IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001182
First-tier Tribunal No:
PA/00784/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 12 October 2023

Before

UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

Mr R M (Nepal)
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr Azhar Chohan (Counsel by Direct Access)
For the Respondent: Ms Julie Isherwood (Senior Home Office Presenting Officer)

Heard at Field House on 21 August 2023

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. This is an appeal against the determination of First-tier Tribunal Judge Norris, promulgated on 29th January 2023, following a hearing at Hatton Cross on 20th January 2023. In the determination, the judge dismissed the appeal of the

Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before us.

The Appellant

2. The Appellant is a male and a citizen of Nepal. He appealed against the decision of the Respondent dated 17th August 2021 refusing his application for asylum and for leave to remain in the UK.

The Appellant's Claim

3. The essence of the Appellant's claim is that he fears his Sponsor's family, who are from the *Bhandari* caste, as he himself is of the *Maharjan* caste. His sponsoring wife is from the *Bhandari* caste, and this caste is politically influential. In fact, her sponsoring wife's mother is a deputy mayor of Urlabari in Nepal and her aunt is the current President of Nepal. The Appellant and his sponsoring wife were married in Nepal in 2010, but they have faced opposition to this union from the sponsoring wife's side because of their caste differences, which have sometimes been of a violent nature. After the Appellant and the Sponsor married secretly, she left Nepal. A year later in March 2011 the Appellant followed her on a student visa. Ten years after they were said to have been married in Nepal, the Appellant and the Sponsor married at Uxbridge Civic Centre on 3rd January 2020. Both of them told the registrar that they were single, and that is what is stated on their marriage certificate.

The Judge's Findings

4. The judge observed that the evidence before him had been that the Appellant and the Sponsor married in 2020 in order to prove to the Respondent and to their own family that they were indeed married because the Respondent had not accepted this to have been the case initially. The judge also heard evidence that a previous lawyer had told them both that they had to marry a second time in the UK because the Home Office did not accept their marriage. Indeed, a previous appeal before First-tier Tribunal O'Flynn in June 2015, against the Appellant's refusal of his Tier 4 student application, had also seen no mention at all of the Appellant having a wife. The only reference was that, "he provided a conditional letter from his sponsor" which he had complained the Respondent having not considered (determination at paragraph 4.25). In February 2016 the Appellant had made a family life application which was refused in May 2016, but this was not because the Respondent did not accept that the couple were married. It was because, as Judge Oliver made clear in a 2017 decision the Respondent accepted that their relationship was genuine and subsisting. The appeal had nevertheless been refused because the Appellant maintained that the lawyer had told him to get married "one more time" and apply as a dependant of his sponsoring wife (determination at paragraph 4.26).

5. In his decision, Judge Norris held it to be "very damaging to the Appellant's credibility that he now claims to have agreed to tell the Registrar something that was not true (i.e. that he and the sponsor were single) in order to obtain leave to remain". Indeed, as Judge Norris pointed out, the sponsor had done the same. Judge Norris was in no doubt that even if that was on legal advice as claimed, "they must have known this was wrong" (determination paragraph 5.2).

Grounds of Application

6. The grounds of application contend that the judge had at the hearing devised his own theory of the case, namely, that the Appellant had dishonestly informed a registrar that he was not already married to the Sponsor, when he in truth was. Furthermore, that the judge sought to cross-examine the witness on that theory, and that when Counsel representing the Appellant sought to intervene, the judge unfairly curtailed his objection and ignored it. In support of this allegation, the Appellant had provided a witness statement from Mr Asad Maqsood, (Counsel), who appeared on his behalf before the judge, together with a statement of truth in support.

7. On 15th May 2023, permission to appeal was granted by the Upper Tribunal on the grounds that "it is arguable that the judge's conduct of the hearing was unfair, in that it arguably deprived the appellant of a fair hearing". Indeed, in **Elais (fairness and extended family members) [2022] UKUT 300 (IAC)**, the Upper Tribunal held that, "in order to conduct a fair hearing, cross-examination should be facilitated by the judge without undue interruption" (see headnote at paragraph 1).

Submissions

8. At the hearing before us on 21st August 2023, Mr Chohan, who appeared on behalf of the Appellant, did not have previous Counsel's hearing notes. He submitted that, whilst it would be possible to contact Mr Asad Maqsood, the previous Counsel, given the holiday period presently in August 2023, there is likely to be a delay in his providing his side of the story as to what happened before Judge Norris.

9. On the other hand, we were fortunate to have in the Respondent's bundle (of 327 pages) and the detailed Home Office minute sheet of the Presenting Officer (pages 289 to 298), dated 24th January 2023. As Mr Chohan did not have a copy of this, we arranged for one to be immediately forwarded to him and then adjourned to enable him to read it so as to be able to take his submissions on it. When we returned half an hour later at 11.08am Mr Chohan confirmed that there was a level of intervention by Judge Norris during the course of the Appellant's evidence which interfered with the cross-examination of the witness, in a way that distorted the hearing process.

10. We put it to Ms Isherwood that the manner of the judge's intervention plainly illustrated that he had decided to enter the fray and to participate in the giving of the Appellant's evidence in a way that was unwarranted. Even before the cross-examination, when the representative, Mr Maqsood, was not very far into the examination-in-chief, the judge had joined in. Ms Isherwood did not agree. She submitted that an analysis of the Home Office minute on the day shows that the Appellant's representative, Mr Maqsood, was himself interrupting the witness, for the purposes of clarification of the evidence. This is exactly what the judge too was doing. We put it to Ms Isherwood that the reality was that the judge was intruding upon both sides in an effort to get confirmation of his own viewpoint. Ms Isherwood submitted that there was not a single hostile word spoken by the judge and that all that was intended was clarification.

11. We do not agree. We add, however, that it is a matter of regret that previous Counsel, Mr Asad Maqsood, did not furnish an affidavit, with an exhibit of

Counsel's notes of the day attached to it, as that would have been altogether more helpful, in the way that the Home Office minute itself was. Nonetheless, we were satisfied that the judge did intrude upon the Appellant's giving on his evidence by constant interruptions in a way that distorted the evidence. One clear example of this is the judge's enquiry (on the third page of the minute) into why, if the Appellant had got married in 2020, he still maintained that he was single. With respect to this, the Appellant replied that the lawyer had asked him to get married because the Home Office had not accepted his relationship with the Sponsor. To this, the judge responds as follows:

> J: that is not why it was refused
>
> A: that is what the lawyer told me as they did not accept your marriage
>
> J: you appealed and I am trying to get an understanding – it was not that it was not accepted that it was not genuine but you said you forgot to mention about the conviction – it was nothing to do with the marriage – what is the reason
>
> A: we wanted to get re-married in this country
>
> J: I will cover this – I don't understand this I don't understand" (page 291)

12. Thereafter, the judge only gets still more interventionist. This can be seen on the next page (at page 293) where the judge is actively cross-examining the Appellant on the question of what happened when he came out of the detention centre, and where he alleged that his lawyer had told him to first get married, and then apply for leave to remain. In the same way when the judge deals with the Appellant's claim that he was beaten (at page 296) it is clear that the judge is actively cross-examining the witness. This is in relation to the second witness, the sponsoring wife, and here again the judge is quite relentless in pursuing his line of enquiry as to whether the Sponsor told the registrar that she was already married, at which point the representative, Mr Asad Maqsood has to intervene and to say, "she is interrupted". This approach continues even when the representatives are making their closing submissions, so that Mr Maqsood is interrupted by the judge again. The judge takes over the giving of submissions by Mr Maqsood, pointing out that it was never stated by the Respondent that the marriage of the parties in Nepal was not valid. Instead, it was not accepted that they were in a genuine relationship. However, it was clear on the face of the document provided that they were married to each other. If that was so, then it was wrong to maintain that they were single. Mr Maqsood explains that, whether the question is that of being single or married, "it is plausible for them to say they are single if it is invalid", to which the judge reprimands Mr Maqsood for interrupting and pointing out that what the Sponsor had said was that the marriage was not legal, which could not be true.

13. When Mr Maqsood explains that "the lawyer said it was not a valid marriage", but that the Appellant himself "does not know why it was not valid" so that "therefore they were single as the marriage was not valid", the judge responds by saying "I am raising this." The judge continues to maintain that the parties were wrong to go to the registrar, and "and it has to be put to them and I have put to them and that is why I have raised it and that is why I told you not to interrupt." Mr Maqsood replies, "I was only saying if she could finish what she was saying – there was no incentive for them to get married …". Plainly, the

judge's reprimand of Mr Maqsood that, "that is why I told you not to interrupt" is an interference with Counsel's duty to bring out the evidence from his witness in the manner that he or she chooses. In fact, there is also an interference by the judge in the closing speech of Counsel at the end of the hearing.

14. It has been well-established by the legal authorities that a fair hearing involves the facilitation by the judge of the examination of the witness without due interruption. It is well-known that "fairness may require a Tribunal to canvas an issue which has not been ventilated by the parties or their representatives, in fulfilment of each party's right to a fair hearing" (see **AM (fair Hearing) Sudan [2015] UKUT 656 (IAC)** at sub-paragraph (v)). However, there is a world of difference between ventilating an issue and actively involving oneself in the conduct of the hearing, which appears to have been the case here. That said, we would hope that in future, there would be a witness statement from Counsel (see **BW (witness statements by advocates) Afghanistan [2014] UKUT 568 (IAC)**), together with an application for a transcript of the hearing (see **Elais (fairness and extended family members) [2022] UKUT 300 (IAC)**). We would also hope that the disputed issues are identified (see **AM (fair hearing) Sudan [2015] UKUT 656 (IAC)**). In addition, there has to be an affidavit from the representative appearing at the hearing backed up by Counsel's notes to highlight the concerns that are being raised.

Error of Law

15. For all these reasons, we are satisfied that the making of the decision below involved the making of an error on a point of law such that the decision stands to be set aside. This is because in accordance with Practice Statement 7.2.(b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be remade was such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal, to be heard by a judge other than Judge Norris.

Notice of Decision

16. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. We set aside the decision of the judge below. This appeal is remitted back to the First-tier Tribunal to be heard by a judge other than Judge Norris.

Satvinder S. Juss

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9th October 2023