Neutral Citation Number: [2024] EWCA Civ 680

Case No: CA-2022-001810

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)**
**UPPER TRIBUNAL JUDGE BRUCE**
**EA/50098/2020 and IA/00495/2020**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/06/2024

**Before :**

**LORD JUSTICE UNDERHILL**
**(Vice-President of the Court of Appeal (Civil Division))**
**LADY JUSTICE KING**
and
**LORD JUSTICE WILLIAM DAVIS**

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**Between :**

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| **Ilirjan Hima** | **Appellant** |
| **- and -** | |
| **The Secretary of State for the Home Department** | **Respondent** |

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**Zainul Jafferji and Huzefa Broachwalla** (instructed by **Syeds Law Office**) for the **Appellant**
**Julie Anderson** (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing dates : 14 May 2024

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# Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**LORD JUSTICE WILLIAM DAVIS :**

## Introduction

1. In October 2019 the appellant, a citizen of Albania, applied for a residence card as the extended family member of an EEA national, Filicia Ruse. On 19 November 2019 the appellant and Ms Ruse married. Following lengthy interviews of the appellant and Ms Ruse, the Secretary of State for the Home Department ("SSHD") refused the appellant's application. The SSHD concluded that the appellant had entered into a marriage of convenience. The appellant appealed to the First Tier Tribunal ("FTT") against the decision of the SSHD.

2. On 10 February 2021 the appeal hearing in the FTT took place. The FTT judge, FTTJ Mills, reserved his decision. It was promulgated on 8 March 2021. The appeal was dismissed. The appellant appealed against the decision of the FTT to the Upper Tribunal ("UT"). The ground of appeal was that the FTT judge "conducted the procedure unfairly". Six examples were given of the alleged unfairness.

3. The UT granted permission to appeal. The hearing of the appeal took place on 6 January 2022. The appeal was dismissed in a written decision promulgated on 27 January 2022. The UT (UTJ Bruce) found that the appellant had "legitimate cause for complaint" in relation to some aspects of the proceedings in the FTT. However, the matters complained of did not require the decision of the FTT to be set aside. The UT concluded that "viewed as a whole the hearing was, to any observer, fair". The UT went on to say that "whilst there were some shortcomings in the FTT's approach on some matters, they were not such that the fair-minded observer would conclude that there was a real possibility of bias here".

4. The appellant now appeals with the permission of Elisabeth Laing LJ against the decision of the UT. Permission was given to argue three grounds. First, the UT erred in concluding that the appellant had a fair hearing despite finding that the FTT judge's conduct was open to criticism. Second, on proper analysis, the UT should have found that the FTT judge approached the hearing before him with a pre-determined mindset. Third, the UT erred in law by determining issues of fact without setting aside the decision of the FTT.

5. At the hearing before this court, the issues crystallised so that the core issue was whether the UT made an error of law in deciding that any unfairness in the course of the FTT hearing was not sufficient to require the decision to be set aside.

## The legal framework

6. Where the SSHD alleges that a marriage is one of convenience i.e. the circumvention of immigration control, the legal burden of proof lies on the SSHD. The position was explained in *Agho v SSHD* [2015] EWCA Civ 1198 at [13]:

> What it comes down to is that as a matter of principle a spouse establishes a prima facie case that he or she is a family member of an EEA national by providing the marriage certificate and the spouse's passport; that the legal burden is on the Secretary of State to show that any marriage thus proved is a marriage of

> convenience; and that that burden is not discharged merely by showing "reasonable suspicion". Of course in the usual way the evidential burden may shift to the applicant by proof of facts which justify the inference that the marriage is not genuine, and the facts giving rise to the inference may include a failure to answer a request for documentary proof of the genuineness of the marriage where grounds for suspicion have been raised. Although, as I say, the point was not argued before us, that approach seems to me to be correct – as does the UT's statement that the standard of proof must be the civil standard….

7. That approach is in line with what the Supreme Court said in *Sadovska v SSHD* [2017] UKSC 54, [2017] 1 WLR 2926, at [28]:

> One of the most basic rules of litigation is that he who asserts must prove. It was not for Ms Sadovska to establish that the relationship was a genuine and lasting one. It was for the respondent to establish that it was indeed a marriage of convenience.

Ms Sadovska in that case was an EEA national who (so the SSHD alleged) had attempted to enter into a marriage of convenience with someone who was not lawfully in the UK. She was issued with a notice of removal on the basis that she had abused her right to reside in the UK. The FTT dismissed her appeal. It was apparent from the decision that the FTT placed the burden of proof on Ms Sadovksa to show that the proposed marriage was genuine. In the Court of Session Ms Sadovska complained that the FTT had misplaced the burden of proof. The Court of Session found that the FTT had considered all the information and reached a decision based upon it. That decision did not depend upon any onus of proof but upon weighing the various factors in the balance. Comparison was drawn with the way in which a court would assess whether an unmarried father should have contact with his child. This was the context of what the Supreme Court said at [28] of *Sadovska*. The task of the FTT was not to conduct an evaluative exercise of all of the factors. Rather, the FTT had to be satisfied on a balance of probabilities that the SSHD had proved that the marriage was one of convenience.

8. In her skeleton argument Ms Julie Anderson who appeared for the SSHD submitted that the basis of the appeal to the UT was apparent bias on the part of the FTT judge. She argued that no allegation of unfair hearing was pursued before the UT. Thus, it was not an issue which the appellant could raise in this appeal. In oral argument Ms Anderson did not maintain this strict demarcation of apparent bias and unfairness. That was a realistic approach given the interplay between the two concepts.

