Upper Tribunal
(Immigration and Asylum Chamber)

Nimo (appeals: duty of disclosure) [2020] UKUT 00088 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 January 2020	.....

Before

THE HON. MR JUSTICE LANE, PRESIDENT

MR C.M.G. OCKELTON, VICE PRESIDENT

Between

CHARLES NIMO

(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Ms M Malhotra, Counsel, instructed by Adukus Solicitors

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

(1) In an immigration appeal, the Secretary of State's duty of disclosure is not knowingly to mislead: CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 0059, citing R v SSHD ex parte Kerrouche No 1 [1997] Imm AR 610.

(2) The Upper Tribunal was wrong to hold in Miah (interviewer's comments; disclosure; fairness) [2014] UKUT 515 that, in every appeal involving an alleged marriage of convenience, the interviewer's comments in the Secretary of State's form ICD.4605 must be disclosed to the appellant and the Tribunal. No such general requirement is imposed by the respondent's duty of disclosure or by rule 24 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

DECISION AND REASONS

1.

A person who is a family member of an EEA national (as defined in the Immigration (European Economic Area) Regulations 2016) exercising treaty rights in the United Kingdom is entitled to ask the respondent for a residence card, confirming his or her status as a family member. The appellant, a citizen of Ghana, made such an application on the ground that he was married to a Dutch national, who was exercising treaty rights in the United Kingdom. For the purposes of the Regulations (and the underlying Directive), a spouse is not entitled to be treated as a family member if he or she is a party to a marriage of convenience.

2.
Having undertaken separate interviews with the appellant and his wife, the respondent decided that they were in a marriage of convenience and so refused to issue the appellant with a residence card.

3.
The appellant appealed against that decision to the First-tier Tribunal which, following a hearing in Newport on 4 June 2019, dismissed his appeal.

4.
The judge had before him the verbatim records of the interviews with the appellant and his spouse. The judge heard oral evidence from them. In his decision, the judge placed no weight on certain discrepancies given by the appellant and his spouse at their respective interviews, concerning their everyday life together. The judge did, however, consider it highly significant that the appellant "knew nothing about his wife being out of the country for a period of a week, let alone which other country she may have gone to and for what reason" (paragraph 18). The judge found that the respondent had discharged the legal burden of proof, the appellant having failed to provide an innocent explanation. The judge concluded that the marriage had been properly shown by the respondent to be one of convenience. He dismissed the appellant's appeal.

5.
Although the judge had the record of interviews, which had also been supplied to the appellant in advance of the hearing, he did not have a document known as ICD.4605. This was the interview summary sheet, compiled by an official of the respondent who undertook the interviews, which included a section headed "recommendation – genuine/marriage of convenience?" together with evidence to support the recommendation.

6.
There is nothing to indicate that the appellant, his solicitors or counsel who attended the First-tier Tribunal hearing asked the respondent for a copy of ICD.4605. Nor was anything said about this document at the hearing.

7.
In the grounds which accompanied the appellant's application for permission to appeal to the Upper Tribunal, we find the following:

"The appellant's application for a residence card as a spouse of an EEA National was refused on 5 April 2019 due to alleged inconsistencies in their responses at the marriage interview. In the interest of fairness, the appellant should have been alerted by the elements of the case against him (sic).

However, the document containing the i nterviewer's comments – form ICD .4605 which should have been disclosed was not. We refer to the case of Miah (interviewer's comments: disclosure: fairness

[2014] UKUT 00515 (IAC). In fairness to the appellant, the hearing should have been adjourned to enable him and his spouse specifically [to] deal with these matters in their witness statements.

Therefore, the FtT Judge's decision to dismiss the appellant's appeal contained an error of law."

8.
Permission to appeal to the Upper Tribunal was granted by the First-tier Tribunal on 20 August 2019. The granting judge's decision contains the following:-

"3. Disclosure is described at [22] of Miah as being dictated by the right to a fair hearing. Given this, I am driven to conclude that the grounds are arguable, it being for the Upper Tribunal to determine whether the fairness point is nonetheless answered by the appellant apparently never having raised the issue before. "

9.
Pursuant to the Upper Tribunal's directions, the parties filed and served skeleton arguments. We also heard oral submissions from Ms Malhotra and Mr Melvin. The respondent's skeleton argument was drafted by Mr Melvin's colleague, Mr Jarvis.

10.
In Miah , the U pper Tribunal held that form ICD .4605 must be disclosed as a matter of course, in order to afford an appellant a right to a fair hearing.

