IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001821
First-tier Tribunal No: EA/11644/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 13 June 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

GLADYS AFFOH
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr A Pipe, Counsel; Bedfords Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

Heard at Field House on 4 June 2024

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Khurram, promulgated on 6 July 2023, dismissing her appeal against the Respondent's decision dated 14 November 2022, in which she refused the appellant's application dated 30 June 2021 for leave under Appendix EU on the basis that her marriage to her spouse is one of convenience.

2. The Appellant applied for permission to appeal on and was granted permission to appeal by Upper Tribunal Judge Norton-Taylor in the following terms:

> 4. The grounds of appeal are unhelpfully drafted in that they are not set out under distinct headings. A number of points raised appear to have very little merit. Having said that, there is sufficient merit in respect of certain aspects of the challenge for permission to be granted and, adopting a pragmatic approach, I do not limit the scope of that grant. The appellant will, no doubt, take account of my observations, below, when preparing for the error of law hearing.

> 5. Having looked at the appellant's initial appeal bundle and supplementary bundle, it is apparent that she provided detailed and lengthy witness statements addressing the circumstances surrounding the marriage and the port interview. It is arguable that the judge failed to address this evidence (which included explanations for matters apparently relied on by the respondent and, in turn, the judge): see paragraph 2 of the grounds.
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> 6. I note that the respondent was not represented at the hearing.
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> 7. Paragraph 1 of the grounds of appeal assert that the judge acted with procedural unfairness by considering matters beyond those identified at case management hearing. However, it appears from [5] of the judge's decision that he did in fact identify the sole issue in the appeal and that he then proceeded to address that issue.
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> 8. The attribution of weight is a matter for the first-instance tribunal. It is difficult to see how the judge erred in placing little weight on the evidence from the Pastor and the police.
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> 9. It may be of some relevance, as contended for in the grounds, that the appellant had come to the United Kingdom having been issued with a family permit as the spouse of the relevant EEA national.
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> 10. I can see no evidence specified in the grounds and/or accompanying the application for permission to appeal which supports the assertion at paragraph 8 of the grounds that the appellant was "made to sign the interview records BEFORE the interviews took place."
>
> 11. Finally, I would also observe that it is not entirely clear to me that the judge approached the appeal correctly as regards the (marriage) of convenience issue. His reference at [16] to the appellant not having "rebutted" the evidence produced by the respondent might appear problematic: the legal burden rested throughout on the respondent and (if, for the sake of argument, one were to apply the 'shifting' evidential burden approach), it was for the appellant only to provide an explanation capable of belief/acceptance and not to have conclusively "rebutted" the reasonable suspicion initially raised.
>
> 12. The appellant is expected to carefully consider the way in which her appeal is put to the Upper Tribunal in due course. There must be full compliance with the standard directions, once issued.

3. In advance of the hearing, the Appellant's counsel drafted and submitted a Skeleton Argument which sought to reformulate the grounds into two coherent arguments which prayed in aid the basis upon which the Upper Tribunal had distilled the main points of challenge. Mr Clarke did not seek to resist this reformulation but indicated that the appeal was resisted.

4. The two points of appeal can be summarised as (i) a failure to consider material evidence, and (ii) making a material misdirection in law.

Findings

5. At the conclusion of the hearing I reserved my decision, which I now give. I do find that the decision demonstrates material errors of law, such that it should be set aside in its entirety.

6. In respect of the first ground and the assertion that the judge has failed to engage with the Appellant's detailed witness statements answering the inconsistencies that the Respondent alleges occurred in two separate interviews at port between immigration officers and the Appellant and her sponsoring spouse, there is not immediate force in this argument as the judge is plainly aware that there were two witness statements from the Appellant at §6 and also mentions at §15c of the decision the judge has cause to make reference to one point made in the Appellant's first witness statement in order to reject it, concerning the reason why she no longer has her WhatsApp chats which arises . However, it does not appear that the Judge has considered the second witness statement numbering 17 pages [CB/560-577]. This, in my view, was essential as the second witness statement was drafted with a particular purpose in mind which is even cited at paragraph 3 therein:

> "This second statement responds to the questions and answers given in interview on 25.01.2020 which are as set out in the refusal decision of 14.11.2022. I have commented in part on this in my First Witness Statement but to make a full, comprehensive response I have expanded on what was written in my previous statement."

7. As such, the importance of the second statement cannot be overstated as the first statement was only part of the Appellant's answer to the Refusal and the second statement it sought to complete her response to the discrepant answers pointed in her interview which was, in essence, her complete answer to the Respondent's criticisms and central to her case attempting to answer the allegation of whether the marriage was one of convenience or not. Although Mr Clarke attempted to persuade me that the detailed statement would not have persuaded the judge, that is a conclusion that I cannot make or predict on the judge's behalf as it is unsafe for me to second guess what the first instance judge would have concluded about the second witness statement. In any event, this argument also seeks reduce the importance of the omission in the judge's task which was to resolve the conflict between the parties taking account of all the evidence before him, and not merely part of it. In short, the judge cannot have reached a conclusion on her discrepant answers without first considering her evidence and then also giving reasons for rejecting it which are also absent from the decision and which gives support to my conclusion that this second statement was not considered before her appeal was dismissed with reasons for not accepting that response. In addition, although not a material omission in and of itself, I accept Mr Pipe's submission that the judge had to also assess the relationship in the context of the Respondent previously accepting the relationship and issuing a family permit for her to enter the UK which contributes to the material error I have already identified.

8. Therefore, ground 1 is made out and the decision suffers from material error and must be set aside.

9. In relation to the second ground of making a material misdirection in law, although this is not material in light of my finding on ground 1, I do agree with Judge Norton-Taylor's view that the judge was wrong to find that the appellant had not "rebutted" the evidence produced by the Respondent as the legal burden rested with the Respondent throughout the appeal and, it was only for the appellant to provide an explanation capable of belief and/or acceptance and not to have conclusively "rebutted" the reasonable suspicion initially raised: see Sadovska & Anor v. Secretary of State for the Home Department (Scotland) [2017] UKSC 54, for illustration. Albeit the judge made a correct self-direction in

relation to the burden of proof at §8, looking at §13 where the judge states that the Respondent's evidence is sufficient to establish "a prima facie case", considered alongside the statement at §16 that the "appellant has not rebutted the evidence produced the respondent", it appears that the judge may have incorrectly adopted a shifting burden of proof, rather than a static one which remains with the Respondent throughout, being conscious that the Appellant must merely provide an explanation capable of belief.

10. I therefore find that the judge has materially erred for the reasons given above.

11. As an aside, I note that the Respondent's Bundle failed to include the sponsor's interview which would surely have been important if not essential in order for the Respondent to demonstrate that the Appellant's answers were discrepant as raised in the Refusal Letter.

Notice of Decision

12. The Appellant's appeal is allowed.

13. The appeal is to be remitted to the First-tier Tribunal to be heard by any judge other than First-tier Tribunal Judge Khurram.

Directions

14. The appeal is remitted to IAC Birmingham.

15. The Respondent shall serve the Sponsor's Interview Record no later than 6 weeks prior to the appeal being relisted before the First-tier Tribunal.

16. A Twi interpreter is required for the substantive appeal hearing.

17. The Respondent is directed to attend the hearing.

18. Upon remittal, each party is at liberty to seek any further direction that may assist in the further management of this appeal.

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber