Upper Tribunal
(Immigration and Asylum Chamber)

Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 December 2011	.....

Before
MR JUSTICE BLAKE, PRESIDENT
UPPER TRIBUNAL JUDGE FREEMAN

Between

ENTRY CLEARANCE OFFICER, NICOSIA

Appellant

And

LINDITA PAPAJORGJI

Respondent

Representation:

For the Appellant: Mr R. Hopkin, Senior Home Office Presenting Officer
For the Respondent: No appearance

i) There is no burden at the outset of an application on a claimant to demonstrate that a marriage to an EEA national is not one of convenience.

ii) IS (marriages of convenience) Serbia [2008] UKAIT 31 establishes only that there is an evidential burden on the claimant to address evidence justifying reasonable suspicion that the marriage is entered into for the predominant purpose of securing residence rights.

iii) The guidance of the EU Commission is noted and appended.

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DETERMINATION AND REASONS

1. The claimant (the respondent before us) is an Albanian national born in 1970. She married a Greek national, Mr Papajorgi in 1996 in Greece.

2. In July 2010 she applied to the British consular authorities in Athens for a document enabling her to accompany her husband on a visit to the United Kingdom for a few weeks returning to Greece in September 2010. She downloaded from the appropriate web site and completed the 115 questions in the entry clearance application form. In accordance with the guidance accompanying the form she submitted her marriage certificate, her passport and evidence confirming that her husband was both a Greek national and intending to accompany her on the visit.

3. On 3 August 2010 she received a decision notice in the following material terms:

> "You have applied for admission to the United Kingdom…as the family member of a European Economic Area national…but I consider this to be a marriage of convenience because apart from your Greek marriage certificate and a copy of your husband's Greek passport you have not provided any documentary evidence of your marriage, such as photographs of your wedding or your life together or agreements in joint names such as a bank account or a tenancy agreement. …I have refused your EEA family permit application on this occasion because I am not satisfied that you meet all the requirements of Regulation 12 of the Immigration (EEA) Regulations 2006."

4. She appealed to the First-tier Tribunal expressing disappointment that her marriage had been characterised as one of convenience and pointing out that she had not been asked to provide such documents but that the telephone bill was in her husband's name. She offered to show her album of photographs but expressed surprise that a marriage of 14 years standing of which there were two children with everyone living in a common household should be so treated. She had in fact provided information to this effect on the application form.

5. On 19 October 2010 the Entry Clearance Manager maintained the refusal decision. She said that:

> "the appellant was advised in extensive publicity from this Consulate of the required documents needed in order for his (sic) application to be assessed, the marriage certificate, certificate of family circumstances and a telephone bill in Greek were seen but not retained but the appellant has still failed to provide evidence to satisfy me that the marriage is not a marriage of convenience".

6. The First-tier judge determined the appeal on the papers and allowed it on 4 February 2011. In a brief decision he cited the decision of the AIT in VK (Marriage of convenience) Kenya [2004] UKIAT 305 for the proposition that:

> "where the respondent alleges that the appellant's marriage is one of convenience the burden of proof lay on him to show on a balance of probabilities that the marriage was one of convenience. Good evidence was needed to establish the allegation".

He noted what the claimant said about her marriage and there was no evidence from the ECO to support his assertion and found that he had no reason to disbelieve her.

7. The ECO obtained permission to appeal to the Upper Tribunal because the Judge had not realised that the decision in VK [2004] UKIAT 305 was no longer authoritative. In 2008 the AIT decided the case of IS (marriages of convenience) Serbia [2008] UKAIT 31 where it concluded that where there is a dispute on the issue the burden of proving that the claimant was a family member under the Immigration (EEA) Regulations and not a party to a marriage of convenience fell on her.

8. The appeal was adjourned on one previous occasion when her husband attended the hearing in person but his English was insufficient to enable him to communicate. A Greek interpreter was booked for the subsequent hearing but he did not travel over for a second time and so no live evidence was taken.

9. We note in passing that the Entry Clearance manager submitted that in accordance with the case of DR*38 (Morocco) (by which we conclude she was referring to DR (ECO: post-decision evidence) Morocco * [2005] UKIAT 00038) the Tribunal should not receive any further evidence in the case. We shall comment on this in due course and note that in July 2011 the claimant submitted a clip of family photographs and the birth certificates of her children.

