Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/05070/2019**

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision and Reasons Promulgated**
On Thursday 24 February 2022	**On Wednesday 09 March 2022**

Before

UPPER TRIBUNAL JUDGE SMITH
UPPER TRIBUNAL JUDGE SHERIDAN

Between

MR GULFRAZ HUSSAIN SHAH

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Sharma, Counsel instructed by Legal Rights Partnership
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer.

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Young-Harry promulgated on 7 January 2020 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 13 September 2019 refusing his application for a residence card under the Immigration (European Economic Area)

Regulations 2016 ("the EEA Regulations") as the spouse of an EEA national. The Respondent refused the application under the EEA Regulations as she did not believe that the Appellant's marriage to his wife ("the Sponsor") was genuine.

2. Judge Young-Harry also did not accept that the marriage was a genuine one. She therefore dismissed the appeal on that basis.

3. The Appellant initially appealed the Decision on nine grounds which can be broadly categorised as a failure to have regard to relevant evidence, procedural unfairness and apparent bias. Permission to appeal was dismissed by First-tier Tribunal Judge Fisher on 22 April 2020 on the basis that the grounds were no more than a disagreement with the outcome.

4. The Appellant renewed his application for permission to appeal the Decision, this time on two grounds only as follows:

> (1) Apparent bias/procedural unfairness.
>
> (2) Failure properly to consider the evidence in light of the Judge's approach (adopting the first ground)

5. Permission to appeal was granted by Upper Tribunal Judge Rintoul on 29 September 2021 in the following terms so far as relevant:

> "Permission is granted.
>
> It is arguable, in the light of the witness statement from Ms Hayre, that the judge erred by entering into the arena, as averred in ground 1, this arguably amounting to a perception of unfairness and/or apparent bias.
>
> It is also arguable that the judge erred in her approach to the evidence as is averred at ground 2.
>
> For the avoidance of doubt, permission is granted on all grounds."

6. As noted in the grant of permission, the Appellant's ground one is supported by a witness statement from his solicitor regarding the events at the hearing of the appeal (which was in fact over two days). The Appellant also provided a statement setting out his perception of the hearing. Given the serious allegation of bias being made about the Judge's conduct of the hearing, Judge Young-Harry was invited to comment on the grounds which she duly did. We also had a full record of the proceedings.

7. At the outset of the hearing, Mr Lindsay indicated that he conceded that there was an error of law in the Decision. We set out the substance of the concession below. We indicated that we accepted his concession. Both parties agreed that, as the grounds raised an issue of procedural fairness, it was appropriate for the appeal to be remitted. We concurred with that view. We now turn to set out briefly the basis on which an error of law is found.

DISCUSSION

8. Mr Lindsay first drew our attention to [19] of the Decision which reads as follows:

> "The appellant and sponsor claimed by way of explanation, that the inconsistencies in the interview arose, from the fact that the sponsor was informed the day before the interview, that she may miscarry her child, thus she was distressed and distracted during the interview. The appellant's evidence however about the possible miscarriage and how and when they were informed, was inconsistent, unreliable and confused. I do not accept this is the reason for the inconsistencies."

9. Mr Lindsay's concern was that the Judge did not reach a clear finding on the evidence in this regard. Whilst she appears to doubt the events said to lie behind the inconsistencies, she asks herself the wrong question. The issue was whether the reason might explain the inconsistencies. The Judge had not therefore considered the circumstances said to give rise to the inconsistencies. Mr Lindsay drew our attention in this regard to [34] of the Supreme Court's decision in Sadovska v Secretary of State for the Home Department [2017] UKSC 54 that "the circumstances in which the interviews took place…must be borne fully in mind".

10. The other basis on which Mr Lindsay accepted that an error had been made was the comment made by the Judge about the impact of the appeal having gone part heard. The Appellant had given his evidence at the first hearing. The Sponsor could not do so as no interpreter had been booked for her. The Judge at [20] of the Decision recognised that much of the Appellant's and Sponsor's evidence at the hearing before her had been consistent. However, she went on to say in that regard that she "[kept] in mind that the matter was adjourned part-heard, after the appellant's evidence but before the sponsor's, thus there was time for possible discussion between the parties." Mr Lindsay accepted that it was procedurally unfair for the Judge to discount consistent evidence on this basis. The Judge had herself adjourned the hearing so that the Sponsor could give evidence on the second occasion. The Judge should have asked herself whether the appeal could be heard fairly in those circumstances and if it could not, she should have dealt with it in some other way.

11. As we have already indicated, we accept those concessions. We add to those our concern that the Judge might have been drawn into the arena by virtue of the questions asked of the Appellant and, to a lesser extent, the Sponsor. It is difficult to see how that questioning arose from questions asked by the Presenting Officer or the Appellant's representative. That too potentially gave rise to an unfairness.

12. We would not have accepted that there was any apparent bias based on the other events relied upon by the Appellant. We do not doubt that the

Appellant's representative might have felt embarrassed by what occurred prior to the hearing. However, having considered the Judge's comments in that regard, we are satisfied that nothing which occurred thereafter gave rise to any apparent bias, save, as we say, possibly in relation to the way in which questions were asked by the Judge. Assertions have been made on the Appellant's side that because the Appellant and representative perceived that the Judge appeared to be biased this meant that the ground was made out. That is not a reason for a finding of apparent bias. The issue is how a fair-minded, reasonable observer would view the situation.

13. We do not need to say anything further about this ground. Mr Lindsay's concession was not based on any apparent bias. It was founded on procedural unfairness. Having accepted however the potential unfairness which arose, and as we have already indicated, we accept that this appeal must be heard entirely afresh and should be remitted to the First-tier Tribunal for that purpose.

CONCLUSION

14. We are satisfied that the Decision contains an error of law for the reasons conceded by the Respondent. We set the Decision aside in its entirety. The Appellant's claim will need to be considered afresh. The appeal is remitted for a de novo hearing before the First-tier Tribunal.

DECISION

We are satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Young-Harry promulgated on 7 January 2020 is set aside in its entirety. No findings are preserved. The appeal is remitted to the First-tier Tribunal for re-hearing before a Judge other than Judge Young-Harry.

Signed L K Smith Dated: 3 March 2022
Upper Tribunal Judge Smith