Appeal No. TH/6639/97 (STARRED)
(01 TH 0100)

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 10/10/2000
Date Determination notified: 24/4/2001

Before

Mr C. M. G. Ockelton (Deputy President)
Mr K. Drabu
Dr H. H. Storey

Between

PIN-WAH JEFF CHANG
APPELLANT

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
RESPONDENT

DETERMINATION AND REASONS

The Appellant, a citizen of Malaysia, appeals, with leave, against the decision of an Adjudicator (Mr G. Warr) that he has no right of appeal against the decision of the Respondent on 9 October 1996 refusing to issue him with a confirmation of a right to remain in the United Kingdom as the spouse of an EEA national exercising Treaty rights. Before the Tribunal he was represented by Mr C. J. Brion of Brion & Co, solicitors, and the Respondent was represented by Mr P. Saini of counsel, instructed by the Treasury Solicitor.

The formal status of this appeal to the Tribunal is that, following service of the Appellant's notice of appeal, the Respondent alleged as a preliminary issue that the Appellant has no right of appeal. The stated reason for that allegation may be explained for the purposes of this determination as follows. (i) The Appellant could have an in-country right of appeal only under Article 18 of the Immigration (European Economic Area) Order 1994 (SI 1987/465) as the family member of a national of a Member State. (ii) Article 2(2) of that Order provides that for the purposes of the Order 'spouse' does not include a party to a marriage of convenience. (iii) The Appellant has no claim except as a spouse. (iv) He is (as alleged by the Respondent) a party to a marriage of convenience. Hence (v) he has no in-country right of appeal.

The Adjudicator was requested to determine the right of appeal as a preliminary issue, as provided for by Rule 8(3) and 11(1) of the applicable rules, the Immigration Appeals (Procedure) Rules 1984. In determining that preliminary issue, however, the Adjudicator was concerned with the law relating to the rights of spouses of EEA nationals, and the burden and standard of proof (if any) imposed on those who seek to obtain documents granting or evidencing their rights to enter or remain in a Member State as a spouse. Those are the matters in issue before us.

The primary facts are not in dispute. We take them largely from the Adjudicator's determination. The Appellant was born on 19 January 1968. He arrived in this country on 27 December 1991. He was refused leave to enter, but was granted temporary admission for two days, expiring on 29 December 1991, when he was expected to return to Bangkok. He failed to do so, and remained here illegally. On 29 November 1994 he married Edel Adrienne Mary McCarthy, who is a citizen of the Republic of Ireland. Her status is not in evidence, but she is said to have been in employment in the United Kingdom as a traffic warden (according to the marriage certificate that was her occupation at the date of the marriage) and to have been unemployed through illness since an unknown date subsequent to the marriage. The marriage is valid in English law. On 16 December 1994 the Appellant applied to the Respondent to remain in the United Kingdom as the spouse of his wife. The Respondent invited the couple to be interviewed, but that invitation was declined. There were then investigations by immigration officers. We do not need to set out the terms of the officers' reports. Given that the second report is by a person who purports to recognise the Appellant's wife, it may be that there were investigations not recorded in either report. In any event, the Respondent took the view that the Appellant was not cohabiting with his wife and, further, that his marriage had been entered into 'solely to evade statutory immigration controls'. He refused to issue a residence document on the ground that the Appellant's marriage 'is one of convenience'.

The Adjudicator noted that, before him, the representatives of the two parties agreed that, given that the Appellant and his wife were validly married, the Secretary of State bore the burden of proving, to a high degree, that the marriage was a sham. He took account of the immigration officers' reports and an allegation, not contradicted by the Appellant, that the Appellant's wife had been claiming Income Support and Severe Disability Allowance as a single person living alone. He found on the evidence that the marriage was without substance, contracted solely for immigration purposes, and giving rise to no community rights.

The Adjudicator further declined to hold in the Appellant's favour on two specific arguments put by Mr Brion. The first was that the fact that the Appellant had entered into a valid marriage was the end of the matter. The second was that, if the Respondent failed to refuse an application for a residence permit within six months of the application, he was obliged to grant it. These arguments are put again before us.

If we may summarise the Appellant's arguments, they are that Community law, in order to promote rights of residence and free movement, severely restricts the power of Member States to require information or documentation before granting a residence permit to

members of the family of a national of a Member State. If a family member has produced the documents required by Community legislation, he is entitled to his permit. It is therefore not open to the Respondent to categorise the Appellant's marriage as a 'marriage of convenience': he is required merely to recognise the existence of a valid marriage and, consequently, a lawful relationship. It follows that the provision in the Immigration (European Economic Area) Order 1994, Article 2 (2) that 'spouse' does not include a party to a marriage of convenience, is contrary to Community law. (We should add, for the sake of completeness, that, with effect from 2 October 2000, that provision was replaced by an identical definition of 'spouse' in Article 2(1) of the Immigration (European Economic Area) Regulations 2000 (SI 2000/2326).)

Mr Brion does not argue that the recognition of a marriage which is, in fact, a sham does anything to promote Community principles. He submits that the question is what the Secretary of State is entitled to do in order to check on the reality of a relationship which is formally valid. His position is that the Secretary of State's powers are effectively restricted by the Community legislation and by Article 8 of the European Convention on Human Rights. In the context of the present case, he argues, first, that the Appellant had done at all that he was required to do; and, secondly, that the inquiries made were an interference with his private life disproportionate to the aim the Respondent sought to achieve.

Both representatives produced full skeleton arguments and bundles. We are grateful to both for their guidance in an area of some complexity. Reference was made to decisions of the European Court of Justice in Knoors [1979] ECR 399, Diatta (Case 267/83) [1985] ECR 567, Levin (Case 53/81) [1982] 2 CMLR 454, Lair v Universität Hannover [1988] ECR 3161, Surinder Singh (Case 370/90) [1992] Imm AR 565, Brennet v Palletta ('Paletta II') [1996] ECR I-2357, Bouchoucha [1990] ECR I-3551, Kefalas [1998] ECR I-2843 and Centros Ltd [1999] ECR I-1459; decisions of the High Court in Husseyin [1988] Imm AR 129 and Cheung [1994] Imm AR 104; determinations of the Tribunal in Kwong (10661), Lau (10859), Wong (12602), Yuen (12960), Desmond (15063) and Yuen (18283); and a determination of an adjudicator, Professor A. Grubb, in Chu (TH/4019/95).

We must consider first the Community legislation, because any right the Appellant has under Community law would survive any purported restriction of it by national law. The materials to which we have been referred are the following. We set out only the parts appearing to us to be relevant.

Regulation (EEC) No 1612/68 of the Council

Article 10
1. The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:
(a) his spouse and their descendants who are under the age of 21 years or are dependants;
(b) dependent relatives in the ascending line of the worker and his spouse.

2. Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes.

Council Directive 64/221/EEC

Article 1
1. The provisions of this Directive shall apply to any National of a Member State who resides in or travels to another Member State of the Community, either in order to pursue an activity as an employed or self-employed person, or as a recipient of services.

2. These provisions shall apply also to the spouse and the members of the family who come within the provisions of the regulations and directives adopted in this field in pursuance of the Treaty.

Article 5
1. A decision to grant or to refuse a first residence permit shall be taken as soon as possible and in any event not later than six months from the date of application. The person concerned shall be allowed to remain temporarily in the territory pending a decision either to grant or to refuse a residence permit.

Council Directive 68/360/EEC

Article 1
Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of nationals of the said States and of members of their families to whom Regulation (EEC) No 1612/68 applies.

Article 4
1. Member States shall grant the right of residence in their territory to the persons referred to in Article 1 who are able to produce the documents listed in paragraph 3.
2. As proof of the right of residence, a document entitled 'Residence Permit for a National of a Member State of the EEC' shall be issued. This document must include a statement that it has been issued pursuant to Regulation (EEC) No 1612/68 and to the measures taken by the Member States for the implementation of the present Directive. ...
3. For the issue of a Residence Permit for a National of a Member State of the EEC, Member States may require only the production of the following documents;
-- by the worker:
(a) the document with which he entered their territory;
(b) a confirmation of engagement from the employer or a certificate of employment;
-- by the members of the worker's family:
(c) the document with which they entered the territory;
(d) a document issued by the competent authority of the State of origin or the State whence they came, proving their relationship;
(e) in the cases referred to in Article 10 (1) and (2) of Regulation (EEC) No 1612/68, a document issued by the competent authority of the State of origin or the State whence they

came, testifying that they are dependent on the worker or that they live under his roof in such country.

4. A member of the family who is not a national of a Member State shall be issued with a residence document which shall have the same validity as that issued to the worker on whom he is dependent.

