Upper Tribunal
(Immigration and Asylum Chamber)

Isufaj (PTA decisions/reasons; EEA reg. 37 appeals) [2019] UKUT 283 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 May 2019	
Further submissions made on 31 May 2019	....

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE GILL

Between

AMARILDO ISUFAJ
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: in person, accompanied by the sponsor
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

(1) Judges deciding applications for permission to appeal should ensure that, as a general matter, there is no apparent contradiction between the decision on the application and what is said in the "reasons for decision" section of the document that records the decision and the reasons for it. As was said in Safi and others (permission to appeal decisions) [2018] UKUT 388 (IAC), a decision on a permission application must be capable of being understood by the Tribunal's administrative staff, the parties and by

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the court or tribunal to which the appeal lies. In the event of such an apparent contradiction or other uncertainty, the parties can expect the Upper Tribunal to treat the decision as the crucial element.

(2) Although regulation 37(1) of the Immigration (European Economic Area) Regulations 2016 provides that a person may not appeal under regulation 36 whilst he or she is in the United Kingdom, where the decision in question falls within regulation 37(1)(a) to (g), once the appeal is instituted by a person who is then outside the United Kingdom, there is no statutory prohibition on the appeal continuing if the person concerned thereafter is physically present in the United Kingdom. It will, however, be for the Secretary of State to decide whether to give that person temporary admission for the purpose of attending an appeal hearing, since regulation 41 does not apply to such cases.

DECISION ON ERROR OF LAW AND SETTING ASIDE OF THE DECISION OF THE FIRST-TIER TRIBUNAL

1. The appellant is a citizen of Albania, born in 1993, who having been refused asylum in the United Kingdom in 2016, was removed to Albania later that year.

2. The appellant attempted to enter the United Kingdom on 4 February 2017, in the company of his wife, the sponsor, who is a citizen of Lithuania. Both the appellant and his wife were refused admission on the basis that the Immigration Officer was satisfied that their marriage was a marriage of convenience and that refusal of entry was appropriate on the grounds of public policy and public security.

3. The notice of decision, given to the appellant, told him that he had a right of appeal under regulation 36 of the Immigration (European Economic Area) Regulations 2016 against the decision but that, pursuant to regulation 37(1)(a), he could exercise that right "only after you have left the United Kingdom".

4. The appellant did so. His appeal was heard at Taylor House on 3 November 2017 by a First-tier Tribunal Judge who, in a decision promulgated on 22 November 2017, dismissed it. At the hearing, the judge heard oral evidence from the sponsor. The appellant remained outside the United Kingdom.

5. Ms Masood of Counsel drafted grounds of application for permission to appeal to the Upper Tribunal against the judge's decision. Ground 1 contended that the judge had wrongly treated the appellant as bearing the burden of showing that his marriage to the sponsor was not one of convenience. It is trite law that, although there can be a shifting of the evidential burden, the legal burden lies throughout on the respondent to show that the marriage in question is a marriage of convenience (and, thus, not a relationship that affords a non-EU party to that marriage any relevant rights under EU law).

6. There was, plainly, great force in ground 1. As Ms Masood pointed out, at paragraph 52 of his decision, the judge said:-

> "On the evidence before me the Appellant has fallen far short of showing that, on balance his marriage to the sponsor was genuine."

7. That incorrect articulation of the burden of proof governed the way in which the judge approached the oral and documentary evidence. So far as the documentary evidence was concerned, the judge said:-

> "49. There is no documentary evidence that the couple cohabited in Rome. Indeed, one of the striking things about this case is the lack of evidence about the relationship in general, including communications, photographs and the sorts of things one would expect to see where a relationship has apparently been ongoing for 4 or 5 years."

8. In her grounds, Ms Masood pointed out that the materials before the judge included over 100 photographs of the couple taken in various locations at various times, including on their wedding day and with various family members, such as the sponsor's son; and written evidence, such as booking documentation, showing that the sponsor had visited the appellant in Albania a number of times in 2017. The grounds submitted that none of that evidence was challenged by the respondent.

