

Subject-matter concerned	<input type="checkbox"/> 1) non-discrimination on grounds of nationality <input checked="" type="checkbox"/> 2) freedom of movement and residence - linked to article 31 of the Directive 2004/38 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
Decision date	2 December 2013
Deciding body (in original language)	Ανώτατο Δικαστήριο Κύπρου, Αναθεωρητική Δικαιοδοσία
Deciding body (in English)	Supreme Court of Cyprus, Review Jurisdiction
Case number (also European Case Law Identifier (ECLI) where applicable)	6296/2013
Parties	<p>Acif Muhammad and Picioroaga Elena Alexandrina v. The Republic of Cyprus through the Director of the Department of population archives and immigration</p> <p>[Acif Muhammad και Picioroaga Elena Alexandrina v Κυπριακής Δημοκρατίας μέσω της Διευθύντριας του Τμήματος Αρχείου Πληθυσμού και Μετανάστευσης]</p>

Web link to the decision (if available)	http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2013/4-201312-6296-2013endiam.htm&qstring=2004%20w%2F1%2038%20w%2F1%20%E5%EA
Legal basis in national law of the rights under dispute	<ul style="list-style-type: none"> • Article 146 of the Cypriot Constitution¹ which provides for the right to apply for judicial review of an administrative act; • Article 47 of the Charter of Fundamental Rights; • Directive 2004/38 and its transposing law N. 7(I)/2007;² • Articles 5 and 13 of the ECHR.
Key facts of the case (max. 500 chars)	The first applicant, a Pakistani national, entered Cyprus with a student visa in 2006. In 2009 he married a Romanian national, the second applicant in this case, and applied for a residence certificate as a member of the family of a Union national. His first application was rejected and he reapplied. His second application was accepted but subsequently the authorities declared their marriage as one of convenience and ordered the first applicant to leave Cyprus, informing him that he had the right to appeal against this decision within 20 days. The letter was sent to the couple's last known address, however, the applicants had meanwhile moved to a new address and never received it. Since no appeal was filed against the decision which had declared their marriage unlawful, the immigration authorities issued orders of detention and deportation against the first applicant. The execution of these orders was suspended pending examination of this application. The applicant argued that his expulsion was prohibited under article 31 of Directive 2004/38 which ought to be interpreted in light of article 47 of the Charter of Fundamental Rights which safeguards the right to an effective remedy and to a fair trial. The Court rejected the application and confirmed the validity of the expulsion order.

¹ Cyprus, The Constitution of the Republic of Cyprus, available at <http://cylaw.org/nomoi/enop/ind/syntagma/section-sc26b4a5c6-5493-b01e-9d76-560d2e45d284.html> accessed on 20 April 2017.

² Cyprus, Law on the right of citizens of the Union and their family members to move and reside freely in the Republic (Ο περί του Δικαιώματος των Πολιτών της Ένωσης και των Μελών των Οικογενειών τους να Κυκλοφορούν και να Διαμένουν Ελεύθερα στη Δημοκρατία Νόμος του 2007) N. 7(I)/2007, available at http://cylaw.org/nomoi/enop/non-ind/2007_1_7/index.html

Main reasoning / argumentation (max. 500 chars)	<p>Since the decision which declared their marriage as unlawful was not appealed against, it became final and could no longer be challenged. In light of this, the applicant could not be treated as a member of the family of a Union national and fell outside the scope of Directive 2004/38. As a result, he lost the right to reside in Cyprus and was rendered an undocumented migrant.</p> <p>No manifest illegality was proven, in order to justify the issue of an order suspending the execution of the detention and deportation orders</p> <p>The applicant did not present evidence to show that the deprivation of his liberty will cause him any irreparable damage. To do that, the applicant would have to satisfy the Court of the serious likelihood of damage which cannot be remedied by any of the remedies available in law, which he failed to do.</p>
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<p>The failure of the applicants to appeal the decision by which their marriage was declared as false and unlawful renders this decision final. Given that each administrative act stands on its own, the finality of this decision triggered an automatic chain of consequences which removed the applicant from the ambit of the Free Movement Directive and rendered him an irregular migrant.</p> <p>Directive Article 31 prohibit expulsions which seek to rely on the grounds of public security, public safety or public health and did not apply in this case.</p> <p>The applicant was not denied the right to a fair trial as this is safeguarded by Charter article 47, because he did exercise this right through this current judicial process.</p>
Results (e.g. sanctions) and key consequences or implications of the case (max. 500 chars)	<p>The application was rejected and the applicant was ordered to pay the respondents' costs. The detention and deportation orders were confirmed as valid and lawful. This was a single judge deciding at first instance; however the decision has not as been overturned.</p>
	<p>Our own comment on this case</p>
	<p>The Court relied on a technicality in order to remove the administrative decision, which had pronounced the applicants' marriage as false, from the ambit of the judicial review process which is intended to check administrative decisions. The judge noted but failed to take into account the fact that the applicants had a child together who was living with the first applicant's father in Pakistan because of the financial difficulties which the couple was facing in Cyprus.</p> <p>The administrative act which triggered the detention and deportation, i.e. the annulment of the marriage, could not be challenged because the deadline has passed, through no fault of the applicants. Having no other options, the applicants decided to challenge the subsequent acts (detention and deportation) in the hope that the judge would see the manifest injustice in the procedure and cancel the consequences of the annulment of the marriage, i.e. the detention and deportation. The judge chose not to correct the injustice done to the applicants and to focus on the procedure, which resulted in denying the applicants protection under the Free Movement Directive.</p>