Council Directive 73/148/EEC

Article 1

1. The Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of:

(a) nationals of a Member State who are established or who wish to establish themselves in another Member State in order to pursue activities as self-employed persons, or who wish to provide services in that State;

(b) nationals of Member States wishing to go to another Member State as recipients of services;

(c) the spouse and the children under 21 years of age of such nationals, irrespective of their nationality;

(d) the relatives in the ascending and descending lines of such nationals, which relatives are dependent on them, irrespective of their nationality.

2. Member States shall favour the admission of any other member of the family of a national referred to in paragraph 1 (a) or (b) or of the spouse of that national, which member is dependent on that national or spouse of that national or who in the country of origin was living under the same roof.

Article 4

...

2. The right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided. Where such period exceeds three months, the Member State in the territory of which the services are performed shall issue a right of abode as proof of the right of residence. Where the period does not exceed three months, the identity card or passport with which the person concerned entered the territory shall be sufficient to cover his stay. The Member State may, however, require the person concerned to report his presence in the territory.

3. A member of the family who is not a national of a Member State shall be issued with a residence document which shall have the same validity has that issued to the national to whom he is dependent.

Article 6

An applicant for a residence permit or right of abode shall not be required by a Member State to produce anything other than the following, namely:

(a) the identity card or passport with which he or she entered its territory;

(b) proof that he or she comes within one other classes of person referred to in Articles 1 and 4.

Council Resolution 12337/97

...
Noting that marriages of convenience constitute a means of circumventing the rules on entry and residence of third-country nationals,
...
Whereas this resolution is without prejudice to Community law,
...
3. Where there are factors which support suspicions for believing that the marriage is one of convenience, Member States shall issue a residence permit or an authority to reside to the third-country national on the basis of the marriage only after the authorities competent under national law have checked that the marriage is not one of convenience, and that the other conditions relating to entry and residence have been fulfilled. Such checking may involve a separate interview with each of the two spouses.
4. Should the authorities competent under national law find the marriage to be one of convenience, the residence permit or authority to reside granted on the basis of the third-country national's marriage shall as a general rule be withdrawn, revoked or not renewed.

We begin with Directive 64/221/EEC. Mr Brion argues that the effect of the rule that decisions must be made within six months is that, if a decision is not made within six months, there must be deemed to be a decision in favour of the applicant. We do not accept that argument. No principle of construction or judicial authority to which we have been referred would suggest it. The Directive clearly provides that an applicant is entitled to remain in the territory in question pending the resolution of the application. That may well be seen as sufficient to cause the Member State to make its decision as soon as possible. But although the requirement is that the decision be made within six months, the Directive itself provides no sanction for failure to meet that time limit. That was what the Tribunal held in Cheow, Yuen (12960) and Yuen (18283), in all of which Mr Brion appeared. Cheow was not cited to us: in that case Mr Brion seems to have argued that failure to make a decision within six months amounted to a refusal, whereas in the other cases he argued, as he did before us, that the failure amounted to a grant of a permit. We see no basis for differing from the Tribunals that decided those cases. The effect for which Mr Brion argues is not implicit in the Directive and there is no reason or requirement to import it. We therefore decline to find that the Appellant became entitled to a residence permit by operation of law on 16 June 1995 (six months after his application), or that the subsequent refusal by the Respondent was for that reason illegal.

Mr Brion does, however, argue that the process of investigation used by the Respondent in this case must have been illegal, because it goes, in his submission, further than is allowed by European legislation. That legislation, he submits, promotes both rights of free movement and rights of residence and deals with the two in similar terms; the rights are extended to members of the principal's family, including in particular his or her spouse; and the process of investigating the entitlement of the family member is specifically restricted by the legislation. We readily accept that, in terms, the relevant legislation enables those exercising substantive rights of free movement and residence to be accompanied by close family

members: otherwise, the rights would not be of 'free' movement and residence. The other two limbs of Mr Brion's argument require more detailed consideration.

Only two of the legislative provisions to which we have been referred specify the mode of proof of relationship to a national of a Member State exercising Treaty rights. They are Article 4(3) of Council Directive 68/360/EEC and Article 6 of Council Directive 73/148/EEC. We take the latter first. Its provisions, which (in a case such as the present) merely require proof that the family member comes within the category 'spouse', are somewhat different from those in Council Directive 68/360/EEC.

Council Directive 73/148/EEC is avowedly concerned only with those nationals of Member States who 'are established or who wish to establish themselves in another Member State in order to pursue activities as self-employed persons, or who wish to provide services in that State' and members of the family of such persons. It may be that the Appellant's wife could have become such a person; but there is no evidence before us that she did. If she had done (in particular no doubt as a recipient of services), then (if intending to remain in the United Kingdom for more than three months) she could have taken steps to acquire a 'right of abode' document, recognising her right of residence of equal duration with the period during which any services were or were to be provided, but limited to that period. The Appellant would then have been entitled, on production of his passport or identity card and proof of his relationship, to be issued with a residence document having the same period of validity as that issued to his spouse.

Those are not the facts of this case. The Appellant's spouse has not sought or been granted any document recognising her limited rights of abode under Council Directive 73/148. There is no residence document that could form the basis of a claim by the Appellant to another 'of the same validity'. It is the clear intention of the Directive that the residence entitlement of dependants under it be coextensive with the rights of the national of the Member State under it. Until the entitlement of the principal is established, the dependant can have no enforceable right under this Directive. We do not accept that this Directive assists this Appellant.

We turn then to Council Directive 68/360/EEC. This Directive appears to set out the manner in which Member States may require nationals and members of their families to prove their status. For the avoidance of doubt, we should emphasise that the phrase 'a Residence Permit for a National of a Member State of the EEC' at the beginning of Article 4(3) is the name of a document prescribed in Article 4(2). That document is issued to some who are nationals of Member States, and some family members who are not nationals of Member States: see Articles 3(1) and 1. Despite the apparent dichotomy between Articles 4(3) and 4(4), the non-national does not claim purely under Article 4(4): the latter paragraph merely prescribes the 'validity' (ie period of validity) of the non-national's 'Residence Permit for a National of a Member State of the EEC'. On the question of the period of validity, the Appellant's problem is the same as that to which we have referred in paragraphs 13-14.

There is no doubt that the Appellant's wife is a national of a Member State and that the Appellant himself claims as her spouse. It would then appear to follow, as Mr Brion

submits, that the Appellant is entitled to a residence permit on production of proof of his relationship. That argument, however, raises a number of issues in reading the Directive.

The Directive is of direct effect, in that it grants enforceable rights to those affected by it. In its terms, however, it is addressed to the Member State, and it is those terms that we must interpret. The Directive does not provide that a residence permit shall only be issued if the documents in question are produced: it provides merely that if the documents are produced, a residence permit shall be issued. That position was accepted (subject to any question of fraud) by the Tribunal in Yuen (12960). There remains the possibility of a permit being issued to a person who cannot, or perhaps will not, produce the documents. But the obligation on the State applies only when the documents are produced.

What then are these documents? So far as concerns a case such as the present, where a non-national husband claims the right to reside in a Member State with his wife who is a national exercising rights of movement and/or residence, they are those set out in Article 4(3)(c) and (d) of the Directive. They are not, as in Council Directive 73/148/EEC, merely proof of coming within one of the classes of those entitled to reside. They are much more closely specified. They are, first, 'the document with which [he] entered the territory', and, secondly, 'a document issued by the competent authority of the State of origin or the State whence [he] came, proving [the] relationship'. Each of those specifications offers some difficulties for the Appellant.

Of course the first requirement is not a reference simply to all or any of the documents that the claimant had in his possession at the time of his entry. 'With which' must mean 'by producing which', or 'by the authority of which'. This element of the Directive would, in usual circumstances, be a requirement to produce the passport or identity card by which the individual passed through, and was entitled to pass through, any immigration controls at the border of the Member State. The requirement of production of this document serves two purposes: it establishes identity and it prevents a document evidencing a right of residence being granted automatically (remembering always the possibility, as pointed out in paragraph 17, of a grant of a residence permit to a person who cannot produce the documents) to a spouse who enters illegally.

The Appellant in this case, as we have indicated, was refused leave to enter. He was granted temporary admission for 48 hours nearly ten years ago. In English law he has not yet entered the United Kingdom for the purposes of the Immigration Act 1971. That is the effect of section 11(1) of that Act, which provides, so far as relevant for present purposes, that a person arriving in the United Kingdom, and who has not otherwise entered, shall be deemed not to have entered as long as he has been granted temporary admission or has been released while liable to detention. The Appellant's short period of temporary admission has been followed by many years of remaining without leave. For the whole of that period he has been, so far as we can see, liable to detention under paragraph 16 of Schedule 2 to the Act. He is, for the purposes of the Immigration Act, deemed not to have entered the United Kingdom and there can therefore, for the purposes of that Act, be no document 'with which' he entered the territory.

