on their part that that was not the only reason and that they were aware that issues as to the marriage were live and as a consequence again I think this was a view that was open to the judge. The other matter was whether or not the families were informed and the issue of presents dealt with at paragraph 10(ix) and (x) are not matters of any great substance and were just matters noted in passing by the judge.

27. Thereafter he went on to note the absence of any serious inconsistencies as between questions put to the appellant and the sponsor at the hearing and this was accorded due weight.
28. Overall however he concluded that it had been shown by the respondent on a balance of probabilities that the appellant did not have a right to remain in the United Kingdom under the EEA Regulations, and more, in particular, that he was not in a genuine and subsisting relationship with the sponsor. The further comment he made that this was a sham marriage was not technically an issue before him, but the previous conclusion as to the genuineness and subsistence of the marriage was.
29. Bringing these matters together I consider that the judge rightly did not take the matter of any inference to be drawn from the non-attendance at interview any further but considered the evidence carefully and came to conclusions on a balanced basis that were properly open to him. It follows that I find there is no error of law in his decision and that as a consequence the decision dismissing the appeal is maintained.
30. No anonymity direction is made.



Signed  
Upper Tribunal Judge Allen

Date 10 Jul. 18

**TO THE RESPONDENT**  
**FEE AWARD**

The appeal is dismissed and therefore there can be no fee award.



Signed  
Upper Tribunal Judge Allen

Date 10 Jul. 18