	This had the effect of applying to Union nationals and their family members the provisions of the national immigration law, vesting the authorities with far reaching deportation powers which exceed those foreseen in the Free Movement Directive.
Key quotations in original language and translated into English with reference details (max. 500 chars)	<p>Η κήρυξη του γάμου του Αιτητή ως εικονικού έγινε με βάση τις πρόνοιες του Άρθρου 7 του Κεφαλαίου 105. Η έκδοση διαταγμάτων κράτησης και απέλασης, τα οποία και γνωστοποιήθηκαν στον Αιτητή στις 11/10/2013, ήταν αποτέλεσμα της απόφασης περί εικονικότητας του γάμου, η οποία και κατέστησε απαγορευμένο, πλέον, μετανάστη τον Αιτητή, δυνάμει της παραγράφου (Κ) του Εδαφίου (1) του Άρθρου 6 του Κεφαλαίου 105, αφού η άδεια παραμονής του ακυρώθηκε. Η κατάληξη της Αρμόδιας Αρχής περί εικονικότητας του υπό αναφορά γάμου ενεργοποίησε και τον μηχανισμό απέλασης του Αιτητή κατ' ακολουθία των προνοιών του Κεφαλαίου 105. Πεδίο εφαρμογής του Νόμου 7(Ι)/2007 δεν υφίστατο, αφού πλέον ο Αιτητής, ως μέρος σε εικονικό γάμο, δεν εντάσσεται στα πλαίσια του όρου «σύζυγος» και δεν καλύπτεται από τον ορισμό «μέλος της οικογένειας» του Άρθρου 2 του υπό αναφορά Νόμου. Εκ του περισσού καταγράφεται ότι στα πλαίσια της παρούσας διαδικασίας και δεδομένης της αυτοτέλειας που καλύπτει κάθε πράξη της Διοίκησης, οι Αιτητές κωλύονται να εγείρουν ζητήματα, τα οποία αφορούν την πράξη κήρυξης του γάμου ως εικονικού και/ή ακύρωσης του δελτίου διαμονής του Αιτητή.</p> <p>[Unofficial translation below]</p> <p>The declaration of the Applicant's marriage as a marriage of convenience was made on the basis of the provisions of Article 7 of Cap 105. The issuing of the detention and expulsion orders, which were notified to the applicant on 11/10/2013, resulted from the decision on the falsity of the marriage which thereafter rendered him as a prohibited migrant under Article 6(1) of Cap 105, since his residence permit was canceled. The conclusion of the Competent Authority on the falsity of the marriage in question also triggered the mechanism for the applicant's deportation pursuant to the provisions of Cap 105. Law 7 (I) / 2007 had no scope of application, since the Applicant being part of a marriage of convenience did not meet the definition of a "spouse" and a "member of the family" in Article 2 of the said Law. For the sake of completeness, it is recorded that in the course of the present procedure and given the autonomy of each act of the Administration, the Applicants are prevented from raising questions concerning the act of declaring the marriage unlawful and / or concerning the cancellation of the applicant's residence visa.</p>
Has the deciding body refer to the Charter of Fundamental Rights. If yes, to which specific Article.	Yes, article 47.