IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001247

First-tier Tribunal No: EA/03883/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 24th May 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

SA
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Ndubuisi, Drummond Miller LLP Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

Heard at 52 Melville Street, Edinburgh on 1 May 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge DDH Stevenson promulgated on 10 January 2023, dismissing her appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations"). Against the decision made on 30 September 2020 to refuse her leave under the EU Settlement Scheme ("EUSS") as a "family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen".

2. I maintain the anonymity order made by the First-tier Tribunal.

3. The appellant is a citizen of Nigeria who entered the United Kingdom as a student in 2008. On 14 June 2013 she applied for an EEA residence card on the basis of her marriage to a French citizen resident in the United Kingdom. That marriage had taken place by proxy. The application was refused by the respondent on 25 January 2014 and an appeal against that decision was dismissed by First-tier Tribunal Judge Britton on 16 June 2014. It is the appellant's case that she and her former husband lived in the United Kingdom for six months from February 2013 until September or October 2013, at which point the relationship broke down owing to his violence towards her. She left him and returned to live in Edinburgh but did not report the domestic violence to the police.

4. The appellant made her first application under the EUSS in 2019, which was refused on 30 September 2020 and subject to an Administrative Review which was refused on 4 July 2022. The appellant had made a second application under the EUSS on 28 June 2021, which was refused on 25 March 2022 and it is against that decision which the appeal lies.

5. In the first refusal dated 30 September 2020 the Secretary of State refused the application on the basis that he was not satisfied that the appellant was the spouse of a relevant EEA citizen on the basis that her marriage had previously been deemed and assessed to be one of convenience and that Judge Britton had upheld that decision, concluding that the marriage was one of convenience. In the application for a review, it was submitted that the application had been refused solely on the basis that her marriage was not properly executed, according to Ghanian law. It is stated that it had not been alleged the marriage or relationship was one of convenience. Further, in any event, it is submitted that the allegation of irregularity was unfounded, and documents were provided indicating that it was regularly made.

6. On 4 July 2022 the Secretary of State upheld the decision stating:-

> "It is apparent that a typographical error has been made in your refusal letter under the EUSS dated 30 September 2020 where it states you were refused your Residence Card because your relationship was deemed to be one of convenience. However, the reasons given for your refusal are correct and continue to apply. You are correct that your relationship was not deemed to be one of convenience by the Home Office in your Residence Card refusal. However, that was the conclusion reached by the judge."

7. It is also stated:

> "The [typographical error] … is not material to the decision …. This is because, while the Home Office mistakenly stated that your initial application for a Residence Card was refused due to your relationship being assessed as one of convenience, this conclusion was reached by an independent Immigration Judge and so it is reasonable for the initial case worker to rely on the appeal determination. It was therefore concluded there was no material working error."

8. In addressing whether the marriage was being properly executed in line with Ghanaian law, it was acknowledged that further documents had been provided to demonstrate the validity but it was stated that the application under the Settlement Scheme was refused, not on the basis of legality, but on the fact that it was one of convenience, thus material was not relevant to the decision.

9. In the decision letter of 25 March 2022, the Secretary of State observed that the appellant had not provided the required proof of the relevant EEA's citizen's identity and nationality in the form of a valid passport or national identity card nor evidence that he has been or had been granted indefinite leave to enter or remain or limited leave to enter or remain under the EUSS. He considered also, with respect to eligibility pursuant to Rule 11 EU11 that there were reasonable grounds to suspect that a marriage was one of convenience and that the evidence provided consisted only of a customary marriage certificate concluding, "there is no evidence to support the validity of your marriage".

Decision of the First-tier Tribunal

10. The judge heard evidence from the appellant. He set out at [16] to [18], his assessment of the decision of Judge Britton. Having directed himself that foreign law is a matter of fact normally established by expert evidence, he concluded [21] that Judge Britton had conflated two separate issues – the validity of a marriage, and whether it was a marriage of convenience – and had reached findings directed more to the invalidity of the marriage in law, rather than whether the marriage was one valid in law but undertaken solely to provide an advantage in immigration law terms, and thus a marriage of convenience. He stated:

> "There was an insufficient evidential basis to conclude that the marriage was one of convenience. What was properly at issue, in my judgment, was whether the marriage can be described as valid".