10. When Mr Hopkin opened his submissions for the Entry Clearance Officer, we indicated that we were very surprised at the refusal decision, which seemed to be based on a failure to understand the relevant principles of European Union law and the material parts of the determination in IS.

11. Mr Hopkin realistically acknowledged that the refusal of the entry clearance was indefensible on its facts, although he reserved the right to argue that a failure to produce relevant evidence could justify the refusal of an EEA application, and submitted IS was properly decided when it placed the burden of proof on the claimant.

12. We indicated that we would dismiss the ECO's appeal from the Judge's decision to allow the claimant's appeal. We now give our reasons for doing so.

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The law

13. The Citizens Directive (EP and Council Directive 2004/38/EC) sets out the basic rules of European Union law regulating the admission of spouses of EU citizens who are not such citizens themselves (third country nationals). The pertinent principles may be summarised as follows:

    i. A visa or similar pre-entry document may be required of third country national family members who do not hold a residence card, but there must be facilities for granting the visa without charge as soon as possible and in an accelerated procedure (Art 5 (2)).
    ii. Where a third country spouse travels without the necessary visa, the Member State shall not turn them away without first affording every reasonable opportunity to obtain the necessary documents or prove that they are covered by the right of free movement and residence (Article 5(3)).
    iii. A residence card operates as a visa and the documents that a Member State issuing a visa or residence card can ask for in order to issue are set out by the Directive (Art 5(2) and Art 10). In the case of a wife the documents are her passport, her marriage certificate and evidence that her husband is an EU national exercising Treaty rights (in this case the right of entry for a short visit) (Art 10(2)).
    iv. Member States can take action to prevent abuse of rights or fraud including action to prevent residence being obtained by a marriage (Article 35).
    v. Measures taken to prevent abuse of rights or fraud must be proportionate and subject to the procedural safeguards in Article 30 and 31 (Article 35).
    vi. These safeguards include a reasoned decision on the public policy grounds on which the decision is based (Article 30(2)), a right of appeal to examine the facts and the legality of the decision to ensure that it is proportionate and based on considerations in Article 28, including the personal conduct of the claimant (Article 31 (3)).

14. The United Kingdom has taken measures to prevent parties to a marriage of convenience from taking advantage of the Citizens Directive by providing in the Immigration (EEA) Regulations 2006, regulation 2(1) that “spouse does not include a party to a marriage of convenience”. No definition is given of marriage of convenience but that phrase has been construed in the context of the immigration rules as a marriage entered into without the intention of matrimonial cohabitation **and** for the primary reason of securing admission to the country (our emphasis). The Minister appears to have applied this approach when introducing the Immigration (EEA) Order 1994 that preceded the 2006 Regulations (see Macdonald “Immigration Law and Practice “(Eighth Edition) 2010 at 7.100). Even on this approach intent

to cohabit as man and wife is inconsistent with a marriage of convenience.

15. In its decision in IS the AIT recognised the importance of EU law in this regard. It found three reasons for its conclusion that the burden of proof lies on the claimant to demonstrate that she is a qualified person under the Regulations. We quote the whole passage:

> "10. The third reason is to be found in the relevant provisions of EU law. So far as concerns the Citizens Directive, although "spouse" is not defined so as to exclude marriages of convenience, there is no doubt that "spouse" in EU law bears a meaning excluding marriages of convenience. Article 35 of the Directive is as follows:
>
> "**Abuse of rights**
> Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31."
>
> Preamble 28 is as follows:
>
> "To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures."
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> 11. The problem of marriages of convenience has been recognised by the community authorities for many years. Council Resolution 12337/97 includes the following text, which has never replaced or superseded:
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> "...
> 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."

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12. As the Tribunal remarked in Chang (EEA Nationals, Spouses) Malaysia [2001] UKIAT 12 (at paragraph 37):

> "Of course a Resolution … cannot override any legislative provision: indeed this one is specifically subject to Community law. We are, however, entirely unable to accept [the appellant's representative'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 [the appellant's representative] 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."

