IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002384
First-tier Tribunal No: EA/12233/2021

Extempore decision

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 22 June 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE HARIA

Between

The Entry Clearance Officer

Appellant

and

Bismark Oppong
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr C. Avery, Senior Home Office Presenting Officer
For the Respondent: The respondent did not appear and was not represented

Heard at Field House on 18 May 2023

DECISION AND REASONS

1. By a decision and reasons promulgated on 2 March 2022 First-tier Tribunal S Taylor ("the Judge") allowed an appeal brought by the appellant, a citizen of Ghana, against a decision of the Secretary of State sent on 2 March 2021 refusing an application for a residence card under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations").

2. The Secretary of State now appeals against the decision of the judge with the permission of First-tier Tribunal Judge Frantzis.

3. Although this is an appeal by the Secretary of State, I will refer to the appellant before the First-tier Tribunal as "the appellant" in these proceedings.

Absence of the appellant

4. Before addressing the substantive issues arising on the appeal, it is necessary to deal with the absence of the appellant. Pursuant to Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Tribunal may proceed in a party's absence if two criteria are met. First, the Tribunal must be satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing. Secondly, the Tribunal must consider that it is in the interests of justice to proceed with the hearing.

5. As to the first criterion, we are satisfied that the appellant has received notice of the hearing. On 25 March 2023 a notice of hearing was emailed to the appellant at the email address he has been using to correspond with the Tribunal until very shortly before this hearing.

6. The second question for our consideration is whether it is in the interests of justice to proceed in his absence. That is a question we must address by reference to the overriding objective of the Tribunal Procedure (Upper Tribunal) Rules 2008 to decide cases fairly and justly.

7. We take into account the following considerations.

   (a) First, the proceedings before the judge took place at the appellant's request on the papers. He is a litigant in person and has prosecuted these proceedings without the benefit or assistance of legal representation. Since this is an entry clearance appeal and the appellant is in Ghana, it seems to us that it is entirely probable that the appellant wishes to continue to engage with these appeal proceedings in the same written form that he has done since their inception before the First-tier Tribunal.

   (b) Secondly, shortly before the hearing, on 17 May 2023, the Tribunal received an email from the appellant sent from the email address to which the notice of hearing was sent to him on 25 April 2023, enquiring as to the progress of his appeal. We read that email as suggesting that the appellant continues to wish to engage with these proceedings on the basis that consideration takes place now, as before, on the papers.

   (c) Thirdly, there has been no indication from the appellant that he wishes to attend. Upon realising that the appellant had not attended either through the sponsor, whose details we shall address shortly, or though the legal representative, we took steps for the Tribunal's staff to make contact with the appellant to ask whether he wished to address the Tribunal on his absence from the hearing this afternoon. No reply has been received from that email.

   (d) Fourthly, we see no reason to adjourn these proceedings of our own motion. Every indication before the Tribunal is that the appellant wishes for this matter to be dealt with on the papers. There is no reason to conclude that matters would be any different were we to have postponed the hearing and reconvened in due course. In fact, in the event that we were to do so of our motion, it is likely, in our judgment, that the Tribunal would simply have found itself in the same position on a further occasion.

(e) Fifthly, and finally, in light of the Secretary of State's grounds of appeal, if the Secretary of State's appeal is allowed, the only option to the Tribunal will be remit this case back to the First-tier Tribunal for the matter to be reheard afresh. It follows that from the perspective of the respondent, the worst case scenario facing him is one whereby he will have a further opportunity to put his case before the First-tier Tribunal.

8. For these reasons, we consider that it is in the interests of justice to proceed in his absence.

Factual background

9. The appellant , on his case, is married to a citizen of Germany who is exercising treaty rights living in the United Kingdom. He applied for a residence card under regulation 7 of the 2016 Regulations on the basis that he would be accompanying her in the United Kingdom.

10. The application was refused by the Secretary of State for two principal reasons. First, although the marriage certificate that was provided with the application to the Secretary of State said that both the appellant and the sponsor were single and had never married, there were details on the sponsor's bank statements that suggested that two salaries were being paid into her account. The appellant had provided only a single set of payslips from one employer with the application and that, accordingly, raised questions as to whether the second salary belonged to another individual and perhaps another partner. The Entry Clearance Officer also noted that the sponsor had a child. The appellant himself had not submitted any documents relating to a child and that raised questions as to whether or not the sponsor had married before and if so whether she was properly divorced at the time of the marriage ceremony. On that basis, the Entry Clearance Officer was not satisfied that the respondent was in a genuine relationship with his sponsor as he claimed.

11. The second principal reason for the Entry Clearance Officer refusing the application was that she was not satisfied that the appellant was dependent on the sponsor as required by regulation 7 of the 2016 Regulations. The application was accordingly refused.

Decision of the First-tier Tribunal

12. In his decision, the judge noted that the appellant had requested a paper hearing and that that had not been objected to by the respondent. He set out the brief procedural background and the relevant law applicable to the proceedings before, at [8], addressing his substantive findings. There the judge addressed the explanation that had been provided in written form by the appellant as to why there were two salary payments into the sponsor's bank account. Put simply, the second set of payments were, said the appellant, refunds from the sponsor's daughter's nursery, which had inadvertently overcharged her by a significant amount on two occasions and so had refunded the sums in question by direct debit. The judge accepted that explanation.

13. In relation to the Entry Clearance Officer's concerns that the sponsor may either have been married to another person prior to the marriage ceremony with the respondent, the judge found that there was no evidence that the sponsor was married previously. Similarly, he observed there was no requirement for the sponsor to disclose information on the child of a previous relationship. On the

face of the Ghanian marriage certificate, there was no reason to conclude that it was not genuine, and the respondent had not challenged its validity.

14. Accordingly, at [9] the judge concluded that on the evidence before the Tribunal, he had no basis to find that the appellant was previously married and not divorced prior to the marriage.

15. In relation to the second reason relied upon by the Entry Clearance Officer for refusing the application, namely the question of dependency, the judge noted at [10] that there was no requirement under regulation 7 for a spouse to be dependent. The judge concluded that stage of his operative analysis in the following terms at [11]:

> "The parties have submitted a marriage certificate which has not been disputed and I have not found that the reasons as set out in the refusal letter are sufficient to conclude that the parties are not in a genuine relationship."

16. It is the next paragraph of the judge's decision which has led to the Secretary of State applying for, and being granted, permission to appeal. In light of what the judge says, and its implications for the issues we have to consider, it is necessary to quote the paragraph in full:

> "12. Although I have found that the refusal letter failed to provide sufficient reasons to refuse the application, I consider that it was deeply unsatisfactory that in an appeal of this nature that the parties opted for a paper hearing, so that the sponsor did not attend the hearing to give oral evidence. The sponsor's statement provided no detail and amounted to a mere assertion that the parties were married as claimed. The statement did not provide any background information on the relationship and did not answer some questions which remain unanswered, such as why the parties waited nearly two years before making the application. The appellant did not provide personal evidence on the relationship, but submitted an unsigned statement which was more of a submission than a statement. The sponsor has taken no active role in the appeal, such as paying the fee and chasing the progress of the appeal, even though she is the party living in the UK. The refusal did not focus on the question of the sponsor exercising treaty rights in the UK. The submitted documents only demonstrated that the sponsor had been working for three months before the UK withdrew from the EU. The marriage certificate states that the sponsor was self employed. Although I consider that the reasons for refusal have not been substantiated, I find that a number of questions about the relationship remain."

Issues on appeal

17. There is a single ground of appeal which contends that it was incumbent on the judge to ensure that the Tribunal heard evidence on all issues which it sought to consider as part of reaching its decision. The issues that the Tribunal had to consider were not limited to those raised in the notice of refusal and the judge should have ensured that the appellant satisfied all of the relevant parts of the 2016 Regulations.

18. In granting permission to appeal, Judge Frantzis reformulated the issues in the following way:

> "it is at least arguable that the FTTJ [the judge] has erred procedurally by allowing the appeal despite finding that a number of questions about the Appellant's and the sponsor's relationship remain."

19. Mr Avery submitted that it was incumbent on the judge to ensure that the concerns that had been raised in [12] were dealt with. Simply because the matter was dealt with in a paper format the request of the appellant did not tie the judge's hands to deal with the matter in that way. The concerns set out by the judge at [12] were such as to require a resolution before the judge was entitled to reach conclusions. For these reasons, Mr Avery submitted that the decision was unsafe.

20. In the absence of the appellant, we did not hear any submissions to the contrary but we have, as we shall set out in our reasoning, in due course, considered the points that would arise on his behalf in any event.

The judge had the power to convert the paper hearing to an oral hearing

21. The premise of the judge's concerns in [12] appear to be on the footing that his hands were tied to considering the matter on the papers only. That was a misunderstanding of the powers enjoyed by the First-tier Tribunal as set out in the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. For example, pursuant to rule 4(iii)(g), it is within the general case management powers of the Tribunal to "decide the form of any hearing". That includes deciding to have a hearing in circumstances where the parties have not requested one themselves. Under rule 14(i)(e), expressly without restriction on the general powers in rule 4, the Tribunal may give directions as to:

> "the manner in which any evidence or submissions are to be provided,
>
> which may include a direction for them to be given—
>
> (i) orally at a hearing; or
>
> (ii) by witness statement or written submissions; …"

22. We also observe that rule 25 contains provision which, in certain circumstances, mandates the Tribunal to hold a hearing. An exception to that principle is where, under rule 25(i)(a), each party has consented to or not objected to the matter being decided without a hearing.

23. In our judgment the judge misunderstood the powers that were available to the First-tier Tribunal. It was within the case management powers of the First-tier Tribunal for the judge to convert the hearing on the papers to an oral hearing. Although rule 25(i)(a) provides an exception to the need for the First-tier Tribunal to hold an oral hearing in circumstances such as this, the fact that the First-tier Tribunal is not mandated to hold a hearing does not mean that it is prohibited from doing so. We therefore conclude that it was an error for the judge to approach his analysis on the basis that there was no power to convert the matter to an oral hearing.

The judge should have converted the paper hearing to an oral hearing

24. In *SSGA (Disposal without considering merits; R.25) Iraq* [2023] UKUT 00012 (IAC), the Vice President presided over a decision which said at [4(iv)] of the headnote:

> *"(iv) A hearing should be held whenever credibility is disputed on any material issue or fact. Cases in which it would be appropriate to determine an appeal without a hearing if credibility is materially in issue would be rare indeed. In almost all cases, the appropriate course of action would be to list the case for a hearing and decide the case on such material as is before the Tribunal."*

In the present matter, the Secretary of State had raised concerns relating to whether or not there was a valid marriage. We do not understand the notice of refusal to contain a suggestion that the relationship between the appellant and the spouse was a marriage of convenience; rather the suggestion that the sponsor had been previously married and may still have been married, was a more fundamental suggestion that the marriage purportedly contracted between them was not valid. So much is clear from the penultimate sentence of the third bullet point under the heading "The Decision" which says, "This raises questions as to whether or not your sponsor has been married before and, if so, she was divorced at the time of your marriage ceremony."

25. There is a very real issue before the judge concerning a finding of fact that he would have to make. From the judge's observations at [12] it is clear that his view was that in order properly to determine that issue, the First-tier Tribunal would need to benefit from the sponsor's oral evidence.

26. We have considered whether it was rationally open to the judge to have concerns of this nature, for example in light of the earlier findings that the judge had set out concerning the absence of evidence contradicting the legal validity of the marriage, it could be said, on behalf of the respondent, that it was not rationally open to the judge to have any concerns of this nature. Having considered that issue we do not consider that it amounted to any form of barrier to the judge expressing the credibility concerns in the terms that he did at [12]. The issue had properly been raised by the Secretary of State in the context of an application that featured a paucity of evidence about the claimed relationship between the appellant and his sponsor. Allied to those concerns, the circumstances of the sponsor in the United Kingdom featured a child and other arrangements, which in the eyes of the Secretary of State were not consistent with the position as set out in the application for entry clearance. In those circumstances, while it may well be the case that had the sponsor given oral evidence, the judge would have concluded that he accepted her account of being single at the time of her marriage to the respondent, it was nevertheless incumbent upon him, as a matter of procedural fairness, to consider those findings of fact in light of a proper consideration of the evidence, and a proper understanding of the First-tier Tribunal's case management powers. In these proceedings, the evidence could only properly be considered with the possibility of the sponsor attending and being cross-examined.

The judge erred by resolving the appeal without addressing the matters raised in [12]

27. Drawing the above analysis together, we find that it was an error for the judge to raise concerns of the fundamental nature of those set out at [12] without

resolving them, at a hearing if necessary. Combined with a misunderstanding or failure to exercise the case management powers of the Tribunal to hold an oral hearing, it follows that the findings of fact reached by the judge up to and including [11] of the decision, were undermined by the judge's contrary and very significant reservations set out at [12]. The decision itself therefore is deeply contradictory. On the one hand, the judge reaches findings of fact that would appear to have been open to the judge from [8] to [11]. Had the decision stopped there, the Secretary of State would have struggled to challenge those findings on appeal.

28. However, by including the significant and serious reservations the judge set out at [12], the findings previously reached in the decision were both contradicted and undermined. That was a contradiction which featured in the context of the judge's failure fully to understand the case management powers open to the First-tier Tribunal, and his failure to hold an oral hearing, as should (on his concerns) have been the case. We therefore find that the decision of the First-tier Tribunal involved the making of an error of law and we set it aside in its entirety.

29. In the light of our findings that there has been no proper consideration of this matter by the First-tier Tribunal the only appropriate course is for us to remit the appeal to be heard afresh by a different judge before that Tribunal.

30. We observe that although case management questions are matters for the First-tier Tribunal, it is very unlikely that it could be said to be appropriate for this appeal to be determined on the papers alone. Whether of course, the appellant as he then will be choses to engage with the proceedings once they have returned to the First-tier Tribunal, is of course another matter and not one for us to determine in these proceedings.

31. For those reasons this appeal is allowed.

<u>Notice of Decision</u>

The appeal is allowed.

The decision of Judge S Taylor involved the making of an error of law and is set aside.

The appeal is remitted to the First-tier Tribunal to be heard by a different judge.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Transcript approved 9 June 2023