IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006527
First-tier Tribunal No:
EA/14752/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 June 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TAREK EID MOHAMED ABDEAZIZ

Respondent

Representation:
For the Appellant: Mr Terrell, Senior Presenting Officer
For the Respondent: Mr Lam, instructed by Tang & Co Solicitors

Heard at Field House on 20 June 2023

DECISION AND REASONS

1. The Secretary of State appeals, with permission granted by Resident First-tier Tribunal Judge O'Brien, against the decision of First-tier Tribunal Judge Maurice Cohen. By his decision of 27 June 2022, Judge Cohen allowed Mr Abdeaziz's appeal against the Secretary of State's refusal of his application for leave to remain as the spouse, under Appendix EU of the Immigration Rules.

2. To avoid confusion, I shall refer to the parties as they were before the First-tier Tribunal: Mr Abdeaziz as the appellant and the Secretary of State for the Home Department as the respondent.

Background

3. The appellant is an Egyptian national who was born on 23 May 1990. He states that he entered the UK unlawfully in 2013. He claimed asylum, pretending to be a Syrian national. As I understand it, his claim for asylum was refused and his appeal was dismissed because he was considered to be lying about his nationality.

4. On 5 November 2020, the appellant married Mariana Bogdan, a Romanian national who is eighteen years his senior. She was granted pre-settled status on 11 November 2020. On or about 16 September 2021, the appellant's solicitors applied for leave to remain on his behalf. The application was supported by evidence of the relationship.

5. The appellant and the sponsor underwent lengthy interviews with the respondent's officials in Hounslow on 15 October 2021. The sponsor was asked 186 questions. The appellant was asked 330. The appellant's application was refused a week later, on 22 October 2021. The respondent concluded that the marriage was one of convenience. The appellant and the sponsor were considered to have given different accounts of important aspects of their lives and their accommodation.

The Appeal to the First-tier Tribunal

6. The appellant appealed. The appeal came before the judge remotely on 18 February 2022. The appellant was represented by Mr Lam, instructed by Tang & Co Solicitors. The respondent was represented by Mr Mashood Iqbal of counsel. The appellant used an Arabic interpreter to give his evidence. The sponsor used a Romanian interpreter. The judge heard their evidence and announced his decision that he would allow the appeal.

7. The judge signed his written decision four months later, on 25 June 2022. The judge set out something of the background and the issue before him. He noted the documentary evidence before him. Under a sub-heading 'The Hearing', the judge said that he had heard submissions from both parties. Under the sub-heading 'Decision', the judge gave his reasons for concluding that the appeal should be allowed. Those reasons were, in full, as follows:

> [7] The burden of proving that the decision of the respondent was not in accordance with the law and the Regulations rests upon the appellant. The standard of that proof is the balance of probabilities. The relevant date for the consideration of the evidence is for the purposes of this appeal is the date of the hearing.
>
> [8] The respondent solely refused the application because the appellant applied under the EUSS scheme when he was not a direct family member of the sponsor and had no entitlement to do so.
>
> [9] The appellant avers that he made the application without legal advice and that he would be prejudiced if the application were not considered on the basis of extended family member.

> [10] I do not have sympathy with the arguments made on behalf of the appellant. I indicated as much at the time of the hearing. The appellant simply made an application which he was not entitled to do and had no prospect of success. The application was made under the EUSS which relates purely to direct family members. The appellant is an extended family member of the sponsor. He simply does not meet the requirements of the EUSS and his application is bound to fail under the Regulations.
>
> [11] In the light of the above, I find that the appellant's appeal under the Regulations falls to be allowed.
>
> [12] The respondent's decision is not in accordance with the law and Regulations. I therefore dismiss the appeal under the Regulations.
>
> [13] I make no anonymity direction in this case.
>
> The appeal is allowed under the Regulations.

Events Subsequent to the FtT Decision

8. It seems that the respondent initially took no action in response to this decision. The appellant's solicitors issued a pre-action letter, complaining that status had not been issued to their client. This caused the respondent to take action, and, on 11 November 2022, she completed form IAFT-4, indicating that she sought permission to appeal to the Upper Tribunal. In fact, the respondent submitted that the judge's decision should be corrected under the slip rule, since it was said to be clear from his [10] that he had intended to dismiss the appeal.

9. That application came before Resident Judge O'Brien on 23 March 2023. Noting that the respondent's application was out of time by some margin, he extended time because the merits of the application were so strong that it was in the interests of justice to do so. His provisional view was that the decision of the judge was not amenable to the slip rule and that it should instead be reviewed under rule 35 of the FtT Rules. He considered that the judge's reasons were 'so contradictory as to be incoherent and clearly incapable of explaining how he allowed the appeal, or indeed if he intended to allow the appeal.' He permitted any representations to the contrary to be made within fourteen days.

10. Representations to the contrary were made by the appellant's solicitors on 11 April 2023. Those representations noted that the judge had indicated at the hearing, having asked a good number of questions of the sponsor, that he was satisfied that the marriage was not one of convenience. The letter recorded that Mr Iqbal of counsel for the respondent had 'indicated that he had no objection on the appeal being allowed on that basis'. It was unfortunate, they submitted, that Judge Cohen had not reflected his findings 'in full or at all'. They submitted that it would be unfair for the appellant to go through another fact-finding process. They submitted that the decision 'should be referred to Judge Cohen requesting him to form a proper decision based on his findings'. The letter concluded by complaining about the extension of time which had been granted to the respondent.

11. Having considered all that was said in the letter of 11 April 2023, Judge O'Brien decided not to review the decision under rule 35. Instead, he granted permission

to appeal on 12 April 2023. He noted that the disposal suggested by the appellant's solicitors was not available to him. He reiterated his decision that it was appropriate to enlarge time and he considered that the judge's decision was arguably erroneous because of its lack of coherence.

The Hearing Before the Upper Tribunal

12. Before me, Mr Lam accepted that the judge's decision was incoherent and that there was nothing he could say to persuade me not to set that decision aside. As I said at the hearing, that concession was entirely properly made.

13. The decision is frankly quite startling in every respect. It does not identify the respondent. It states that the respondent was represented by a Presenting Officer, when it was Mr Iqbal of counsel who represented the respondent. It states that the appellant was represented by Taj Solicitors when it was Tang & Co Solicitors who represented him. After these incorrect details of the representatives, the word 'oops' appears in bold. Whether that was because the judge realised that he had made a mistake during the dictation of the decision, I do not know, but the fact remains that the decision was plainly not proofread in any way.

14. Those flaws are all apparent before one comes to the substance of the decision, which makes no sense whatsoever. The part which I have reproduced above appears to relate to an entirely different case. The judge appears in [10] to have decided to dismiss the appeal but then goes on to allow it. Quite how he did so after observing that the appellant's appeal was 'bound to fail under the Regulations', we can never know. Mr Lam therefore adopted the only stance which was properly open to him, given his obligation to the Tribunal, and conceded that the decision could not stand.

15. I turned then to the question of relief. Mr Lam submitted, as had his instructing solicitors, that the appeal should be remitted to Judge Cohen so that he could perfect his decision. That submission was firmly opposed by Mr Terrell, who noted that it would be an unusual outcome and that the only case in which he was aware of that course having been taken was *Wilson (NIAA Part 5A; deportation decisions)* [2020] UKUT 350(IAC); [2021] Imm AR 329, the circumstances of which were wholly different.

16. Mr Lam reminded me that the judge had heard the evidence and had announced his decision that he was satisfied that the marriage was one of convenience. All that was required, he submitted, was for the judge to explain in writing why he had reached that conclusion. Any such fresh decision would obviously carry a right of appeal to the Upper Tribunal and would not cause the respondent any prejudice.

17. I declined at the hearing to remit the appeal to Judge Cohen. There are two reasons why it would not in my judgment be appropriate to do so.

18. The first of those reasons concerns the passage of time. The hearing before the FtT was in February 2022 and sixteen months have passed. Where, as here, the outcome of an appeal depends largely on the credibility of the evidence given at the hearing, it would present Judge Cohen with a difficult task indeed to recall the evidence and the view he had formed of it contemporaneously. Whilst the days of rigid adherence to the three-month period identified in *Sambasivam v SSHD*

[2000] Imm AR 85 have long since passed, it is obvious that any judge would be hard pressed to recall the impression he formed of the appellant and his wife so long ago.

19. The second of those reasons concerns the conduct of the hearing before Judge Cohen. It was apparent to UTJ Lesley Smith, who gave listing instructions in this case, that there might be a need for the Upper Tribunal to listen to the proceedings before the FtT. The electronic recording of the proceedings was accordingly provided to me in advance of the hearing and I informed Mr Lam that I had listened to it. Having appeared below, he did not ask to listen to the recording, and he confirmed that the events I am about to recount corresponded with his own memory of the hearing.

20. The hearing before the judge began with a certain amount of confusion over the presence of two interpreters (one Arabic, one Romanian). Mr Lam having confirmed that two interpreters were required, the judge proceeded with the appeal.

21. There was then a preliminary discussion of the issues in the case and the evidence which would be brought to bear on those issues. Mr Lam observed during the course of these discussions that he had undertaken a statistical analysis of the answers given by the appellant and the sponsor at interview and had discovered that some 85% of the answers were materially identical. He indicated that it would be his submission that this spoke cogently to the existence of a relationship which was not a sham. For the respondent, Mr Iqbal accepted that figure but submitted that it was in fact the 15% of answers which were not materially identical which shed greater light on the relationship. He said that he would take the judge through the significance of those answers in his closing submissions.

22. The judge then heard evidence from the appellant and the sponsor. Mr Iqbal asked one question of the appellant, after which the judge took over. He asked a number of questions, most of which were about Egyptian food. He did not turn back to Mr Iqbal to ask whether he might have any additional questions. Nor, for that matter, did he ask Mr Lam whether he had any re-examination. He asked Mr Lam, instead, 'Have we got the wife there?'. Mr Lam responded that the sponsor had been in a different room (As I have already observed, this was a remote hearing) and that she had heard nothing of the appellant's answers.

23. The judge then heard oral evidence from the appellant's wife. Before she gave evidence, he said to Mr Iqbal that he would be allowing the appeal if 'the wife' gave answers consistent with what he had just heard from the appellant. He added that he 'always like[s] the appeal to come down to being about food'.

24. Mr Lam did not call the sponsor; he confirmed that he was content for the judge to 'go straight into it'. The judge then asked a series of question about religion and food, particularly Egyptian food, after which he said "This has all been very lovely and I allow the appeal. Thank you very much. I allow. Your husband can stay. Very good." This seemingly caused the sponsor to burst into tears. The judge invited the sponsor to tell her husband about the outcome. They both thanked the judge and he told them that they were welcome and dismissed them, after which he had a short discussion with Mr Lam and Mr Iqbal.

25. Contrary to what the judge said in his written decision, he heard no submissions from the representatives and he proceeded straightaway to state that the appeal was allowed. He apologised to Mr Iqbal of counsel, noting that he had not allowed him to 'say much'. Mr Iqbal said that this was 'fine'; the judge had heard the oral evidence and was satisfied with it. The judge then remarked that the sponsor sounded 'fantastic on the old Egyptian food' and that he 'wished he could go round there'. Mr Lam and the judge talked briefly about the fact that their children attended the same university before the recording comes to an end.

26. Even bearing in mind the injunction in the FtT's Procedure Rules that it should avoid unnecessary formality and seek flexibility in its proceedings (rule 2(2)(b) refers), the procedural flaws in this hearing are quite apparent. The judge did not give Mr Iqbal an opportunity to cross-examine the appellant or the sponsor and he did not hear the respondent's submissions. The latter failure is particularly important, given that Mr Iqbal had indicated at the outset that he would take the judge to the particular difficulties in the interview in his closing submissions. The judge did not hear any such submissions. Any view that he formed of the oral evidence given by the appellant and the sponsor was premature and procedurally unfair, therefore.

27. Mr Lam sought valiantly to submit before me that the procedural improprieties in the hearing had been waived by Mr Iqbal, who could have asked the judge to hear his submissions. The difficulty with that, as Mr Lam recognised, is that the judge had already made and articulated his dispositive finding. He had told the appellant and his wife that he had found them to be credible and that he allowed the appeal. He had told the sponsor that the appellant could 'stay'. Having said all of that, he could hardly have rescinded those comments and heard submissions. A decision had by that stage been made and it would not, in my judgment, have been appropriate for Mr Iqbal to ask the judge to 'rewind' the hearing.

28. The result is that the hearing before the FtT was not completed in a procedurally fair manner, whether by reference to the absence of cross-examination or the absence of submissions.

29. For all of these reasons, I do not accept Mr Lam's submission that the proper course is to remit the appeal to Judge Cohen so that he can 'perfect' his decision, whether with the assistance of the recording or otherwise. His decision was wholly flawed and followed a wholly flawed process. To adopt the expression used by Lord Wilson in *Serafin v Malkiewicz* [2020] UKSC 23; [2020] 1 WLR 2455, the outcome articulated by the judge at the end of the oral evidence was 'written in water' and however much Mr Lam and his client wish to preserve that outcome, and to avoid the cost and time which will be expended on a fresh hearing before another judge, that is the course which justice plainly requires.

30. The only proper course in these unfortunate circumstances is that the appeal will have to be reheard before another judge of the First-tier Tribunal. I recognise that this will be a source of immense frustration and upset for the appellant, but it is the only course which is properly open to me. I should perhaps add that this is evidently not a case which should be retained in the Upper Tribunal, given the flaws in the hearing before the FtT.

Notice of Decision

The decision of the FtT involved the making of an error on a point of law and that decision is set aside in full. The appeal is remitted to the FtT to be heard afresh by a judge other than Judge Cohen.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 June 2023