13. It is clear that the terms of the Citizens' Directive allow national law to make regulations to prevent abuses founded on marriages of convenience. So far as the detection of such marriages is concerned, it is clear from the Council Resolution that the relevant residence documents are not to be issued if there are "factors which support suspicions for believing that the marriage is one of convenience", until the suspicions are resolved in the applicant's favour. That appears to us to be a clear indication that, so far as EU law is concerned, the burden of proof, as it is called in English law, rests on the appellant, because, the suspicions having arisen, the matter will be resolved against him unless the suspicions are resolved in his favour. The Resolution clearly indicates that what Wigmore calls "the risk of non-persuasion" is borne by the appellant.

14. As we have said, these three reasons taken together lead us to the view that the burden of proving that a marriage is not one of convenience lies on the appellant. We would, however, also associate ourselves with the wording of the Council Resolution to this extent. Not every applicant needs to prove that his marriage is not one of convenience. The need to do so only arises where there are factors which support suspicions for believing the marriage is one of convenience. Translated into the technical language of the English law of procedure and evidence, that means that there is an evidential burden on the respondent. If there is no evidence that could support a conclusion that the marriage is one of convenience, the appellant does not have to deal with the issue. But once the issue is raised, by evidence capable of pointing to a conclusion that the marriage is one of convenience, it is for the appellant to show that his marriage is not one of convenience.

15. If the burden of proof were on the respondent, there would be room for argument that the standard should be higher than the standard of the balance of probabilities. As we have noted, the Tribunal in Chang thought that there was no reason in principle to apply a higher standard. R(CPS) v Registrar General of Births, Deaths and Marriages [2002] EWCA Civ 1661, to which Mr. O'Callaghan referred us, suggests the same. As the burden is on the appellant, however, there can be no reason at all for supposing that the standard is higher than that of a balance of probabilities."

16. Following this decision of the AIT, the Court of Appeal in TC (Kenya) v Secretary of State for the Home Department [2008] EWCA Civ 543, 17 April 2008 affirmed that a marriage of convenience is an abuse of rights within the meaning of EU law and that meant that not every one of the factors set out in Article 28 of the Citizens Directive such as length of residence is relevant in the assessment of whether the claimant is a party to a marriage of convenience. Incidentally, we conclude that Macdonald "Immigration Law and Practice" (Eighth Edition) at 7.144A misrepresents the Court of Appeal decision when it says that the Court concluded none of the Article 28 factors are in play in such a case. Pill LJ at [18] said that not every Article 28 factor would be relevant in marriage of convenience cases.

17. The question of the burden of proof did not arise in TC (Kenya) where the behaviour of the spouses was suspicious and their evidence was disbelieved. The Court of Appeal at [16] had noted the earlier decision of the European Court of Justice in the case of C-16/05 R (on the application of Veli Tum and Mehmet Dari) v SSHD where at paragraph 64 it said:

> "it must be borne in mind that, according to settled case-law, Community law cannot be relied on for abusive or fraudulent ends (Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 68) and that the national courts may, case by case, take account -- on the basis of objective evidence -- of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely":

18. We entirely agree with the AIT in IS that EU law permits states to take measures against marriages of convenience; that such marriages are regarded as a form of abuse and fraud, and that the Council Resolution suggests that where there is reason to suspect a marriage of convenience a visa need not be granted but the matter proceeds to investigation and a conclusion reached. A reason to suspect a marriage of convenience would be part of the objective evidence in the case to which Tum and Dari refers.

19. The important point note however, is that there must be reason to suspect a marriage of convenience before the application can be suspended pending further investigation. We emphasise this important passage of the AIT's reasoning:

> "Not every applicant needs to prove that his marriage is not one of convenience. The need to do so only arises where there are factors which support suspicions for believing the marriage is one of convenience. Translated into the technical language of the English law of procedure and evidence, that means that there is an evidential burden on the respondent. If there is no evidence that could support a conclusion that the marriage is one of convenience, the appellant does not have to deal with the issue."

20. This passage indicates that the AIT concluded that there was no burden on an applicant in an EU case until the respondent raised the

issue by evidence. If there was such evidence it was for the applicant to produce evidence to address the suspicions. In our judgment such an approach can be described as one of an evidential burden in the first place on the respondent and then shifting to the claimant in the light of the relevant information rather than a formal legal burden. We agree with that approach.

21. The impression we have obtained from various parts of the ECO's original reasons for the decision is that the ECO has applied a general policy of requiring applicants to prove that their marriage is not one of convenience, and in this context treats EEA applications in the same way as ordinary immigration applications under the Rules. The ECO's reliance on DR (ECO: post-decision evidence) Morocco * at least suggests this. That was an immigration case concerned with the Immigration Rules rather than a free movement case under EU law. The AIT (Ouseley J presiding) concluded that, whereas s.85 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), as it was then drafted, precluded evidence of post-decision facts, it did not prevent the admission of further evidence to establish what the true picture was at the time of the decision, and neither did it prevent post-decision evidence adduced to demonstrate the reliability of an assessment of future intentions.

22. However, the AIT in IS concluded at [25] that an EEA case is outwith the exclusionary scope of s.85(5) as the family permit is not an ordinary entry clearance within the meaning of s.82 and s.85 of the 2002 Act[1]. In any event evidence to rebut an allegation of marriage of convenience is admissible under s.85 for the reasons given in DR (Morocco)*. Further the scope of an appeal in an EEA case needs to reflect the procedural safeguards referred to in Article 35 of the Citizens Directive rather than national law restrictions on the evidence to be admitted. We have received and noted the further evidence submitted by the claimant in July 2011. We would emphasise that EEA rights of entry are not exercises of discretion generally afforded to Member States to formulate rules for the admissions of aliens, but the exercise of Treaty rights to be recognised by states subject to the substantive and procedural provisions for preventing abuse and fraud.

23. We asked Mr Hopkin whether there were any factors which would support such a suspicion in the present case. He could not point to any, and recognised that there were none. The consequence is that the application should have been granted when received and did not require further investigation.

24. What the ECO seems to have done is to reason as follows:-

25. IS establishes that the burden is on the claimant to show that the marriage was not one of convenience.

[1] But see Schedule 1 paragraph 4(7) of the 2006 Regulations.

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i) She did not produce any evidence as to the quality of the marriage such as photographs, letters etc, when she could have done so to discharge the burden;

ii) The failure to produce such evidence justifies refusal because the burden has not been discharged, and /or is the source of reasonable suspicion

26. The Entry Clearance Manager appears to have agreed this implicit line of reasoning as she endorsed the decision. In our judgment each step in the reasoning was flawed.

27. First, there is no burden on the claimant in an application for a family permit to establish that she was not party to a marriage of convenience unless the circumstances known to the decision maker give reasonable ground for suspecting that this was the case. Absent such a basis for suspicion the application should be granted without more on production of the documents set out in Article 10 of the Directive. Where there is such suspicion the matter requires further investigation and the claimant should be invited to respond to the basis of suspicion by producing evidential material to dispel it.

28. Second, a suspicion cannot arise by the claimant's failure to produce photographs and the like. The application form did not ask for such material to be submitted. So far as our own researches and those of Mr Hopkin are concerned neither did the published guidance note. If the ECO Nicosia has been publishing local guidance to applicants, we have not seen it, and cannot therefore comment on its contents. It is elementary that to draw an inference from the absence of something that was not asked for is wholly unfair and perverse. Even if there was local guidance that did ask all spouses for such material to be produced in every case, it would be inconsistent with the application form itself, and in our judgment would also be contrary to the provisions of the Citizens Directive. The documents that can be insisted on are set out in Article 10, and the claimant produced them. Other documents only become relevant if there is a case for an investigation. National authorities cannot set up their own general criteria for documents to support a claim for family membership in EU law. To do so would risk distorting the application of the Directive throughout the European Union.

29. Third, in any event, in this case by answering the questions in the form the claimant had produced the evidence that the marriage was a genuine one and could not be considered to be a marriage of convenience. As the Judge noted:

i) The marriage had not been contracted shortly before and for the purpose of entry to the UK, it had lasted some 12 years at the date of decision.

ii) The application form revealed that both husband and wife lived at the same address and shared a common telephone number as well as

incidentally informing the diligent reader that there were children of the marriage.

iii) The claimant was not coming for an indefinite stay but a visit.

30. Although neither the Directive nor the Regulations define it, as a matter of ordinary parlance and the past experience of the UK's Immigration Rules and case law, a marriage of convenience in this context is a marriage contracted for the sole or decisive purpose of gaining admission to the host state. A durable marriage with children and co-habitation is quite inconsistent with such a definition.

31. These points are so obvious that we are dismayed that the Entry Clearance Manager approved the flawed decision in this case and that there was an appeal from the First-tier Judge's decision. Although he quoted the wrong case, he got the basic principle right. Of course, the application form need not be decisive if the ECO is in possession of some intelligence or background data suggesting lies are being told. In those circumstances an investigation is both permissible and necessary and would almost certainly involve an interview with one or both parties to the marriage for an opportunity to be given for doubts to be dispelled. But that is not this case. The ECO did not challenge the claimant's answers to the questions in the form. If there had been any doubt about them, a telephone call to the landline and mobile number given in the form as a point of contact might well have resolved it.

32. The visa should be issued promptly on application unless the ECO has reasonable grounds to suspect a marriage of convenience. The evidential onus of showing there are such reasonable grounds in the first place rests on the decision maker. It is a matter of regret that the claimant has had to wait 18 months to obtain her visa and has only done so now by way of appeal and considerable expenditure of public time and resources. There have been three hearings and a number of case management decisions. On the face of the information in the application form a belief that this was a marriage of convenience is simply ludicrous. There was simply no material to justify suspicion or an investigation.

Further observations on the burden of proof

33. We have already expressed our agreement with the AIT in IS that a failure on the claimant to participate in the investigation and contribute information to dispel the reasonable suspicion may lead to a lawful refusal of the application. If the AIT was intending to go further than this and decide that once evidence of reasonable suspicion has been raised, there is a legal burden on the applicant to demonstrate that it is more probable than not the marriage is not one of convenience, we would have reservations about such an approach and the whole issue will need further examination in a future case where the nature of the dispute requires it to be decided. In our judgment the first two reasons given for the AIT for its conclusion are

unpersuasive of such a proposition and the third reason does not lead to such a conclusion.

34. The first reason the AIT gave for the burden of disproving a marriage of convenience being on the claimant was that it fell on the claimant to establish that she was a family member. We agree that the claimant must establish that she is a family member; but in the ordinary case she does this by producing the basic documents set out in the Directive. Where there is no reason to suspect that the claim is fraudulent, or the marriage one of convenience, that is conclusive of the matter. Regulation 12 of the Immigration (EEA) Regulations 2006 does not in terms require the claimant to prove a negative. She must prove that she is married, but that marriage will not avail if it turns out to be one of convenience.

35. The second reason given was rule 53 of the Asylum and Immigration Tribunal (Procedure) Rules 2005. This provision does not appear to us to be relevant. It places the burden of proof on someone who claims an exemption from an immigration decision by reason of status, usually British nationality. That has no purchase here. The claimant is not claiming an exemption, she seeks the issue of the document that proves her right of admission because she is a family member and there is no reason to suspect fraud.

36. It is clear that the justification for exclusion of marriages of convenience from those otherwise entitled to a residence document under the Directive is to be found in the EU law principle of fraud or abuse of rights. That very much suggests that in any dispute on appeal as to the nature of the marriage, it would in the last instance be for the respondent to satisfy the judge of the factual basis of the personal conduct of the claimant relied on to exclude her from the entitlement. Thus if the respondent were to allege that the claimant were a spy or a drug runner or involved in other conduct detrimental to public policy, on the ordinary principle that he who alleges must substantiate, it would fall on the respondent to make that suggestion good, although the Judge would be alive to the difficulties of proof (see the recent decision by SIAC in SC/103/2010 Ekaterina Zatuliveter v SSHD, 29 November 2011.)

37. It is not enough that the ECO honestly suspects there is a marriage of convenience; the claimant will only be disqualified if it is established that it is. Adverse inferences may be drawn by a claimant's failure to provide data reasonably open to her in the course of the investigation or appeal; but that cannot form the sole or decisive reason for the conclusion. We observe that the guidance of the European Commission issued in respect of the Citizens Directive COM 2009 313 2 July 2009 is explicit in placing the burden of proof on the state and invites the state to set out indicative criteria for and against the proposition that the marriage is one of convenience. We reproduce what we consider to be the material part of that guidance at Appendix A to this determination. We consider this guidance is likely to prove

helpful for Judges who have to decide such questions in the future although it is not binding as a piece of EU legislation.

