IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos UI-2023-004572
First-tier Tribunal No: EA/10974/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 29 February 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Robinjeet KAUR
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr M Parvar, Senior Home Office Presenting Officer
For the Respondent: Mr A Arafin of Counsel

Heard at Field House on 5 January 2024

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of First-tier Tribunal Judge Zahed promulgated on 22 August 2023 allowing an appeal against a decision of the Respondent dated 15 September 2022 refusing an application made under the European Union Settlement Scheme ('EUSS').

2. Although before me the Secretary of State for the Home Department is the appellant and Ms Kaur is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to the Secretary of State as the Respondent and Ms Kaur as the Appellant.

3. The Appellant is a citizen of India born on 2 August 1997. The application under the EUSS, and in turn her appeal, was based on a marital relationship with Mr Daniel Gulbicki, a national of Lithuania born on 10 May 1997. It was said that the Appellant, who had been studying in Cyprus, met her husband there in June 2017, and that in due course a relationship had developed. The couple married in Cyprus on 31 January 2018. The Appellant was granted a residence card in Cyprus as a 'Non-EU Citizen Family Member of a Union Citizen' as the spouse of an EEA national. The couple subsequently relocated to the UK in 2020 and cohabited until their separation in 2022.

4. On 8 March 2020 Mr Gulbicki was granted pre-settled status in the UK under the EUSS.

5. On 12 May 2020 the Appellant applied for pre-settled status as a spouse. The Respondent conducted interviews of both the Appellant and her husband on 21 March 2021. In consequence of those interviews the Appellant's application was refused on the ground that their marriage was considered to be a marriage of convenience. The Appellant lodged an appeal against this decision; however, the appeal was withdrawn prior to its hearing.

6. On 9 August 2022 the Appellant made a further application under the EUSS, again in reliance upon her relationship with Mr Gulbicki.

7. In this context it is to be noted that the Appellant issued a 'sole divorce application' on 1 August 2022. As such, it may be seen that the instant application was made after separation. However, this is not an inevitable bar to success under the EUSS, and, more particularly, nor is it determinative of the issue of marriage of convenience.

8. The application was refused for reasons set out in a decision letter dated 15 September 2022. The reasons essentially repeat reliance on the contents of the interviews conducted in March 2021 in, again, reaching the conclusion that the Appellant's marriage was one of convenience. In material part the decision letter states:

> *"The interview, which took place on 15 March 2021, has highlighted a number of inconsistencies in your and the EEA citizen's answers:*

knowledge regarding wedding witnesses

different answers regarding sponsor's child

different version of events into who was present when you and your sponsor first met

different version of events into how you travelled to interview

Living arrangements

Based on the information gathered during interview, and the inconsistencies set out above, we have reasonable grounds to suspect that your marriage with the EEA citizen is one of convenience entered into as a means to circumvent the requirements for lawful entry to or stay in the UK or Islands."

9. The Appellant appealed to the IAC.

10. The First-tier Tribunal allowed the Appellant's appeal for the reasons set out in the decision of First-tier Tribunal Judge Zahed promulgated on 22 August 2023.

11. The Respondent applied for permission to appeal, which was in the first instance refused on 19 September 2023 by First-tier Tribunal Judge Elliott. A renewed application was granted on 27 November 2023 by Deputy Upper Tribunal Judge Sills. The grant of permission to appeal is in these terms:

"It is arguable that the Judge has given inadequate reasons, and failed to take material matters into account, in finding that the Respondent has not established that the marriage was one of convenience. The Interview Summary Sheet gives a long list of reasons why the Interviewer considered the marriage to be one of convenience. The Appellant's evidence was that in the course of their marriage the Sponsor has fathered a child (born around the beginning of 2020) with another woman, and was dishonest about this in the interview, because he did not want to disclose that he was still seeing the mother of the child. Given that context, and the fact that the Sponsor did not attend the hearing, the Judge arguably failed to consider the particular issues raised by the Interviewer and referred to in the decision letter, and gave inadequate reasons for finding that the Respondent had not established that the marriage was one of convenience."

12. Although the Appellant has not formally filed a Rule 24 response, Mr Arafin provided a Skeleton Argument on the day of the hearing resisting the challenge to the decision of the First-tier Tribunal.

Consideration of the 'error of law' challenge

13. Before the First-tier Tribunal the burden of proof was on the Respondent to demonstrate that the Appellant's marriage was a marriage of convenience, that is to say that it was a marriage entered into for the sole aim of circumventing the rules on entry and residence. (This latter test is reflected in the wording of the decision letter.) The First-tier Tribunal Judge duly directed himself: see paragraphs 6 and 20.

14. At first sight, it might be thought that a marriage entered into in 2018 outside the UK, with no entry to the UK until 2020, is unlikely to have been a marriage entered into with the aim of circumventing any entrance and residence requirements in respect of the UK. However, bearing in mind the context of EU rights, and the grant of a permit in Cyprus, it seems to me as a matter of principle that a marriage entered into with the sole aim of circumventing the rules of entry and residence in a different EEA state is appropriately characterised as a marriage of convenience even if its significance in the context of the UK only manifests subsequently.

15. Further in this context it seems to me as a matter of principle that the grant of a residence card in Cyprus is not binding on a UK decision-maker when considering an EUSS application. In this context I note the comment at paragraph 18 of Mr Arafin's Skeleton Argument to the effect that the authorities in Cyprus "*had conducted their checks and found the relationship to be genuine and subsisting*": however, there is no evidence of what, if any, specific checks were conducted in Cyprus. Again, as a matter of principle, the Respondent was entitled to conduct an enquiry by way of interview and reach her own conclusions. The Respondent was not in any way estopped by reason of the issuing of a permit in Cyprus.

16. In any event, in this context, it was not the approach of the First-tier Tribunal Judge that the decision in Cyprus was determinative, and there is no cross-appeal or other challenge by the Appellant to the approach of the First-tier Tribunal in this regard: it is apparent that the Judge considered it a relevant consideration but not determinative – e.g. see paragraph 15. Instead, the Judge sought to analyse the Respondent's case as presented by reference to the interviews of March 2021.

17. It is the Judge's analysis of such interviews that is the subject of the challenge now pursued by the Respondent.

18. Before me Mr Parvar amplified on the "*long list of reasons why the Interviewer considered the marriage to be one of convenience*" identified in the grant of permission to appeal, and compared that with what was submitted to have been an analysis by the Judge that failed to consider all relevant matters.

19. Before further discussion, it is convenient and appropriate to make reference to the 'Interview Summary Sheet' mentioned in the grant of permission to appeal, and its availability before the First-tier Tribunal.

20. The Summary Sheet is a five-page document split into columns. There is in substance a little over two A4 pages-worth of closely typed analysis of the interviews of the Appellant and her then husband. It is detailed, thorough and competent and appears adequately to reflect the contents of the interviews themselves. It is consistent with – and no doubt informed - the identification of the five areas of concern expressed in the decision letter. The same five areas were specified in the earlier decision letter of 25 March 2021.

21. However, for reasons that are unclear, it was not included in the final version of the Respondent's bundle that was before the First-tier Tribunal.

22. The first version of a Respondent's bundle, seemingly filed on 25 November 2022, included the Summary Sheet at Annex I. However, that version in its coversheet referred to a decision of 25 March 2021 to refuse to grant permanent residence. A certificate of application within the bundle is dated 12 May 2020, whereas the instant application is the later one of 9 August 2022 and the appeal is against the decision of 15 September 2022. The bundle is prepared as if it were in the context of an appeal against the previous EUSS decision. This irregularity resulted in Directions being issued by the Tribunal on 26 April 2023 for the Respondent to file and serve a new bundle relating to the decision of 15 September 2022. The second and final version of the Respondent's bundle, under cover of letter dated 17 May 2023, does not include the interview summary sheet, although it does include the written transcripts of the interviews of the Appellant and her then husband (Annex L (wrongly labelled as Annex M in the coversheet) – running to some 40 pages).

23. Whilst the original version of the bundle remained on the digital electronic CCD file it had, of course, been overtaken by the filing of the second version of the bundle and to that extent is not something that it might have been reasonable to expect the First-tier Tribunal Judge to consider. As such, the Summary Sheet was not formally filed as part of the Respondent's evidence before the First-tier Tribunal; certainly, the Judge makes no reference to it; it seems to me more likely than not that he was not aware of it; however he is not to be criticised for this.

24. It is not clear that Deputy Upper Tribunal Judge Sills in granting permission to appeal was aware of this subtlety in the case. However, this is not something that undermines the substance of the Respondent's challenge.

25. Nonetheless, it does mean that I have had to give very particular consideration to how, if at all, the contents of the Interview Summary Sheet should inform my consideration of the case at the 'error of law' stage.

26. As noted above, it cannot be said that the First-tier Tribunal Judge fell into any error for disregarding the Summary Sheet: it was not formally before him. There has been no formal application before me to admit the Summary Sheet as an item of evidence. Ultimately Mr Parvar invited me to have regard to it in the context of the error of law hearing as if it were akin to being a part of a written submission before the Upper Tribunal in support of the challenge to the decision of the First-tier Tribunal – a submission highlighting aspects of the interviews, and thereby supportive of a submission that the Judge had failed to engage with aspects of the interviews, or otherwise provide evidence-based reasons for concluding that the contents of the interviews did not support the Respondent's case and were in the main part "*entirely consistent as to the majority of the answers*".

27. Given that in substance Mr Parvar could have essentially repeated the contents of the Summary Sheet as part of his oral submissions, it seemed to me that this was a sensible approach. Moreover, as further noted below, it is apparent that the Appellant and her advisers had previously had sight of the Summary Sheet – at least in the context of the filing of the first bundle in the instant appeal, and probably in the filing of documents in the earlier appeal that was withdrawn prior to the hearing: as much is evident in the drafting of the Appellant's witness statement which addresses matters that are found in the Summary Sheet that are not found in the decision letter. In such circumstances I could see no procedural unfairness in allowing Mr Parvar to advance the substance of the contents of the Summary Sheet as if they were part of his oral submission.

28. I turn to the First-tier Tribunal's approach to the appeal.

29. The First-tier Tribunal Judge had regard to the oral evidence of the Appellant. The Judge noted the non-appearance of Mr Gulbicki but considered that this was in substance explained by the circumstances claimed in respect of the breakdown of the marital relationship and as such did not place any specific adverse weight, or draw any adverse inference from, Mr Gulbicki's non-participation in the proceedings. Contrary to the pleading in the Grounds, in my judgement there was nothing intrinsically wrong in such an approach, and nor can it be said as a matter of principle that "*the Appellant's evidence alone is insufficient to demonstrate that the marriage is not one of convenience*": there is no principle that evidence uncorroborated by another witness cannot be accepted; in any event such a pleading overlooks that the burden of proof was on the Respondent.

30. The Judge addressed the contents of the interview at paragraphs 11-12 in these terms:

> "*11. I have carefully looked at the very long interview with the appellant and her sponsor on 15th March 2021. I note that the interview record runs to 16 pages and that the parties are asked around 250 questions.*
>
> *12. Out of the 250 questions asked of the appellant and EEA sponsor I note that the appellant was able to find 5 inconsistencies between them. However, I find that the appellant and his EEA sponsor wife were entirely consistent as to the majority of the answers including when and where they first met, the fact that the appellant has 2 tattoos, how long they lived in Cyprus, how many witnesses there were at their marriage ceremony in Cyprus, that the appellant lived in London with an uncle; that the sponsor came to appellant's house in London and stayed the night before going to the marriage interview the next day.*"

31. The Judge further commented: "*I find that the appellant and his [sic.] EEA sponsor have answered 90% of the questions correctly and consistently and that the respondent has sought to find any discrepancy in order to find the marriage as being a sham*" (paragraph 14). In respect of specific discrepancies the Judge said this:

> "*16. I accept the explanation by the appellant that she and her husband lived separately during the weekdays because her EEA sponsor lived near his employment but that they would see each other over the weekends. I accept the appellant's account of how they met in Cyprus and find that they were living together for a year in Cyprus before they came to the United Kingdom. I accept the appellant's evidence that at the time they got married that had not intended to go and live in the United Kingdom.*
>
> *17. I do not find that the EEA sponsor's not knowing the names of the wedding witnesses in 2017 some 5 years ago from the date of interview amounts to sufficient evidence to prove that the marriage is one of convenience. I note that the appellant was able to name correctly at least one of the witnesses.*
>
> *18. I accept the appellant's explanation as to why there were different answers regarding the EEA sponsor's child. I find that discrepancy amounts to sufficient evidence to prove that the marriage is one of convenience.*
>
> *19. I find that there was confusion as to who drove and in what car the parties arrived in London the night before the interview and then the travel the day after to the interview. I find that confusion explains why there were different version of events of how the appellant*

travelled to interview. I find this does not amount to sufficient evidence to prove that the marriage is one of convenience."

32. I accept that there is substance to the criticisms made of these passages. In particular I note the following:

(i) The interview record with Mr Gulbicki comprises just over 20 pages; the interview with the Appellant is a further 20 pages. In the circumstances it is unclear to what the Judge was referring as being a 16-page interview record.

(ii) The notion of a possible error here and possible confusion with a different case is reinforced by the Judge's reference to "*the appellant and his EEA sponsor wife*" (paragraph 12, and also see similarly at paragraph 14): it is the Appellant who was being sponsored by an EEA husband.

(iii) The Judge's reference to 5 inconsistencies in 250 questions does not equate with the comment that 90% of the questions were answered correctly. More particularly and in any event either metric significantly underplays and mis-characterises the extent of the discrepancies and differences.

(iv) The Respondent did not identify a mere 5 inconsistencies between the respective interviews of the Appellant and her then husband. Rather, 5 *areas* of inconsistency were identified. A due and proper reading of the interview record quickly reveals that in some such areas there was a series of differences and implausibilities. As such there were considerably more than five inconsistencies. The apparent misconception on the part of the Judge suggests an absence of due and proper reading of the interviews, and as such an absence of due and proper engagement with the evidence and - perhaps more particularly - the case as being put by the Respondent.

(v) Such a notion is reinforced by a consideration of, for example, what the Judge said about the Appellant's tattoos. (See further below.)

(vi) The recitation of the acceptance of aspects of the Appellant's evidence at paragraph 16 does not in itself engage with the nature of any of the discrepancies apparent on a reading of the interview records, or otherwise explain why such discrepancies were not considered to be relevant.

(vii) The Judge was in factual error in stating that the passage of time between the wedding and the interview was "*some 5 years*", and was in error with regard to the year of the wedding. The wedding did not take place in 2017 but in January 2018; the interviews were conducted in March 2021 – 3 years and 2 months later.

33. I have identified above that the Judge's observations in respect of the Appellant's tattoos is illustrative of a lack of due regard to the interview records. Before discussing this in more detail, it is worth noting that 'tattoos' did not feature as an express area of discrepancy in the decision letter. It did feature, however, in the Interview Summary Sheet. It was a matter addressed by the Appellant in her witness statement. To this extent it is more than a reasonable inference that the Appellant had had sight of the Interview Summary Sheet in preparing her appeal, even if it did not ultimately find its way into the final version of the Respondent's bundle. Be that as it may, the Judge's observation that the Appellant and her then husband "*were entirely consistent*" in respect of "*the fact that the appellant has 2 tattoos*" fails to engage with the actual evidence.

