Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/03750/2019**

THE IMMIGRATION ACTS

Remote Hearing by Skype
On 4th May 2021

Decision & Reasons Promulgated
On 17th May 2021

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

REFAIL HAJDARI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Georget, instructed by Queens Court Law
For the Respondent: Ms R Petterson, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Albania. He claims to have arrived in the UK in December 2015. On 29th March 2019 he married Ancuta-Kasandra Dinca and on 8th April 2019 he applied for a Residence Card as a family member of an EEA national exercising treaty rights in the UK in accordance with the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). The appellant and Ms Dinca were interviewed on 1st July 2019. The application was refused by the

respondent for reasons set out in a decision dated 19th July 2019. The respondent identified a number of inconsistencies in the answers given by the appellant and Ms Dinca during the interview, in particular, concerning their first meeting, Ms Dinca's travel to Romania just before the interview, the circumstances surrounding the appellant's entry to the UK, the marriage proposal, the addresses at which they lived, their wedding day, and their employment. The respondent concluded the marriage is one of convenience for the sole purpose of the appellant obtaining a right of residence in the UK.

2. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Obhi for reasons set out in a decision promulgated on 5th November 2019. The appellant identifies nine separate grounds of appeal that are set out in the appellant's grounds of appeal dated 17th November 2019. Permission to appeal was granted by First-tier Tribunal Judge Kelly on 17th March 2020. He said:

> ".. It is arguable that the Tribunal failed to have regard to evidence capable of supporting the innocent explanation provided by the appellant for apparent anomalies in interviews conducted by the respondent with the appellant and his wife, respectively, and thus unfairly drew adverse conclusions concerning whether the marriage was one of convenience (the sole issue in the appeal). It is also arguable that the Tribunal misdirected itself in relation to the legal burden and standard of proof in relation thereto. The other grounds of appeal are also arguable and potentially material to the outcome of the appeal…."

3. The hearing of the appeal before me on 4th May 2021 took the form of a remote hearing using skype for business. Neither party objected. The appellant joined the hearing remotely and was accompanied by his partner Ms Dinca. I sat at the Birmingham Civil Justice Centre. I was addressed by the representatives in exactly the same way as I would have been if the parties had attended the hearing together. I am satisfied: that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate. I was satisfied that it was in the interests of justice

and in accordance with the overriding objective to proceed with a remote hearing because of the present need to take precautions against the spread of Covid-19, and to avoid delay. I was satisfied that a remote hearing would ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the parties. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.

4. At the conclusion of the hearing I informed the parties that I am satisfied that the decision of Judge Obhi is vitiated by a material error of law and must be set aside. I informed the parties that my reasons would follow in writing. This I now do.

5. At the hearing of the appeal before me, Mr Georget confirmed that although set out as nine separate grounds of appeal, there are essentially three criticisms made. First (*Grounds 1, 2 and 3),* there was material evidence before the First-tier Tribunal that the Judge failed to have regard to and failed to make any findings upon. Second *(Grounds 5, 6, 7 and 8)*, the Judge made irrational findings or findings that were contrary to the evidence before the Tribunal. Third *(Grounds 4 and 9),* the Judge failed to apply the correct legal test as set out in Sadovska v SSHD [2017] UKSC 54.

6. Mr Georget submits that at paragraph [22] of her decision Judge Obhi notes the appellant had filed “substantial evidence” comprising of statements from the appellant’s friends and family designed to support his claim that he is in a genuine relationship with Ms Dinca. At paragraph [38] of her decision Judge Obhi considered the appellant’s explanation regarding the answers given by the appellant and Ms Dinca as to who Ms Dinca was living with when they first met. Judge Obhi did not find it to be a credible explanation. Judge Obhi noted Ms Dinca had not mentioned ‘Jeni’ during the interview at all. She said that the appellant must have

got the name from somewhere, and if it came from his wife, then it is likely that she would also have mentioned that name at the interview, even if just to say that she had shared the flat with Jeni previously. Mr Georget submits Judge Obhi failed to have any regard to the letters that were before the Tribunal from 'Jeni' and 'Dana', which corroborate the evidence of appellant and his partner regarding the living arrangements at the time when the appellant met Ms Dinca.

7. Mr Georget submits that at paragraphs [16] and [17] of her decision, Judge Obhi refers to the evidence of Roxana Dinca and Ndriqim Sadiki. Both of these witnesses were called to give evidence before the First-tier Tribunal. Mr Sidiki's evidence was not challenged. At paragraph [44], Judge Obhi refers to the evidence but does not say whether their evidence is accepted or rejected. The implication appears to be that the evidence has been rejected but the Judge does not give reasons for rejecting their evidence. There was also other evidence before the Tribunal that is material to the sole issue in the appeal but is not referred to at all in the decision. There was a letter from Ms Dinca's mother, a letter from the appellant's sister and a letter from his mother, all attesting to the genuine nature of the relationship between the appellant and Ms Dinca that Judge Obhi failed to have regard to. Mr Georget accepts that all the letters that were before the Tribunal did not have to be considered individually, but the Judge was required to engage with the evidence that was particularly relevant to her decision and the findings made. There were also a number of photographs before the Tribunal taken over a period of time, including photographs of the appellant with Ms Dinca and her daughter when she visited the UK. There was also other evidence of the couple living together at the same address including a tenancy agreement, and utility bills. That evidence is also not referred to by the Judge.

8. In reply, Ms Petterson candidly and in my judgement quite properly, acknowledges that there was evidence before the First-tier Tribunal

regarding the appellant's relationship with Ms Dinca that Judge Obhi does not refer to in her decision.

9. Having carefully considered the submissions made before me I have reached the conclusion that I am satisfied that the appellant has established that Judge Obhi failed to have regard to, and failed to make any findings upon relevant evidence, and that the first of the criticisms made by the appellant is made out. I quite accept that a Judge is not required to recite in a decision all the evidence that was before the Tribunal and engage in a line-by-line analysis of the evidence. It would be entirely impractical to do so. It is now well established that although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge. The evidence of Roxana Dinca and Ndriqim, taken together with the evidence of other family members was at least capable of corroborating the account given by the appellant and Ms. Dinca that this was not a marriage of convenience. Judge Obhi does not make any finding as to the credibility of the two witnesses that were called to give evidence and does not refer to the other evidence that was before the Tribunal from close family members, and in the form of photographs and documents. The focus of Judge Obhi was clearly upon the interview record, and the discrepancies between the answers given by the appellant and Ms Dinca, but in reaching her decision she failed to consider the extent to which the other evidence that was before the Tribunal was capable of corroborating the account given by the appellant and Ms. Dinca regarding their relationship. It would have been open to Judge Obhi to reject the evidence, or to attach little weight to evidence that was not capable of being tested in cross-examination but the difficulty here is that Judge Obhi does not refer to much of the evidence at all. She does not say whether she accepts or rejects the evidence of the witnesses that were called to give evidence, and insofar as it can be

inferred that their evidence was rejected, Judge Obhi fails to give adequate reasons for doing so.

10. Insofar as the burden and standard of proof is concerned, Mr Georget submits that at paragraph [6] of her decision, Judge Obhi, directed herself that this is an immigration decision and the burden of proof is on the appellant, and that the standard of proof required is the balance of probabilities. He refers to the decision of the Supreme Court in Sadovska v SSHD [2017] UKSC 54, in which the Supreme Court confirmed the burden of proof rests upon the SSHD when proposing removal for abuse of the right of residence by attempting to enter into a marriage of convenience. At paragraphs [29] and [34] Lady Hale, with whom Lord Neuberger, Lord Kerr, Lord Clarke and Lord Reed agreed, said:

> “29. For this purpose, "marriage of convenience" is a term of art. Although it is defined in the Directive and the 2009 Communication as a marriage the sole purpose of which is to gain rights of entry to and residence in the European Union, the 2014 Handbook suggests a more flexible approach, in which this must be the predominant purpose. It is not enough that the marriage may bring incidental immigration and other benefits if this is not its predominant purpose. Furthermore, except in cases of deceit by the non-EU national, this must be the purpose of them both . Clearly, a non-EU national may be guilty of abuse when the EU national is not, because she believes that it is a genuine relationship.
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> ...
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> 34. ...In seeking to establish its case, the respondent will no doubt concentrate on the interviews, the discrepancies between the appellants' accounts, and the gaps in Ms Sadovska's knowledge of Mr Malik's family, together with the sentence in their statement of 28 March that their thoughts of living together and marriage had not yet "manifested into action" (which on 28 March was strictly true in that they were not yet living together or married but they had given notice of intention to marry). But in considering those discrepancies, the circumstances in which the interviews took place, and the statement was made must be borne fully in mind. Furthermore, there were many matters on which their accounts were consistent. It turns out, for example, that Ms Sadovska's mother does indeed live in Lithuania, as Mr Malik said in explaining why she was not there. There is also a considerable body of evidence which supports their claim to have been in a genuine relationship, dating back some time before they gave notice of intention to marry. 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. Their legal and their factual cases must be considered separately."

11. Mr Georget submits that although a Judge is entitled to take into account the inconsistencies in answers given during the course of an interview, the interview must be read as a whole. Here, Judge Obhi failed to have any regard to the fact that the lengthy interviews were conducted the day after Ms Dinca had returned to the UK from Romania, and were conducted in English, with the inherent risk of some linguistic misunderstanding because English is not the first language of the appellant or Ms Dinca. Mr Georget submits that at paragraph [44], Judge Obhi concludes that she was satisfied that there are reasonable grounds for the respondent to believe that this was a marriage of convenience and the explanations given by the couple do not address the concerns. She found, at [45], that this was a marriage of convenience, but failed to consider whether, on the evidence, the sole or predominant purpose for contracting the marriage was to gain an immigration advantage. The Judge did not consider whether the predominant purpose of the marriage was for the appellant to gain rights of residence in the European Union.

12. In reply, Ms Petterson accepted that Judge Obhi refers to the burden of proof as being upon the appellant, and in the end accepted that the failure to engage with the evidence that was before the Tribunal and the failure properly direct herself to the relevant burden of proof is sufficient to establish the decision of the First-tier Tribunal is vitiated by an error of law. It was uncontroversial that the appellant and Ms Dinca married on 29th March 2019. It was therefore for the respondent to justify any refusal of residence.

13. In my judgment, those two errors of approach in the decision of the First-tier Tribunal are sufficient to establish that the decision of the First-tier Tribunal is vitiated by a material error of law and must be set aside. In the circumstances I need not address the remaining criticism.

14. As to disposal, I am persuaded by the parties that the appeal should be remitted to the First-tier Tribunal for hearing *de novo* with no findings preserved. I have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having considered paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. In my view, in determining the appeal, the nature and extent of any judicial fact-finding necessary will be extensive.

15. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

16. The appeal is allowed, and the decision of FtT Judge Obhi promulgated on 5th November 2019 is set aside.

17. The appeal is remitted to the FtT for a fresh hearing of the appeal with no findings preserved.

V. Mandalia

Upper Tribunal Judge Mandalia **5th May 2021**