11.
The Upper Tribunal summarised the two questions raised in the case as follows:-

"2. The main question raised by this appeal is an interesting one, the answer whereto could potentially affect the conduct of interviews in contexts other than that under consideration. It may be summarised thus: is a decision by the Secretary of State under the Immigration (European Economic Area) Regulations 2006 (" the EEA Regulations ") that a marriage is one of convenience vitiated by procedural unfairness and, thereby, erroneous in law where the decision making process includes comments, or opinions, of the interviewing officer adverse to the subject's case which are conveyed to the decision maker but are withheld from the subject? Thus formulated, this appeal raises a classic question of common law procedural fairness. This is essentially the issue on which the FtT allowed the appeal and upon which permission to appeal was granted.

3. The subsidiary question raised by this appeal is also of some interest, as it bears on the Secretary of State's duty to the First-tier Tribunal under Rule 13 of the Asylum and Immigration Procedure Rules 2005. It may be framed thus: does the duty under Rule 12 encompass a requirement to disclose Form ICD4605, the "Interview Summary Sheet", in every case of this nature? The consequences of the new FtT procedural rules are addressed in [20] infra ."

12.
At paragraph 9, the Upper Tribunal cited from the speech of Lord Mustill in R v Secretary of State for the Home Department ex-parte Doody [1994] [1 AC 531], in which it was stated that where an Act of Parliament confers an administrative power, there is a presumption that it will be exercised in a manner which is fair in all the circumstances. Standards of fairness are not immutable but will very often require a person who may be adversely affected by the decision to have an opportunity to make representations, either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. Since worthwhile representations

cannot be made without knowing what factors may weigh against the person's interests, fairness will often require the person to be informed of the gist of the case he has to answer.

13.
The Upper Tribunal also cited R v Secretary of State for the Home Department ex-parte Fayed [1996] EWCA Civ 946. This involved a judicial review by Mr Fayed of the Secretary of State's decision to refuse to grant him naturalisation as a British citizen. The Upper Tribunal noted, in particular, the observation of Phillips LJ (as he then was) that the duty of disclosure is calculated to ensure that the process by which the minister reaches his decision is fair. This enables the party affected to address the matters which are significant and therefore helps to ensure the Minister reaches his decision having regard to all the relevant material (p.253).

14.
Having observed that finding a person is a party to a marriage of convenience "will be a significant blot on the pers on's history and can operate to his detriment in the future", the Upper Tribunal said:-

"13. These features of the context point decisively to the proposition that the affected person must be alerted to the essential elements of the case against him. This places the spotlight firmly on the pre-decision interview which, it would appear, is an established part of the process in cases of this nature. The interview is the vehicle through which this discrete duty of disclosure will, in practice, be typically, though not invariably or exclusively, discharged. In this forum, the suspicions relating to the genuineness of the marriage must be fully ventilated. This will entail putting to the subject the essential elements of any evidence upon which such suspicions are based. In this way the subject will be apprised of the case against him and will have the opportunity to make his defence, advancing such representations and providing such information, explanations or interpretations as he wishes. Adherence to these basic requirements should, in principle, ensure a fair decision making process in the generality of cases. In order to cater for the unusual or exceptional case, those involved in the decision making process must always be alert to the question of whether, in the interests of fairness, anything further is required."

15.
Miah was an appeal to the Upper Tribunal by the Secretary of State, following the First-tier Tribunal's decision to allow the appeal of the person who was said to be party to a marriage of convenience. It appears that the appeal had been allowed because 4CV 4.605 had been disclosed to the Secretary of State's decision maker. The Upper Tribunal was, understandably, not disposed to regard this as a constituting an impermissible action, such as to entitle the other party to succeed. It would, frankly, be bizarre if, within any organisation, an official was precluded from making a recommendation to another (usually higher) official, who is tasked with the duty of making the decision in the case.

16.
The Upper Tribunal put the matter in the following way:-

"17. Insofar as Mr Ahmed submitted that the comments and opinions of the interviewing officer should never be considered by the decision maker, I cannot agree. The interviewer will normally be well equipped and placed to express relevant views, particularly where the same person has, separately, interviewed the two parties to the marriage. More specifically, the interviewer will be uniquely placed to comment on the subject's presentation, reactions and demeanour generally. This is illustrated in the present case, in the interviewing officer's description of his "impression" that the wife was evading certain critical questions. There is no challenge to the bona fides of the interviewer. Where the interviewer elects to include comments and/or opinions in the materials conveyed to the

decision maker, the latter will not, of course, be bound by them. I consider that the duty on the decision maker is to approach and consider all of the materials with an open mind and with circumspection. The due discharge of this duty, coupled with the statutory right of appeal, will provide the subject with adequate protection."

17.
The Upper Tribunal in Miah then turned to the second issue. This concerned rule 13 of the Asylum and Immigration Tribunal (Procedure) Rules 2005. So far as relevant, rule 13, provided as follows:-

" **Filing of documents by respondent.**

13 – (1) When the respondent is served with a copy of a notice of appeal, it must (unless it has already done so) file with the Tribunal a copy of -

(a) the notice of the decision to which the notice of appeal relates, and any other documents served on the appellant giving reasons for that decision;

(b) any –

(i) statement of evidence form completed by the appellant;

(ii) record of an interview with the appellant,

in relation to the decision being appealed;

(c) any other unpublished document which is referred to in a document mentioned in sub- (a) or relied upon by the respondent;

…"

18.
In October 2014, the 2005 Rules were replaced by the Tribunal Procedural (First-tier Tribunal) (Immigration & Asylu m Chamber) Rules 2014. Rule 24 makes provision, in paragraph (1) to the same effect as old rule 13(1):

"24 – (1) …when a respondent is provided with a copy of a notice of appeal, the respondent must provide the Tribunal with—

(a) the notice of the decision to which the notice of appeal relates and any other document the respondent provided to the appellant giving reasons for that decision;

(b) any statement of evidence or application form completed by the appellant;

(c) any record of an interview with the appellant in relation to the decision being appealed;

(d) any other unpublished document which is referred to in a document mentioned in sub-paragraph (a) or relied upon by the respondent;

…"

19.
In Miah , the Upper Tribunal was in no doubt that the principles of procedural fairness, as articulated in its analysis of the first of the two issues, required rul e 13 to be read so that form ICD .4605 must be disclosed to an appellant:-

“21. The requirement to make disclosure (formerly discovery) of all material documents in a party's possession, custody or power is a long established feature of most litigation contexts. It is an integral part of the administration of justice. It is a duty owed to both the other party and the court or tribunal concerned. It is rooted in fairness and the rule of law itself. In the particular context of judicial review proceedings, Sir John Donaldson MR stated in R - v - Lancashire County Court, ex parte Huddleston [1986] 2 All ER 941, at 944;

"Certainly it is for the applicant to satisfy the Court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands".

...

This has also been formulated as a duty of candour: see Tweed - v - Parades Commission (Northern Ireland) [2006] UKHL 33, at [54], per Lord Brown. Asylum, immigration and kindred appeals are a species of public law proceedings, in which the parties are the citizen (on the one hand) and the State (on the other). I consider that these duties apply with full force in the context of such appeals. To suggest otherwise would be inimical to the administration of justice. Rule 13 of the 2005 Rules is to be construed and applied accordingly.

22. The representatives of both parties were agreed that the document enshrining the interview er's comments - Form ICD .4605 - is not routinely disclosed in appeals of this kind. The practice appears to be irregular and inconsistent. I consider that fulfilment of the duties identified above requires disclosure of this Form as a matter of course. The Claimant's right to a fair appeal 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. It will also enable mechanisms such as redaction, which in practice one would expect to arise with extreme rarity, to be considered.

23. While, there may be cases where it can be demonstrated that non-disclosure of this document did not contaminate the fairness of the tribunal's decision making process, one would expect these to be rare.”

Discussion

20.
It is plain from paragraph 21 of Miah , in which the Upper Tribunal made reference to the duty “to make disclosure (formerly discovery) of all material documents in a party’s possession custody or power” , that the Upper Tribunal considered this duty, or something very like it, applies in i mmigration a ppeals, including EEA appeals. With respect, that is not right. Regrettably, the Upper Tribunal did not have cited to it the relevant authorities, which establish that there is a significant difference between , on the one hand, appeals in the Immigration and Asylum Chambers of the F irst-tier Tribunal and the Upper Tribunal and , on the other, civil litigation as conducted in courts.

21.
The authorities were usefully analysed by the Upper Tribunal in CM (EM country guidance; disclosure (Zimbabwe) CG [2013] UKUT 0059. Although concerned with an asylum appeal, what CM has to say on the issue of disclosure is of general application in this jurisdiction , so far as concerns appeals :-

“36. As a starting point and in contrast to ordinary civil litigation, we recognise that there is no general requirement for disclosure of all relevant data held by the Home Secretary or indeed the Foreign Secretary in asylum appeals. These are appeals to a Tribunal governed by a statutory regime and the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended. Neither these Rules nor the AIT (Procedure) Rules 2005 made pr ovision for general disclosure. ”

37. In principle, the starting point was similar to that considered by the House of Lords in Abdi and Gawe [1996] 1 WLR 2 98 [1996] Imm AR 288 where Lord Lloyd concluded that ne ither the express provisions of the rules then applicable nor the interests of justice required the Secr etary of State to give discovery in asylum appeals. The case was concerned with return to a safe third country, and it is clear from the speech of Lord Lloyd and the partly concurring speech of Lord Mustill that the circumscribed timetable of third country appeals was a material factor in determining what the interests of justice required.

38. R v SSHD ex p Kerrouche No 1 [1997] Imm AR 610 was another third country case; Lord Woolf said:

”While Lord Lloyd’s approach must be the starting point for the consideration of this issue, there are limits to the approach he indicated in that case. The decision would not justify the Secretary of State knowingly misleading the Special Adjudicator. The obligation of the Secretary of State cannot be put higher than that he must not knowingly mislead. Before the Secretary of State could be said to be in that position, he must know or ought to have known that the material which it is said he should have disclosed materially detracts from that on which he has relied.”

22.
Accordingly, in placing weight upon rule 13(1)(c) of the 2005 Rules to support its finding that fo rm ICD .4605 must be disclosed as a matter of course, the Upper Tribunal in Miah was starting from the wrong place. The rules and principles relating to civil litigation disclosure do not apply to appeals of the present kind.

23.
As can be seen from paragraphs 10 and 21 of its decision, the Upper Tribunal in Miah appears to have equated judicial review proceedings with those of a statutory immigration appeal. However, these two types of litigation are distinct. There is no legitimate reason to import into immigration appeals the duty of candour, which exists in judicial review.

24.
The basic reason why it is unnecessary and inappropriate to do so is identified in Mr Jarvis’s skeleton argument. We are, here, concerned with an appeal. The F irst-tier Tribunal judge was not undertaking a review of the respondent’s decision, with all the attendant restrictions that flow the judicial review process . The case is not like Fayed , where the claimant received an adverse decision which he wished to challenge but did not know the reasons for that decision and, thus, the case he had to meet. On the contrary, it was an appeal, where the respondent was obliged to say why she had refused the application and where the judge was required to decid e for himself the question whether, on the evidence before him, the respondent had discharged her duty of showing, on the balance of probabilities , that the appellant’s marriage was one of convenience.

25.

Although concerned with an appeal raising human rights issues, what the House of Lords said in Huang v Secretary of State for the Home Department [2007] UKHL 11 makes the distinction in this context between appeal and judicial review plain :-

“11 … the task of the appellate immigration authority, on an appeal on a Convention ground against a decision of the primary official decision-maker refusing leave to enter or remain in this country, is to decide whether the challenged decision is unlawful as incompatible with a Convention right or compatible and so lawful. It is not a secondary, reviewing, function dependent on establishing that the primary decision-maker misdirected himself or acted irrationally or was guilty of procedural impropriety. The appellate immigration authority must decide for itself whether the impugned decision is lawful and, if not, but only if not, reverse it… ”

26.
To put that another way, in an immigration appeal the reasons for the respondent’s decision are merely the starting point for an independent judicial process. Once this point is grasped, it can readily be seen that there is no justification for a rigid requirement on the respo ndent to file and serve from ICD .4605 in marriage of convenience cases. This proposition can be tested by reference to the facts of the instant appeal.

27.
The verbatim records of interview were produced by the respondent pursuant to rule 24(1)(d) of the 2014 Rules. The respondent’s decision of 5 April 2019 made specific reference to the interview. The inconsistencies identified in the decision, arising from the interviews, were expressly articulated in the form of “bullet points”. Details were given in those bullet points of what was said to be inconsistent. For instance (and as the judge emphasised), the appellant could not recall the last time his wife visited the Netherlands, whereas she said that she had gone to the Hague for a week in October 2018 for friend’s funeral.

28.
Other inconsistencies detailed in the decision, by refence to the interviews , involved the appellant’s knowledge of his wife’s work, her finances, her past life in the Netherlands, and information about his wife’s children. The decision also referred to two photographs of the appellant and his wife, taken in a restaurant, as regards which there was an inconsistency as to who had taken the photograph and whether that person had been dining with the couple.

29.
From the information on the Upper Tribunal’s file, we can see that the respondent was directed by the F irst-tier Tribunal on 7 May 2019 to send copies of the documents disclosed pursuant to rule 24(1)(d) to the appellant , by 4 June 2019. There was no complaint at the hearing that the appellant and those professionally representing had had insufficient time to consider the record of interviews.

30.
As we have already mentioned , form ICD .4605 has been disclosed by the respondent. This followed the grant of permission to appeal to the Upper Tribunal. In it, we can see the caseworker’s recommendation was that the appellant’s marriage was a marriage of convenience. In the following column, headed “Evidence to support recommendation” , the caseworker set out what were considered to be inconsistencies in areas where the appellant did not know information about his wife which he might be expected to know, if his marriage were genuine. With one exception, these correlate precisely with the reasons given in the decision. The exception is that the interviewing

caseworker had credibility issues with photographs supplied by the appellant, in addition to those taken in the restaurant.

31.
Since the case before the F irst-tier Tribunal judge was an appeal and not judicial review, the case the appellant had to meet was set out in the respondent's decision. The reasons given in that decision , and only those, were being relied upon by the respondent in order to resist the appeal and the IC D . 4605 was not, either expressly or by implication, "referred to" in the decision or the reasons for it.

32.
We note that rule 24(2) of the 2014 Rules requires the respondent to provide "a statement of whether the respondent opposes the appellant's case and the grounds for such opposition " , in circumstances where "the respondent intends to change or add to the grounds or reasons relied upon in the notice or the other documents referred to in paragraph (1)(a) " . This provides a mechanism for ensuring that, where the respondent's justification for her decision changes, both the appellant and the T ribunal are made aware of this.

33.
It therefore matters not at all whether form ICD.460 5 contains observations, by reference to the records of interview, that might further support the respondent's decision concerning the nature of the marriage, but which are not articulated in that decision. There can be no possible unfairness to the appellant in this regard because both he and the F irst-tier tribunal judge are in the same position. Neither will know of those additional observations in ICD.4605. Th ose observations therefore can not play any part in the judge's decision whether to allow or dismiss the appeal.

34.
Before us, Ms Malhotra submitted that, insofar as the decision followed and reflected the stance of the caseworker who compiled ICD.4605, that document should have been disclosed, as it was part of the decision. We do not agree. A s we have already observed , it is a commonplace of any ministry o r, indeed, any organisation (certainly , one of the size of the Home Office) that several officials will be engaged in the process that leads to a formal decision, such as a decision that gives rise to a right of appeal to the F irst-tier Tribunal . The fact that a decision - maker adopts the recommendations of a colleague does not mean that those recommendations have to be supplied to an appellant and the Tribunal. What matters to the appellant and the Tribunal are the reasons for the decision.

35.
It is, however, necessary to make the following point. The duty not to mislead, as described by the Upper Tribunal in CM , will require the respondent to disclose form ICD.4605, where there is something in it that could materially assist the appellant, but which is not mentioned in the respondent's decision or in the records of interview. If, for example, the interviewing officer comments that the appellant or spouse appeared to be seriously unwell during the interview, and that this might account for the unsatisfactory answers given, then the respondent is under a duty to disclose. The presenting officer would, in such circumstances, be misleading the Tribunal , if she were to rely on the discrepant or otherwise unsatisfactory answers, without drawing attention to what the interviewer had had to say about the interviewee's apparent state of health. The possibility that such a piece of information might lie within form ICD.4605 is not, however, a reason to require its automatic production, any more than there ought, for such a reason, to be a general duty of disclosure on the respondent in respect of all internal communications leading to any decision in the i mmigration field , which may be appealed to the F irst-tier Tribunal .

36.
For these reasons, we respectfully decline to adopt the broad construction of (what is now) rule 24(1)(d), which was adopted by the Upper Tribunal in Miah . In the present case, ICD.4605 was not referred to in the n otice of d ecision or any other document provided to the appellant , giv ing reasons for that decision. Form ICD.4605 was not relied upon by the respondent. The expression "relied upon" in rule 24(1)(d) must mean that the respondent relies upon the unpublished document as part of her case before the F irst-tier Tribunal . For the reasons we have given, the expression cannot properly be construed as referring to any advisory or preparatory document that has led up to the form in which the respondent has articulated the reasons for her decision, as contained in the decision letter.

37.
In the present case, the F irst-tier Tribunal judge gave entirely sustainable reasons for finding that the appellant was party to a marriage of convenience. The appellant and his advisors had advance notice of the record of interview s , which featured in the written decision and reasons. No unfairness was occasioned by the fact that the appellant and the First-tier Tribunal judge did not see form ICD.4605.

DECISION

The appeal is dismissed.

Signed Date

The Hon. Mr Justice Lane

President of the Upper Tribunal

Immigration and Asylum Chamber