34. The Summary Sheet helpfully articulates the nature of the Respondent's concerns in respect of this issue. Approaching the Summary Sheet, as discussed above, as if it were merely part of Mr Parvar's oral submission, I note that the Respondent emphasised the following as emerging from the interviews:

> "*The applicant has a tattoo on her right arm showing a stylised depiction of a queen. The applicant has a small tattoo on her left wrist – a heart with the words 'mum and dad' inside of it. The sponsor knew that his wife had two tattoos and the locations but did not know what they looked like; he did not know at all about the tattoo on the right arm, and initially thought the tattoo on the left wrist was a bird and a flower, before saying that he did not know. The sponsor added that this was because he did not like tattoos. It is in no sense credible that a genuine partner could not know what their spouse's two tattoos were, whatever their feelings regarding tattoos.*"

35. The Appellant's witness statement of 1 March 2023 at paragraph 11 under the subheading 'Tattoo' states:

> "*I was asked question whether I had tatoo to which I responded yes I have two Tatoos. We also had a fight over these as he does not like Tatoos. My husband responded the same that I do have two tatoos and that he doesn't like tatoos.*"

36. It may be seen that the Appellant's witness statement does no more than confirm that she and Mr Gulbicki were consistent as to the number of tattoos, and were consistent in that he did not like tattoos. However, this falls very short of addressing the particular concerns as to the apparent absence of reasonably expected intimate knowledge that emerge from a reading of the interviews.

37. The Judge without more, and in particular without any specific reference to the actual contents of the interviews, appears to have accepted the substance of the Appellant's witness statement as a complete answer to any possible concern in this area: "*entirely consistent as to… the fact that the appellant has two tattoos*". It is as if the Judge thought that any difficulty in respect of the answers given at interview in respect of the tattoos was confined to a discrepancy as to number.

38. Much the same concern about the adequacy of the Judge's understanding of the discrepancies and credibility gaps emerging from the interviews arises from a careful consideration of other aspects grossly oversimplified in the Judge's analysis – in particular, for example, the respective accounts offered at interview as to the journey to the interview, which is not remotely or adequately recognised or addressed by the Judge at paragraph 19. The extent of the discrepancies cannot reasonably be explained by mere and vague reference to 'confusion'; very particular and specific details were offered by each of the Appellant and Mr Gulbecki such that the fundamental differences between them could not possibly be reconciled on the basis of confusion. Moreover these were events that occurred immediately before the interview and could not be said to have become clouded over the passage of time.

39. I am afraid that in all the circumstances I am left with the impression that the Judge – who it is to be recalled wrongly identified the number of pages in the interviews – has not actually read the interviews. Alternatively, if the Judge has read the interviews, his decision proceeds on an apparent failure to identify and understand the extent of the discrepancies and credibility gaps, or to otherwise provide reasons demonstrating adequate engagement with such matters.

40. In my judgement the failure adequately to demonstrate engagement with the evidence relied upon by the Respondent, or to offer any adequate reasons in respect of any such engagement, amounts to an error of law that is material in that it is in substance a failure to engage with the case of one of the parties. The decision of the First-tier Tribunal must be set aside accordingly.

41. Given the nature of the error of the First-tier Tribunal, there has in substance not been a full and proper trial of the issues: therefore the appropriate forum for remaking the decision in the appeal is the First-tier Tribunal. As much was common ground between the representatives before me.

42. I do not propose to make any formal Directions for the onward case management of this appeal: Standard Directions will likely suffice, but that is a matter now for the First-tier Tribunal. I merely note that the

Respondent is now aware that the Interview Summary Sheet has not been formally filed as part of the evidence in the proceedings before the First-tier Tribunal, and may wish to remedy this accordingly.

Notice of Decision

43. The decision of the First-tier Tribunal is vitiated for material error of law and is set aside.

44. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Zahed or First-tier Tribunal Elliott.

Ian Lewis

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

23 February 2024