38. Finally, at paragraph 15, the AIT thought that any burden on the respondent would have been a high one, to the criminal standard. It is now established that in civil proceedings, there is only one civil standard, although proof of criminal acts such as fraud will be considered less likely on such a standard than of ordinary matters. See: In Re B (Children) [2008] UKHL 35.

Conclusions

39. In summary, our understanding is that, where the issue is raised in an appeal, the question for the judge will therefore be 'in the light of the totality of the information before me, including the assessment of the claimant's answers and any information provided, am I satisfied that it is more probable than not this is a marriage of convenience?'.

40. In our judgment this case from first to last never had any appearance remotely suggesting that the marriage was one of convenience. The decision was flawed and not in accordance with the law. The First-tier Judge reached the right result on the evidence before him.

41. The Entry Clearance Officer's appeal is accordingly dismissed. We direct that the family permit be issued promptly on receipt of this determination as it should have been eighteen months ago.

Signed

Mr Justice Blake
President of the Upper Tribunal,
Immigration and Asylum Chamber

Date: 21 December 2011

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APPENDIX A

Commission of the European Communities

PART 4 (page 14)
Communication from the Commission to the European Parliament and the Council on guidance for the better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

Brussels
2 June 2009
COM (2009) 313 Final

4. ABUSE AND FRAUD

Community law cannot be relied in case of abuse[55].

Article 35 allows Member States to take effective and necessary measures to fight against abuse and fraud in areas falling within the material scope of Community law on free movement of persons by refusing, terminating or withdrawing any right conferred by the Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure must be proportionate and subject to the procedural safeguards provided for in the Directive[56].

Community law promotes the mobility of EU citizens and protects those who have made use of it [57].

There is no abuse where EU citizens and their family members obtain a right of residence under Community law in a Member State other than that of the EU citizen's nationality as they are benefiting from an advantage inherent in the exercise of the right of free movement protected by the Treaty [58], regardless of the purpose of their move to that State[59]. By the same token, Community law protects EU citizens who return home after having exercised their free movement rights.

4.1. Concepts of abuse and fraud

4.1.1. Fraud

For the purposes of the Directive, **fraud** may be defined as deliberate deception or contrivance made to obtain the right of free movement and residence under the Directive.

In the context of the Directive, fraud is likely to be limited to forgery of documents or false representation of a material fact concerning the conditions attached to the right of residence.
Persons who have been issued with a residence document only as a result of fraudulent conduct in respect of which they have been convicted, may have their rights under the Directive refused, terminated or withdrawn[60].

4.1.2. Abuse

For the purposes of the Directive, **abuse** may be defined as an artificial conduct entered into **solely** with the purpose of obtaining the right of free movement and residence under
Community law which, albeit formally observing of the conditions laid down by Community rules, does not comply with the purpose of those rules[61].

4.2. Marriages of convenience

Recital 28 defines **marriages of convenience** for the purposes of the Directive as marriages contracted for the **sole** purpose of enjoying the right of free movement and residence under the Directive that someone would not have otherwise. A marriage cannot be considered as a marriage of convenience simply because it brings an immigration advantage, or indeed any other advantage. The quality of the relationship is immaterial to the application of Article 35.

The definition of marriages of convenience can be extended by analogy to other forms of relationships contracted for the sole purpose of enjoying the right of free movement and residence, such as (registered) partnership of convenience, fake adoption or where an EU citizen declares to be a father of a third country child to convey nationality and a right of residence on the child and its mother, knowing that he is not its father and not willing to assume parental responsibilities.

Measures taken by Member States to fight against marriages of convenience may not be such as to deter EU citizens and their family members from making use of their right to free movement or unduly encroach on their legitimate rights. They must not undermine the effectiveness of Community law or discriminate on grounds of nationality.

When interpreting the notion of abuse in the context of the Directive, due attention must be given to the status of the EU citizen. In accordance with the principle of supremacy of Community law, the assessment of whether Community law was abused must be carried out in the framework of Community law, and not with regard to national migration laws.

The Directive does not prevent Member States from **investigating individual cases** where there is a **well-founded suspicion of abuse**. However, Community law prohibits systematic checks[62].

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Member States may rely on previous analyses and experience showing a clear correlation between proven cases of abuse and certain characteristics of such cases.

