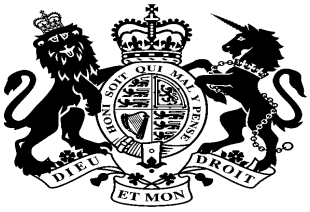

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/00495/2020
[EA/50098/2020]

THE IMMIGRATION ACTS

Heard at Bradford IAC	**Decision & Reasons Promulgated**
On 6th January 2022	**On 27th January 2022**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Llirjan Hima
(no anonymity direction made)

Appellant

And

Secretary of State for the Home Department

Respondent

For the Appellant: Mr Jafferji, Counsel instructed by Syeds Law Solicitors
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Albania born on the 19th August 1981. He appeals with permission against the decision of First-tier Tribunal Judge Mills to dismiss his appeal.

2. The matter in issue before Judge Mills was whether the Appellant was entitled, under the Immigration (European Economic Area) Regulations 2016, to a residence permit as family member (husband)

of an EEA national exercising treaty rights. Judge Mills decided that he was not, and dismissed the appeal.

3. The matter in issue before this Tribunal is whether in so doing, Judge Mills acted fairly and without bias.

Background

4. On the 23rd October 2019 the Appellant made an application for a residence card as the extended family member of Ms Filicia Ruse, a Romanian national resident in the UK. The couple were married on the 19th November 2019.

5. On the 29th July 2020 a 'marriage interview' was conducted, that is to say the Respondent asked the Appellant and Ms Ruse to separately answer a series of questions with the aim of determining whether this was a genuine and subsisting marriage.

6. The application was refused on the 3rd August 2020. The Respondent found that the couple had given divergent answers in relation to give matters at interview; she further determined that the documentary evidence of co-habitation was all recent and of insufficient weight to establish that they actually live together. This led the Respondent to the conclusion that this was a marriage of convenience.

7. The Appellant appealed and on the 10th February 2021 the matter came before Judge Mills sitting at Birmingham. It was heard remotely via CVP. It was the Appellant's case that the accusation that this was a marriage of convenience was one for the Respondent to prove. The Appellant relied on caselaw to the effect that in such cases a marriage certificate serves *prima facie* as evidence of a marriage. If the Respondent has reason to doubt that the marriage is a genuine one, there is an evidential burden upon her to provide some grounds to support her suspicion. The Appellant should then be given an opportunity to address that evidence but the final legal burden always rests on the party making the allegation of wrongdoing, here the Secretary of State. It was submitted, by Mr Hussain of Syeds Law Office Solicitors on behalf of the Appellant, that the matters identified by the Respondent were incapable of discharging even that initial evidential burden: he here made submissions about the weaknesses in the Respondent's five points arising from the couple's answers at interview. That being so, the Appellant was under no obligation to respond to the allegations made, since the evidence submitted by the Respondent, even absent a reply, was incapable of discharging the ultimate legal burden of proof.

8. Judge Mills did not agree with Mr Hussain's analysis of the evidence cited in the refusal letter. He found that the five matters identified as arising from the interviews *were* capable of giving rise to a reasonable

suspicion that this was not a genuine marriage. He additionally found a number of other reasons why the appeal should be dismissed – more deficiencies in the Appellant's answers at interview, the "very sparse evidence of cohabitation", the Appellant's history of attempting to deceive the immigration authorities, his behaviour in respect of an earlier marriage, and the fact that no one other than the Appellant – such as friends, relatives or his wife - gave evidence. Although the Appellant claimed to have been twice visited by immigration enforcement officers who had been "satisfied that this was a genuine marriage", the Presenting Officer before the First-tier Tribunal, a Ms Mepstead, was unable to find any record of these visits on the Respondent's electronic system and in the absence of any credible evidence about what actually happened, this was a matter that attracted little weight. Judge Mills rejected the Appellant's submissions about the weakness of the Respondent's case and dismissed the appeal.

9. The grounds of appeal, drafted by solicitor Mr Hussain who appeared below, are that the conduct of the First-tier Tribunal was capable of giving rise to an appearance of bias. *In particular* it is alleged that the Tribunal:

   i) started the hearing with a predetermined mindset;

   ii) demonstrated significant bias towards the Appellant in taking on the role of the Respondent by subjecting him to cross examination from the bench;

   iii) took adverse points that had not been advanced by the Presenting Officer and of which the Appellant had no notice;

   iv) erred in its approach to the alleged enforcement visits;

   v) misinterpreted an earlier decision by another Tribunal.

10. In support of these grounds Mr Hussain swore a witness statement dated the 19th April 2021, and quite properly instructed Counsel, Mr Jafferji, to represent the Appellant in the Upper Tribunal.

11. Permission was granted by Upper Tribunal Judge Blundell on the 23rd June 2021.

Adjournment in the Upper Tribunal

12. The matter first came before me on the 18th November 2021 when I was sitting at Manchester Civil Justice Centre. Having heard submissions from the parties I decided of my own motion that it would be in the interests of justice to adjourn the hearing before me. I did so for the following reason.