9. Unsurprisingly, First-tier Tribunal Judge Grimmett granted permission on Ms Masood's grounds. Judge Grimmett's decision, dated 26 April 2018, stated in terms "The application is granted".

10. Paragraph 1 of Judge Grimmett's "Reasons for decision", however, noted that the application was fourteen days out of time and that there was no explanation for the delay. Judge Grimmett said that, as a result "I do not extend time".

11. Paragraph 2 of the reasons went on to state that: "It is arguable that the Judge erred in requiring the appellant to show that there was a genuine marriage when the initial burden was on the respondent to show it was a marriage of convenience".

12. When the appellant's appeal came before Deputy Upper Tribunal Judge Renton at Field House on 2 July 2018, Ms Masood appeared on behalf of the appellant. Deputy Judge Renton took what he regarded as a jurisdictional point on the decision produced by Judge Grimmett. Having heard submissions from Ms Masood and Ms Pal, the Home Office Presenting Officer, Deputy Judge Renton found as follows:-

> "4. My decision is that there is no valid appeal before me. Although Judge Grimmett eventually granted leave to appeal, the first decision was that the application for leave to appeal was made out of time and that there was no reason for her to extend time. This is the first decision in the grant and therefore in my view takes precedence. What the Judge subsequently decided in paragraph 2 of the grant is therefore irrelevant. I took the view that it was not for me to overturn in some way the decision of Judge Grimmett not to extend time. I decided not to consider a possible review under Rules 34 and 35 of the Tribunal

> Procedure Rules 2014 as there would be no compliance with Rule 35(3). I found it significant that Judge Grimmett had not decided to review the decision in the appeal under the provisions of Rule 34."

13. Having reached that conclusion, Deputy Upper Tribunal Judge Renton held that there was "No valid appeal before against the decision of the First-tier Tribunal which is therefore not set aside".

14. Ms Masood applied on behalf of the appellant for permission to appeal to the Court of Appeal against Deputy Judge Renton's decision. In that application, she drew a distinction between what Judge Grimmett had said was her "decision" and what she had expressed as her "reasons for decision".

15. Upon receiving the application for permission to appeal to the Court of Appeal, Upper Tribunal Judge Gill considered (as she was permitted to do by rule 45(1) of the Tribunal Procedure (Upper Tribunal) Rules 2018) whether to undertake a review of Deputy Upper Tribunal Judge Renton's decision. Upper Tribunal Judge Gill decided to do so. She noted that the Upper Tribunal decision in <u>Safi and Others (Permission to appeal decisions)</u> [2018] UKUT 00388 (IAC) had been reported. The headnote of <u>Safi and Others</u> reads as follows:-

> "(1) It is essential for a judge who is granting permission to appeal only on limited grounds to say so, in terms, in the section of the standard form document that contains the decision, as opposed to the reasons for the decision.
>
> (2) It is likely to be only in very exceptional circumstances that the Upper Tribunal will be persuaded to entertain a submission that a decision which, on its face, grants permission to appeal without express limitation is to be construed as anything other than a grant of permission on all of the grounds accompanying the application for permission, regardless of what might be said in the reasons for decision section of the document."

16. Judge Gill considered that, if Deputy Upper Tribunal Judge Renton had had the benefit of the judgment in <u>Safi and Others,</u> he might have appreciated, by analogy with the reasoning in that case, the significance of the fact that the section of the standard form document that contained the decision of Judge Grimmett stated "The application is granted" as opposed to "Extension of time is refused".

17. Accordingly, Upper Tribunal Judge Gill decided to set aside the decision of Deputy Upper Tribunal Judge Renton, pursuant to rule 46 of the Upper Tribunal Rules. In so doing, Upper Tribunal Judge Gill made it plain that the significance of the distinction between the "decision" and the "reasons for decision" sections in the standard form document does not merely provide an answer to the problem that faced the Upper Tribunal in <u>Safi and Others</u> of whether a grant of permission is general or restricted, but that it is the general means whereby the significance of other deficiencies in the "reasons" part of the document ought to be addressed. In the present case, what Judge Grimmett said about extending time had to be

read in the light of the main or overarching decision that, "**In the matter of an application for permission to appeal** … **The application is granted".** Her decision was to grant permission to appeal. Since that meant time had to be extended, paragraph 1 of the "**REASONS FOR DECISION**" section of the document had to be construed in that light.

18. Judges deciding applications for permission to appeal should therefore ensure that, as a general matter, there is no apparent contradiction between the decision on the application and what is said in the "reasons for decision" section of the document. As was said in Safi and others, a decision on a permission application must be capable of being understood by the Tribunal's administrative staff, the parties and by the court or tribunal to which the appeal lies. In the event of such an apparent contradiction or other uncertainty, the parties can expect the Upper Tribunal to treat the decision as the crucial element.

19. As a result of Upper Tribunal Judge Gill's "set-aside" decision, the appellant's appeal was listed for hearing on 17 May 2019. At that hearing, the appellant appeared in person, accompanied by the sponsor. The appellant had, apparently, entered the United Kingdom shortly beforehand, with the aim of attending the hearing. He had been detained by the respondent but then released on temporary admission, with directions being set for his removal, shortly after the hearing, to Malta, which is where the appellant and the sponsor are currently living.

20. The Upper Tribunal invited submissions from the parties on whether the appellant could pursue his appeal from within the United Kingdom, having instituted the appeal whilst outside it. Written submissions on this matter were received from Mr Deller, Senior Home Office Presenting Officer, dated 31 May 2019. No submissions have been received from the appellant.

21. Mr Deller states that the respondent's position is that no prohibition on pursuing such an appeal can be derived from the 2016 Regulations. Schedule 2 to the Regulations does not import, for an appeal under regulation 36 (Appeal rights), any provision of section 92 or 104 of the Nationality, Immigration and Asylum Act 2002, which determines the place from which an appeal under section 82(1) of the 2002 Act may be brought or continued. Accordingly, the respondent submits that there is no legislative bar to the appellant's appeal continuing if the appellant is physically present in the United Kingdom whilst the appeal is pending.

22. We see no basis for taking issue with Mr Deller's submissions on this matter. Provided that the appeal is instituted when the appellant is outside the United Kingdom, his subsequent presence in the United Kingdom does not cause the appeal to lapse or otherwise become ineffective.

23. We would, however, emphasise that the present appeal is not an appeal under the 2016 Regulations against a decision to remove the appellant under regulation 23(6)(b). As a result, the appellant does not have a right to require the respondent under regulation 41 to admit him temporarily to the United Kingdom in order to make submissions in person in his appeal

(except where such appearance may cause “serious troubles to public policy or public security”: regulation 41(3)). In an appeal of the kind with which we are concerned, it is for the Secretary of State to decide whether to grant temporary admission.

24. Regrettably, on 17 May 2019, no Albanian interpreter was available to enable the appellant to speak to us in his native language. His knowledge of English was extremely limited. The sponsor was able to communicate with the appellant in Italian and, to some extent, to communicate to the Tribunal what the appellant was attempting to say. However, as the First-tier Tribunal Judge noted when the sponsor gave evidence before him, the sponsor’s own knowledge of English is somewhat limited (albeit better than that of the appellant).

25. In the circumstances, we indicated that, subject to the jurisdictional issue, we would decide whether there was an error of law in the decision of the First-tier Tribunal, such that that decision should be set aside.

26. For the reasons we have given, we are fully satisfied that there is such an error in the decision. The First-tier Tribunal Judge wrongly placed the burden of proof on the appellant and, as a result, his analysis of the evidence and findings thereon cannot stand. The First-tier Tribunal Judge also ignored a wealth of material that was before him, including extensive photographic evidence.

27. We accordingly set aside the decision of the First-tier Tribunal. We shall re-make the decision in the Upper Tribunal. To that end, the respondent has indicated that she would be prepared to grant the appellant temporary admission for the purposes of attending the resumed hearing.

Signed Date

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber