IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001516
First-tier Tribunal No:
EA/08579/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 02 November 2023

Before

UPPER TRIBUNAL JUDGE LINDSLEY
DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

MD RT ARAFIN KHAN
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G. Hodgetts of Counsel instructed by Legit Solicitors
For the Respondent: Mr E. Terrell Senior Home Office Presenting Officer

Heard at Field House on 17 October 2023

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Bangladesh born on 5th November 1981. He applied for pre-settled or settled status under the EUSS on 10th November 2021 on the basis of his former marriage to an Italian citizen, Ms Jasmin Laura Rosso. His application was refused on 27th August 2022. His appeal against the decision was dismissed by the First-tier Tribunal (Judge Short) in a decision promulgated on the 20th March 2023.

2. The substantive matter in issue between the parties was whether the appellant's former marriage to Ms Rosso, an Italian national, was a

marriage of convenience. In short, the background is as follows. The appellant and Ms Rosso married in the UK on 9th June 2014. The appellant first applied for a residence card on the basis of his marriage on 10th August 2014. The appellant and Ms Rosso were subject to a marriage interview on 10th July 2015. The respondent concluded on the basis of that interview that the marriage was a marriage of convenience. She refused the application and subsequently detained the appellant. The appellant was released on bail in February 2016. Ms Rosso left the UK for Germany in December 2017 and has not returned. The appellant filed for divorce in March 2021 and the divorce was finalised on 10th April 2021. The appellant then applied under the EUSS on 10th November 2021 on the basis of his former marriage to Ms Rosso. The respondent refused the application in reliance on her previous decision that she deemed the marriage to be a marriage of convenience.

The Judge's decision under challenge

3. The appellant and a witness, Mr Ahmed, both attended the hearing to give live evidence. The appellant further relied on written testimony from Ms Rosso and another witness who had been refused permission to give live evidence from abroad. At the hearing Judge Short admitted into evidence a copy of the appellant's bail summary, served late by the respondent's representative on the day of hearing, because it was relevant to the issues and contained information known to the appellant relating to his immigration and bail history.

4. Judge Short concluded that the marriage was a marriage of convenience. He took into account, amongst other things, discrepancies in the answers given during the marriage interview and accepted the information contained in the bail summary which asserted that Immigration Services received telephone calls and a fax communication from Ms Rosso in September 2015 stating that she wanted nothing more to do with him. Judge Short rejected the evidence of Mr Ahmed, who met the appellant and Ms Rosso before they married and attended their marriage ceremony, on the basis that his evidence was 'opinion evidence' and 'not actual evidence of the enduring nature of the relationship' at [56 (h)]. He dismissed the appeal.

The appellant's challenge

5. The grounds of appeal are five-fold.

6. The first ground contends as follows. The appellant had applied for Ms Rosso to give evidence from Switzerland but this application had been refused. Judge Short admitted on the morning of the hearing a bail summary which the respondent wished to have included which contained alleged prejudicial statements made to the Immigration Services by his former wife. The appellant was not given a proper opportunity to object to this evidence being admitted and reliance was

placed upon it by Judge Short as evidence of showing that the marriage was not subsisting at this early stage.

7. The second ground argues, in summary, that there was a failure to make adequate findings on oral testimony from the witness Mr Ahmed, and in making an irrational interpretation of this evidence at paragraph 56 of the decision. Mr Ahmed gave evidence that he is a close friend of the appellant; that he had been invited to supper with the appellant and Ms Rosso on many occasions prior to their marriage and gave evidence about their wedding which he said was attended by many guests. He recalled that Ms Rosso was very upset when the appellant was detained, and that they lived together as a normal couple for a period of three years up until 2016. Judge Short finds that this was not evidence of a person close to the couple, which is not accurate, and gives it no weight, dismissing it as "opinion evidence" without making a finding as to whether Mr Ahmed was a credible witness.

8. Third, it is argued, that Judge Short fails to balance all of the material evidence before coming to a conclusion on the appeal. There was a failure to consider the following: the evidence of Mr Ahmed; the documentary evidence in the bundle showing cohabitation; the fact that the overwhelming majority of the answers to questions at interview were consistent; and medical evidence that the appellant's former wife had been hospitalised with suicidal ideation due to the stress she was caused by his immigration detention. It is argued that it was irrational to consider as a negative the time the appellant's wife spent in Germany with the intention of establishing a business with her sister.

9. Fourth, it is argued, that Judge Short misdirected himself in law as he did not apply the correct test for a marriage of convenience. Judge Short failed to apply a test of whether the sole reason that both parties entered the marriage was to circumvent immigration control. Instead, Judge Short focuses wrongly on the lack of endurance of the relationship at paragraph 56(h).

10. Fifth, it is argued that Judge Short failed to understand that the burden of proof remained on the respondent throughout, and instead placed a burden on the appellant by stating that he must displace any allegations at paragraph 55 of the decision.

11. Permission to appeal was granted by Judge of the First-tier Tribunal S Aziz on 20th April 2023 on the basis that it was arguable that Judge Short had erred in law by conducting a procedurally unfair hearing by admitting late evidence on the day of the hearing from the respondent in the form of a bail summary, which included information that the appellant's former wife had telephoned and faxed the Immigration Service in 2015 stating she wanted nothing to do with the appellant, which gave the appellant no opportunity to respond to this information. He had provided a witness statement from his former wife but this did

not address these matters and she was not present before the First-tier Tribunal.

12. The respondent did not file a Rule 24 response.

13. The matter came before us to determine whether Judge Short had erred in law, and if so whether any such error was material and the decision should be set aside.

The hearing and our decision

14. At the outset of the hearing we did not need to call upon Mr Hodgetts to amplify his grounds of appeal for the appellant as they are detailed and concise. In the absence of a Rule 24 response from the respondent, we invited Mr Terrell for the respondent to address us first on the grounds.

15. In his submissions Mr Terrell very fairly accepted that ground four placed the respondent in difficulty in seeking to defend Judge Short's decision. Mr Terrell properly acknowledged that Judge Short lost sight of the appropriate legal test and fell into error in concentrating on whether the relationship was of enduring strength and subsisting at [56(h)] rather than focusing on the circumstances pertaining at the date of marriage and the parties' intentions. Mr Terrell submitted that whilst the appellant's other grounds were contested, this error was so fundamental that the decision could not stand. We indicated at the hearing our view that there was merit in the procedural fairness challenge (ground one), but as we were in entire agreement with Mr Terrell, it was not necessary to hear from Mr Hodgetts, and we announced our decision that we were satisfied that Judge Short erred in law and we set aside his decision.

16. In the circumstances, it is not necessary to traverse each of the appellant's grounds, particularly as we did not hear from Mr Terrell in respect of them all. Our reasons can be shorty stated.

17. A marriage of convenience is defined in Rosa v SSHD [2016] EWCA Civ 14 at paragraph 10, as one where it is entered into with the "sole aim of circumventing the rules on entry and residence of third-country nationals and obtaining for the third-country national a residence permit or authority to reside in a Member State". The burden of proof is on the respondent in showing that a marriage is one of convenience. At paragraph 37 of the decision Judge Short correctly sets out the burden of proof as being on the respondent, and the standard of proof as being the balance of probabilities, given that the appellant had submitted his marriage certificate.

18. Whilst we acknowledge that a correct direction is set out at paragraph 40 of the decision in so far as it is clear that the marriage must be solely for immigration reasons, we accept that Judge Short produced an answer to the wrong question. He was not tasked with assessing whether the Appellant's relationship with Ms Rosso was subsisting and

'enduring' and nor was he required to weigh the evidence "against the evidence which suggests that no such enduring relationship existed". The question was whether, at the date of the marriage in June 2014, it had been a marriage of convenience. That is because it is only by focusing on the intentions of the parties at the date that the marriage was entered into that we are able to determine whether the predominant purpose of it was to circumvent immigration control. We agree that at paragraph 56(h) Judge Short's reference to the lack of enduring nature to the marriage as a factor, together with a failure to assess the parties' sole or predominant intention in contracting the marriage, identifies a misapplication of the correct test. We are satisfied therefore that the decision does lack direction on the issue being the reasons for entering into the marriage and concentrates erroneously on the later quality of the marriage.

19. We are satisfied therefore that ground four is made out and given the nature of the error, we agree with Mr Terrell that the error is material and sufficient to vitiate the decision.

20. Nonetheless, we feel that we should make some reference to ground one because it is relevant to our decision on disposal. At paragraphs 7 and 8 of the decision Judge Short deals with the late evidence (the bail summary) submitted by the respondent. It is clear that the representative for the appellant objected to its admission but it was admitted on the basis that it only contained information known to the appellant namely regarding his immigration history. It is clear from Judge Short's summary of the bail summary, at paragraph 23(d) of the decision, that it did not simply contain the appellant's immigration history but also reports of supposed calls and a fax from Ms Rosso to the Immigration Service in 2015 stating that she wanted nothing more to do with the appellant and was intent on divorcing him. Judge Short places reliance on this evidence at paragraph 56(e)(ii) and 56(g)(ii)(1) of the decision, describing Ms Rosso's statements of intent as "clear and consistent", as showing that the marriage was one of convenience.

21. We agree with Mr Hodgetts that the approach adopted by Judge Short gave rise to unfairness. It is appreciably clear that Judge Short construed the information in the bail summary as established facts and proceeded on that basis. That we consider was impermissible in circumstances where the content of the bail summary was misstated by Judge Short – the evidence was that the contents were not known to the appellant - and the appellant had no opportunity to provide a riposte to the assertions in the bail summary through Ms Rosso who had not been given permission to give evidence from abroad, and the evidence was adduced on the day of the hearing. We are satisfied that the appellant was not given a fair opportunity to respond to material and potentially prejudicial evidence not previously raised or relied upon by the respondent. We find that this is a further material error of law, which in itself is also sufficient to vitiate the decision.

22. To conclude, the errors of law, which can be characterised both as a misdirection in law and procedural unfairness are made out. Given the parties are in agreement that the decision of Judge Short cannot stand, it is not necessary in the circumstances to consider the remaining grounds.

Disposal of the appeal

23. We turn to the question of disposal and how we should re-make matters. We remind ourselves of the decisions in AEB v SSHD [2022] EWCA Civ 1512 and Begum [2023] UKUT 00046 (IAC) and the nature and extent of the necessary fact-finding, and the matter of procedural unfairness. Both representatives agreed with us that this was an appropriate case that would need to be remitted back to the First-tier Tribunal.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

We set aside the decision of the First-tier Tribunal with no preserved findings of fact.

We remit this appeal to the First-tier Tribunal for a complete rehearing by a judge other than Judge Short.

R Bagral

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

1 November 2023