13. The grounds, and the witness statement of Mr Hussain, take issue with the way that the First-tier Tribunal recorded a number of events

at the hearing. Specifically he challenges the record, and makes submissions, on the following matters:

- On an exchange at the outset of the hearing about whether the Appellant's wife should give evidence. Mr Hussain contends that the Judge indicated to the HOPO Ms Mepstead that she should invite him to draw a negative inference from the lack of oral evidence from the sponsor, when Ms Mepstead herself had raised no issue about the absence of that witness
- It is further alleged that Judge Mills instructed Ms Mepstead to rely on the negative credibility findings reached by a previous Tribunal about the Appellant's general immigration history, contrary to her intended submissions
- The Appellant contended that immigration officers had twice visited the family home and had left content that there was no issue with the relationship. The decision records that the HOPO Ms Mepstead accepted that at least one of these visits had taken place, because the Appellant was able to produce paperwork on it, but she was unable to comment on what had taken place. As for the claim that there had been an earlier visit, in 2019, "she confirmed that there was no reference to that on the Home Office system". Mr Hussain submits that this was not in fact what Ms Mepstead had said. What she actually said was that she only had limited access to the records and from what she could see the visits were not logged. The decision later records [at 59] that "Mr Hussain alleged that the respondent was deliberately concealing evidence that undermined the case". Mr Hussain takes issue with that. He strongly refutes the suggestion that he in any way impugned Ms Mepstead's integrity; on the contrary he knows and respects her as a colleague. His submission was based on *her* indication that the records she was privy to may be incomplete. He was seeking a direction from the court that the full record be checked and disclosed. The grounds submit that the "transcript should demonstrate the eagerness of the FTT to dismiss this evidence instead of exploring it"
- The decision of the First-tier Tribunal contains a finding that the Appellant's previous marriage was bogus. That marriage had been found to be genuine by the previous Tribunal and Ms Mepstead had made no submissions on that point; nor had she cross examined on it. Mr Hussain contends that it was in fact the Tribunal itself which took the point, with the Judge descending into the arena and asking the Appellant several questions about it himself. Mr Hussain submits that it was wholly inappropriate for him to do so. The transcript will show that the *Devaseelan* finding that that had been a genuine marriage was not challenged by the Respondent and the Appellant had no idea that the Judge would go on to make a strongly adverse finding on the matter, one which contributed to its reasoning about *this* marriage

- The Tribunal found that the Appellant and the Sponsor do not live together because of an alleged discrepancy about when he had last seen her daughter. Mr Hussain submits that the transcript will show that the Respondent did not take that point and in fact expressly accepted that the couple *had* been cohabiting

14. The general tenor of the challenge is encapsulated in Mr Hussain's witness statement as follows: "it is my personal opinion that Judge Mills was not satisfied with the performance of the Home Office and went on to argue the case on their behalf and in his written determination".

15. At the outset of the hearing in November 2021 I queried whether, in light of these grounds, it would be preferable for me to have access to a transcript of the First-tier Tribunal hearing, or better still a recording. Mr McVeety agreed. Mr Jafferji acknowledged that the Appellant had himself been persistently seeking disclosure of the recording but indicated that he now wished to proceed without it, because he did not wish to wait any longer for his case to be determined. With that in mind Mr Jafferji did a valiant job seeking to persuade me that some of the grounds stood apart from the allegation of bias, and for those the CVP recording was unnecessary. If he could win on those grounds, he need not pursue the remaining limbs of the challenge. As attractive as Mr Jafferji's submissions were, the allegation of bias remains the central matter in issue before me. Although I make no determinative finding on this matter, it seems to me that the discrete grounds, as Mr Jafferji framed them, cannot immediately be separated from the overall complaint, turning as they do on issues of fairness about the way that the hearing was conducted and the decision was reached.

16. I remained concerned that I had not heard the CVP recording of the hearing, nor seen a transcript. It was not clear from the file why the Appellant's repeated requests for disclosure of the same had not been actioned. I did have Mr Hussain's notes, and a typed version of the Record of Proceedings; the Rule 24 response provided by the Secretary of State sets out the note of the HOPO Ms Mepstead. Although there was certainly areas of consistency in these three documents, there are also areas in which Mr Hussain's recollection is divergent from that of others. Given the gravity of the allegations put, it does not seem to me appropriate to simply reject Mr Hussain's evidence about what happened on the basis that it is outweighed two-to-one; nor am I tempted to take the road Mr Jafferji invites me down, which is to give the Appellant the benefit of the doubt, having regard to his persistent requests for the transcript/recording. In fairness to the Appellant, and to the Judge concerned, the Upper Tribunal should have the opportunity of hearing the recording itself. I therefore adjourned to enable the transcript, or recording, to be obtained.

17. The adjournment further provided an opportunity for investigation into another aspect of the case. As I note above, at the hearing before the First-tier Tribunal the Appellant asserted that immigration officers

had twice visited the home that he claims to share with his wife. Although he was not present on either occasion, his wife states that she was interviewed and the officers were shown the shared bedroom, the Appellant's clothes in the wardrobe etc. The HOPO Ms Mepstead knew nothing about these visits, and when she checked the electronic system there was no record of them having taken place: she was however prepared to accept that at least one of them occurred because the Appellant had produced a receipt from a named immigration officer who had attended his home.

18. An issue arises in this appeal about the approach that the Tribunal took to these claimed visits. The First-tier Tribunal appears to have been under the impression that Ms Mepstead declared that there was no records at all, and that Mr Hussain was accusing her, in so doing, of deliberately concealing evidence. Before me the parties appeared to be in agreement that if that was the Tribunal's understanding of their respective positions, it was mistaken. Ms Mepstead could not have made a definitive statement about the record because she was well aware that she did not have access to all the different systems/places such a visit might be recorded: that much was evident from the fact that the visit she *accepted* as having taken place did not appear on the system available to her in court. As I note above, Mr Hussain strongly rejects the notion that he was personally criticising Ms Mepstead. The point was that these visits were potentially of some significance to the case. If, as claimed, immigration officers had, on two separate occasions, been satisfied that this couple were cohabiting and sharing a bedroom as claimed, that was plainly pertinent. At the hearing before me the Appellant had managed to find a receipt given to his wife at the second of these visits, meaning that there is now confirmation, from a named officer, of both of them. This was produced and shown to Mr McVeety who indicated that now he is aware of the officer's names, it would not be difficult to contact them directly and obtain their notes, or witness statements. He indicated that he would endeavour to obtain confirmation, one way or the other, before the resumed hearing.

The Resumed Hearing

19. On the 23rd November 2021 I obtained, and sent to the parties, a link to a CVP recording of the hearing before Judge Mills. On the 3rd December 2021 Mr Hussain provided a transcript of those parts of the hearing that he regarded as pertinent to the appeal. At the outset of the resumed hearing I indicated to the parties that I had listened to the entire recording twice, once in November 2021 and once again on the morning of the hearing. I have since listened to it again. Mr McVeety indicated that he had also had an opportunity to listen to the recording, as had Mr Jafferji. The parties indicated that they were content to proceed to make their own submissions about what transpired at the hearing before Judge Mills and there was no further

need to hear the tape during the course of the hearing. Mr McVeety did not take any issue with the accuracy of the transcript prepared by Mr Hussain, although he did point out that it was incomplete, in particular in that it omitted important exchanges at the beginning of the hearing.

20. As hoped the hiatus between hearings gave Mr McVeety an opportunity to obtain the records relating to the visits by officers from immigration operational enforcement to the home of the Appellant's wife. In an email dated the 2nd December 2021 Mr McVeety explained much of the information in the original notes had to be redacted, so he copied the summaries of the visits. The first of these summaries read:

> Officers arrived at the address at approximately 08:40 on 14/11/2019.
>
> Entry was gained by OIC via fully informed consent and granted by the occupant of the house. The occupant was an adult female who stated she was due to marry the target of the visit on 19th November 2019. IOs conducted a search of the premises with the consent of the occupier. Also present were two adult males, both were cleared, and no other persons or the target were found present.
>
> The occupier, an EEA national, informed officers of the intention between her and the subject to marry and to submit an application for leave for the subject. She stated he was in London with family, however he would be moving into the address when they married and that this address would become his main residence.
>
> All officer then left the address and returned to the vehicles at approximately 08:53.

21. The second summary relates to a visit said to have taken place in late January 2021:

> IE officers attended the address at approx. 17:18hrs along with Nottingham MDS police team and uniformed officers. Entry was gained by informed consent. Present were 1 female and 2 males, all who had ROU documents and were cleared.
>
> HIMA was not present. RUSE stated that he was away at the time visiting his brother, although stated they were now married and that he did reside at the address.
>
> Officers saw a photo from the wedding day, and in RUSE's room were a few male belongings/clothing, however 2 other males living at the property and therefore cannot confirm who they belong to.
>
> RUSE stated waiting to hear from Home Office/solicitor regarding HIMA's leave application appeal.
>
> All officers left and returned to the van at approx. 17:28. Target not present to confirm circumstances in relation to if substantive relationship with RUSE.

22. Mr McVeety's email contained the following additional commentary on these notes: "As will be made clear neither of the visits were in any way connected to an assessment of the validity of the marriages and contrary to claims neither of the visits made any conclusions that they were satisfied that the marriage was genuine. It is to be noted that the Appellant was not present at either of the visits despite the second visit being undertaken when there was a National lockdown due to Covid restrictions".

23. This new evidence having been admitted, I proceeded to hear the submissions of the parties. I reserved my decision, which I now give.

24. This was a complex case in that many of the grounds pleaded overlap, and many findings by Judge Mills are subject to more than one complaint. I have found it most convenient here to begin by addressing the central complaint of bias.

Bias

25. In Sivapathan (appearance of bias) [2017] UKUT 00293 (IAC) the then President of the Tribunal Mr Justice McCloskey reviews a number of pertinent authorities. In Alubankudi (appearance of bias) [2015] UKUT 542 (IAC) he had himself drawn the distinction between actual and apparent bias, with the following test held to apply to the latter:

> *"The question is whether the fair minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was bias."*

26. The fair minded observer, is not, McCloskey J explained, to be equated with his jurisprudential predecessor, the innocent bystander. The fair minded observer is to be regarded as being aware of everything bearing on the judge's impartiality, and the proceedings must therefore be assessed as a whole.

27. There was, it is fair to say, a degree of ambivalence in the Appellant's case on this point. At one stage, it certainly seemed that there was an accusation here of direct, actual bias. Mr Hussain's notes of the hearing reveal that the Appellant was furious upon learning that Judge Mills was formerly employed as a "Home Office lawyer" (he was once a Senior Presenting Officer). The initial grounds allege that the Judge "conducted the procedure unfairly"; they make reference to the decision in Sivapathan and "indications of a closed judicial mind" and submit that Judge Mills displayed a "pre-determined mindset". Before me however Mr Jafferji considerably refined that position to submit that this was not an accusation of actual bias, rather the concern expressed is that the fair minded observer might conclude there to be a real *possibility* that the tribunal was bias.

28. My overall conclusion is that the test for apparent bias has not been made out. The fair minded observer might well conclude that the

hearing was at times fractious; Judge Mills certainly expressed frustration, and there was, at one point in particular, a deviation from the norm; but being in possession of the facts as a whole, I do not think that observer would conclude there to be a real possibility that Judge Mills was bias.

29. I start by acknowledging the matters which would tend to support the Appellant's claim.

30. During his examination in chief Mr Hussain had asked the Appellant about the visits to his home by immigration officers. His statement had mentioned that immigration officers had visited his wife's home in 2019 and Mr Hussain wanted to know if anything else had happened. The Appellant said that it had, and that there had been a second visit, very shortly before the hearing. During cross examination it became clear that Ms Mepstead knew nothing at all about these visits, since she asked for proof that they had occurred. Mr Hussain interrupted to say that he did have documentary evidence – in the form of a receipt left by the officers – in respect of at least one. If the fair minded observer heard the exchange that followed they may be left wondering why it was Mr Hussain who became subject to criticism from the bench rather than Ms Mepstead: instead of questioning her about why the Home Office had not taken steps to investigate this claim prior to the hearing, Judge Mills instead demands of Mr Hussain why he had not introduced this evidence earlier. Having listened to this particular exchange several times it seems to me that one explanation for this is that Judge Mills overlooked the fact that the claim was actually in the witness statements, filed and served in accordance with directions prior to the hearing: this would accord with the mistake of fact at paragraph 14 of the decision that "no mention of this had been made at this point".

31. Mr Hussain's explanation was that he had assumed that the matter would be uncontentious, since he expected Ms Mepstead to know about visits conducted by officers working for the same organisation as her: that's why he had not bothered to prepare a further witness statement and append the receipt. This explanation is rejected by Judge Mills as "not a good one". For my own part, Mr Hussain's conduct in this regard seemed perfectly reasonable. He was entitled to assume that everyone had read the witness statement, and that the Home Office records would all be accessible by Ms Mepstead. As Mr McVeety was to later explain, for various reasons concerning the internal workings of the Home Office, the latter assumption was actually wrong, but it was nevertheless reasonable.

32. I am further satisfied that the Tribunal misunderstood the position of Ms Mepstead in respect of the record of these visits. The decision suggests, at for instance paragraph 18, her submission to have been that there was *no evidence* of these visits. In fact her submission was that on the records *available to her at the hearing* there was no confirmation available. As Ms Mepstead readily acknowledged, that

did not mean there was no evidence available at all, anywhere. It was just she couldn't confirm it at that moment. That much was of course readily apparent from the fact that the visit that was *accepted* to have taken place, for which the Appellant produced a written 'receipt' given to his wife by the officers, could not be seen on the system available to Ms Mepstead.

33. Finally on this point, the Tribunal was wrong to suggest that Mr Hussain made a personal accusation against Ms Mepstead. I have listened to the recording several times and I am satisfied that what he actually did was to make it very clear that he in no way impugned her personally. His complaint was rather that the Home Office, *as an organisation*, should be in a position to confirm that these visits had taken place. He took the view that these visits were obviously relevant to the matter in hand, and that the 'concealment' of them from the court was a matter of concern. A more pragmatic approach would have been preferable. Had Mr Hussain brought the subject up at the beginning of the hearing and questioned in a more neutral fashion the possibility of an adjournment to enable Ms Mepstead to make enquiries (of the kind subsequently made by Mr McVeety) the subject would have been less heated. Instead Mr Hussain leapt to the conclusion that there was something nefarious afoot, an approach which Judge Mills clearly found unhelpful.

34. I now turn to what was, in my view, the most problematic part of the hearing. At the beginning of the day the Judge had asked Mr Hussain to explain why he was only calling the Appellant. He expressed surprise that Mr Hussain was not calling the wife, nor indeed other family members such as her cousin and brother who allegedly live with the couple. Mr Hussain explained in very clear and coherent terms his case strategy: he did not think that the matters identified by the Respondent were capable of even raising a reasonable suspicion about the nature of this marriage. In those circumstances he had decided to do no more than call the Appellant himself, who could provide a complete *Rosa* answer to all of the concerns raised in the refusal letter. There can have been no doubt that this was his position, since he explained it clearly, reiterated it in response to questions from the bench, and Judge Mills subsequently ensured that the Appellant understood that this was the approach that his representative was taking. It was no doubt for that reason that Ms Mepstead did not pursue the point with any vigour during her cross examination, accepting the Appellant's explanation that he did not think he needed to call any other witnesses, before moving on.

35. When cross examination was over Judge Mills said that he had "just a couple of questions" for the Appellant. He went on to ask no fewer than 23 questions about the absence of witnesses, including the following exchange about the Appellant's brother:

> Q. Why is he not here as a witness?

A. Why he is not here? Because he is home, he just arrived Monday evening, is not allowed to come out so he need to stay 14 days isolation.

Q. So when did he come back to the UK?

A. My brother?

Q. Yes

A. Monday evening, this past Monday

Q. And where had he been?

A. He been home

Q. And how long had he been gone for?

A. 10 days

Q. So you have known about todays hearing for quite a long time, prior to him going on holiday to Albania and then being isolated after he came back. Why did you not plan to have him give evidence at your hearing?

A. Yes sir you are right but when I find out the hearing date he was already home

Q. So sorry, when did you find out the hearing date

A. So its two weeks now or something

36. Before turning to the absence of the Appellant's stepson:

Q. Right that's fine you have lived with your stepson who is an adult for quite a period of time. Again, why hasn't he come as a witness. He could clearly speak to you and his mother being in a genuine relationship if he is there sleeping in the property every day …

37. It was at this point that Mr Hussain raised an objection: "the Tribunal cannot cross examine my client". Whilst expressed in blunt terms, the fair minded observer may well have some sympathy with Mr Hussain's interjection. That is because the questioning was lengthy – in fact longer in duration than cross examination had been – and, with respect to Judge Mills, entirely unnecessary. The reason that the witnesses were not called had been made clear, and it is difficult to see why there was any need for further clarification on the point. Judge Mills may have been curious about what the answers might

have been – and I think genuinely baffled by Mr Hussain's strategy- but in pursuing such extensive questioning from the bench he ran the risk that he may be accused of having entered the arena. That risk was heightened by his reaction to Mr Hussain's interjection:

> "Mr Hussain you are not doing your client any favours with your behaviour today I can tell you that much. The presenting officer asked why no witnesses were called and the answer was 'why should I?'. That's not a good answer is it, so I am clarifying that point. That's clarification, Mr Hussain, not cross examination. You should know better than to accuse me of cross examining. You are welcome to apologise".

Mr Hussain remained silent. Judge Mills goes on to say:

> "So you are not going to apologise. You are not doing your client any favours at all Mr Hussain. I will carry on with my perfectly legitimate line of clarificatory questioning …"

38. In his witness statement Mr Hussain describes Judge Mills as being "demonstrably unhappy" at this point; Mr Jafferji described the exchange as "fractious". Both are fair, and perhaps even understatement. The turn of phrase "you are not doing your client any favours" is capable of conveying the unfortunate impression that the Tribunal was contemplating taking its frustration with the legal representative out on the appellant. For reasons I return to below, I do not however think that is what Judge Mills meant at all.

39. In respect of all of these matters I accept that Mr Hussain, and his lay client, have legitimate cause for complaint. I am not however satisfied that any of these establish an error in approach such that the decision should be set aside. That is because viewed as a whole the hearing was, to any observer, fair.

40. The written grounds suggest that what was happening at the hearing was that the Judge was not satisfied with the way that the Presenting Officer was running the case for the Home Office, and so took over himself. Looming over that submission is of course the fact, known to all, that Judge Mills was formerly a respected Presenting Officer himself. Having read the decision, and listened to the entire recording three times, I am satisfied that in fact it was the converse: he was not trying to assist the Secretary of State to present her case, he was trying to assist the Appellant in presenting his.

41. The root of the difficulties in this appeal comes back, in my view, to the case strategy adopted by Mr Hussain. In a series of well-known cases culminating in Rosa v SSHD [2016] EWCA 14 the courts have held that where an allegation is made that a marriage has been contracted for 'convenience' alone – i.e. the circumvention of immigration control – the legal burden of proof to make good that allegation lies on the Respondent. In Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC) further

nuance had been added, of which the Court of Appeal said this, in Agho v SSHD [2015] EWCA Civ 1198:

> "13. ... What it comes down to is that as a matter of principle a spouse establishes a prima facie case that he or she is a family member of an EEA national by providing the marriage certificate and the spouse's passport; that the legal burden is on the Secretary of State to show that any marriage thus proved is a marriage of convenience; and that the burden is not discharged merely by showing 'reasonable suspicion'. Of course in the usual way the evidential burden may shift to the applicant by proof of facts which justify the inference that the marriage is not genuine, and the facts giving rise to the inference may include a failure to answer a request for documentary proof of the genuineness of the marriage where grounds of suspicion have been raised. Although, as I say the point was not argued before us, that approach seems to me to be correct ..."

42. The first stage was for the Appellant to establish a *prima facie* claim to be a family member with the production of a marriage certificate. Stage two was for the Secretary of State to consider whether in her view there was a reasonable suspicion that this was a marriage of convenience, and evidence that suspicion. Stage three sees the evidential burden shift to the Appellant to dispel the reasonable suspicion. Stage four is the final reckoning, with all matters taken into account and the overall legal burden lying on the Secretary of State.

43. The first stage had been completed by the production of the marriage certificate: a *prima facie* case had been established. The Secretary of State had however found cause for reasonable suspicion, as set out in the five problematic areas of evidence identified in the refusal letter. Mr Hussain looked at those five areas and came to the view that they were, as a matter of fact and law, insufficient to discharge that evidential burden on the Secretary of State. His approach from thereonin was to say ‘we don’t need to do very much’, since on his analysis, there was no case to answer.

44. It is worth identifying here what the five areas were. The couple had given inconsistent information about who was in the house when they had left to come to the interview; the Appellant had said that his stepchildren have contact with their biological father when in fact they have had none for many years; the Sponsor was completely unaware that the Appellant had come to the UK at any time before 2017; the two were unable to recall who they were with the night that they met, even though it was said that the same friends had attended their wedding; the Appellant said that his stepchildren were in the living room to see him propose to their mother – she said that the proposal took place in the back garden and they were alone at the time.

45. It was against this background that Judge Mills appeared genuinely concerned at the position adopted by Mr Hussain at the outset of the hearing. When Mr Hussain explained that he would not be calling

anyone else, Judge Mills pointed out that the usual approach in such cases would be to call both husband and wife; this would be the best evidence you could bring; he reminded the advocates that he would be entitled to draw a negative inference from the absence of witnesses such as the wife; he went so far as to check that the Appellant understood the legal strategy being adopted by his representative, and was happy with it. Listening to that exchange it is abundantly clear that the Judge was giving Mr Hussain an indication from the bench. Mr Hussain either did not recognise it as such, or was so confident in his own analysis he thought he could plough on regardless.

46. Mr Hussain's strategy was a bold one, and in another case it might be justified. Here it was misconceived for three reasons. First because the five areas identified in the refusal letter were plainly sufficient to raise a reasonable suspicion. Second, because it was self-evident that where contradictions have arisen between two accounts, some explanation might be needed from the other person – as Judge Mills observed, that is the usual approach because it is the best evidence one could bring. Third, because in the final analysis the decision maker must look *at all of the relevant evidence*. As Mr Hussain knew full well, in this case that included the fact that his client had twice claimed asylum using false identities (and in one case a false nationality) and had entered the UK illegally after losing an appeal on the grounds that he had significantly contrived to circumvent the immigration rules. That history was plainly relevant. Mr Hussain, being a diligent and competent representative, would also have been aware that there were problems with the marriage interviews other than those listed in the refusal letter.

47. It was the insistence on pursuing this strategy that forms the backdrop to this appeal. Mr Hussain is disappointed that Judge Mills did not share his interpretation of the evidence; Judge Mills was first taken aback, then increasingly infuriated by Mr Hussain's refusal to deviate from the path he had set himself.

48. In his submissions Mr Jafferji identified six particular issues which he says, considered cumulatively, would lead the fair minded observer to conclude that there was a real possibility that the Tribunal was bias. I have already accepted that in respect of two of these matters there is legitimate cause for concern: there was no reason for Judge Mills to conduct the extensive questioning of the Appellant that he did, and his reaction to Mr Hussain's objection about that was intemperate.

49. I am not however satisfied that in any of the remaining points made by Mr Jafferji the Tribunal can be criticised.

50. There was nothing wrong with Judge Mills turning to Ms Mepstead as he did to say that he "assumed" that she would be asking him to draw an adverse inference from the lack of witnesses: that was nothing more than a statement of the obvious, and there is nothing at

all to support the suggestion that this was not a point that Ms Mepstead would have taken herself. It was quite obvious that she would do so.

51. Nor was there anything inherently wrong with Judge Mills pointing out that previous findings, made by Judge Shiner, might be relevant. He was wrong as a matter of fact to say that it might be a judicial assessment of the *Appellant's* evidence – it had been an entry clearance appeal conducted when the Appellant was in Tirana – but nothing turns on that, since the truth of the matter would be revealed when Judge Mills saw the document for himself. He was however quite right to direct himself to Devaseelan. That previous judicial assessment of the Appellant's behaviour generally – in the context of a 320(11) refusal – was obviously pertinent. Again this highlights the perils of the strategy adopted by Mr Hussain. Had he stood back and looked at the case holistically, as he knew full well the decision maker would have to, he would have known that the Appellant's appalling immigration history was likely to feature. There can have been no rational objection to the admission of Judge Shiner's decision since it was, as Mr Hussain himself acknowledged, evidence of a history already known to all concerned.

52. I have already accepted that the Tribunal appeared to misunderstand the position of Ms Mepstead in respect of the record of the visits, but this is not in my view a matter capable of raising the spectre of bias, unless it is suggested that Judge Mills has deliberately reframed her submissions on the point to advantage the Secretary of State – which I do not perceive to be the submission.