9. In *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468 Leggatt LJ (as he then was) defined bias as "a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case". This definition was based on a substantial line of authority including *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA Civ 1117 and *Secretary of State for the Home Department v AF (No2)* [2008] EWCA Civ 117, [2008] 1 WLR 2528. The overlap between bias and unfairness was discussed in *Serafin v Malkiewicz* [2020] UKSC 23, [2020] 1 WLR 2455. The

Supreme Court was concerned with an action for defamation which was tried in the High Court. The issue was whether the judge's conduct of the hearing had rendered the trial unfair. After referring to the definition of bias provided in *Bubbles & Wine Ltd* Lord Wilson giving the judgment said at [39]:

> 39…..the Court of Appeal in the present case was correct to treat the claimant's allegation as being that the trial had been unfair. We have not been addressed on the meaning of bias so it would be wise here only to assume, rather than to decide, that the quite narrow definition of it offered by Leggatt LJ….is correct. On that assumption it is far from clear that the observer would consider that the judge had given an appearance of bias. A painstaking reading of the full transcripts of the evidence given over 4 ½ days strongly suggests that, in so far as the judge evinced prejudice against the claimant, it was the product of his almost immediate conclusion that the claim was hopeless and that the hearing of it represented a disgraceful waste of judicial resources.

In *Serafin* the court was concerned with the effect of a judge interrupting both the evidence of an unrepresented claimant and the claimant's cross-examination of witnesses. However, the observations in relation to unfairness and bias were of general application.

10. The test to be applied when considering whether apparent bias is made out is set out in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, namely whether "a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias". In the course of his submissions, Mr Jafferji for the appellant used this formulation in assessing the significance and effect of different aspects of the hearing in the FTT.

11. Determining whether a hearing was unfair requires an objective assessment by the court of the conduct of the hearing. Fairness in judicial proceedings requires consideration inter alia of whether the judge was open-minded in the course of the hearing, whether the parties to the proceedings were treated in an even-handed manner and whether the judge demonstrated partiality during the hearing. In the context of judicial interruptions or interventions during oral evidence one issue will be whether that generated a risk of a descent into the arena. All of these matters are to be assessed not by whether it gave rise to an appearance of bias in the eyes of the fair-minded observer but by whether objectively it rendered the trial unfair.

12. Whether judicial unfairness in the course of a hearing vitiates the eventual decision will be part of the objective assessment. There will be cases where a judge acts unfairly in a hearing but the effect of the unfairness is not sufficient to affect the outcome of the proceedings. By way of example, in *Jahree v State of Mauritius* [2005] UKPC 7, [2005] 1 WLR 1952, a magistrate had asked questions of the defendant in a way which amounted to hostile cross-examination. The Privy Council strongly deprecated the questioning by the magistrate but concluded that "it was not of sufficiently central significance in the present case to affect the overall fairness of the trial and justify setting the magistrate's finding aside". The determination will depend on the facts and circumstances of the particular case.

13. In this case the core complaints are that the FTT judge cross-examined the appellant, that the judge's response to the appellant's representative's objection to the cross-examination was inappropriate, that the judge accused the representative of making an improper submission when no such submission had been made and that the judge had made a finding adverse to the appellant without giving the appellant an opportunity to deal with the point. In my view the reality of the appellant's case is that the hearing was unfair, not that there was apparent bias. There is no factual basis for suggesting that there was a real possibility that the judge's conduct of the proceedings was affected by reasons extraneous to the legal or factual merits of the case even taking a broad view of that description of bias. Therefore, I will consider the appellant's case by reference to an objective assessment of whether the judge's conduct of the proceedings was unfair. In the light of that assessment, the issue will be whether the UT judge erred in her conclusion that such unfairness as there was did not require her to overturn the decision of the FTT. Whether she referred to the relevant matters as potential bias or as unfairness is not of significance in determining that issue.

## The factual background

14. The appellant has a poor immigration history. It was considered in detail at a hearing in March 2017 before a different judge of the FTT when the appellant appealed against a refusal of entry clearance in 2015. That appeal was dismissed. The appellant had first come to the UK in 2001 using a false name and date of birth. He had claimed asylum. This claim had been refused. The appellant was removed to Albania. Within 2 months he re-entered the UK using another name (still not his true name). He was eventually removed in February 2008. In May 2008 the appellant entered the UK illegally. In 2012 he applied for leave to remain based on his relationship with a British national to whom he was recently married. Leave to remain was refused. An appeal against that refusal failed. In 2014 the appellant returned to Albania. It was from there that in 2015 he had applied for entry clearance. The appellant re-entered the UK in May 2017. He did so illegally. By this time his earlier marriage had, he said, broken down. At some point the marriage was dissolved. He married Ms Ruse some 2 ½ years later. I shall refer to the appellant's wife as Ms Ruse throughout to avoid any confusion.

15. Shortly before the marriage in November 2019 officials from the Home Office visited the home of Ms Ruse in Mansfield. They did so because of a report of a suspicious marriage from the registrar to whom notice of the marriage had been given. Ms Ruse was at the house. She said that the appellant was in London with family and that he would move into the address after the marriage. On 29 July 2020 the appellant and Ms Ruse were interviewed by an officer from the Home Office. The interviews were conducted via Skype. Ms Ruse's interview lasted a little under 1 ½ hours. She was asked approximately 360 questions about the appellant and her relationship with him. The appellant was interviewed for an hour. He was asked approximately 270 such questions.

16. On 3 August 2020 the SSHD issued the decision letter refusing the appellant's application for a residence card. Reliance was placed on two matters. First, the appellant had provided utility bills and council tax documents. The SSHD considered that the documentary evidence that he and Ms Ruse had been residing together for the period they claimed was insufficient. Second, there were inconsistencies between the accounts given by the appellant and by Ms Ruse when interviewed which the letter

highlighted as follows. First, the appellant said that Ms Ruse's daughter was at the home they shared when they had left to attend the interview whereas Ms Ruse said that her daughter had gone to Manchester the previous afternoon. Second, the appellant said that Ms Ruse's children had contact with their father. Ms Ruse said that the last such contact had been many years before. Third, Ms Ruse said that she knew that the appellant had entered the UK illegally in 2017 but that she believed that this was the first time he had come to the UK. Although the appellant did not say that he had discussed his immigration history with Ms Ruse, the refusal letter noted that it was not credible that a genuine married couple would not have had such a discussion. Fourth, whilst both the appellant and Ms Ruse said that they first had met in September 2018 at a club, neither was able to recall the other people the other was with at the club. Fifth, the appellant said that he had proposed to Ms Ruse in the living room of her home with both of her children present. Ms Ruse said that the proposal had taken place in the back yard at her house, the children being inside the house. For those reasons it was stated that the marriage was one of convenience designed for the sole purpose of giving the appellant an immigration advantage.

17. For the purposes of the appeal to the FTT the appellant's representative submitted a skeleton argument. The primary submission was that, once the appellant had provided proof of marriage (which he had), there was an evidential burden on the SSHD to adduce evidence to establish a prima facie case that the marriage was not genuine. It was said that the discrepancies or inconsistencies in the interviews were incapable of establishing a prima facie case. The secondary submission was that the evidence of the appellant as set out in a witness statement made for the purposes of the FTT hearing was sufficient to rebut any prima facie case. In consequence, the SSHD had failed to discharge the burden of proving on a balance of probabilities that the marriage was one of convenience.

18. The appellant also provided further documents relating to the address at which it was said that he lived together with Ms Ruse. These were considered by the SSHD in advance of the hearing before the FTT. As a consequence, in the respondent's review served prior to the hearing, she accepted that the appellant and Ms Ruse lived together. But the SSHD maintained her case that the marriage was one of convenience by reference to the discrepancies in the interviews of the appellant and Ms Ruse. The review referred to the same matters as those set out in the decision letter.

19. On 20 January 2021 (some three weeks before the hearing in the FTT) there was a further visit by Home Office officials to Ms Ruse's house in Mansfield. This was in conjunction with police enquiries into unsubstantiated reports of criminal activity at the address. The police had asked Home Office officials for assistance in visiting the house. Ms Ruse was at home. The appellant was not there. She told the officials that the appellant was visiting his brother but that he lived at the address. The officials saw a wedding photograph and saw some male clothing and belongings in Ms Ruse's room.

## The FTT hearing

20. There is a full transcript of the hearing. The recording of the hearing also is available. I have listened to the recording. The FTT judge sat in Birmingham. The hearing was fully remote. The parties attended via CVP. The SSHD was represented by a

presenting officer, Ms Mepstead. The appellant was represented by a legal representative, Mr Hussain. At the outset of the hearing the judge addressed Mr Hussain. The judge said that he had seen the skeleton argument to which I already have referred. He summarised the essence of the argument in relation to the insufficiency of the evidence relied on by the SSHD. He then asked if it was intended that the appellant's wife should give evidence. Mr Hussain said that it was not. The judge said this:

> "I do not need to tell you that in a case where marriage of convenience is asserted it is normal for both parties to that marriage to give evidence and be subject to cross-examination in order to prove the genuineness of their relationship. That is not something you think is required in this case, is that your position?"

Mr Hussain maintained the position as set out in the skeleton argument. The judge pressed the point about Ms Ruse giving evidence describing it as "the best evidence for your client". He said that he could draw an inference that she did not give evidence because Mr Hussain was worried about what her evidence might be. After further exchanges to the same effect, the judge addressed Ms Mepstead. He put to her that her intended approach was to question both the appellant and Ms Rune about their lives together to see whether it was genuine. Ms Mepstead said that this was correct.

21. Before embarking on the hearing proper, the judge asked if there were any further documents which he ought to have which were not in the bundle provided in advance of the hearing. Ms Mepstead asked for permission to introduce the FTT decision in relation to the appeal in 2017. She said that it set out the appellant's immigration history which was what first had given the SSHD reasonable grounds for suspicion that the marriage may be one of convenience. The judge responded by putting to Ms Mepstead that the decision went to the reliability of the appellant as a witness, a proposition with which she agreed. Mr Hussain objected to the introduction of the decision which at that point he had not seen. He argued that the earlier decision had not been relied on by the SSHD in refusing the application for a residence card. It may have been the trigger for the interviews conducted in July 2020 but it had no probative value. The judge dismissed Mr Hussain's objection. He said that the decision "may say – and I dare say this is the reason Ms Mepstead wants to put it in and rely on it – it may say the appellant is a liar, the appellant has misled the Secretary of State, the appellant told untruths in court…." This was later adopted by Ms Mepstead when she said that decision did affect the appellant's credibility.

22. In due course the appellant gave evidence. He adopted the witness statement he had made. Mr Hussain asked only a few additional questions. These related to visits to Ms Ruse's home by Home Office officials. In the witness statement the appellant had referred to the Home Office visit in November 2019. Mr Hussain asked him if there had been any further visits. He said that there had been a visit some two to three weeks before the hearing when officials had spoken to Ms Ruse and had checked the property. When Ms Mepstead cross-examined the appellant, the first issue she raised was the visits and whether any document had been left by the officials. The appellant said that he had a document from the recent visit. He was asked why it had not been produced. The clear implication of the question was that it did not exist. Mr Hussain

intervened to say that he had a digital copy of the document on his mobile telephone. The judge asked why this had not been provided previously. Mr Hussain explained that it only came into existence after the appeal bundle had been prepared. The judge expressed irritation that the document had not been uploaded. Mr Hussain said that he had not expected Ms Mepstead to challenge the fact of the visit since Home Office officials had made the visit. The judge said this:

> "I am extremely displeased, Mr Hussain, that you are seeking to admit something via examination-in-chief when we have already delayed the hearing for the best part of an hour in order for you to look at a document that you should have already seen yourself."

This was a reference to the previous FTT decision. The judge asked Ms Mepstead whether she was content to permit the document to be admitted to which she said that "it should of course have been submitted earlier".

23. There was a delay whilst the document on Mr Hussain's mobile telephone was retrieved. Ms Mepstead resumed her cross-examination. She asked whether the appellant's entry into the UK in 2017 was illegal. He conceded that it was. She asked why the appellant had provided no supporting evidence from anyone else to say that they knew him and his wife and to state their belief that the marriage was genuine. The appellant asked why he needed to do that. He referred to the visits officials had made to the address in Mansfield. The judge asked the appellant if he was saying that he had not produced evidence from others to confirm that the relationship was genuine because he did not think that he should have to do so. The appellant's response as transcribed was:

> "Yes, it is right because even if I take someone else, I don't know who are you thinking, be a friend, be a family, any person, still you are not going to believe. So, I don't know – I don't know – I don't know what to do."

Ms Mepstead asked nothing further in cross-examination. She asked no questions arising from the 2017 decision or about the appellant's previous marriage. She did not cross-examine in relation to the interview in July 2020 whether in respect of the discrepancies referred to in the decision letter or any other matters arising from the interview.

24. After establishing that Mr Hussain had no re-examination the judge said "just a couple of questions from me". There were in fact some 25 questions. The judge first asked about the appellant's first wife and whether he had gone to live with her when he came into the UK in 2017. The appellant said that he had not. He explained that this was because they were struggling in their relationship and that is why they were divorced. This was not an issue which had been raised hitherto in the appeal proceedings or the decision which had preceded it. The judge did not pursue the appellant's evidence on this point any further.

25. The judge moved on to ask about people who might have been in a position to speak about the relationship between the appellant and Ms Ruse. He identified that the appellant's brother was such a person. Having done that, he asked "so why is he not

here as a witness?" When the appellant said that his brother had been out of the country and, due to Covid restrictions, had to isolate, the judge put to the appellant that he had known about the hearing for quite a long time. "Why did you not plan to have him give evidence at your hearing?" was the judge's question.

26. The judge also asked about Ms Ruse's stepson who was 18 by the time of the appeal hearing. Having established that the appellant and the stepson had lived in the same household for a significant period, the judge asked why he had not come as a witness. It was at this point that Mr Hussain raised an objection. He argued that it was not appropriate for the judge to cross-examine the appellant. The judge denied cross-examining the appellant. He went on to say:

> "Mr Hussain, you are not doing your client any favours with your behaviour today, I can tell you that much. The presenting officer asked why no witnesses had come. And the answer was, "Why should I?" Well, that is not a good answer, is it? So, I am clarifying that point. That is clarification, not cross-examination, Mr Hussain. You should know better than to accuse me of cross-examining. You are welcome to apologise. OK. You are not apologising. You are not doing your client any favours at all, Mr Hussain. I will carry on with my perfectly legitimate line of clarificatory questions."

The judge continued to ask about the stepson. The appellant said that he did not think that he needed to have the stepson give evidence i.e. the answer he had given in relation to witnesses in general to Ms Mepstead. The judge then concluded his questions by reiterating the proposition that they were "questions in clarification".

27. Ms Mepstead made her closing submissions. She relied on the lack of evidence about the marriage from anyone other than the appellant. She referred to the potential witnesses whose identity had been elicited in the course of the judge's questioning of the appellant. The judge asked whether Ms Mepstead had any submissions about the visits to Ms Ruse's home by Home Office officials. She accepted that there had been a visit in January 2021 in relation to which the appellant had produced a document. She invited the judge to conclude that insufficient evidence had been provided of any visit in 2019. She said that she had checked the records held by the SSHD but could find no record of such a visit.

28. Mr Hussain began his submissions by referring to authority establishing that the ultimate burden of proof lay on the SSHD to establish that the marriage was one of convenience. In that context he argued that an inference adverse to the SSHD should be drawn by reason of the failure to produce evidence about the visit in January 2021. The judge said that Ms Mepstead had not known about the visit until the appellant gave oral evidence on the topic. Mr Hussain responded by repeating his argument in relation to the burden of proof. He said that the lack of disclosure of any evidence of the visit was not to do with Ms Mepstead. Rather, it was the responsibility of the SSHD and her officials who had overall conduct of the case. The judge intervened and this exchange followed:

> "JUDGE MILLS: Mr Hussain ---

> MR HUSSAIN: Yes.
>
> JUDGE MILLS: --- you have already accused me of being impartial (sic) in this case today. You have already accused me of cross-examining your client. Are you now accusing Ms Mepstead of deliberately concealing evidence from the tribunal? Is that what you are doing?
>
> MR HUSSAIN: No, sir, that is not what I said.
>
> JUDGE MILLS: Are you quite sure that is not what you are doing?
>
> MR HUSSAIN: Yes, I am quite sure that that is not what I am doing.
>
> JUDGE MILLS: I am pleased to hear it."

Mr Hussain went on to reiterate that his argument was that the SSHD had conducted investigation beyond the interviews in July 2020 and that it was incumbent on the SSHD to make the results of that investigation available to the FTT. There followed a lengthy intervention from the judge in which he referred to the fact that Ms Ruse had not given evidence and to the appellant's credibility being "without question tainted by his past history". He went to criticise Mr Hussain's approach to the evidence of visits. He concluded with: "You can say the burden is on the Secretary of State as much as you like. Do you really think as a legal professional that you have approached this case in the appropriate way Mr Hussain?"

29. Mr Hussain explained that his submission was that the correct approach to the evidence was not to ask the appellant why he had not adduced evidence that he could have adduced. Rather, the question should be why the party bearing the burden of proof had not provided relevant evidence. He then moved on to detailed submissions in relation to the interview and the five matters in that interview referred to in the decision letter. The judge made no intervention in the course of those submissions. Finally Mr Hussain addressed the relevance of the 2017 appeal decision. He observed that the FTT in that instance had accepted that the appellant's earlier marriage was genuine. The judge did not comment on that observation.

**The FTT decision**

30. The judge's written reasons covered 21 pages of typescript. He rehearsed the course of the hearing in some detail. In relation to the questions he asked of the appellant the judge said:

> "….there were a number of matters that I was still unclear on, and so I proceeded to ask questions in clarification. Having asked 10 questions, Mr Hussain objected that I was cross-examining the appellant. I assured him that I was simply clarifying some matters that were apparent from the facts of the case, which had not been addressed in the appellant's evidence thus far."

31. When he turned to the basis of his decision, the judge began with a consideration of the appellant's immigration history and the FTT decision in 2017. He concluded that this provided the starting point for his assessment of the appellant as an unreliable witness whose evidence could not be taken at face value. He went on to say that a further issue arose from the appellant's oral evidence which undermined his case that his marriage to Ms Ruse was genuine. This was the fact that, when the appellant had returned to the UK in 2017, he had not gone to live with his first wife. The judge's conclusion was:

> "It is hard to avoid the conclusion that his relationship to Ms White was, as with his two earlier bogus asylum claims, nothing more than an attempt to obtain immigration status in the UK by whatever means possible. This is the context in which I must assess whether the current relationship is genuine or not."

32. The judge moved on to consider the matters in the interview relied on by the SSHD in the decision letter. As well as those matters, he said that "there were other things that they did not know about one another, in addition to the five matters raised by the respondent, that I consider it would be perfectly reasonable for them to have known". He went on to say:

> "While I cannot give significant weight to these points given that they were not put to the appellant in the decision or in evidence at the hearing, I am satisfied that I can place some weight on them given that Mr Hussain has had sight of the interview transcripts since at least September 7th 2020 when the respondent's bundle was uploaded to MyHMCTS, and so had ample time to go through the record, to note what are clear and obvious issues, and to deal with them in the appellant's witness statement."

**The decision of the UT**

33. I have spent some time reviewing the proceedings in the FTT. Although this is an appeal from the decision of the UT, that decision concerned the fairness of the hearing in the FTT. This court is concerned with whether the conclusion of the UT on that issue was one properly open to it. Any assessment of the UT's decision inevitably requires a close examination of the proceedings in the FTT.

34. The UT admitted fresh evidence. This consisted of summaries of the Home Office records of the visits to the home of Ms Ruse. One occurred on 14 November 2019 and, according to the records, lasted for around 13 minutes. The second occurred in January 2021 and was recorded as lasting for about 10 minutes. These summaries were accompanied by an e-mail from a Mr McVeety, the Home Office presenting officer who conducted the hearing before the UT. The e-mail stated that neither of the visits was in any way connected to an assessment of the validity of the marriage. This court has been provided with full copies of the relevant records. Those documents disclosed that the visit in 2019 was made because of a report from the registrar. That would suggest that the visit was connected to an assessment of the marriage which at that point was pending. Ms Anderson had no instructions as to how the e-mail came

to be written in the terms that it was. I shall ignore the apparent discrepancy. The material admitted by the UT is relevant only to the third ground of appeal which is not central to the resolution of the appeal.

35. The decision of the UT was divided into two sections headed "Bias" and "Fairness" respectively. Under the first heading the UT judge, after a few preliminary observations, set out her conclusion:

> "My overall conclusion is that the test for apparent bias has not been made out. The fair minded observer might well conclude that the hearing was at times fractious; Judge Mills certainly expressed frustration, and there was, at one point in particular, a deviation from the norm; but being in possession of the facts as a whole, I do not think that observer would conclude there to be a real possibility that Judge Mills was bias (sic)."

She then set out the matters which she said would tend to support the appellant's claim.

36. The UT judge first considered events relating to the visits to Ms Ruse's home. Of the FTT judge's reaction to Mr Hussain's production of a document relating to the later visit, she said that the fair-minded observer could be left wondering why Mr Hussain had been subjected to criticism rather than Ms Mepstead. Ms Mepstead was not asked why the Home Office had taken no steps to investigate the claim of a visit in 2019, that visit being referred to specifically in the appellant's witness statement. Rather, it was Mr Hussain who was criticised. The UT judge concluded that Mr Hussain's conduct was perfectly reasonable. She further found that the FTT judge was wrong to accuse Mr Hussain of making a personal accusation about Ms Mepstead's conduct.

37. The UT judge then set out in detail the part of the hearing in which the FTT judge asked questions of the appellant. She said that this was "the most problematic part of the hearing". She described the FTT judge's questions as "entirely unnecessary" since there was nothing which required clarification. The reason the appellant had called no witnesses had been made clear. The UT judge surmised that the FTT judge was curious about what their answers may have been and baffled by the approach taken by Mr Hussain. However, the judge's questioning meant that he ran the risk of being accused of entering the arena. That risk was heightened by his reaction to Mr Hussain's legitimate interjection.

38. Having set out those matters, the UT judge said that the appellant and Mr Hussain had a "legitimate cause for complaint". However, she found that they did not establish an error of approach sufficient to require her to set aside the decision. Her finding was that, viewed as a whole, the hearing was to any observer fair.

39. The UT judge considered other aspects of the FTT judge's conduct of the proceedings about which complaint had been made. She did so in the context of what she described as the misconceived strategy of Mr Hussain. She said that the areas identified in the decision letter plainly raised a prima facie case which made it self-evident that some explanation would be needed from the appellant. She said that the appellant's immigration history was plainly relevant. Mr Hussain would have been

aware that there were problems with the interviews which went beyond the areas in the decision letter. Taking those matters into account, she described the FTT judge as being "was first taken aback, then increasingly infuriated by Mr Hussain's refusal to deviate from the path he had set himself."

40. The UT judge's conclusion was that there was no other matter which would lead a fair-minded observer to consider that there was a real possibility of bias albeit that there were "some shortcomings in the Tribunal's approach". Under the heading "Fairness" the UT judge dealt with three issues: the FTT judge's view of the genuineness of the appellant's previous marriage; the FTT judge taking into account problems arising from the interviews other than those set out in the decision letter; the approach of the FTT judge to the visits by Home Office officials to Ms Ruse's home. She found that the judge's approach to the previous marriage was appropriate. Once the appellant's answers to the judge's questions revealed that he had not returned to live with his first wife, the appellant and Mr Hussain should not have been taken unawares by the judge drawing an adverse inference. The UT concluded that there was no unfairness in the FTT judge taking into account matters in the interview beyond those identified in the decision letter. In relation to the visits, the UT judge considered that the evidence available to her showed that the FTT judge had been right to find that the visits added nothing to the appellant's case. She said in terms that she had regard to the evidence obtained by Mr McVeety.

## Discussion

41. In her submissions Ms Anderson sought to persuade us that proceedings in the FTT of the kind with which we are concerned are quasi-inquisitorial in nature. Judges of the FTT must be free to conduct appeals in a manner which elicits the evidence they need in order to reach a proper decision. In the course of a hearing evidence beyond that set out in the decision letter may emerge. Ms Anderson said that the approach in proceedings in the FTT in this jurisdiction should not be overly legalistic. She expressed a similar anxiety as appears to have been expressed by counsel for the government in *Abdi v Entry Clearance Officer* [2023] EWCA Civ 1455. *Abdi* was an appeal in relation to a FTT decision decided against the appellants on the basis of a matter not raised by the respondent and of which the FTT gave the appellants no notice. The facts of the case are of no direct relevance. The appeal was allowed because of procedural unfairness. As a postscript to his judgment Lord Justice Popplewell noted the apparent anxiety of counsel that, were the appeal to be allowed on the ground of unfairness, it would have a widespread effect on FTT decisions in immigration cases more generally. Lord Justice Popplewell observed that this anxiety lost sight of the facts of the particular case. Questions of procedural fairness depended on context and were fact and case specific. Those observations are apposite to this case. There is no general principle involved here other than the requirement for the FTT proceedings to be conducted fairly.

42. Having said that, I am satisfied that any suggestion that judges of the FTT are not subject to precisely the same requirement to act fairly as any other judge is misconceived. A judge of the FTT takes the same judicial oath as all judges, namely to "do right to all manner of people after the laws and usages of this Realm without fear or favour, affection or ill will". Implicit in the judicial oath is the concept of acting fairly. The FTT in the field of asylum and immigration inevitably will deal

with appeals of huge significance to the parties. That underlines the requirement for proceedings in the FTT to be fair and demonstrably so.

43. The UT is a specialist tribunal. Due respect must be paid to any conclusion of the UT in relation to its specialist field. The same applies to the FTT. But whether proceedings are fair is a universal concept. Ms Anderson argued that the UT with its specialist knowledge was able to understand the nature of the judicial conduct being scrutinised in the context of an immigration appeal. In my view, insofar as that proposition has any validity, it does not affect the basic principles which apply in any judicial context. This court is as well placed as the UT to assess the fairness of the FTT proceedings in this case. I have come to the clear conclusion that the FTT judge in this case did not act fairly in his conduct and determination of the appeal. I find that the UT judge was wrong in finding that, viewed as a whole, the proceedings were fair. I find also that some aspects of the hearing which she did not criticise in fact were unfair.

44. The UT judge said that the most problematic part of the hearing was when the FTT judge asked many questions of the appellant. She said that the questioning was unnecessary. In fact, it was wholly inappropriate. Mr Hussain was right when he described the exercise as cross-examination. The appeal was an adversarial process. The SSHD bore the onus of satisfying the FTT that the appellant's marriage was one of convenience. After the appellant had given his evidence in chief, he was cross-examined by Ms Mepstead. She asked a total of nine questions. She began with the issue of visits to Ms Ruse's home. That line of cross-examination ended when Mr Hussain produced the document on his mobile telephone. She then cross-examined on three points: whether the appellant had entered the UK illegally in 2017; why the name of a person who was said to live with the appellant and Ms Ruse was not on the tenancy agreement; why the appellant had not produced supporting evidence to show that the marriage was genuine. Although the FTT judge later described his questions as "clarificatory", there was nothing in the matters raised by Ms Mepstead that required clarification.

45. The FTT judge's cross-examination occupied more time than any other part of the appellant's evidence. The initial questions related to the appellant's previous marriage. It had not been suggested by the SSHD that this marriage was questionable. That is hardly surprising since the FTT in 2017 found as a fact that the marriage was genuine. The appellant's witness statement did not deal with the previous marriage. Mr Hussain did not ask any questions about it in the hearing. Nor did Ms Mepstead. This was the context in which the FTT judge cross-examined on the topic. His questions could not be described as clarification. Having established that the appellant had not lived with his previous wife after his return to the UK, the judge left the point. He gave no indication as to his purpose in raising the issue. He did not ask whether it meant that the previous marriage was a sham.

46. The questions put by the FTT judge in relation to witnesses whom the appellant could have called to give evidence were not neutral inquiries. They were not clarifying what the appellant had said. Rather, the judge asked in relation to more than one person why they had not been called to give evidence. When the appellant gave an explanation, the explanation was challenged. When Mr Hussain properly objected to the cross-examination, the judge was dismissive of Mr Hussain's representation of the appellant. The UT judge was correct to categorise this as "the most problematic part

of the hearing". Had this been a minor episode in a lengthy hearing, the cross-examination, whilst wholly inappropriate, might not have been of critical significance. In fact, the hearing was relatively brief. The only live evidence came from the appellant. A substantial part of his evidence was taken up by cross-examination of him by the FTT judge.

47. Ms Anderson submitted that, in the jurisdiction of the FTT dealing with immigration cases, different approaches are taken. This court should not be concerned to establish an exercise in perfection. I accept that it would be unrealistic to expect perfection from any tribunal. But the cross-examination of the appellant was not a minor departure from ideal practice. In the context of this hearing, it demonstrated that the judge had entered the arena to an impermissible extent.

48. Moreover, when Mr Hussain quite properly drew the judge's attention to the fact that it was not appropriate for him to cross-examine the appellant, the judge roundly criticised Mr Hussain. He did so in a way which would have led the appellant to conclude that his case was not being given a fair crack of the whip. Unfairness in the treatment of a party's representative will impact on the fairness of the hearing. By way of example in *R v Dean Cole* [2008] EWCA Crim 3234 the Court of Appeal Criminal Division overturned a conviction where the judge had criticised counsel repeatedly. That was despite the evidence against the appellant being strong and in the context of a case where the judge was not the tribunal of fact. In this case Mr Hussain was unfairly criticised on more than one occasion during the relatively short hearing.

49. The further instances of unfair treatment of Mr Hussain were in relation to the production of the document arising from the January 2021 visit and his submissions about the failure of the SSHD to disclose material relating to either visit. When Ms Mepstead sought leave to introduce the FTT decision of 2017, the judge said nothing by way of criticism even though it was material of some significance. In contrast, Mr Hussain was upbraided for failing to provide in advance a document which ought to have been in the hands of and disclosed by the SSHD. This was combined with an observation that the hearing had been delayed for Mr Hussain to look at a document (the previous FTT decision) which supposedly he should have seen before the hearing. There was no reason for Mr Hussain to have been in possession of a decision dating back to 2017. Later in the hearing Mr Hussain made proper submissions about the failure of the SSHD to disclose material. The UT judge considered that the submissions could have been made in a more neutral tone. She found that the FTT judge clearly found Mr Hussain's approach to be unhelpful. I consider that the substance of the submissions is not open to criticism. What can be criticised is the reaction of the FTT judge. When he accused Mr Hussain of making an allegation against Ms Mepstead personally, Mr Hussain's denial of the allegation was put politely. The judge's treatment of that was unsympathetic. His question about whether Mr Hussain as a legal professional had approached the case in an appropriate way was rhetorical. It can only have been seen by the appellant as expressing animus towards his case. The judge dealt with the matter unfairly.

50. There was no reference in the decision letter to the genuineness of the appellant's previous marriage. It was not suggested that the nature of that marriage was such as to affect the view to be taken of the marriage to Ms Ruse. The respondent's review served prior to the hearing did not mention the previous marriage. Ms Mepstead did

not cross-examine on the issue. The point only became live when the FTT judge asked the appellant about whether he had lived with his previous wife after his return to the UK in 2017. Following the judge's cross-examination, the highest that Ms Mepstead put it in her closing submissions was that the appellant's decision not to live with his previous wife in combination with his immigration history provided reasonable grounds for doubting his intentions. In his decision the judge reached the conclusion that the previous marriage was a sham. He used that fact as part of the context in which to judge the genuineness of the marriage to Ms Ruse. He did not put to the appellant the proposition that he had not lived with his previous wife because that marriage was a sham. He did not raise the issue with Mr Hussain during submissions.

51. Whether a failure to alert an appellant to an issue upon which the FTT proposes to rely in making its decision amounts to procedural unfairness will depend on the circumstances of the particular case. Where a party might reasonably expect the FTT to reach a view on a particular point, there generally will be no unfairness in the FTT not drawing attention to that issue. Thus, where inconsistencies are used to support a decision, it will not normally be necessary for the FTT to draw the attention of the parties to those inconsistencies: *SSHD v Maheshwaran* [2002] EWCA Civ 173. In this case, I am satisfied that there was no reason for Mr Hussain to suspect that the FTT judge would come to a conclusion about the genuineness of the previous marriage which was contrary to that which had been reached in 2017. Fairness required that Mr Hussain be warned of the position so that he could address it. When the judge cross-examined the appellant he did not put it to him that the previous marriage was a sham. Nor did the judge alert Mr Hussain to his thinking so that Mr Hussain could consider re-examining the appellant on the circumstances of the break-up of his previous marriage. In my view the UT judge was wrong to find that there was no criticism to be made of the FTT judge in relation to this issue. Rather, the approach taken by the FTT judge was unfair.

52. In his submissions Mr Jafferji argued that the judge's reliance on inconsistencies between the interviews of the appellant and Ms Ruse was unfair. The UT judge without giving any detailed reasons found that there was no unfairness in the judge taking into account matters in the interviews additional to those raised by the SSHD. I do not consider that the UT was wrong in reaching that conclusion. It might have been helpful to engage in closer analysis of the FTT decision. However, the FTT judge said in his decision that he could not "give significant weight to these points given that they were not put to the appellant in the decision or in evidence at the hearing". He concluded that some weight could be given to them since the interview transcripts had been in the possession of the appellant and Mr Hussain for some months prior to the hearing and the matters relied on by the judge were clear and obvious. Given that the core issue in the appeal was whether the SSHD was justified in reaching her conclusion by reference to the interview material, it was reasonable for the judge to consider the entirety of that material.

53. The assessment of the fairness of a hearing is a cumulative exercise. Mr Jafferji argued that, once any aspect of the hearing has been identified as being unfair, the entire process is undermined. His argument was that it is not possible to rescue the outcome of a hearing where there has been unfairness by showing that some of the hearing was fair. I disagree with that proposition for which there is no authority. Mr

Jafferji relied on a passage in *Abdi* relating to a submission made in that case that the unfairness had no material impact on the outcome. That is a different issue. As was made clear elsewhere in *Abdi*, what has to be considered is the overall fairness of the hearing.

## Conclusion

54. For all of the reasons I have set out, I am satisfied that the appeal in this case was subject to substantial unfairness such that the outcome cannot stand. The UT judge's view was that the problems in the hearing stemmed from Mr Hussain's misguided approach to the appellant's case. She thought that the FTT judge by turns was surprised and infuriated. That assessment of the FTT judge's reaction may be correct. Any judge may be irritated by what the judge considers to be a bad point. The judge is entitled to draw the advocate's attention to the view being taken by the court or tribunal. That is what the FTT judge did at the outset of the hearing in this case. There is no proper criticism to be made of that. What the judge is not entitled to do is thereafter unfairly to criticise the advocate or to engage in wider procedural unfairness. It is not for me to comment on Mr Hussain's strategy. Whether it was appropriate is not the point. What was not appropriate was for the judge to act as he did.

55. Ms Anderson submitted that Mr Hussain was seeking to impose his strategy on the judge and that a judge sitting in the FTT was not to be shackled by the strategy adopted by an appellant or his representative. I understood her submission to be that the FTT judge was entitled to investigate more widely than the narrow confines of the case put by the appellant. That submission is well founded. The way in which an appellant wishes the FTT to view the case cannot be determinative. But that cannot justify unfairness on the part of the FTT judge.

56. I have not addressed the subsidiary argument of the appellant that the UT judge made findings of fact in relation to the visits made to the home of Ms Ruse when she was not entitled to do so. Resolution of that issue is unnecessary given my conclusions on the issue of fairness of the hearing.

57. I consider that the appeal should be allowed. The proper course now would be for the decisions of the FTT and the UT to be set aside. The matter should be remitted to the FTT to be reheard by a different FTT judge.

**King LJ:**

58. I agree with both judgments.

**Underhill LJ:**

59. I agree that this appeal should be allowed, for the reasons given by William Davis LJ, and that the appellant's appeal should be remitted to the FTT for hearing by a different judge. The hearing by the FTT was unfair for essentially three reasons, though they are to some extent related. First, the judge asked the appellant a series of questions which went well beyond an attempt to seek clarification and amounted to cross-examination on points not raised by the Secretary of State: see in particular paras. 45-46 of William Davis LJ's judgment. Second, he based his conclusion in

part on a point which had not been raised with the appellant or his representative (and which was contrary to the finding of the FTT in an earlier case): see paras. 50-51. Third, his criticisms of Mr Hussain not only were unfounded but were expressed in inappropriate language which evinced (to put it to no higher) serious irritation and some personal animus: paras. 48-49. It is unnecessary to decide whether any one of those features by itself would have been enough to render the hearing unfair: taken cumulatively, they certainly did. I do not doubt that this experienced judge was making a conscientious effort to get to the bottom of the issues as he saw them, but that involved him in "descending into the arena" in a way which led him into the errors in question.

60. There are two general points made by William Davis LJ about which I would like to add something.

61. First, as he says at para. 41, deciding whether the conduct of a judge has been such as to render a hearing unfair is a highly fact- and context-specific exercise. For that reason, I would not want our decision to be understood as discouraging FTT judges from asking their own questions of witnesses where that is necessary in order to enable them fully to understand the facts and the issues. While I do not accept Ms Anderson's submission that the role of a judge hearing immigration and asylum appeals in the FTT is quasi-inquisitorial, I recognise that the characteristics of such cases may mean that it may more often be appropriate for judges to intervene during the evidence than it is in typical High Court litigation. But what is appropriate depends on the circumstances of the case, and the judge should in any event do nothing that compromises the fairness of the proceedings or gives an impression of partiality.

62. Secondly, I agree with his observation at para. 54 that we need not express any view about whether it was sensible for Mr Hussain to adopt the approach that he did to whether to call evidence supporting the appellant's own evidence that the marriage was genuine. He had evidently thought carefully about it, and we do not know the full circumstances. But unless an advocate can be confident that the evidential burden will not shift to their client to prove the genuineness of their marriage, they will generally be well advised to call any cogent supporting evidence that may be available.