UT Neutral citation number: [2022] UKUT 00300 (IAC)

Elais (fairness and extended family members)

Upper Tribunal
(Immigration and Asylum Chamber)

Heard at Field House

THE IMMIGRATION ACTS

Heard on 17 May 2022
Promulgated on 28 September 2022

Before

UPPER TRIBUNAL JUDGE RIMINGTON
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAMADAN MAHER HAFEZ MOHAMED ELAIS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms S. Cunha, Senior Home Office Presenting Officer
For the Respondent: Mr P. Richardson, Counsel, instructed by Gulbenkian Andonian Solicitors

The fairness issue:

1. *In order to conduct a fair hearing, cross-examination should be facilitated by the judge without undue interruption.*

2. *Where a transcript or recording is available of a hearing at which it is alleged that the proceedings were unfair, it is less likely to be appropriate to seek an account from the judge as to what took place.*

The extended family member issue:

3. *Where:*

    a. *an application for a residence card as the durable partner of an EEA national under the Immigration (European Economic Area) Regulations 2016 was made or refused before the end of the "implementation period" on 31 December 2020 at 11.00PM, and*

    b. *the putative durable partners marry after the end of the implementation period,*

    in any appeal against the refusal of the application, the post-implementation period marriage is not capable of amounting to a "new matter" for the purposes of an appeal under the 2016 Regulations and is, at its highest, simply further evidence as to existence and durability of the claimed relationship between the appellant and the EEA sponsor.

4. *Where such an appellant relies on a post-implementation period marriage to demonstrate the durability of the relationship upon which an application for a residence card as a durable partner was based, whether that marriage is genuine and subsisting may be a relevant issue for the tribunal to determine. The established EU law jurisprudence concerning marriages of convenience does not apply to that assessment.*

DECISION AND REASONS

1. This appeal concerns whether the hearing before the First-tier Tribunal was unfair and, consequently, the approach to be adopted when considering grounds of appeal making such allegations.

2. This is the appeal of the Secretary of State against a decision of First-tier Tribunal Judge Knight ("the judge") dated 21 January 2022 allowing an appeal by the appellant against a decision of the Secretary of State dated 24 December 2020 to refuse his application for a residence card as the durable partner of an EEA national, as defined by regulation 8(5) of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). For convenience we will refer to the appellant before the First-tier Tribunal as "the appellant" in these proceedings.

3. Allegations of the sort advanced by the Secretary of State in these proceedings will always be sensitive, regardless of the party raising them. The grounds of appeal require this tribunal to proceed with the utmost care. We have had the benefit of a full transcript and recording of the hearing before the First-tier Tribunal and witness statements from the advocates involved, to which we shall turn in due course.

FACTUAL BACKGROUND

4. The appellant is a citizen of Egypt born on 4 April 1990. He entered the UK clandestinely on 27 September 2016 under a different name. He claimed asylum but the claim was treated as withdrawn. On 23 November 2020, he applied for a residence card as the durable partner of Camelia Gradila ("the sponsor"), a citizen of Romania. The application said that their relationship began in September 2019, that they married in an Islamic ceremony in November, and began cohabiting in December.

5. In the refusal decision, the Secretary of State said that she was not satisfied that the appellant and the sponsor were in a durable relationship. The evidence of their cohabitation was "very recent". There was no evidence of joint finances, commitments or responsibilities. The photographs they had submitted did not take matters any further. The Islamic marriage certificate could not be used as evidence of their relationship. The sponsor was said to have assisted her former husband to make an application for a permanent residence card, which had been issued to the address that she claimed to cohabit with the appellant, in May 2019.

The appeal before the First-tier Tribunal

6. The appeal was heard on 18 January 2022 at Taylor House. The appellant was represented by Ms S. Saifolahi, of counsel. The Secretary of State was represented by Mr F. Fazli, also of counsel. The appellant participated in the hearing through an Arabic interpreter, and the sponsor through a Romanian interpreter. The hearing was conducted remotely, as was then necessary to guard against the spread of Covid-19. Those conditions clearly required a degree of procedural choreography on the part of the judge, which he approached with evident care.

7. On 4 May 2021, the appellant and sponsor had married in a civil ceremony, for which they had been waiting for permission for some time. By the time of the hearing before the First-tier Tribunal, the appellant and sponsor appeared before the judge as husband and wife. The impact of the marriage between the appellant and the sponsor was the subject of lengthy discussion at the outset of the hearing. The parties advanced competing submissions as to whether the marriage was capable of being regarded as a "new matter", and thereby potentially falling within the jurisdiction of the tribunal, subject to the consent of the Secretary of State, or whether it was simply (at its highest) additional evidence of the durability of the relationship between the appellant and the sponsor. Ms

Saifolahi adopted the former position; Mr Fazli, the latter. The judge ruled in favour of the Secretary of State. There has been no challenge to that approach, but in light of the discussion at the hearing, it is necessary to outline the discussion in more depth.

8. The context for the ruling is section 85 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), as applied to appeals under the 2016 Regulations by Schedule 2(1). Section 85 provides that the tribunal may consider any matter which it thinks is relevant to the substance of the decision under appeal, including a matter arising after the date of the decision. But under section 85(5), the tribunal must not consider a "new matter" unless the Secretary of State has given the tribunal consent to do so. A "new matter" must constitute a ground of appeal specified in section 84 of the 2002 Act or an "EU ground of appeal" under the 2016 Regulations, the definition of which we set out below.

9. The appellant's position was that his civil marriage was a "new matter" which, subject to the Secretary of State providing her consent, could have been considered by the tribunal. Family members by marriage enjoyed more preferential rights than durable partners under the 2016 Regulations, which is no doubt why the appellant sought to rely on it in the appeal.

10. The discussion at the hearing concerning the new matter issue was complex and wide-ranging. The original application to the Secretary of State, and the Secretary of State's decision, were before the "implementation period" under the EU withdrawal agreement came to an end on 31 December 2020 at 11.00PM. By contrast, the marriage took place on 4 May 2021, once the UK's withdrawal from the European Union had completed. The appeal had been pending since before the implementation period came to an end, yet the hearing (and, of course, the marriage) took place after that date. The discussion before the judge encompassed the EU Settlement Scheme, the preserved rights of appeal, and the available grounds of appeal. Ms Saifolahi alluded to correspondence, which we have not seen but of which the judge appeared to be aware, between the Secretary of State and an immigration practitioners' association concerning durable partners who were unable to marry before the end of the Implementation Period.

11. The judge gave a ruling on the new matter issue at the hearing, holding that the marriage was only relevant insofar as it was evidence of the appellant and sponsor being in a durable relationship at the relevant times. He summarised his reasons at [44] and [45] of the decision.

12. In the course of legal argument on the new matter issue and in the course of the ruling itself, but before hearing any evidence, the judge made a number of observations about the potential impact of the marriage, which the Secretary of State submits demonstrate that he approached the appeal with a closed mind. We have had the benefit of a full transcript of the proceedings. For present purposes, we highlight the following remarks, to which we have added emphasis:

a. In response to Ms Saifolahi's submissions that the marriage was capable of being a "new matter", the judge said, at page 8 of the transcript:

> "I entirely see how it's *very compelling* evidence that they were durable partners."

b. Following Ms Saifolahi's reference to the matters apparently raised in the correspondence between the immigration practitioners' association and the Secretary of State:

> "…the marriage is, is *compelling evidence* of the durable partnership…"

c. In the course of his ruling on the new matter issue the judge said:

> "it seems to me that the marriage is *extremely compelling evidence* that there was a durable partnership at the relevant time…"

13. Following the judge's ruling, Mr Fazli summarised the respondent's position in the appeal in the following terms:

> "…the principal issue that the respondent takes with the appellant's application is a lack of evidence that they were durable partners at the time of the application…"

14. Against that background, the hearing progressed to evidence. The appellant adopted his witness statement and was cross-examined by Mr Fazli. The cross-examination covered the circumstances in which the appellant and sponsor met, when cohabitation commenced, and the timing of their Islamic marriage (*nikah*).

15. We have included a transcript of the relevant exchanges of the appellant's cross-examination in the **Annex**. In summary, the judge intervened on a number of occasions during Mr Fazli's cross-examination of the appellant. When the appellant was challenged by Mr Fazli as to the timing of his claimed cohabitation with the sponsor, the judge interjected to say that there were two interpretations of the appellant's answers to the questions posed, and that Mr Fazli's line of questioning meant that he had "assumed one meaning and then interpreted the appellant's answers as being inconsistent". Mr Fazli moved on to ask questions about the wedding ceremony. As may be seen from the transcript in the Annex, the judge prevented Mr Fazli from asking questions on that basis, asking how such questions were relevant to the durability of the relationship. The judge said that, if the Secretary of State was not alleging that the marriage was a "sham relationship", it followed that questions as to who attended the marriage were not relevant. To paraphrase Mr Fazli's response, he said he sought to investigate whether the marriage was genuine and subsisting, in order to establish whether the couple were in a durable relationship for the purposes of the Regulations. The judge retorted that

he had “no idea” how that was relevant “unless you’re alleging sham marriage”. Mr Fazli moved on.

16. Mr Fazli went on to cross-examine the sponsor, with fewer interventions from the judge. Both parties made submissions. The judge allowed the appeal at the hearing.

The decision of the First-tier Tribunal

17. The judge set out the applicable law from [4] to [10], although in doing so quoted Article 3(2)(a) of Directive 2004/38/EC (“the Directive”) and regulation 8(2) of the 2016 Regulations, which concern “other family members” through dependence or household membership. The judge did not cite, or otherwise direct himself on, Article 3(2)(a) of the Directive and regulation 8(5), which concern durable partners.

18. At [11] to [13] he addressed the relevant transitional provisions which preserved the right of appeal in these proceedings, in light of the United Kingdom’s withdrawal from the European Union. Having set out the parties’ respective cases, the evidence and the submissions, the judge set out the reasons he relied on for having allowed the appeal at the hearing. At [39], he said:

> “It is useful for me to start by considering what is not in dispute. That is the identity of the Sponsor, the relationship to the Appellant, the genuineness of their marriage and relationship, the fact that they previously underwent an Islamic marriage ceremony, and their attempts to have children together. I note that the Respondent is fundamentally wrong when she says that the Islamic marriage is not evidence on which they can rely. It is. Indeed, it is strong evidence of the durability of the relationship at the time of the application, a year after the ceremony.”

19. At [40], the judge concluded that the Secretary of State had failed to provide any evidence concerning the assertion in the refusal letter that the sponsor had assisted her ex-husband to obtain resident documentation. The respondent was “fundamentally wrong” by stating that the Islamic marriage was not evidence the appellant could rely on, concluding that it was strong evidence of the durability of the relationship at the time of the application, which had been a year after the (Islamic) ceremony.

20. He concluded at [41] that there was “nothing” that contradicted the accounts of the appellant and sponsor. The documentary evidence and they needed no more evidence to support their case. The barriers faced by those without leave to secure official documentation of the sort expected by the Secretary of State, for example bank statements or tenancy agreements, meant that “the fact that there is not more such evidence is adequately explained.” He concluded that the Secretary of State had:

> “…failed to have regard to her own policies and the legislation created as part of the hostile environment that she has intentionally brought about.”

The judge found that the appellant and sponsor had told the truth, observing that they were honest, reliable and forthright witnesses, in relation to whom he accepted the entirety of their accounts. The judge allowed the appeal.

Grounds of appeal

21. The sole ground of appeal is that it was a procedural irregularity for the judge to prevent the cross-examination of the appellant and the sponsor on matters relevant to disputed issues, namely factors going to the genuineness of the appellant's claimed marriage relationship with the sponsor. The grounds contend that judge's conduct was indicative of a closed mind and gave the appearance of bias, through approaching disputed issues as though they were settled in favour of the appellant. The grounds of appeal were accompanied by Mr Fazli's attendance note, to which we shall turn shortly.

22. Permission to appeal was granted by First-tier Tribunal Judge Lester.

23. On 11 March 2022, Judge Stephen Smith informed the parties that the Upper Tribunal would take steps to obtain a recording of the hearing with a view to the parties being able to listen to it, or be provided with a transcript. The directions also required Mr Fazli to provide a witness statement, pursuant to *BW (witness statements by advocates) Afghanistan* [2014] UKUT 00568 (IAC) at (ii) of the Headnote. Mr Fazli provided a witness statement dated 26 March 2022.

24. The parties were provided with a full transcript of the hearing on 29 March 2022, along with detailed directions from Mr Asim Hussain, a lawyer of the Upper Tribunal acting under delegated powers, for the service of a rule 24 notice (by the appellant before the First-tier Tribunal) and a skeleton argument, by the Secretary of State, along with any applications under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. The appellant applied for permission to rely on a witness statement from Ms Saifolahi dated 4 April 2022. We admit both statements under rule 15(2A).

THE LAW

The appearance of bias and preliminary judicial indications

25. The grounds of appeal allege bias and unfairness. As the Supreme Court held in *Serafin v Malkiewicz* [2020] UKSC 23 at [38], it is important to distinguish the two; although they overlap, they are distinct. A hearing may be unfair for any number of reasons, including as a result of the conduct of the judge, without there being any suggestion of actual or apparent bias. If there is the appearance of, or actual, bias that will have rendered the hearing unfair, but the primary error of law will be the actual or apparent bias.

26. The test for establishing unfairness differs from determining the presence of the appearance of bias. Whether a hearing was fair is an objective judicial question; either the hearing was fair, or it was not. By contrast, the question of whether there is the appearance of bias is determined by asking whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased: *Porter v Magill* [2001] UKHL 67 at [103] per Lord Hope.

27. The working definition of bias accepted by the Supreme Court in *Serafin* was taken from *Bubbles and Wine Ltd v Lusha* [2018] EWCA Civ 468, in which Leggatt LJ said, at [17]:

> "Bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case."

Bias and preliminary judicial indications

28. As to the propriety of a judicial preliminary indication and its relationship to the appearance of bias, in *Arab Monetary Fund v Hashim* (1993) 6 Admin LR 348, Sir Thomas Bingham MR held:

> "…the English tradition sanctions and even encourages a measure of disclosure by the Judge of his current thinking. It certainly does not sanction the premature expression of factual conclusions or anything which may prematurely indicate a closed mind. But a Judge does not act amiss if, in relation to some feature of a party's case which strikes him as inherently improbable, he indicates the need for unusually compelling evidence to persuade him of the fact. An expression of scepticism is not suggestive of bias unless the Judge conveys an unwillingness to be persuaded of a factual proposition whatever the evidence may be."

29. In *Harada Ltd v Turner* [2001] EWCA Civ 599 at [31], Pitt LJ identified the importance of preliminary judicial indications in directing the parties to the focus on the issues of greatest concern to the judge:

> "Provided a closed mind is not shown, a judge may put to counsel that, in the view of the judge, the counsel will have difficulty in making good a certain point. Indeed, such comments from the Bench are at the very heart of the adversarial procedure by way of oral hearing which is so important to the jurisprudence of England and Wales. It enables the party to focus on the point and to make such submissions as he properly can."

30. The headnote to *Sivapatham (Appearance of Bias)* [2017] UKUT 293 (IAC) summarises the relevant principles in these terms:

> "(i) Indications of a closed judicial mind, a pre-determined outcome, engage the appearance of bias principle and are likely to render a hearing unfair.
>
> (ii) Provisional or preliminary judicial views are permissible, provided that an open mind is maintained."

31. In summary, the common law tradition of the courts and tribunals in England and Wales (and, indeed, the United Kingdom as a whole) values dialogue between the parties and the Bench. The purpose of preliminary indications is not for the judge to indicate a closed judicial mind, or a predetermined outcome. Rather it is to enable the parties to focus on the issues of greatest concern to the judge. Preliminary indications may enable the parties to make submissions on the essential issues that, in the judge's preliminary view, lie at the heart of the case, and which may present the greatest obstacles to a party's case. Provided a judge maintains an open mind to the conduct of the hearing and the determination of the issues, there can be no objection to the judge giving an indication of the tribunal's preliminary or provisional judicial view.

