Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: EA/00450/2019(P)**

THE IMMIGRATION ACTS

Decided under Rule 34 without a Hearing on 20 August 2020

Decision & Reasons Promulgated On 24 August 2020

Before

UPPER TRIBUNAL JUDGE GILL

Between

MR ABDUL KARIM
(ANONYMITY ORDER NOT MADE) Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

This is a decision on the papers without a hearing. The appellant requested an oral hearing. The respondent made no submissions on the question whether the Upper Tribunal should proceed to decide the questions described at para 4 below without a hearing. A face-to-face hearing or a remote hearing was not held for the reasons given at paras 13-17 below. The documents described at para 6 below were submitted. The order made is set out at para 38 below. *(Administrative Instruction No. 2 from the Senior President of Tribunals).*

Representation (by submissions in writing):

For the appellant: Mr R Solomon, of Counsel, instructed by Jein Solicitors.
For the respondent: Mr T Lindsay, Specialist Appeals Team.

Decision

1. The appellant, a national of Pakistan born on 14 August 1983, appeals against a decision of Judge of the First-tier Tribunal D.P. Herbert OBE (hereafter referred to as the "Judge") who, in a decision promulgated on 8 October 2019 following a hearing

on 17 September 2019, dismissed his appeal against a decision of the respondent of 16 January 2019 to refuse to issue a residence card as a family member of an EEA national exercising Treaty rights in the United Kingdom. The appellant had applied on 3 December 2018 for a residence card as the spouse of Ms Karolina Grzymala, a Swiss national said to be exercising Treaty rights in the United Kingdom (hereafter the "sponsor").

2. The respondent refused to issue a residence card because she took the view that the appellant's marriage to the sponsor was a marriage of convenience.

3. By a Notice of Hearing dated 12 February 2020, this appeal to the Upper Tribunal was listed for hearing on 27 March 2020. However, the hearing was adjourned due to the imposition of the lockdown on 23 March 2020.

4. On 24 April 2020, the Upper Tribunal sent to the parties a "*Note and Directions*" issued by Upper Tribunal Judge Smith. At para 1 of the "*Note and Directions*", Judge Smith stated that, in light of the need to take precautions against the spread of Covid-19, she had reached the provisional view, having reviewed the file in this case, that it would be appropriate to decide, without a hearing, the following questions:

   (a) (*question (a)*) whether the Judge's decision involved the making of an error of law; and

   (b) (*question (b)*) if so, whether his decision should be set aside.

5. Judge Smith gave certain directions to enable the parties to object to the Upper Tribunal deciding the said questions without a hearing and also to make submissions on the questions.

6. In response to Judge Smith's "*Note and Directions*", the Upper Tribunal has received the following documents:

   (i) from the respondent, a Rule 24 reply dated 13 May 2020 by Mr Lindsay, submitted under cover of an email dated 13 May 2020 timed at 10:43 hours; and

   (ii) from the appellant, a document entitled: "*Further submissions on behalf of the appellant"* (hereafter the appellant's "Further submissions") dated 11 May 2020 by Mr Solomon, submitted under cover of a letter from Jein Solicitors dated 12 May 2020 and sent to the Upper Tribunal by email dated 12 May 2020 timed at 17:39 hours and again by email dated 13 May 2020 timed at 16:17 hours.

7. In his Rule 24 reply, Mr Lindsay accepted that the Judge had materially erred in law, that his decision should be set aside and that no findings should be preserved. Mr Lindsay did not make any submissions as to whether or not the decision on the appellant's appeal should be re-made in the Upper Tribunal or whether the appeal should be remitted to the First-tier Tribunal ("FtT").

8. At para 1 of his Further submissions, Mr Solomon stated that no response had been received to date to the grant of permission. It is therefore clear that Mr Solomon was unaware, at the time that he prepared the appellant's Further submissions, that the respondent had accepted in her Rule 24 reply that the Judge had materially erred in law, that his decision should be set aside and that no findings should be preserved. However, in view of the respondent's acceptance of these matters and my decision

(for the reasons given below) that this appeal must be remitted to the FtT, I decided that the appellant would not suffer any prejudice if I were to proceed to decide questions (a) and (b) set out at para 4 above and whether the appeal should be remitted to the FtT without affording him an opportunity to respond to the respondent's Rule 24 reply.

9. The submissions of the parties in response to Judge Smith's "*Note and Directions*" were considered by Upper Tribunal Judge Sheridan. Judge Sheridan summarised the parties' submissions at paras 3-6 and made observations at paras 6-7. These read:

> "3. Following the reply by the respondent it is clear that both parties are in agreement that the decision of the FtTJ discloses the making of an error on a point of law and should be set aside based on a misdirection in law as to the burden of proof in a "marriage of convenience case (see paragraph 3 of the Rule 24 response). The appellant's grounds also rely upon a procedural irregularity (where the appellant and his partner did not attend).
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> 4. In the submissions made on behalf of the appellant by Counsel) it was submitted that the Tribunal should set aside the decision, to either remake the appeal by allowing it or alternatively to remit the appeal to the FtT to remake the decision or to adjourn the appeal to be heard in the Upper Tribunal (see paragraph 8).
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> 5. The respondent's rule 24 response invites the Tribunal to set aside the decision and to remit the appeal to the First-tier Tribunal with no findings preserved.
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> 6. Following this, the appellant's solicitors sent a number of documents (including a copy of the application made in 2018, photographs) under cover of a letter dated 21 May 2020 stating "we have attached further error of law submissions along with supporting documents". However, there are no submissions and the bundle exhibits documents for the original application. It is wholly unclear what the purpose of those documents are and no further submissions are included.
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> 7. In the circumstances there does not seem to be any agreement as to the disposal of the appeal- whether to remit the appeal to the FtT (as submitted by the respondent) or to re-make the appeal. The first set of submissions sets out all the options but does not make submissions in support of the desired preference or submissions in support."

10. Contrary to para 5 of Judge Sheridan's "*Note and Directions*", Mr Lindsay did not make any submissions on the respondent's behalf about disposal; that is, whether the appeal should be remitted to the First-tier Tribunal or not.

11. Judge Sheridan proceeded to give further directions, as follows:

    (i) for the appellant to file and serve, no later than 7 days after his directions have been received, a reply to the respondent's Rule 24 response dealing with the issue of whether the appeal should be remitted to the First-tier Tribunal or re-made at a hearing or alternatively on the basis of further submissions in writing, such further submissions to be attached to the reply; and

    (ii) for any reply made on the respondent's behalf to be served and filed on the other party and the Tribunal no later than 7 days after receiving the appellant's response.

12. The Upper Tribunal has not received any further submissions from the parties in response to Judge Sheridan's directions.

Whether it is appropriate to proceed without a hearing

13. The respondent has not made any submissions on this issue.

14. At para 2 of his Further submissions, Mr Solomon requested an oral hearing on questions (a) and (b) "*given the issues involved and to address any questions that the Tribunal may have*". He proceeded to rely upon Sengupta & Another v Holmes & Others [2002] EWCA Civ 1104, at paras 38 and 47.

15. I am aware of the judgment in Sengupta & Another v Holmes & Others. I also take into account the guidance at para 2 of the judgment of the Supreme Court in Osborn and others v Parole Board [2013] UKSC 61.

16. I noted that the respondent has agreed that the Judge materially erred in law, that his decision should be set aside and that none of his findings should be preserved. I entirely agree with both parties, for the reasons given below, that the Judge materially erred in law, that his decision should be set aside and that none of his findings should be preserved. Accordingly, neither party is prejudiced by my proceeding to decide questions (a) and (b) without a hearing.

17. In all of the circumstances, and taking into account the overriding objective and having considered Osborn and others v Parole Board, I have concluded that it is appropriate, fair and just for me to exercise my discretion and proceed to decide questions (a) and (b) without a hearing.

The Judge's decision

18. The Judge's decision is poorly proofed and, indeed, in part unintelligible. In quoting from his decision below, it seemed to me pointless to attempt to indicate precisely where the grammatical and other typographical errors were. Suffice it to say that the extracts below mirror exactly his decision.

19. The appellant did not attend the hearing before the Judge and no representative appeared on his behalf. The Judge dealt with this matter at paras 2-4 of his decision which read:

> "2. Unfortunately what I have the before me is the interview which appears to have taken place on the 4th of February 2015. The appellant solicitors who were on record at the time wrote to the immigration appellate authority requesting an adjournment as they had made several request to the respondent asking for a full transcript of the interview that was held at the Home Office on the 4th of February 2015. This adjournment request was served on the immigration appellate authority but an adjournment request was refused apparently as the case file reveals. Notwithstanding that I have before me the full copy of the interview in a covering notice of adjourned hearing report which appears to have been marked stating that the earlier hearing on the 22nd of May 2019 was adjourned and the matter was relisted to today the 17th of September 2019.
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> 3. In the light of the absence of the appellant's or his representative I had the court clerk ring the solicitors JEIN solicitors whose was number was on file. They said that they were without instructions from the client and the reason why nobody was an appearance was because a lack of funds and instructions.
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> 4. I therefore decided it was appropriate to carry on to hear the appeal in the light of the fact that the appellant's clearly knew that the hearing was today and therefore there was presumably a decision by him not to attend the hearing and give evidence."

20. At paras 5-11 of his decision, the Judge set out aspects of the respondent's case, i.e. that the respondent relied upon various inconsistencies that arose between the

interview records of the appellant and the sponsor during marriage interviews conducted by the respondent.

21. At para 13, the Judge directed himself on the applicable burden and standard of proof as follows:

> "13. The burden of proof rests on the appellant and the standard of proof is on a balance of probabilities. The relevant date the date of decision before me."

22. The Judge then gave his reasons for finding that the marriage was a marriage of convenience at paras 14-17 which read:

> "My Findings of Fact and Law Relating to this Appeal
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> 14. The respondent does have a duty to identify marriages of convenience and therefore it is normal practice for the respondent to interview the appellant in such circumstances independently to attempt to verify whether it is a genuine and subsisting marriage. Having carefully looked at the discrepancies listed in the respondent's refusal letter they are by and large answers which one would normally expect of a married couple. The previous interview in 2015 relied upon when one looks it did in the round does not count contain major discrepancies and in fact for the most part the answers are very similar. This is an unusual case because if the parties had simply turned up and confirmed what was in their interview and their present circumstances I would have probably had little doubt in allowing the appeal.
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> 15. One of the features of a marriage which is no longer genuine subsisting however is that the parties do not appear or do not decide to instruct solicitors to appear on their behalf. It may well be that there is some other reason for the appellants non-attendance but I have none before me. In the circumstances the respondents suggestion that this is on a marriage of convenience does not face any opposition from the appellants and from the appellant and his wife say for what is contained in the interview of February 2015. On that basis therefore as to whether turning the clock back and looking at the marriage itself whether it was a marriage of convenience I can only make an assessment on the interview of February 2015. And on that whether the appellants are before me today.
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> 16. As I have already indicated the discrepancies relied upon by the respondents are minor and the vast majority of the answers that were given by the appellant and his wife were similar. The only issue that undermines that finding is the failure of the appellant to appear before me today.
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> 17. Notwithstanding that this is a finely balanced case and I decide I have come to the view that on a balance of probabilities it is more likely than not that this was a balance of convenience simply because of the appellant's failure to appear before me today with his wife or to arrange representation. In those circumstances therefore I find that it is more likely than not that this was a marriage of convenience from the outset and that is why neither the appellant nor spouse has decided to appear today. In the circumstances therefore the applicant's application for a residence card must fail as it would not comply with regulation 2 of the Immigration (Europe Economic Area) Regulations 2016."

Assessment

23. Given that the parties agree that the Judge materially erred in law, I deal with the grounds and the parties' submissions only to the extent necessary to explain my own reasons for setting aside the Judge's decision and for deciding the appropriate disposal and the ambit of the re-making of the decision on the appeal.

24. The Judge appeared to be unaware of relevant case-law concerning marriages of convenience. As Mr Solomon submits in his Further submissions, the relevant cases include Papajorgi (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC), Agho v SSHD [2015] EWCA Civ 1998, Rosa v SSHD [2016] EWCA Civ

14 and Sadovska v SSHD [2017] UKSC 54. These cases establish a number of principles, none of which the Judge appears to be aware of. Firstly, there is no burden at the outset on an applicant to demonstrate that his marriage is not one of convenience. The legal burden of proof is upon the respondent to establish that the marriage is a marriage of convenience. However, if the respondent produces evidence to demonstrate that there is a reasonable suspicion that the marriage is a marriage of convenience, then the *evidential* burden shifts to the appellant to address the evidence justifying reasonable suspicion. However, at all times, the *legal* burden of establishing that the marriage was a marriage of convenience rests on the respondent and the standard of proof is the balance of probabilities.

25. Given that the Judge said that the inconsistencies in the interviews of the appellant and the sponsor were minor, he should have made a finding as to whether the respondent had discharged the initial burden. He failed to do so.

26. It is evident that the sole reason for dismissing the appeal was the fact that the appellant and his wife did not attend the hearing. Whilst non-attendance of a hearing may leave a judge in a position whereby he or she does not have explanations for inconsistencies or other credibility issues that call for an explanation, it is not permissible to draw an adverse inference from the mere fact of non-attendance.

27. Furthermore, the Judge's decision to draw such an inference and rely upon it as the sole reason for dismissing the appeal meant that, in effect, the appellant was deprived of a fair hearing. This is because his substantive case was not considered at all as a consequence of the fact that the Judge dismissed his appeal solely because he had not attended the hearing.

28. It appears from the Judge's decision that he had a full copy of the interview records and that he was also aware that the appellant did not, given that the basis of the appellant's adjournment request was that he and his representatives had not received a full transcript of the interview records. Given that he had in his possession relevant documentary evidence to which the appellant did not have access, the Judge ought to have considered of his own volition whether it was fair to proceed with the hearing of the appeal without giving the appellant an opportunity to consider the interview records. Accordingly, in this regard as well, the appellant has been deprived of a fair hearing.

29. The Judge's decision is poorly proofed, contains grammatical errors and, in part, is unintelligible. Further, it refers to the "immigration appellate authority". This body was abolished some years ago, a fact that the Judge appears to be unaware of.

30. I am satisfied not only that the Judge materially erred in law and misdirected himself in law for the reasons given at paras 24-26 above but also that the appellant simply has not had a fair hearing for the reasons given at paras 27-28. That the Judge's decision is poorly proofed, contains grammatical errors and, in part, is unintelligible simply compounds matters.

31. For all of the above reasons, I set aside the decision of the Judge in its entirety.

32. At para 7 of his Further submissions, Mr Solomon explains that, as at the hearing date, Jein Solicitors were awaiting the appellant's further instructions having notified him by email of an earlier refusal of an adjournment request made on 10 September 2019. It is accepted that they informed the FtT's clerk that they were without instructions. However, Mr Solomon states that Jein Solicitors subsequently came to

learn that the appellant had not seen their email because the email went to his junk mail folder. I noted that there was no witness statement in support of these assertions. However, I did not need to consider whether or not the appellant had been deprived of a fair hearing on account of these matters given that I have reached the conclusion, for different reasons, that he was deprived of a fair hearing.

The appropriate disposal

33. In his Further submissions, Mr Solomon suggested, inter alia, that the Upper Tribunal re-make the decision on the applicant's appeal by allowing it. I refuse to do so. My reasons are as follows: It is clear that the Judge was unaware of applicable legal principles and case-law. In my judgment, it is impossible and indeed unfair to the respondent to construct an inferred finding, that the respondent had failed to discharge the initial burden, from a decision made in total ignorance of relevant legal principles.

34. I therefore turn to consider whether the decision on the appellant's appeal should be re-made in the Upper Tribunal or whether the appeal should be remitted.

35. In the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements") recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

> "(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
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> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

36. In view of my conclusion that the appellant has been deprived of a fair hearing, I am satisfied that para 7.2(a) of the Practice Statements applies.

37. This appeal is therefore remitted to the FtT for that Tribunal to re-make the decision on the appellant's appeal.

Notice of Decision

38. The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision is set aside. This case is remitted to the First-tier Tribunal for a hearing on the merits on all issues by a Judge other than Judge of the First-tier Tribunal D.P. Herbert OBE.

Upper Tribunal Judge Gill Signed: 20 August 2020