53. The final matter raised relates to Judge Mills' conduct during Mr Hussain's submissions. He described Mr Hussain as getting "irate", asked him to slow down, became mildly irritated when the line kept dropping out and when Mr Hussain could not give him correct reference for authority that he was citing, challenged him on his submissions about the Secretary of State's conduct and concluded by asking "do you really think as a legal professional you have approached this case in an appropriate way, Mr Hussain?". I understand that Mr Hussain feels aggrieved about these comments. They were not however, in all the circumstances, unreasonable. Judge Mills was no doubt feeling some degree of irritation about the fact that Mr Hussain was not addressing the facts of the case, and instead doggedly reiterating his position about the burden of proof being on the Respondent. He did however remain calm and courteous. I do not accept that any fair minded observer would regard disagreeing with a representative as constituting bias.

54. I conclude that whilst there were some shortcomings in the Tribunal's approach on some matters, they were not such that the fair minded observer would conclude that there was a real possibility of bias here. The fair minded observer would rather, it seems to me, see a Judge who was trying to persuade a legal representative to abandon

a strategy which he regarded as flawed. This is what Judge Mills meant when he said that Mr Hussain was "not doing his client any favours", and is reflected in the final paragraph of the decision where the judge says this:

> "It is perfectly possible, had I heard oral evidence from Ms Ruse and other witnesses who would have been able to provide material evidence as to the genuineness of the marriage, that I might have reached the opposite conclusion. It is in no small part down to the inexplicable approach of Mr Hussain in conducting the appeal through failing to call the best evidence available to seek to rebut the allegation made by the respondent, that I find that the Secretary of State makes out her case".

Fairness

55. I now turn to address the remaining grounds which can be broadly placed under the heading of fairness. As I noted at the initial hearing they cannot be entirely divorced from the central ground of bias and in reaching my decision on these matters I have specifically had regard to the recording of the hearing helpfully made available to me by the First-tier Tribunal, and to the evidence concerning the operational enforcement visits obtained by Mr McVeety.

56. Mr Jafferji began his very careful submissions by placing emphasis on the first ground pleaded in the application for permission. This concerned the relevance or otherwise of a previous relationship of the Appellant.

57. In March 2017 the Appellant was in Albania seeking leave to enter as the spouse of a British woman. In considering that application the Entry Clearance Officer in Tirana had not taken any issue with the claimed relationship, but had refused to grant a visa on the grounds that the Appellant had previously contrived in a significant way to frustrate the intentions of the immigration rules, a matter capable of attracting a refusal under paragraph 320(11), a "general ground for refusal". The Appellant had appealed and the matter had come before First-tier Tribunal Judge Shiner. Judge Shiner had also accepted that the relationship was genuine, but having had regard to the Appellant's history of deception had upheld the 320(11) refusal and had dismissed the appeal. The evidence before Judge Mills was that the Appellant had ignored that decision and had simply re-entered the UK illegally.

58. The decision of Judge Shiner was introduced into the evidence in this case by Ms Mepstead. She had brought that decision along because it set out in clear terms the nature of the Appellant's poor immigration history. It was her a submission that this dismal record was relevant to the appeal in that it added weight to the Secretary of State's assessment that this relationship was another contrivance to circumvent the rules. What she did not suggest, submitted Mr Jafferji,

was that any negative inference could be drawn from the facts surrounding this earlier relationship. Ms Mepstead did not therefore ask any questions about this earlier marriage.

59. Judge Mills, however, did. He questioned the Appellant himself about whether he had, upon his illegal entry to the UK, gone to live with his wife. The Appellant's evidence was that he had not: there had at that point been "problems" in the marriage and he had instead gone to live with his brother. Judge Mills deduced from this admission that the earlier marriage had in fact been a sham and that adverse inference could therefore be drawn:

> "34. Judge Shiner dismissed the appellant (*sic*), finding that the appellant's complete disregard for the immigration laws of the UK, involving a long history of lying in order to gain immigration status, outweighed his family life with Ms White. Mr Hussain argued that this immigration history was of no relevance to the question before me in this appeal, but I cannot agree. A recent judicial assessment of the appellant, which found his deception to be so serious as to lead to the dismissal of his appeal, is plainly material to my assessment of whether he is again, as the respondent contends, practising deception in order to obtain an immigration advantage.
>
> 35. My starting point must be that the appellant is not a reliable or trustworthy person and I find that I cannot take his word at face value. This should have been obvious to Mr Hussain and makes it all the more surprising that he declined, despite being given several opportunities to reconsider his approach, to call any other witnesses to counterbalance the problems with the appellant's credibility.
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> 36. He stated that his last illegal entry to the UK was in May 2017. This was just a few weeks after Ms White had attended a court hearing and given oral evidence that the couple were devoted to each other and asked that the appellant be allowed to join her in the UK where they intended to live together for the rest of their lives. However he admitted in his evidence that when he entered the UK shortly thereafter, rather than go and live with her he immediately went to stay with his brother and has had no contact with Ms White since.
>
> 37. His only explanation was that "it didn't work out". It is hard to avoid the conclusion that his relationship with Ms White was, as with his two earlier bogus asylum claims, nothing more than an attempt to obtain immigration status in the UK by whatever means possible. This is the context in which I must assess whether the current relationship is genuine or not"

60. Mr Jafferji strongly objected to these passages in the decision, in particular the conclusion that his relationship with Ms White was, "as with his two earlier bogus asylum claims, nothing more than an attempt to obtain immigration status in the UK by whatever means possible". Mr Jafferji pointed out that the Respondent had expressly accepted that the relationship with Ms White had been genuine; Ms

Mepstead had neither cross examined nor made submissions to the contrary; the Appellant therefore had no notice that the point was to be taken. Mr Jafferji accepted that the genuineness or otherwise of this first marriage was not subjected to judicial enquiry by Judge Shiner, but pointed out that he had reviewed the evidence and was himself satisfied that it was no sham, having had regard to the fact that, for instance, Ms White had visited Albania. To go behind that decision without notice was unfair.

61. I am not satisfied that there was anything improper in Judge Mills' conduct or conclusion on this matter. The Appellant's immigration history was referred to in the refusal letter, and as a whole was obviously relevant to the allegation now put by the Secretary of State. It is true that no issue was taken with the genuineness of the marriage to Ms White by the ECO, Judge Shiner or indeed the Secretary of State in this refusal letter. But given the nature of the case, it was not impermissible for the Judge to seek clarification about the circumstances of the Appellant's illegal entry to the UK in 2017. Once those questions were asked, and revealed that he had never in fact lived with that wife, that was quite obviously a matter that needed to be addressed. Mr Jafferji is mistaken when he says that it was not relied upon by Ms Mepstead: in her submissions she pointed out, in the context of talking about the Appellant's immigration history, that the Appellant did not go to live with Ms White, instead living with his brother. She concluded this part of her submissions by saying "that in my submission is reasonable grounds for doubting his intentions". Mr Hussain should not therefore have been taken unawares that an adverse inference might be drawn. As to the objection to the Judge taking as his "starting point" that the Appellant was "not a reliable or trustworthy person" this was what he was, applying Devaseelan, *bound* to do. Judge Shiner had found that the Appellant had previously contrived in a significant way to frustrate the intentions of the rules: there can be no criticism of Judge Mills taking that into account.

62. Similarly I am not satisfied that there was any unfairness or impropriety in Judge Mills taking into account problems arising from the interviews other than those identified in the refusal letter, for instance the fact that many of the questions asked of the Appellant elicited an "I don't know" response. The Judge makes this point in response to the suggestion by Mr Hussain that the Appellant can be taken to have got most of the answers 'right': this was not, in fact the case.

63. Another issue arises in respect of the approach taken by the Tribunal to the visits by immigration enforcement.

64. We now know that two visits took place to the home that Ms Ruse shared with her male cousin and brother. On the first Ms Ruse told officers that the Appellant did not live there yet. She explained that they were planning to get married and he would be moving in there

with her after the wedding. As it stands, the officer's notes add nothing to the evidence that Ms Ruse had already given to the Home Office herself at that point. In the second visit, only a few weeks before the hearing, officers entered the home for the duration of ten minutes. The Appellant was not there. They saw some male clothing and they saw a wedding photograph. Neither of these matters add anything to the case. In respect of the clothes, two other men live at the property. In respect of the wedding photograph, there is no dispute that the wedding actually took place. Whether the marriage is in pursuit of a genuine relationship or an arrangement of convenience, one would expect there to be a photograph of it. What we do now know is that contrary to the hearsay evidence of the Appellant (his wife, the person who actually spoke to the officers, did not give evidence), the purpose of this visit was not to verify that this was a genuine relationship. It was conducted following a tip off from a member of the public that the property was being used for the purpose of human trafficking – the reason that the visit was so brief was that the officers were immediately satisfied that it was not.

65. This leaves Mr Jafferji's central complaint about the Tribunal's approach to the visits. The Tribunal made it clear that it attached weight to the fact that the Appellant had failed to produce evidence it regarded as pertinent, including the evidence of other witnesses who might know the couple, and in particular the evidence of the Appellant's wife; yet it nowhere attached weight to the failure of the Home Office to acknowledge that the enforcement visits took place. Mr Jafferji submits that this reveals a lack of balance in the Tribunal's approach. The burden of proof lay on the Respondent, and it was therefore incumbent upon the decision maker to take all relevant evidence into account, and to ensure that such evidence was available to the Tribunal.

66. I find this argument to be misconceived. First, the very brief note taken by officers during very brief visits were, as I set out above, of negligible value in working out the truth of the matter. The notes of the visits confirm no more than the fact that Ms Ruse knows the Appellant and has married him: we already know that. That being the case they added nothing at all to the balance, whether produced or not. By contrast the evidence not called by the Appellant – principally that of his wife – was of immediate and obvious relevance to the matter in hand.

67. For those reasons I find that the grounds are not made out and the decision of the First-tier Tribunal is upheld.

Decisions

68. The appeal is dismissed.

69. There is no direction for anonymity.

Upper Tribunal Judge Bruce
11th January 2022