Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05814/2018

THE IMMIGRATION ACTS

Heard at Bradford via Skype	**Decision & Reason Promulgated**
On 7 October 2020	**On 13 October 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ULYANA [I]
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Norman instructed by Sterling & Law Associates LLP
For the Respondent: Mr S Walker Senior Home Office Presenting Officer

ERROR OF LAW DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Hodgkinson promulgated on 2 August 2019 in which the Judge found the respondent had discharged the burden of proof upon her to establish that the marriage between appellant and her sponsor is one of convenience and that, accordingly, the appellant was not a family member of her sponsor for the purposes of the EEA Regulations, leading the appeal to be dismissed.

2. Permission to appeal was granted by another judge the First-tier Tribunal the operative part of the grant being in the following terms:

> "Arguably, at the core of the appeal is the question of whether the Judge properly applied the guidance to be found in Sadovska [2017] UKSC 54. He referred to it [48] but arguably, as identified in the grounds, it is arguable that the text of the decision shows that he did not properly apply it [68 & 73]. Moreover, as identified in the grounds, it is arguable that the Judge erred in his approach to the evidence served late by the Respondent, and to the question of whether he should allow that evidence to be relied upon without giving the Appellant the opportunity to respond. Since he identified this evidence as relevant and a key part of his reasoning [61] it is arguable that he failed to conduct a fair hearing. The Appellant challenged the accuracy of the translation relied upon, and has arguably demonstrated that she was right to do so. I would note also, that it is arguable that the Judge erred in dismissing in their entirety the written evidence of the witnesses who did not attend the hearing, without further analysis as to the weight that could be attached to it. The absence of evidence from the witnesses to the marriage is arguably of little relevance, since the fact that a marriage ceremony had been performed was not in issue [69]."

Background

3. The appellant is a citizen of Ukraine born on 24 May 1990 who appealed against the respondent's decision of the 10 August 2018 to remove her from the United Kingdom.

4. The Judge noted that the appellants immigration history and the factual matrix relied upon by both the appellant and the respondent. The Judges findings are set out from [49] the decision.

Error of law

5. In Sadovska v SSHD [2017] UKSC 54 it was said that the objective to obtain the right of entry and residence must be the predominant purpose for the marriage to be one of convenience and a marriage could not be considered to be a marriage of convenience simply because it brought an immigration advantage. "Should the tribunal conclude that Mr Malik was delighted to find an EU national with whom he could form a relationship and who was willing to marry him, that does not necessarily mean that their marriage was a "marriage of convenience" still less that Ms Sadovska was abusing her rights in entering into it".

6. The Judge specifically refers to the case at [48] stating that he has taken the findings and observations of the Supreme Court into account.

7. At [73] the Judge writes:

> "73. Having taken into account the totality of the above evidence, some of which I accept, is potentially supportive of the appellant's case, but much of which is not, and applying the balance of

> probability test to the available evidence, I conclude that the appellant and the sponsor lacked credibility in respect of the material aspects of their evidence. I find that, on balance, the respondent has discharged the legal burden of proof upon him in establishing that the marriage between the appellant and the sponsor is one of convenience."

8. There is no specific finding by the Judge that the predominant purpose of the marriage was to obtain a right of entry and residence and nor can this be inferred from the decision. It is accepted by Mr Walker this amounts to a material error of law.

9. In relation to the fairness point, the Judge set out the procedural chronology between [1 – 9] of the Grounds of Application for permission appeal. This records an earlier adjournment granted to the Respondent as they did not have documents previously served on the appellant and was seeking translations of copies of text messages taken from the appellant's mobile phone during an immigration officer's visit on 9 August 2017. The hearing of 25 March 2019 was adjourned to 16 July 2019 with directions the respondent file and serve an indexed and paginated bundle including the translation of text messages they sought to rely on 14 days prior to the hearing with the appellant's representative finding and serving any supplementary bundle no later than seven days prior to the next hearing. It is noted that despite that direction the respondent only filed and served the translation of the text messages on 15 July 2019 at 11:10, less than 24 hours prior to the hearing.

10. The appellant asserts the Judges approach to the weight given to such evidence was flawed. It is said to Judge places less weight on the text messages produced by the appellant failing to give adequate reasons for doing so. The Judge gives little weight to the messages as the sponsor found them on an old phone by chance as he was preparing to sell the phone but fails to express concerns the messages appear to be forged or fake, and appears to take no issue with the messages provided by the respondent which are in the same format.

11. The appellant also assert the Judge was wrong to place the weight he did upon the text messages as the late service of those documents, less than 24 hours prior to the hearing, afforded no opportunity for the appellant to have them independently verified. The grounds note the sponsor took issue with the translation of "my child" at the hearing and that had the documents been served in accordance with directions the appellant could have had the translations independently verified. The grounds claim the appellant has now had the messages translated and the relevant phase translates as "the child", corroborating the sponsors evidence that "my" is a mistranslation. The appellant asserts that to have attached the weight to those documents that was given, in all the circumstances, amounts to an error of law.

12. At the hearing on 29th October 2018 the respondent applied for an adjournment as shortly prior to that hearing she had served a 10-page interview summary which included vastly more information than the refusal. The appellant's position was that the new material needed to be dealt with fully and responded to by the appellant who would have to obtain documents to rebut new issues. Handwritten notes were also served the appellant's solicitors who stated she needed to cross-reference these against the summary and that the matter had gone from being a straightforward marriage of convenience case to what appeared to be a wider conspiracy involving more individuals. The hearing was therefore adjourned with directions. When the matter returned to the First-tier Tribunal on 25th March 2019 the respondent again applied for an adjournment as the translation of the text messages had not been provided, the respondent's bundle was said to be "lacking", there were several strands of seriousness. and that the interests of justice required further evidence. The judge on that occasion further adjourned the hearing with directions for the respondent to file and serve the remaining evidence no later than 14 days prior to the next hearing and directing the appellant's representatives to file and serve any supplementary appellant's bundle no later than seven days prior to the next hearing.

13. Whilst the Judge was entitled to admit the respondent's evidence filed by the respondent outside the time limit provided if the Judge thought it in the interests of justice to do so, it was incumbent upon the Judge to give careful consideration to whether admitting that evidence late required the proceedings to be adjourned to enable the appellant to respond, as was anticipated in the earlier adjournment decisions. There is no indication in the decision the Judge undertook this exercise and no findings supported by adequate reasons as to why, in all the circumstances, it was fair to proceed without providing the appellant the opportunity to do; especially in light of the fact it had previously been considered she should have such a right in light of the additional material the respondent was seeking to rely upon.

14. The grounds seek to challenge the weight the Judge gave to the evidence, but the fundamental issue is the fairness of the proceedings. Mr Walker accepted in light of the chronology the Judge had erred in law in a manner material to the decision to dismiss the appeal based upon a procedural irregularity in failing to provide the appellant the opportunity to comment upon the additional evidence.

15. Even if the decision is ultimately the same the appellant is entitled to a fair hearing of her appeal. I find this has not occurred in this matter and accordingly set the decision of the Judge side with there being no preserved findings.

16. As the appellant has not had a fair hearing of her appeal, as additional evidence may be required, in light of the fact substantial further factual findings may be required, and having considered the Presidential

Guidance on remittal of appeals, I consider it appropriate in all the circumstances for this appeal to be remitted to the First-tier Tribunal sitting at Hatton Cross to be heard by a judge other than Judge Hodgkinson.

Decision

17. **The First-tier Judge materially erred in law. I set aside the decision of the original Judge. I remit this appeal to Hatton Cross to be heard afresh by a judge other the Judge Hodgkinson.**

Anonymity.

18. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 7 October 2020