11. The judge then considered the evidence provided as to the validity of the marriage, having had regard to NA (Customary marriage and divorce, evidence) Ghana [2009] UKAIT 00009. He noted [22] that the expert evidence provided in NA was that a valid customary marriage could only be validly contracted between two Ghanaian citizens and that both parties must have capacity to marry. He concluded that although the respondent was wrong to have had regard solely to Ghanaian law in the 2014 decision, what followed from NA was that there was a basis to question how a citizen of Nigeria, with no connection to Ghana, could be customarily married

there; both the appellant and her putative husband were citizens of Nigeria. He observed a lack of documentation since 2014 and a lack of evidence of the relationship [25] and that the evidence was insufficient to displace concerns about the validity of the marriage.

12. The judge concluded that the appellant had not discharged the burden upon her to demonstrate that the marriage was valid and as such she could not be considered as the family member of an EEA national, which was the starting basis for the claimed basis of a qualification under the EUSS.

13. The appellant sought permission to appeal on the basis that the judge had erred in going behind an acceptance by the respondent in the Administrative Review decision of 4 July 2022 that the marriage was valid. It is averred that this would have been determinative of the appeal given the allegation that the marriage of convenience was not made out as the FtT had found.

14. On 11 April 2023 First-tier Tribunal Mills granted permission to appeal.

15. On 12 May 2023, in a letter pursuant to Rule 24, the Secretary of State stated that there had not in fact been a concession in the Administrative Review Decision, given that all the paragraph did was to acknowledge that the appellant had provided further documents to demonstrate the validity of the marriage but did not say it was accepted or conceded on the basis of the evidence that the marriage was valid.

Submissions

16. I heard submissions from both representatives. Mr Ndubuisi sought to persuade me that irrespective of whether or not there had not been a concession, nevertheless the decision was flawed on the basis that the judge had not considered properly the evidence as to the validity of the marriage and had failed to address the issue of domestic violence. He accepted, however, that these were not matters covered by the grounds of appeal. He did, however, accept that if a marriage is not valid then the issue of whether it is a marriage of convenience does not logically apply.

17. Mr Mullen relied on the Rule 24 notice and submitting that the decision did not involve the making of an error of law.

18. I reserved my decision.

The Law

19. There is no challenge to the law as set out in the decision of the First-tier Tribunal. The first issue was inevitably whether there was a valid marriage. That, as a matter of logic, is a question which must be answered before the issue of whether a marriage was one of convenience; if a marriage is not valid then it simply does not exist and so whether it is one of convenience or not does not arise.

20. The Secretary of State did proceed primarily on the basis that the marriage is one of convenience. The judge, correctly, proceeded to address the question first as to whether the marriage between the appellant and her husband was valid. The Secretary of State did, however, address the issue of validity but I do not accept that what was said in the Administrative Review Decision , could properly be construed as an acceptance that the marriage was valid or that there be any concession to that effect. Rather, what is said, is that the validity of the marriage is not relevant because the Secretary of State had decided already that it was a marriage of convenience. I agree with the submission that all the decision of 4 July 2022 did was to acknowledge that the appellant had provided further documents to demonstrate the validity of the marriage, not that it was accepted or conceded that that was so.

21. As there was no concession as to the validity of the marriage, it cannot be argued that the judge erred in not taking it into account. It was open to the judge to consider the issue of validity of the marriage as it was in issued, and the judge did so.

22. The grounds, as pleaded, are narrow. In essence it is said that the error was in failing to have regard to the respondent's acceptance that the marriage was valid. There was no such acceptance and thus this does not identify any arguable error of law. The second part of the grounds, that it was material as it would have been determinative, therefore falls. Any discussion as to whether or not there was a marriage of convenience is relevant only if there is a marriage.

23. I indicated to Mr Ndubuisi during his submissions that in my view the grounds, as pleaded, did not include a challenge to the judge's assessment that the marriage was not valid. He did not make any application for the grounds should be amended.

24. Mr Ndubuisi did not set out in writing any basis on which the grounds ought to be amended and in the circumstances I am not satisfied that the grounds as pleaded are sufficiently broad to encompass a submission that the judge's findings with regard to the validity of the marriage involved the making of an error law. I bear in mind that any such finding was a finding of fact, given that it related to foreign law, and no sufficient basis is put forward in the grounds as to why that was an error.

25. Accordingly, for these reasons, I concluded that the decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Notice of Decision

26. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed Date 14 May 2024

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul