Upper Tribunal
(Immigration and Asylum Chamber) Case No: UI-2022-001833

First-tier Tribunal No: EA/07047/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

5th January 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MS FRANCISCA EKYEM
(Anonymity order not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Victor-Mazeli, Counsel
For the Respondent: Mr M Parvar, Home Office Presenting Officer

DECISION AND REASONS

Heard at Field House on 1 December 2023

The Appellant

1. The Appellant is a citizen of Ghana born on 04/03/73 who entered the United Kingdom on 22 July 2014. She appeals against a decision of Judge of the First-tier Tribunal French dated 15 February 2022 which dismissed her appeal against a decision of the respondent dated 20 April 2021. The respondent's decision refused the appellant's application for a family permit under the EU Settlement Scheme, which had been submitted by the appellant on 23/02/21. The appellant states that she is the spouse of Elvis Adjoda Mensah, an Italian national ("the sponsor"). The respondent considers that the marriage, which occurred on 22/08/20 by proxy is one of convenience.

The Appellant's Case

2. The appellant first met the sponsor in person on 22/09/18 at the wedding of a friend, although she had apparently been talking to the sponsor on the telephone for some time before that. The couple decided on 14/02/19 that they would get married a few weeks after the appellant's divorce came through. They started living together on 23/02/19. The predominant purpose of the wedding was not so that the Appellant could obtain a visa, but rather because the couple loved each other.

The Decision at First Instance

3. At [18] of the determination the judge said that: "the inconsistencies in the Appellant's case …. are so numerous as to undermine any credibility." These included how they had travelled to the interview centre for their marriage interview with the respondent which caused the judge to question whether the couple were actually living together. There was evidence that the Appellant was living in Leeds rather than at the sponsor's address in Milton Keynes, since the appellant's expenditure as shown in her bank statements was in Leeds. The Appellant and Sponsor did not seem to know much about each other's families. The Appellant was unaware of what shifts the Sponsor had been working. The appellant did not know that the Sponsor had left the United Kingdom in 2019 when he went back to Italy at a time when they were supposed to be living together. The judge commented at [17] that it was difficult to understand how the Appellant could be unaware of such an event.

4. The judge's conclusion was that this was not a genuine relationship. At [18] he said: "In my opinion they have reached an agreement to "marry" solely to permit the Appellant to obtain a family permit to remain in the UK. I am sure that the Appellant is not in a genuine relationship with the Sponsor and never has been." At [19] the judge said in the alternative even if the marriage had been genuine it was clear that the predominant purpose of the marriage was to facilitate the appellant's ability to remain in the United Kingdom and thus it fell foul of the ratio in the case of **Saeed [2022] UKUT 18**. He dismissed the appeal.

The Onward Appeal

5. The appellant appealed against this decision concentrating on the issue of the lack of documentation provided by the respondent in relation to the marriage interviews of the appellant and sponsor which were conducted on 8 April 2021. The grounds did not deal in terms with the various inconsistencies between the appellant and sponsor that the judge had identified in his determination. The problem with the interview records was said to be that what was supplied by the respondent for the hearing was not a complete transcript of the two interviews. The respondent supplied a summary of the interviews which the judge referred to extensively during the course of the determination. At the hearing itself the appellant's representative, who did not appear before me and who did not make a statement in relation to the events which had occurred at the hearing invited the judge to disregard the summaries provided by the respondent in their entirety.

6. The respondent's explanation for the lack of a transcript of the interviews was that they were digitally recorded but unfortunately the digital recording had not survived hence it was not possible to produce a complete transcript. The remainder of the grounds dealt with various miscellaneous points. In relation to the judge's criticism that the couple were not living together it was argued that under European law it was not necessary for a couple to be living together to have a valid marriage. In relation to the sponsor's statement that he had offered to help the appellant out, that had been misconstrued by the judge. The judge, it was said, made a plain error at [15] when reference was made to the appellant and sponsor not attending the hearing when they clearly had attended. As to the inconsistencies themselves noted by the judge, these were derived from the interview record which was tainted because a complete transcript had not been produced.

7. Permission to appeal was refused by the First-tier and the application was renewed to the Upper Tribunal. Permission to appeal was granted on the basis that it was arguably procedurally unfair to rely on the marriage interviews when, despite the full transcript being requested by the appellant, it was not served by the respondent. The Upper Tribunal added in the grant, that "in the light of the findings in [19] it may be that the arguable errors identified in the grounds of appeal are immaterial." There was no rule 24 response filed by the respondent following the grant of permission to appeal. I deal with [19] in more detail below, see paragraph 23 below.

The Hearing Before Me

8. In consequence of the grant of permission the matter came before me to determine in the first place where there was a material error of law in the

decision of the First-tier Tribunal such that it fell to be set aside. If there was then I would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.

9. In oral submissions counsel relied on the grounds as drafted. The appellant's representatives had applied to have the record of interviews produced by the respondent but this request was disregarded. A full transcript should have been provided by the respondent. This would have enabled the appellant to prepare for her appeal. The judge did not make a decision at the outset on the appellant's application to exclude the excerpts from the interviews relied upon by the respondent. The respondent bore the evidential burden of showing dishonesty by the appellant and sponsor but that burden had not been discharged in this case. The decision to proceed with the appeal without the full transcript was procedurally unfair.

10. The appellant relied on the Upper Tribunal decision of **Miah [2014] UKUT 515**. The appellant's right to a fair hearing dictated the duty of disclosure. There were limited exceptions such as where a redaction was necessary to protect the parties but those exceptions were not relevant in this case. The judge could have adjourned the matter for the transcript to be provided. If a full transcript had been provided the appellant's representatives could have gone through it with her. The interviews were lengthy.

11. The respondent had to show that the objective of obtaining entry/leave to remain was the dominant purpose of the marriage. The judge's comment on this point at [19] was not a fair assessment. There were also errors of fact made such as the judge's reference to looking at all of the evidence and then saying that the appellant and sponsor did not attend the hearing. In any event it could not be said that the judge had looked at all of the evidence given that the record of interview was only partial. The judge should have adjourned the hearing. There was also reference in the determination to what appeared to be another person altogether and not this appellant as certain details about leaving Ghana in 1999 did not apply to the appellant in the instant case. The appellant had left in 2014. When these mistakes were taken into account it did not appear that the judge had given anxious scrutiny to the case.

12. In response the presenting officer argued that it was regrettable that a full transcript had not been supplied. There was a summary sheet at page 97 of the bundle and topics from the interviews were put to the witnesses as part of cross-examination. It was inappropriate for the appellant to allege bad faith on the part of the respondent in not producing the full transcript. Had a full transcript been available it would have been produced but such mistakes unfortunately did occur on occasion. That there was no full transcript did not of itself mean that the interviews could be overlooked or ignored. The issues raised in the interviews were explored in cross-examination. The judge had taken the

view that it was permissible to put such matters to the witness and the grounds of appeal did not say that the appellant's representative had objected to this course of action.

13. If a representative felt that there was procedural unfairness it was incumbent upon them to apply for an adjournment but that had not happened in this case. An allegation of unfairness had to be supported by evidence of what had happened at the hearing from an advocate who was present, see the Joint Presidential Guidance 2019. There was no witness statement from the representative in this case who had appeared at first instance. The transcript was one part of the respondent's evidence. Clearly it was a mistake for the judge to talk about there being no attendance by the appellant and sponsor. A reading of the remainder of the determination showed that the judge was well aware that they had attended to give evidence. The judge had placed weight on the evidence given by the appellant and sponsor at the hearing in particular that their accounts were inconsistent.

14. In conclusion counsel for the appellant queried whether the result in the case would have been the same if the judge had disregarded the interview record in its entirety as he was requested to do. The basis of the appeal was that the reason for refusal letter had contained only excerpts from the interviews. The judge could have adjourned the matter for one or two weeks to see whether a full transcript could be provided. The judge had relied on the interview records not just the oral testimony. The provision of a full transcript was mandatory. Case law made it clear that disclosure had to be given. It was incumbent upon the judge to adjourn the case for a short while.

Discussion and Findings

15. The issue in this case is whether there was procedural unfairness at the hearing at first instance when the judge did not have before him a full transcript of the interviews conducted by the respondent with the appellant and sponsor. If there was procedural unfairness then it follows that the decision of the First-tier Tribunal must be set aside and the matter reheard. In support of the contention that there was procedural unfairness the appellant relies on the case of **Miah** in which Mr Justice McCloskey said at paragraph 13: "These features of the context point decisively to the proposition that the affected person must be alerted to the essential elements of the case against him. This places the spotlight firmly on the pre-decision interview which, it would appear, is an established part of the process in cases of this nature. The interview is the vehicle through which this discrete duty of disclosure will, in practice, be typically, though not invariably or exclusively, discharged. In this forum, the suspicions relating to the genuineness of the marriage must be fully ventilated. This will entail putting to the subject the essential elements of any evidence upon which such suspicions are based. In this way the subject will be apprised of the case against him and will have the opportunity to make his defence,

advancing such representations and providing such information, explanations or interpretations as he wishes. Adherence to these basic requirements should, in principle, ensure a fair decision making process in the generality of cases." Mr Justice McCloskey continued that "the key requirement of a fair decision making process is disclosure to the "suspect" of the substance of the case against him. This means, in practice, that the interview will invariably occupy a position of pivotal importance in the process".

16. **Miah** was not in fact a case on whether a full transcript of the interviews had been provided as by contrast is the issue in the case before me. **Miah** was decided on the basis that after the interview the interviewing officer had made comments on the interview record and those comments had been forwarded to a decision-maker at the Home Office. It was argued that that could lead to procedural unfairness since the appellant would not know what extra comments had been made and how much weight they had been given nor how to answer them.

