



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002920

First-tier Tribunal No: EA/09170/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 26th of September 2024

Before

UPPER TRIBUNAL JUDGE BLUNDELL
UPPER TRIBUNAL JUDGE PINDER

Between

MOHAMED MAHMOUD KHALIL ELARGAWY
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Pullinger, Counsel instructed by M A Consultants
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

Heard at Field House on 19 September 2024

DECISION AND REASONS

Introduction

1. The Appellant appeals with permission to the Upper Tribunal a determination of First-tier Tribunal Judge I D Boyes ('the Judge'), promulgated on 16th March 2023. The Judge dismissed the Appellant's appeal against the Respondent's decision dated 22nd September 2022 to refuse to grant the Appellant Settled or Pre-Settled status under the EU Settlement Scheme ('EUSS'). This was on the basis that the

Appellant's marriage to his EEA national spouse was one of convenience in order to circumvent the requirements for lawful entry to or stay in the UK.

2. The Appellant is a national of Egypt and he married his wife, a Polish national, on 24th August 2020. As part of his EUSS application, both the Appellant and his wife were interviewed remotely by the Respondent on 21st September 2022. The interview records show that the Appellant was asked approximately 430 questions and his wife just under 200 questions. Following these interviews, the Respondent refused the Appellant's application and relied on a number of purported inconsistencies between the Appellant and his wife's answers.
3. In his appeal in the First-tier Tribunal, the Appellant put forward a written statement addressing the Respondent's reasons for refusal. In particular, at paragraph 7 of his statement, the Appellant provided a response to each of the issues raised against him by the Respondent in relation to his and his wife's answers at interview. A witness statement from the Appellant's wife in line with the Appellant's was also relied upon. Whilst this is not recorded in the Judge's decision, both the Appellant and his wife attended the appeal hearing and were called to give oral evidence, each in turn cross-examined by the Respondent's Presenting Officer. A number of documents were also included in the Appellant's bundle as evidence of cohabitation and in support of their relationship, claimed to be a genuine and subsisting one.

The Judge's decision and findings – a summary

4. The Judge's decision is very short, amounting to just over three pages. At [7] of the determination, the Judge recounts the Appellant's history of having fabricated a previous protection claim – a fact, which the Judge records as having been admitted to during the Appellant's evidence at the hearing. At [8], the Judge summarises the Appellant's relationship and how it was said that the couple met and started their relationship together. The Judge concluded at [12] that the Appellant's marriage was a sham and he includes six reasons in support. These reasons can be summarised as follows:
 - (a) The Appellant's credibility is described to be *"incredibly low"* and *"coming as close to having no credibility as is possible"* on the basis that he created and manufactured a previous claim, in a different identity, and maintaining these deceptions for a significant period of time [12A];
 - (b) There was little evidence before the Judge of any shared lives, with only a few photographs mainly of the wedding ceremony [12B];
 - (c) There was no evidence of a joint life, e.g. joint financial commitments. Joint council tax bills and joint utility bills carry little weight as there is no check on the information provided [12C];

- (d) The explanation of the Appellant as to why he was not able to spell his wife's name (whether at interview or otherwise is not clear from the Judge's decision) was not accepted as reasonable [12D];
- (e) The Judge did not accept that the Appellant was being truthful in relation to the addresses he and his spouse had purportedly lived at, with reference to both the Appellant's and his wife's answers at interview [12E];
- (f) The Judge did not find any of the Appellant's responses or explanations to be satisfactory and he found that the Appellant was trying to fit these around the evidence [12F].

The Appellant's appeal

- 5. In his permission to appeal application, the Appellant argued that Judge Boyes had arguably materially erred in law by failing to approach the evidence before him holistically and in the round, with particular reference to the Judge placing too much emphasis on the Appellant's poor immigration history and previous acts of deception and failing to weigh in the balance the remainder of the marriage interview records, which were on the whole consistent across the Appellant's and wife's responses.
- 6. It was also submitted that the Judge had arguably failed to engage with the evidence of the Appellant's wife, who had been called as a witness and cross-examined by the Respondent. It was asserted in the grounds of appeal that there had been no inconsistencies between her and the Appellant's oral evidence at the hearing. In the alternative, it was argued that the Judge had failed to explain, even in brief terms, why her evidence as the Appellant's witness and wife was rejected.
- 7. Permission to appeal was granted by Upper Tribunal Judge Canavan on 2nd November 2023 on the basis that it was just arguable that the Judge failed to consider whether any of the evidence might support the Appellant's claim to be in a genuine marriage with a European citizen, and if he rejected it, to give reasons. In particular, Judge Canavan noted that it was at least arguable that the Judge failed to make findings in relation to the credibility of the Appellant's wife, who it was said had attended the hearing to give evidence.
- 8. The matter now comes before us to determine whether the First-tier Tribunal Judge erred in law, and if so whether any such error was material and whether the decision of the First-tier Tribunal should be set aside.

The parties' respective submissions and our conclusions

- 9. Mr Pullinger helpfully addressed the Appellant's grounds of appeal in a separate skeleton argument. There was no Rule 24 response on behalf of the Respondent.

10. At the start of the hearing, we indicated to Mr Walker that we were of the pre-liminary view that the Judge had failed to engage with the written and oral evidence of the Appellant's wife. We noted with Mr Walker that it was not even apparent from the Judge's decision and his summary of the evidence before him that the Appellant's wife had attended as a witness. Considering the relevance of this evidence to the core issue in dispute, this is surprising.
11. The Respondent had not sought to dispute prior to the hearing the matters asserted in the Appellant's grounds of appeal, namely that the Appellant's wife had attended to give oral evidence and had been duly cross-examined. Mr Walker agreed at the hearing that she had been so called.
12. Mr Walker accepted that it was incumbent on the Judge to engage with the evidence of the Appellant's wife and that his failure to do so constituted a material error of law. This is particularly so in the context of an allegation raised by the Respondent that the Appellant had entered into a marriage of convenience.
13. In the circumstances, we are satisfied that the Judge has materially erred in law. Considering the relevance of the evidence of the Appellant's wife, we also find that the Judge's error is such that the decision as a whole is unsafe. Accordingly, we conclude that the Appellant's appeal should be allowed and Judge Boyes' decision should be aside, with no findings preserved.

Decision

14. The decision of the First-tier Tribunal is set aside. None of the findings of fact shall stand.
15. The Appeal is remitted to the First-tier Tribunal for a hearing *de novo*, before any Judge of the First-tier Tribunal, other than Judge Boyes.

Sarah Pinder

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23rd September 2024