It is possible (although not certain, particularly given the decision of the European Court of Justice in R v SSHD ex parte Yiadom C-357/98, The Times, 16 November 2000, which came to hand after we had heard argument in this appeal) that a different view would be taken outside the 1971 Act, in particular under Community law, on the question whether the Appellant is to be treated as having entered the United Kingdom. But we do not think that anyone would regard the Appellant's passport as a document 'with which' he was enabled to find himself physically within the United Kingdom. On the contrary: for his application for leave to enter, supported no doubt by that document, was specifically refused. He was able to enter the physical territory only because he was granted temporary admission. The authority behind a grant of temporary admission has to be in writing (as required by paragraph 21 of Schedule 2 to the 1971 Act), and a person granted temporary admission is usually, perhaps always, given a written notice, because his admission will have been made subject to conditions that do have to be notified in writing (paragraph 21(2)). We think it would be stretching it somewhat to regard the written notice of the terms of temporary admission as 'the document with which [he] entered the territory'. But we cannot see that there is any other document that, even arguably, might fulfil that description; and, so far as we are aware, even this document was not produced to the Respondent in support of the Appellant's application.

The other document that must be produced before the Member State is obliged to issue a residence permit is the one proving the relationship. It has to have been issued by the competent authority of the state of origin or the state from which the applicant came. The Appellant's state of origin is Malaysia, and there is nothing to suggest that 'the state from which he came' has any meaning other that Malaysia in his case. He married in the United Kingdom and it is not suggested that since his marriage he has left the United Kingdom. There is simply no document in existence, issued by the Malaysian authorities, proving that he is married to his wife, nor could there be. His English marriage certificate would seem clearly not to come within the description: if the Directive had intended that, it would surely not have specified the origin of the document.

The documents mentioned in subparagraphs (c) and (d) of Article 4(3) are appropriate in the case of what might be loosely called a 'moving family': that is to say, a family including at least one national of a Member State exercising Treaty rights of free movement, who arrive together at the border of a Member State and seek admission, or where members of the family seek to join the principal. This part of the Article clearly envisages that the relationship is one which already existed outside the Member State in which the right of residence is to be exercised. That was the situation in Surinder Singh. Although the marriage had taken place in the United Kingdom, the rights in issue were those accruing to the claimant on his return, with his wife, to the United Kingdom from Germany. (No doubt on entry to Germany he produced his passport and his English marriage certificate, and on return to the United Kingdom he produced his passport and his residence permit issued in Germany: in each case therefore producing a document issued by the competent authority of the state whence he came, proving the relationship.)

A person will not be able to claim a right to the automatic grant of a right of residence document under Article 4(1) if he entered illegally, or if, for example, he has lost the

passport or identity card with which he entered; nor if he has come within the class of 'relatives' only since he entered. That is not to say that he will not be granted the right: it is merely to say that he may have to do more to establish it; and the Member State is not in such a case prohibited by the Directive from requiring more of him.

We thus conclude that Directive 68/360/EEC does not deal with rights of free movement and rights of free residence in precisely similar terms throughout. We do not regard that as particularly surprising. The rights themselves are granted by Regulation (EEC) 1612/68 of the Council and Article 1 of the Directive: Article 4 is merely procedural. That there should be a swift automatic procedure for the grant or recognition of the rights of family members whose relationship has already been recognised elsewhere is an obvious feature of a right of free movement around the Union. A national exercising Treaty rights of movement may be unwilling to do so if family members may be subject to unexpected enquiries or requests for unusual documents at the border or shortly after admission. But such considerations do not apply to rights of (continued) free residence. Those rights do not have the same need for fast routine determination. Where movement of a family is in issue, it may be said that a fuller investigation might bring movement to a halt. Where, on the other hand, the preservation of the status quo of one party, and the acquisition of family rights by the other party is in issue, there is no reason to rule out fuller and individual investigation.

Although it does not form part of our reasoning in this appeal, we attempt not to lose sight of one particular factor. That is that the purpose of the legislation we are examining is not to give free-standing rights to the family members. It is rather to enlarge and consolidate the rights of nationals of Member States. Although it is open to a family member, such as the present Appellant, to seek to enforce the rights he is given by the legislation., the legislation is to be interpreted in the light of its purpose. The Appellant's spouse is not a party to this appeal, but it is her rights that the legislation promotes: she is at the centre of the question of interpretation.

In our judgement the provisions of Article 4(3) do not apply to those claiming family membership on the basis of a relationship that came into existence after their last entry to the Member State in which they claim the right of residence. That view is, we consider, in accordance with both the language of the Article and the purposes of the legislation. It follows that the Appellant is not entitled to claim that he should have been issued with a grant of the right of residence simply on the basis of having produced the documents he did produce. On the contrary: there is nothing preventing the Respondent from investigating his claim substantively. It further follows (although this point was not specifically argued before us) that Article 5(2)(b)-(c) of the Immigration (European Economic Area) Order 1994 is a proper implementation of the Directive, not a breach of it.

That is not the end of the matter. It leaves open questions relating to what it is that the Respondent is to concern himself with, and what methods of investigation he may use.

In the first place we must decide whether the Respondent is bound by the form of a spousal relationship, or whether he may consider its substance. Nothing to which we have been referred suggests that rights of free movement and residence are intended to arise from

relationships that exist in form only; and, other than the procedural provisions to which we have made reference above, there appears to be no relevant provision of European law that would have that effect. Diatta is of no real assistance to either side. That was a case where a residence permit had been issued to the wife in a relationship which was at that time subsisting in every relevant sense. After the marriage broke up (but before any divorce) the authorities refused to renew the wife's residence permit, citing solely the ground that she no longer lived with her husband. The Court ruled that non-renewal could not be justified on that sole ground. The judgement specifically states that cohabitation is not to be made a requirement for persons to be considered 'spouses' for the purposes of free movement and residence (page 583).

As the Adjudicator, Professor Grubb, wrote in Chu:

This is a far cry from saying, as Mr Brion does, that any marriage - providing it is legally valid - will do. Secondly, it also seems to me that what the ECJ was saying was that once the Community right is established then it will only be lost when the status of the person seeking the residence permit as a 'spouse' ceases. This can only occur when under the relevant national law the marriage is dissolved. By contrast, the Diatta case does not assist in determining when the Community right comes into existence, i.e. when a person is a 'spouse' so as to engage the provisions of Council Regulation 1612/68 and Directive 68/360.

We agree. Further, as the Court remarked in Surinder Singh (at p 569-70), 'the Court has consistently held ... the facilities created by the Treaty cannot have the effect of allowing the persons who benefit from them to evade the application of national legislation and of prohibiting Member States from taking the measures necessary to prevent such abuse'. It is indeed well-established in general that that Community law cannot be relied on for abusive or fraudulent ends or for purposes intended to evade lawful provisions of national legislation: see Kefalas paras 20-21, citing authority. In such a case, however, the abuse must be established and the state's response must be proportionate, as is illustrated by the judgement against the Danish State in Centros.

That principle is in our view sufficient to show that it cannot be right to say that investigation of a claimant's substantive position is prohibited where he establishes his formal position. Investigation may be appropriate if it is thought that the documents produced do not reflect a relevant factual reality (such as the sick notes in Brennet v Palletta). It may also be appropriate where it is thought that the documents reflect a legal reality not based on underlying substance, as shown by the cases cited in the preceding paragraph. Mr Brion emphasised that in the present case the Respondent has not demonstrated any fraud or abuse. Even if that be accepted, it is clear that the state is entitled to investigate.

There is a further consideration. In Bouchoucha the claimant was an osteopath. The question was whether France was entitled to convict him of an offence of practicing 'medicine' without the qualifications required by French law, or obliged, as he claimed, to recognise him as an authorised medical practitioned because of his United Kingdom qualifications. In giving its judgement against the claimant, the Court said this at p I-3567:

[I]t must be observed that in so far as there is no Community definition of medical acts, the definition of acts restricted to the medical profession is, in principle, a matter for the Member States. It follows that in the absence of Community legislation on the professional practice of osteopathy each Member State is free to regulate the exercise of that activity within its territory, without discriminating between its own nationals and those of the other Member States.

As with osteopathy, so with marriage. Indeed, it is a major part of the reasoning in Diatta that

The Community legislature did not intend to deal with specific problems of family law within the context of the right to free movement. There is no common concept, shared by all member states and all individuals, as regards the substance of marital relations. To attempt to commit the Community legislature to the image of the family living 'under the same roof' or in the same dwelling goes far beyond the objectives pursued in the matter of free movement.

In these circumstances a Member State such as the United Kingdom is entitled, within the limits imposed by relevant Community legislation, to regulate the matter by its own law. Article 2(2) of the Immigration (European Economic Area) Order 1994 cannot exempt the United Kingdom from its obligations to issue a residence permit as required by the provisions of Article 4(3) of Council Directive 68/360/EEC. Those provisions are, however, as we have indicated in paragraph 25, procedural. They limit the ways in which a Member State may in certain circumstances investigate an applicant's entitlement. They do not of themselves create a substantive entitlement. Subject to them, and to any similar provisions, such as those in Council Directive 73/148/EEC, it appears to us that the United Kingdom is not prevented from regulating what it considers to be a 'marriage' for the purposes of matters related to immigration (or, for that matter, anything else).

We accept that (as the Adjudicator held in Chu) the phrase 'marriage of convenience' is not to be given the meaning it had acquired in United Kingdom immigration law many years ago, before even the (now abolished) 'primary purpose' rule was developed. Subject to that, however, we are not persuaded that the Order's provision that 'spouse' does not include a party to a marriage of convenience, is of itself contrary to Community law either generally or on the facts of this appeal.

We are supported in that view by Council Resolution 12337/97. Of course a Resolution similarly cannot override any legislative provision: indeed this one is specifically subject to Community law. We are, however, entirely unable to accept Mr Brion's submission that it 'has nothing to do with European law'. It is a statement by one of the legislative bodies, and as such is entitled to respect. It relates to a subject covered by Council Directives, which are themselves not entirely clear. In addition, it would be surprising if (as Mr Brion essentially has to claim) the Council was so ignorant of its own legislation that it was capable of passing a Resolution the whole contents of which were contrary to Community law. We decline to accept that thesis. The Member States have no obligation to allow Community

rights to arise out of marriages of convenience save where legislation specifically has that effect. To this extent Community law is identical to English law.

Nevertheless, in assessing the nature of the relationship between an applicant and his spouse, the Respondent is no doubt restricted by the principle of proportionality. That is to say, the actions the Respondent takes in order to satisfy himself as to the nature of the relationship should not be disproportionate either to their particular purpose or to the general need to ensure that the route to rights of residence is not abused. Mr Brion's submissions on this issue were founded on Article 8 of the European Convention on Human Rights. This is not in fact an appeal to which that Article has any direct relevance, for the decision about which the Appellant complains was made well before 2 October 2000, and in making it the Respondent does not assert that he had regard to the Appellant's rights under the Convention (which distinguishes this appeal from R v SSHD ex parte Arman Ali [2000] Imm AR 134). Nevertheless, the rights protected by the Convention lie at the heart of Community law. In B v SSHD [2000] Imm AR 478, 482, the Court of Appeal accepted that the tests of proportionality in matters of Community law did not differ from that in matters of Human Rights. The Court of Appeal heard no argument on this issue and nor did we: but we see no reason to take a different view.

Mr Brion's submission is that the Respondent's process of investigation in this case was disproportionate. He points in particular to the fact that the Respondent did not use a non-intrusive technique that he used and used in other similar cases: that is, to write to the parties to the marriage inviting them to submit various documents, for example utility bills and bank statements, to show that they live together at the address named. Instead he offered only what Mr Brion characterised as a potentially intrusive and embarrassing personal interview, and, when that invitation was declined, resorted to surveillance and to approaches of perhaps doubtful legality.

We consider that there is merit in this submission. The Respondent deals with many applications for leave to remain in the United Kingdom on the basis of marriage. To our knowledge there is a process in which the preliminary investigations and invitations to the applicant to establish his claim are in writing on both sides. This case (and apparently a number of others sharing some similarities with it) were treated in a different way from the beginning. We are told that the Respondent has now modified his procedure in cases such as this. That, of course, certainly does not amount to a confession of past wrongdoing. On the other hand, there has been no explanation or justification for omitting the written stage. We should not want to say that all interviews are intrusive or embarassing, but when a request for an interview is used as the first stage of an investigation the potential is clearly there. The Respondent has not sought to persuade us that there was any reason for adopting a process other than what was apparently found adequate in many other cases. In these circumstances we find that the process adopted here was disproportionate.

The effect of that finding on our decision in this appeal is, however, minimal. The Adjudicator was faced with the evidence that was before him, and this is not an appeal under the Human Rights Act 1998. If it is said that the evidence should not have been before the Adjudicator, the remedy, if any be available, must lie elsewhere.

In any event, given the manner in which this matter comes to the Authority, it is indeed very doubtful whether it can be said that there was 'an appeal to' an Adjudicator under Part II of the 1971 Act, governed by section 19 of that Act. It is that section alone which could empower (indeed oblige) an Adjudicator to allow the appeal if persuaded that the decision was not in accordance with the law. Here the only possible right of appeal is under section 14(1), which is within Part II. But the right to appeal under section 14 is granted by Article 18 of the (European Economic Area) Order 1994, which also limits it to 'an EEA national or the family member of such a person'. The question at issue before the Adjudicator was whether the Appellant was a family member and, accordingly, whether there was 'an appeal to him' under Part II. It is more than arguable, in our view, that there has in this case never been an appeal to an Adjudicator within the meaning of section 19 and that the power to allow the appeal (and hence set aside the decision) for want of legality has never become exercisable by the Appellate Authority.

Before the Adjudicator it was common ground that the Respondent had the burden of proving that the Appellant's marriage was a 'sham'. The position before us was the same. For the purposes of this determination we accept it, but it appears to us that that position (as to both burden and standard) might properly be reconsidered in some other case. So far as concerns burden, the burden of proof is, as a matter of the general law, usually on the party who asserts. We should, if we were required to make a decision on the matter, have been inclined rather to say that it is the Appellant who asserts that he is a spouse who has a right of residence than that he merely asserts that he is a spouse, leaving the Respondent to deny that he has a right of residence. We are fortified in that view by the provisions of Rule 31 of the 1984 Rules (which applied to this appeal before the Adjudicator). So far as concerns standard, a high standard is appropriate in cases where misconduct is alleged: but, as at present advised, we are not persuaded that there is anything inherently wrong in marrying for convenience and taking any advantages that flow from the relationship - provided, of course, that no deception is involved.

The Adjudicator had before him evidence derived from the Immigration Officers who had investigated the Appellant's claim. He summarised the evidence as follows:

Attempts to persuade the couple to attend an interview proved fruitless. As the Tribunal has made plain, failure to attend an interview on its own cannot be relied on in these cases. Accordingly, the Home Office arranged visits. They visited both addresses given on the marriage certificate. They found no trace of the Appellant at either address. No one had heard of the Appellant at the Appellant's address. I have set out in detail the result of the visit to the Appellant's wife's address. As [the Home Office Presenting Officer] points out, there is the question of the wife's behaviour, and her claim to Income Support and Severe Disability Allowance as a single person living alone. There is also the equivocal behaviour of Mr Endersby.

The Adjudicator went on to conclude that 'the Appellant's marriage is a sham, a marriage without substance, contracted solely for immigration purposes' and that it thus gave rise to no community rights.

We take the view that the Adjudicator was entitled to reach that conclusion on the evidence before him and we see no real basis for interfering. If we were minded to make (or rather re-make) the decision ourselves, we should reach the same conclusion, for the following reasons.

The Respondent has undertaken to prove a negative: that is to say, to prove that the marriage has no substance or purpose other than that for which it has avowedly been used - as a vehicle for an application for immigration status. The proof of a negative is notoriously difficult, but it is not normally impossible. In the present case the Respondent has undertaken investigations in various places where, if there were anything other than mere form in the relationship between the Appellant and his spouse, traces of it might be expected to show. At the Appellant's old flat there was no recollection of him or his wife, and at his wife's present flat there was no evidence of the Appellant. It is right to say that there may be many reasons why there might be no recollection of the Appellant at his old flat; but in proving a negative it is advisable to leave no stone unturned. The Social Security records show that the Appellant's spouse claims as single and living alone. It may be that there could be no claim by the Appellant: but the spouse's description of herself is unambiguous and it is not suggested that she ever inquired whether it was properly applicable to her. We see no reason to interpret her description of herself other than literally. A friend of the Appellant's spouse knew nothing of the Appellant.

Wherever one looks, there is no trace of the incidents of a relationship: on the contrary, all the evidence points in the other direction. Other than what is on the Marriage Certificate, the only thing known abaout the marriage is that it has been used by the Appellant as the basis for this claim. Taken as a whole, the evidence is sufficient for us to find that the marriage was entered into solely for immigration purposes and were we to make the decision on the facts it would be to that effect.

It follows that, as a party to a marriage of convenience, the Appellant he is excluded from the definition of a spouse by Article 2(2) of the Immigration (European Economic Area) Order 1994. It further follows that he is not the family member of a national of a Member State and has no claim to a residence permit. For the reason alleged in the Respondent's explanatory Statement, he has no right of appeal exercisable within the United Kingdom. We affirm the determination of the Adjudicator and dismiss this appeal to the Tribunal.

C. M. G. Ockelton
Deputy President