In order to avoid creating unnecessary burdens and obstacles, it is possible to identify ***a set of indicative criteria*** suggesting that there is unlikely to be an abuse of Community rights:

- the third country spouse would have no problem obtaining a right of residence in his/her own capacity or has already lawfully resided in the EU citizen's Member State beforehand;
- the couple was in a relationship for a long time;
- the couple had a common domicile/household for a long time[63];
- the couple have already entered a serious long-term legal/financial commitment with shared responsibilities *(mortgage to buy a home, etc);*
- the marriage has lasted for a long time.

Member States may define ***a set of indicative criteria*** **suggesting the possible intention to abuse the rights conferred by the Directive for the sole purpose of contravening national immigration laws**. National authorities may in particular take into account the following factors:

- the couple have never met before their marriage;
- the couple are inconsistent about their respective personal details, about the circumstances of their first meeting, or about other important personal information concerning them;
- the couple do not speak a language understood by both;
- evidence of a sum of money or gifts handed over in order for the marriage to be contracted *(with the exception of money or gifts given in the form of a dowry in cultures where this is common practice)*;
- the past history of one or both of the spouses contains evidence of previous marriages of convenience or other forms of abuse and fraud to acquire a right of residence;
- development of family life only after the expulsion order was adopted;
- the couple divorces shortly after the third country national in question has acquired a right of residence.

The above criteria should be considered possible triggers for investigation, without any automatic inferences from results or subsequent investigations. Member States may not rely on one sole attribute; due attention has to be given to all the circumstances of the individual case. The investigation may involve a separate interview with each of the two spouses.

S., a third country national, was ordered to leave in one month as she had overstayed her tourist visa. After two weeks, she married O., an EU national who had just arrived to the host Member State. The authorities suspect that the marriage might have been concluded only to avoid expulsion. They contact the authorities in O.'s Member State and find out that after the wedding his

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family shop was finally able to pay a debt of 5000 EUR, which it had been unable to repay for two years.

They invite the newly-weds for an interview, during which they find out that O. has meanwhile already left the host Member State to return home to his job, that the couple is not able to communicate in a common language and that they met for the first time one week before the marriage. There are strong indications that the couple may have married with the sole purpose of contravening national immigration laws.

The **burden of proof** lies on the authorities of the Member States seeking to restrict rights under the Directive. The authorities must be able to build a convincing case while respecting all the material safeguards described in the previous section. On appeal, it is for the national courts to verify the existence of abuse in individual cases, evidence of which must be adduced in accordance with the rules of national law, provided that the effectiveness of Community law is not thereby undermined[64].

Investigations must be carried out in accordance with **fundamental rights**, in particular with Articles 8 *(right to respect for private and family life)* and 12 *(right to marry)* of the ECHR *(Articles 7 and 9 of the EU Charter)*.

On going investigation of suspected cases of marriages of convenience cannot justify derogation from the rights of third country family members under the Directive, such as the prohibition of the right to work, seizure of passport or delay of the issue of a residence card within six months from the date of application. These rights can be withdrawn at any time as a result of subsequent investigations.

53 AG Stix-Hackl in case C-441/02 *Commission v Germany*
54 Case 36/75 *Rutili* (paras 37-39)
55 Cases 33/74 *van Binsbergen* (para 13), C-370/90 *Singh* (para 24) and C-212/97 *Centros* (paras 24-25)
56 Case C-127/08 *Metock* (paras 74-75)
57 Cases C-370/90 *Singh*, C-291/05 *Eind* and C-60/00 *Carpenter*
58 Cases C-212/97 *Centros* (para 27) and C-147/03 *Commission v Austria* (paras 67-68)
59 Cases C-109/01 *Akrich* (para 55) and C-1/05 *Jia* (para 31)
60 Cases C-285/95 *Kol* (para 29) and C-63/99 *Gloszczuk* (para 75)
61 Cases C-110/99 *Emsland-Stärke* (para 52 et seq.) and C-212/97 *Centros* (para 25)
62 The prohibition includes not only checks on all migrants, but also checks on whole classes of migrants
(e.g. those from a given ethnic origin).
63 Community law does not require third country family spouses to live with the EU citizen to qualify for
a right of residence – case 267/83 *Diatta* (para 15 et seq.).
64 Cases C-110/99 *Emsland-Stärke* (para 54) and C-215/03 *Oulane* (para 56)