The fairness of a trial

32. In *Serafin*, the Supreme Court held that the leading authority on inquiry into the unfairness of a trial remains the judgment of the Court of Appeal in *Jones v National Coal Board* [1957] 2 QB 55. Mrs Jones' husband had been killed in a mining accident. She brought proceedings against the National Coal Board. Her claim was dismissed at first instance. She appealed on the basis that the judge, Hallett J, had adopted an overly interventionist approach to cross-examination. He prevented questions from being put on behalf of Mrs Jones to the defendant's witnesses and took over large parts of the examination himself. The Coal Board made similar complaints to the Court of Appeal. Denning LJ said, at page 65, that:

> "…such interventions should be as infrequent as possible when the witness is under cross-examination. It is only by cross-examination that a witness's evidence can be properly tested, and it loses much of its effectiveness in counsel's hands if the witness is given time to think out the answer to awkward questions; the very gist of cross-examination lies in the unbroken sequence of question and answer. Further than this, cross-examining counsel is at a grave disadvantage if he is prevented from following a preconceived line of inquiry which is, in his view, most likely to elicit admissions from the witness or qualifications of the evidence which he has given in chief."

33. It is often said that a judge must not "descend into the arena". The phrase is said to find its origins in this context in *Yuill v Yuill* [1945] P. 15, 20 per Lord Greene MR. Denning LJ said in *Jones*, at page 65:

> "If a judge, said Lord Greene, should himself conduct the examination of witnesses, he, so to speak, descends into the arena and '*is liable to have his vision clouded by the dust of conflict*'." (emphasis added)

34. The phenomenon of judicial vision being "clouded by the dust of conflict" was illustrated in *London Borough of Southwark v Kofi-Adu* [2006] EWCA Civ 281. In contrast to *Jones*, the focus of the court was less on whether

the judge's conduct prevented the parties fully from participating in the proceedings (although the court was highly critical of the trial judge's attitude towards one of the barristers), but rather concerned the judge's descent into the arena through extensive participation in cross-examination, which impaired his ability to perform his role properly. The court found that certain of the judge's findings were irrational. He failed to take into account the oral evidence that had been given, despite his own extensive participation in cross-examination, and had based his findings almost entirely on the written evidence, with minimal if any regard for what had happened during the trial. At [146], Jonathan Parker LJ identified the consequences from a judge falling into such error in these terms:

> "It is, we think, important to appreciate that the risk identified by Lord Greene MR in *Yuill v. Yuill* does not depend on appearances, or on what an objective observer of the process might think of it. Rather, the risk is that the judge's descent into the arena (to adopt Lord Greene MR's description) may so hamper his ability properly to evaluate and weigh the evidence before him as to impair his judgment, and may *for that reason* render the trial unfair…" (emphasis supplied)

35. In *Serafin*, the judge's extensive interventions aimed at the Claimant litigant in person were characterised by the Supreme Court as a "barrage of hostility", which had been "fired by the judge in immoderate, ill-tempered and at times offensive language". In turn, that meant that the judge did not allow the claim to be properly presented, and that he could not fairly appraise it, thereby rendering the trial unfair: [48].

36. One facet of a fair trial is the exercise of judicial restraint during the taking of evidence. In *WA (Role and duties of judge) Egypt* [2020] UKUT 127 (IAC), the first paragraph to the headnote states:

> "During the taking of evidence a judge's role is merely supervisory."

At [6], the Presidential Panel gave further practical guidance as to the conduct of the judge during evidence being taken:

> "…while evidence is being taken, [a judge] should limit himself to making sure that the evidence is given as well as may be. He should be alert to the witness's welfare; he should check that there are no obvious problems with interpretation. He will ensure that there are no undue interventions from the other side, reminding representatives, if necessary, that they will have an opportunity in due course to ask their questions. When both sides have finished their examination, he may ask questions of his own by way of clarification; if he does, he should give both sides an opportunity to ask any further questions arising from his."

37. In summary, interventions that stray beyond the merely supervisory role of a judge during the taking of evidence risk a judge descending into the arena and so clouding their vision by the dust of conflict.

THE 2016 REGULATIONS

Durable partners

38. Regulation 8 of the 2016 Regulations defines the term "extended family member" of an EEA national to include a party to a durable relationship:

> "(5) The condition in this paragraph is that the person is the partner (other than a civil partner) of, and in a durable relationship with, an EEA national or the child (under the age of 18) of that partner, and is able to prove this to the decision maker."

Preserved rights and grounds of appeal under the 2016 Regulations

39. The 2016 Regulations were revoked by paragraph 2(2) of Schedule 1 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 with effect from 31 December 2020, at the conclusion of the "implementation period" for the UK's withdrawal from the EU. The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 ("the 2020 Regulations") make provision for certain provisions of the 2016 Regulations to continue to apply, notwithstanding their revocation, in relation to appeals against EEA decisions that were taken before "commencement day", that is the day upon which the 2016 Regulations were revoked: see Schedule 3, paragraph 5(1)(c). For such appeals, certain provisions of the 2016 Regulations continue to apply, with the specified modifications, in accordance with paragraph 6 of Schedule 3. The preserved provisions under paragraph 6 include regulation 8 of the 2016 Regulations (extended family members): see paragraph 6(1)(g).

40. The appeals provisions of the 2016 Regulations are also preserved by paragraph 6(1). Immediately before their revocation, Schedule 2 to the 2016 Regulations made provision for appeals to the First-tier Tribunal to be brough on the basis of an "EU ground of appeal", which was defined as being a contention that the decision under challenge:

> "breaches the appellant's rights *under the EU Treaties* in respect of entry to or residence in the United Kingdom…" (emphasis added)

41. Under the modifications made by the transitional provisions in the 2020 Regulations, an appeal brought pursuant to the preserved provisions of the 2016 Regulations may only now be brought on the basis that the ground of appeal breaches the rights of the appellant under the EU Treaties as they applied to the United Kingdom pursuant to Part 4 of the EU withdrawal agreement. Schedule 6(1)(cc)(bb) to the 2020 Regulations provides, where relevant, that Schedule 2 to the 2016 Regulations has affect in relation to such preserved appeals as though:

> "the words '*under the EU Treaties*', in so far as they relate to things done on or after exit day but before commencement day, were a reference to the EU Treaties so far as they were applicable to and in

> the United Kingdom by virtue of Part 4 of the EU withdrawal agreement."

"Commencement day" is the term defined by the 2020 Regulations as the time and date on which the 2016 Regulations are revoked for all purposes. It marked the end of the implementation period.

42. "EU withdrawal agreement" is a term defined in Schedule 1 to the Interpretation Act 1978 to mean the definition given section 39(1) of the European Union (Withdrawal Agreement) Act 2020, which is as follows:

> "'withdrawal agreement' means the agreement between the United Kingdom and the EU under Article 50(2) of the Treaty on European Union which sets out the arrangements for the United Kingdom's withdrawal from the EU (as that agreement is modified from time to time in accordance with any provision of it)."

43. Part Four of the EU withdrawal agreement provides, at Article 127(1):

> "Unless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period."

SUBMISSIONS

44. Ms Cunha relied on the Grounds of Appeal and a skeleton argument by Ms Willocks-Briscoe, a Senior Home Office Presenting Officer, dated 21 April 2022. Mr Richardson relied on a rule 24 notice submitted on 19 April 2022.

45. Ms Cunha submitted that the force with which the judge expressed his preliminary view as to the "extremely compelling" significance of the marriage between the appellant and the sponsor was indicative of a closed mind. That was demonstrated by the manner in which the judge prevented Mr Fazli from asking questions which challenged the validity of the marriage relationship, or in relation to other topics which could have sought to dissuade the judge from turning his preliminary view into his concluded view. The judge's interventions during cross-examination were inappropriate and misunderstood the Secretary of State's case.

46. For the appellant, Mr Richardson submitted that the judge's conduct was not such as to have caused the fair minded and informed observer to conclude that there was a real possibility that the appeal had been decided before the evidence had been given. The judge's interruptions during cross-examination, particularly in relation to the timing of the *nikah* and the couple's cohabitation, were in order to avoid confusion. While that intervention may well have been unnecessary, it was not indicative of the appearance of bias. It was entirely proper for the judge to intervene during cross-examination to prevent questioning on irrelevant topics, and, when pressed by the judge, Mr Fazli had not submitted that the marriage between the appellant and the sponsor was a "sham". The judge did not intervene during the cross-examination of the sponsor. Mr Fazli was not

prevented from asking any questions or placed under time pressure. Mr Fazli did not object to the judge's interventions at the time, nor invite the judge to recuse himself, thereby demonstrating that he did not consider the judge's conduct at the time to be unfair.

DISCUSSION

Preliminary observation

47. We have considered whether it would have been appropriate to invite the views of the judge in response to the grounds of appeal and the contents of Mr Fazli's attendance note and the witness statements. That is the practice, endorsed by Lord Wilson in *Serafin* at [44], outlined in *Sarabjeet Singh v Secretary of State for the Home Department* [2016] EWCA Civ 492, [2016] 4 WLR 183 at [53]. The guidance in *Sarabjeet Singh* was given in the context of First-tier Tribunal hearings that were not recorded. While it is by no means universal, many hearings in the Immigration and Asylum Chamber of the First-tier Tribunal are now recorded. The practice has developed, it appears, as a result of the Covid-19 pandemic; proceedings conducted remotely often offer the facility for the hearing to be recorded in a way that required specialist equipment previously. As such, it was not necessary to seek the views of the judge in the present matter. That approach is consistent with *Serafin* at [45]:

> "…where, as in the present case, there is a full transcript of the relevant part of the proceedings, it is less likely to be appropriate to invite the judge to comment…
>
> …where a transcript exists, it is not the present practice of appellate courts to invite the judge to comment; but that the absence of his ability to comment places upon them a requirement to analyse the evidence punctiliously."

48. Accordingly, in light of the detailed transcript that has been prepared, we do not consider that it is necessary to seek the views of the judge.

Impact of post-Brexit marriage

49. We consider that the judge was right to conclude that the marriage was not capable of amounting to a "new matter" and that it was merely part of the evidential landscape going to whether the appellant and sponsor were in a durable relationship.

50. A "new matter" raising an EU law point must be anchored to the sole permitted ground of appeal under the 2016 Regulations, as modified by the 2020 Regulations, which required the term "the EU Treaties" to be read as though referring to the preserved and modified scope of the EU Treaties in accordance with Part Four of the EU withdrawal agreement. The judge dealt with the limits on the tribunal's jurisdiction correctly. By definition, it could not have been a breach of the EU Treaties, as applied by the EU withdrawal agreement, to refuse to grant an application for a residence

card as a family member on the grounds of a marriage that did not take place until after the implementation period came to an end, when Union law no longer applied to the parties to the marriage. The appellant was outside the personal scope of the rights of residence conferred on "family members" by Part 2 of the EU withdrawal agreement, since he had not resided in the UK under Union law prior to the end of the implementation period: see Article 10(1)(e)(i) of the EU withdrawal agreement. The highest quality of residence the appellant can hope to attain under the EU withdrawal agreement is the facilitation of his residence as a durable partner, pursuant to Article 10(2) to (4). This is because he applied for his residence to be facilitated in that capacity before the end of the implementation period: Article 10(3).

51. It follows that the judge correctly recognised that the marriage "route", as he put it, was no longer available to the appellant.

52. This meant that the judge had to approach the issues before him on the legally correct but somewhat artificial footing that the appellant's marriage to the sponsor was merely evidence of the prior durability of the couple's unmarried relationship, rather than being evidence of a relationship of any greater legal significance.

53. We do not consider that the definition of "durable partner" in regulation 2(1) of the 2016 Regulations precludes a party to a post-implementation period marriage from being a durable partner. While the definition of the term seeks to exclude a durable partner of a person whose spouse, civil partner or durable partner is already residing in the United Kingdom, that is plainly with a view to prevent an applicant claiming to be in a durable partnership while simultaneously maintaining a durable relationship, marriage or civil partnership with a third person. It does not address the situation where, as here, the application, appeal and marriage straddle the end of the implementation period.

54. While the judge was right to view the jurisdictional implications of the marriage in the above terms, we consider that he fell into error by holding that Mr Fazli could only question whether the marriage was genuine and subsisting by reference to the established EU law jurisprudence concerning marriages of convenience, or, to use the judge's terminology, "sham" marriages. This was not a marriage of convenience case, and the burden was on the appellant to establish that (i) the sponsor was his partner; and (ii) their relationship was durable, to the satisfaction of the decision maker. That being so, the mere fact of the marriage between the appellant and the sponsor could not be a development that, without more, would be capable of shedding the determinative light on the issue that the judge announced at the outset of the hearing that it could.

55. It was unfortunate that the judge misquoted the relevant provisions of Article 3(2) and regulation 8 of the 2016 Regulations, and instead set out the criteria for other family members through dependence and household membership, rather than those applicable to durable partners. As Laing LJ

put it recently in *SR (Sri Lanka) v Secretary of State for the Home Department* [2022] EWCA Civ 828 at [86], such an error suggests that the judge did not take sufficient care in writing the decision, and it could be said that it is "automatic and uncritical use of a standard paragraph." The significance in the judge's omission lies primarily in the fact that the wording of regulation 8(5) imposes a duty on an applicant as a putative durable partner to be able to prove their claimed durable partnership to the decision maker. At no stage in the decision did the judge direct himself concerning the burden to which the appellant was subject to demonstrate to the decision maker that he was in a durable partnership. In fact, as we set out above, the judge approached matters on the opposite premise, as though the Secretary of State was subject to a burden to disprove the relationship, within the established parameters relating to marriages of convenience.

56. The legal burden was on the appellant to establish that he was in a durable relationship with the sponsor at the date of the hearing before the judge. There were two limbs to what had to be proved: that he was the sponsor's "partner" and that he was in a "durable relationship" with her. The Secretary of State was entitled to test and challenge the appellant's case that he met both limbs.

57. That being so, the Secretary of State was also entitled to scrutinise the genuineness of the marriage between the appellant and the sponsor, since, as all parties agreed, it was relevant to the existence and durability of the claimed relationship between the appellant and the sponsor. The Secretary of State was not constrained to challenge a factual development that happened after the conclusion of the "implementation period" by principles of EU law which, by definition, could only apply in relation to analyses of situations governed by EU law. The "marriage route" was no longer available to the appellant after 31 December 2020, and nor did he enjoy the EU-law based protections that a party to an alleged marriage of convenience would enjoy. We consider that the judge's misunderstanding of this feature of the case is what lies behind his interventions.

The judge's conduct of the hearing: apparent bias

58. Against that background, we turn to the judge's conduct of the hearing. This will always be a sensitive exercise and must be performed by reference to the judge's overall conduct of the hearing.

59. The fair-minded observer would approach the judge's preliminary indications in the knowledge that the common law tradition within which this jurisdiction sits values dialogue from the bench, provided an open mind is maintained throughout. That said, the observer may have some concerns that the force with which the judge announced conclusions on disputed factual points, before having heard evidence, and so would hold that factor in the balance.

60. The fair-minded observer would know that the judge's interventions during Mr Fazli's cross-examination of the appellant were likely to be motivated by a misunderstanding of the law as it applied to the complex transitional scenario that was before the tribunal, and the judge's intention to ensure the parties remained within his understanding of the law. The fair-minded observer would know that, had a marriage that had taken place before the end of the implementation period been before the tribunal then, subject to any consent as required for a "new matter", the Secretary of State would have been subject to a legal burden to prove that the appellant was a party to a marriage of convenience, and that, had the judge's interventions taken place within that previous legal framework, they would at least have reflected a sound understanding of the law. Further, the fair-minded observer would ascribe significance to the fact that Mr Fazli did not raise any concerns arising from the judge's conduct with him at the time. The fair-minded observer would also know that Ms Saifolahi had not sensed any animus on the part of the judge towards the Secretary of State at the hearing.

61. We find that the fair-minded observer would not conclude that there was a real possibility that the judge was biased. His interventions were motived by a misunderstanding of the law, rather than prejudice against the party for reasons unconnected with the factual or legal merits of the case. While we consider the language adopted by the judge at [41], quoted at paragraph 20, above, could, on one reading, have a pejorative tone, we do not consider that the fair-minded observer would conclude that there was a real possibility that the judge gave the appearance of bias on account of that sentence alone. The fair-minded observer would conclude that the force with which the judge announced the potential impact of the appellant's marriage to the sponsor was motivated by his misunderstanding of the law, not bias or prejudice for reasons unconnected to the case. The judge's focus on the role of the so-called "hostile environment" preventing the appellant from being able to generate adequate evidence was, at least in part, attributable to the judge's misunderstanding of where the burden in establishing the validity of the claimed relationship fell.

62. We therefore reject the Secretary of State's submissions that the judge displayed apparent bias in his conduct of the hearing.

Fairness of trial

63. In our judgment, the hearing before the judge was unfair, primarily because of the limits he placed on Mr Fazli's cross-examination, the extent to which he intervened during cross-examination and the consequential, and unfair, impact that had on the Secretary of State's ability to advance her case. The judge's interventions during the appellant's cross-examination strayed significantly beyond the merely supervisory role that judges have during the taking of evidence.

64. The interventions commenced when Mr Fazli addressed the timing of the appellant's Islamic marriage to the sponsor. Mr Richardson accepted that this intervention was unnecessary but submitted that it did not taint the proceedings.

65. In our judgment, the judge's intervention was inappropriate. We accept that the appellant used the word "after" twice, when answering a question asking when he began to cohabit with the sponsor ("*after two months after we get the Muslim er nikah...*"). It was entirely logical for Mr Fazli to probe as to when, in fact, the couple began to cohabit, since the apparent lack of evidence concerning the couple's cohabitation was one of the reasons the Secretary of State had refused the application. The judge's intervention meant that the appellant was not given the opportunity to answer the question (and nor the Secretary of State to receive the answer): the judge had stepped in before he had a chance. Had the appellant failed to understand the question, or otherwise had difficulty engaging with the process, the judge may well have been entitled to intervene at that stage to ensure that the questions were being understood and were not unnecessarily complex. Alternatively, the judge could have put clarificatory questions of his own to the witness at the end of the hearing. However, this intervention was unnecessary, and therefore it was necessary *not* to make it.

66. Once the judge had drawn Mr Fazli's attention to what he considered to be a misunderstanding on Mr Fazli's part, the judicial exchange continued in a similar vein, culminating in Mr Fazli moving to a different topic of examination. Bearing in mind that "the very gist of cross-examination lies in the unbroken sequence of question and answer", the judge's interventions had evidently deprived the Secretary of State the opportunity of exploring this avenue.

67. Mr Fazli had barely commenced cross-examination on the topic of the civil marriage ceremony before the judge interjected once again, this time to challenge the relevance of Mr Fazli's line of questioning to establish the number of guests at the ceremony, and other matters relating to the genuineness of the marriage. The judge's assertion that "this isn't a game of he said, she said" highlights his misunderstanding of the potential relevance of the marriage, and the burden to which the appellant was subject to establish all parts of his case.

68. The judge's repeated interventions on the marriage issue reveal that he had misunderstood both the law and the Secretary of State's position. With respect to the judge, we struggle to see how it was open to him to state, at [39], that the relationship between the appellant and the sponsor, and the genuineness of their marriage, was not in dispute. The genuineness of their relationship was an issue raised squarely by the refusal letter. Page 2 of the refusal letter stated:

> "you have not provided adequate evidence that you are the partner of an EEA national, and that you have a durable relationship with them."

69. This formulation reflects the dual criteria contained in regulation 8(5), that the applicant must be the partner of, and in a durable relationship with, an EEA national. The Secretary of State had challenged both limbs in the refusal decision, so it should have been clear to the judge that both limbs were in issue (although since the judge had not directed himself concerning the relevant provisions of the 2016 Regulations, we cannot be sure). By definition, the Secretary of State had not considered the civil marriage, as it was a post-decision development, but Mr Fazli confirmed at the hearing that he wished to test the genuineness of it as an aid to determining whether the relationship was durable. It is not clear, therefore, the basis upon which the judge concluded at [39] that central disputed issues "were not in dispute", and nor why it was considered to be "a game of he said, she said". Mr Richardson accepted that the Secretary of State had not conceded the existence of the relationship.

70. In our judgment, proceedings in any court or tribunal are never a "game", whether of "he said, she said", or otherwise. In order to conduct a fair hearing, cross-examination should be facilitated by the judge without undue interruption. There can be merit in comparing the testimony of two or more witnesses against each other in cross examination, to assess consistency as an aid to determining their credibility, especially where, as here, the questions addressed matters of central relevance to the appeal. There was nothing inappropriate about Mr Fazli's questions on the genuineness of the marriage and the guests who attended the civil wedding ceremony, in a case where the burden was on the appellant to demonstrate (i) that he was the sponsor's partner, and (ii) that their relationship was genuine.

71. Drawing this analysis together, we conclude that the judge unfairly prevented the Secretary of State from challenging the appellant on key points in cross-examination, and so was prevented from being ably to advance her case. The judge's interventions strayed significantly beyond the mere supervisory territory that should be occupied by judges during the taking of evidence and were premised on a misunderstanding of the law and the facts. By descending into the arena, the judge's vision was clouded by the dust of conflict, with the result that the hearing was unfair.

72. We allow the appeal. The only course open to us is to set the decision of the judge aside, with no findings preserved, and remit the appeal to the First-tier Tribunal to be heard by a different judge.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and is set aside with no findings of fact preserved. It is remitted to the First-tier Tribunal to be heard by a different judge.

No anonymity direction is made.

Signed Stephen H Smith Date 5 September 2022

Upper Tribunal Judge Stephen Smith

Annex – extracts from transcript

Judge: Mr Fazli

Mr Fazli: Thank you sir, er, Mr Elais how did you meet your wife

[Translation by Interpreter]

Mr Elais: Liverpool Street, in, in the coffee

Mr Fazli: Um, do you, do you remember what date it was when you met her

[Translation by Interpreter]

Mr Elais: It's 2019, I think in, er, er

Interpreter: Er, could be August, could be September

Mr Fazli: Which, which year

[Translation by Interpreter]

Interpreter: 2019

Mr Fazli: Thank you, and when did your relationship start with her formally

[Translation by Interpreter]

Interpreter: After the, after we met about a month

Mr Fazli: After a month, OK so you met say in, on or about September 2019 so it would have been October 2019 is that right

[Translation by Interpreter]

Interpreter: Yes

Mr Fazli: And when did you move in together to live as a couple

[Translation by Interpreter]

Interpreter: Er, after two months after we get the Muslim, er, nikah

Mr Fazli: OK, now I can see that your Islamic marriage took place on the 25th of November 2019 so it would have been January 2020 that you moved in together, is that right

[Translation by Interpreter]

Interpreter: OK, it was in December on that year 2019

Mr Fazli: OK, so you moved in together in December 2019 yeah

[Translation by Interpreter]

Mr Elais: Yes

Interpreter: Yes

Mr Fazli: So it couldn't have been two months after your Islamic marriage because your Islamic marriage took place on the 25th of November 2019

[Translation by Interpreter]

Judge: Let's, let's just pause there, Mr Fazli you're assuming in answer to a question was as you thought it was, the words that were translated were after two months after we got the nikah, that could either be after two months or it could be two months after we got the nikah

Mr Fazli: OK sir, so, the suggestion being sir that the nikah is different to the marriage certificate is that

Judge: No, it's the

Mr Fazli: Yeah

Judge: Ei-either after two months after what you are talking about, er, when the relationship formally started, um

Mr Fazli: OK

Judge: Which would have been October 2019, two months after that is December 2019 or two months after they got the nikah which would be January 2020, you've assumed that, um, one of those two meanings without establishing which meaning was correct

Mr Fazli: Thank you sir, I think, I think I, er, the, the marriage certificate sir is dated the, um, 25th of November 2019, my understanding of the evidence was that it was two months after that

Judge: No that's not the evidence that he gave, the question you asked when did you move in together to live as a couple, the

answer, the, the exact words were after two months after we got the nikah, that could either mean after two months, that is to say after we got the nikah

Mr Fazli: Oh I see

Judge: Or it could mean two months after we got the nikah, you've assumed one meaning and then interpreted the appellant's answers as being inconsistent

Mr Fazli: OK, er, OK thank you sir. In your, um, marriage that took place the, um, the, the English marriage you registered, er, on the 4th of May 2021 how many people attended

Interpreter: Sorry can you repeat the date, I didn't hear you

Mr Fazli: Yeah the 4th of May 2021

Interpreter: 25th of May

Mr Fazli: 4th of May, 4th of May 2021, yeah

Interpreter: 4th of May, er

[Translation by Interpreter]

Interpreter: Fifteen

Mr Fazli: And, and who were these people

[Translation by Interpreter]

Interpreter: Her relatives

Mr Fazli: All, all of her relatives, er, *[inaudible]*

Interpreter: Some of these friends and relatives

Mr Fazli: Sorry, sorry *[inaudible]*

Judge: Mr Fazli, Mr Fazli, what are we getting at here

Mr Fazli: Um, well just, just, just to establish sir that whe-whether he's aware of who the people were and *[inaudible]* asked the same questions of the partner

Judge: What's the relevance of that, this isn't a game of he said, she said

Mr Fazli: Well of course sir but, but you're required to determine durable relationship sir and, and the evidence, it's, it's important that, um, there is evidence on all aspects of the relationship

Judge: Yeah, and how, how is it, yeah how is it relevant to the durability of the relationship

Mr Fazli: To determine one, the issue that we take sir is that we don't accept that it's a genuine and subsisting relationship and that's

Judge: *[Inaudible]* claiming this is a sham relationship

Mr Fazli: Well I mean, but that's the inference sir because

Judge: Well if that's, if that's a matter in issue then it needs to be put clearly so that the parties know what needs to be addressed and so that I know what needs to be addressed, is it the respondent's case that this is a sham relationship

Mr Fazli: The, the case is this sir, it's not as clear cut as that, it's, it's that we're not satisfied this is a relationship that's durable, that's subsisting, er, with, within, within the meaning of, um, of the 2016 Regulations so that's really what we're saying but, but

Judge: And if you not alleging that it's a sham relationship then how is who attended the marriage relevant

Mr Fazli: Um, primarily sir to investigate whether or not the marriage is subsisting and that they are a, they are a couple, er, in, in, as required by, by the Regulations

Judge: I have no idea how the people that attended the marriage ceremony could be relevant to that question unless you're alleging sham marriage

Mr Fazli: Um, I'm, I'm, I can move on from that question but I think it's more *[inaudible]* the Tribunal as there is to, as to whether their responses are, um, consistent to the extent that they were living together, um, and, and that they met the requirements of durability because you remember

Judge: But if you, if you

Mr Fazli: Yes, sorry

Judge: If you want to ask questions about whether they were living together at the relevant time and they met any, um, requirements such as durability, then by all means ask those questions but I'm not sure who attended the wedding ceremony could be possibly relevant to that

Mr Fazli: OK, um, alright I'm, I'm happy, I'm happy to, to move on sir, perhaps you have a, I think, a different view on relevance in that issue but I'm happy to move on to more perhaps questions before the application as opposed to the subsequent living, er, thank you