17. The position in the case before me is different. What the judge had was the interview summary sheet which appeared in the respondent's bundle. Starting at page 97 and finishing at page 106 it was a detailed summary of the points put to the parties and their responses. The record included the recommendation of the interviewer to the decision-maker that this was a marriage of convenience. Disclosure of this latter comment satisfied the ratio in the case of **Miah**. Whilst therefore the lengthy summary sheet in the instant case may not have been an exact recording of the interviews it certainly gave a very strong indication to the appellant and the sponsor what the concerns of the respondent were and what the inconsistencies were said to be. These inconsistencies were then further explored in cross examination.

18. The appellant and sponsor had had the opportunity in examination in chief to give any further comments on the inconsistencies set out in the summary but this did not happen as the judge remarked. It was a matter for the appellant and her representatives as to how her case was presented. It was also noticeable that neither the appellant nor the sponsor made statements following the marriage interviews which might have indicated that relevant matters had not been included in the summary but which had nevertheless been discussed in the interviews themselves. Indeed it is a feature of this case that neither the appellant nor the sponsor at first instance took issue with the accuracy of the summary. It is not good practice for the respondent to fail to produce a complete transcript of the interviews. The essence of the decision in **Miah** is that an appellant should know what case they have to meet but that was complied with in this case. The appellant and sponsor knew the substance of the concerns that in particular they seemed to know little about each other yet nowhere do they say that a relevant answer given by either of them was not reflected in the summary sheet.

19. Ultimately it was a matter for the judge at trial to decide whether the appellant could receive a fair hearing if the case went ahead on the basis of the evidence before the tribunal. The objection to the summary was simply that it was not a full record rather than that any inaccuracies were perceived to exist in the summary. If the digital recording of the interviews was not available no purpose would be served by an adjournment for the respondent to deliver a full transcript since it would not be available after the period of adjournment either. The judge had to take a decision whether to proceed with the appeal or disregard the summary sheet. The judge decided to proceed. That was a decision which was open to the judge and it did not conflict with the ratio in **Miah**.

20. The principal objection in this case is that the judge proceeded on the basis of the lengthy summary sheet provided. Since I do not uphold that objection, the remainder of the appellant's grounds of appeal fall away. The case at first instance became an analysis of the credibility of the appellant and sponsor's evidence and the judge gave cogent reasons for the finding that there were so many inconsistencies between the parties they could not be said to be in a genuine relationship. It was thus open to the judge on the basis of the evidence to find that this was indeed a marriage of convenience and was entered into by the couple for the purpose of securing the appellant's right to remain in the United Kingdom under the European Union regulations which were relevant to this case.

21. The judge also dealt with the issue in the alternative, that even if it was a genuine marriage the main purpose of the marriage was to secure an immigration advantage for the appellant. Relying on the case of **Saeed [2022] UKUT 18** the judge dismissed the appeal on that alternative basis as well as the inconsistency point. In the case of **Molina** (cited in the UT decision of **Saeed**) it was said "a 'sham marriage' can only be established if there is no genuine relationship between the parties; whereas the 'hallmark of a marriage of convenience is one that has been entered into... for the purpose of gaining an immigration advantage' [para. 64]. This means that a 'marriage of convenience' may exist [even] where there is a genuine relationship if the sole aim of at least one of the parties is to gain an immigration advantage."

22. In the instant case before Judge French he held that the purpose of entering into the marriage was to secure an immigration advantage for the appellant. Even if the judge was wrong in apparently characterising the marriage of the appellant and sponsor as a sham that is to say it had never been a genuine relationship, the judge was entitled to come to the conclusion that this was a marriage of convenience because the evidence pointed to the appellant seeking an immigration advantage, for example the sponsor's comment that he wanted to help the appellant out of her immigration difficulties.

23. It was noticeable that in granting permission to appeal the Upper Tribunal specifically left open the possibility that the judge had not erred in law in

dismissing this appeal because even if the judge should have stayed or adjourned the proceedings whilst the respondent tried to find the digital recording it was evident from the evidence which came out that the parties were seeking to gain an advantage for the appellant and not to pursue a genuine relationship. It was of course regrettable that the judge had made the mistake of referring in one paragraph to the parties not attending before him. It does appear as if boilerplate text from another case had crept into this determination. It was an error but it was not a material one. Whilst this might in some circumstances indicate a lack of care about the evidence, it cannot be said that either the appellant, sponsor or the representatives were misled by this. The appellant at all times knew the case she had to meet and from the very clear wording of the remainder of the determination knew exactly why she had lost her appeal.

24. Ultimately an assessment of the evidence including the discrepancies was a question for the judge who gave cogent reasons why this appeal should be dismissed. I do not find that there was any procedural unfairness in the judge's part in hearing this appeal nor do I find that any material error of law has been shown to exist in the determination.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as this was not requested and there is no public policy reason for so doing.

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT