IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004792

First-tier Tribunal No: EA/10995/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

4th January 2024

Before

UPPER TRIBUNAL JUDGE KEITH

Between

TITILOLA LOLADE MUSTAPHA (NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Ogunfeibo, A Ogunfeibo & Co Solicitors, via Teams
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer, in person

Heard at Field House and via Teams on 14 December 2023

DECISION AND REASONS

Preliminary issue - late applications for adjournment and compliance with directions

1. These written reasons reflect the full oral decision which I gave to the parties at the end of the hearing.

2. On a preliminary matter, this error of law hearing had originally been listed to take place in person at Field House. However, at 11.24am yesterday, 13th December, the Appellant's representative, Mr Ogunfeibo applied for an adjournment of the hearing on the basis that he was unwell, was unable to attend the hearing, and had not been able to obtain alternative representation at short notice.

3. I refused the application at lunchtime yesterday on the basis that:

> "No details of the appellant's representative's illness have been provided; when he became ill; what steps (if any) have been taken to secure alternative counsel; or why a colleague cannot attend. Judge Keith is particularly concerned

> given that it appears that no hearing bundle has been uploaded to CE File. Any renewed application for an adjournment should provide full details and an explanation for the apparent lack of case readiness."

4. Mr Ogunfeibo renewed the application at 14:00pm yesterday, stating that:

> "In this regard, and in response to the decision, we can confirm that our Mr Anthony Ogunfeibo has been down with a severe case of flu since the beginning of the week. He believed he would have recovered well enough by today to attend to the matter, but this has not been the case. Unfortunately, enquiries were made with some Counsel's chambers earlier today, but they all said they cannot get Counsel at such short notice. At the same time, Mr Anthony Ogunfeibo's colleagues at the firm are engaged with other pressing matters and deadlines and therefore cannot attend. It is as a result of the above and in the interests of justice that an adjournment is being sought. Finally, may we say that it is not correct that no hearing bundle has been sent to the Tribunal. In this regard, please find attached the screenshot of an email sent to the Tribunal on 4 December 2023 with the attached hearing bundle. A copy of the hearing bundle is again attached to his email. We look forward to hearing from you."

5. I pause to add that the Appellant's representatives had not uploaded the bundle onto CE file, as previously directed.

6. I refused the renewed application in a second decision mid-afternoon yesterday, stating that:

> "The application may be renewed at the hearing, but the appellant's representatives will need to explain what professional commitments prevent other colleagues from attending the hearing as a priority and which chambers have been approached who have declined to provide counsel, with relevant evidence."

7. At 17:17pm yesterday, Mr Ogunfeibo wrote to this Tribunal, stating that:

> "Please be informed that our client has instructed us that the matter be dealt with tomorrow by consideration of the papers before the Tribunal. In the circumstances, there is no longer any need for attendance at the hearing tomorrow."

8. I also add that it is not for the Appellant or Mr Ogunfeibo to decide that the appeal will be decided on the papers without a hearing and that consequently there is no need for attendance. That is a decision for this Tribunal, pursuant to Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

9. At 22:32pm yesterday evening, Mr Ogunfeibo emailed this Tribunal in the following terms:

> "Please find attached the Appellant's Skeleton Argument for tomorrow's hearing. Should the Tribunal require my assistance or any clarification, I can be contacted on telephone number [number redacted]. I am also available for a video call should this be required."

10. In response, I ordered that arrangements be made for a hybrid hearing, whereby Mr Ogunfeibo should attend the hearing via Teams, provided he was well enough to attend a full hearing; could do so from a place of privacy with sufficient wi-fi

connection and had access to relevant documents. I was particularly concerned that his offer of availability for a video call was not consistent with his assertion that the Appellant's instructions were to ask for a decision on the papers.

11. Having canvassed and checked with Mr Ogunfeibo that he was medically well enough to conduct the hearing remotely this afternoon, he confirmed that although he was still suffering some ill-effects, he was well enough to represent his client at the hearing. When I asked for an explanation as to whether the Appellant wanted a hearing or not, and the apparent inconsistency in what Mr Ogunfeibo had said were his instructions, he explained that his instructions had changed during the course of the evening when he felt more able to participate in the hearing and consequently he had written to the Tribunal late yesterday evening on that basis. Therefore, the Appellant did not seek for her appeal to be decided on the papers.

12. I add that Mr Ogunfeibo's repeated communications over the course yesterday did not assist with the efficient resolution of how to proceed with this appeal. The adjournment application was left until the last possible moment, did not provide any details of why other professionals were unable to stand in for him, only to switch between asserting (incorrectly) that attendance was unnecessary, to suggesting that Mr Ogunfiebo was available to be contacted, without expressly stating what Mr Ogunfeibo now said had been his instructions late yesterday evening, namely for there to be a hearing at which he wished to attend remotely. It was left to me to identify this as a possibility and direct it myself, and has involved multiple communications in a short timeframe, during which I might not have been available. I finally note that Mr Ogunfeibo had not initially complied with directions to file the Appellant's bundle by way of uploading it onto CE File, although he rectified this, but once again at the last moment. This also incurred additional time and meant that the bundle was not initially identified by Tribunal staff (nor would I expect them to do so), meaning that I was only able to review its contents at short notice.

The appeal

The decision of the First-tier Tribunal

13. The Appellant appeals a decision by First-tier Tribunal Judge Munonyedi (the 'Judge'), promulgated on 22nd August 2023, in which she dismissed the Appellant's appeal against the Respondent's decision dated 28th October 2022 to refuse her application for leave to remain under Appendix EU of the Immigration Rules. That application had been made on 4th June 2022. The Respondent's refusal was on the basis that she believed the Appellant was party to a marriage of convenience with her EU sponsoring husband.

14. As the Judge noted in her decision at §2, the Appellant had married her husband, a Portuguese national, by a proxy marriage that had taken place in Nigeria, with the Appellant present in person but the spouse represented by his father. As the Judge recorded at §6, the Respondent asserted that the Appellant was party to the marriage of convenience because the Appellant had made a student visa application on 6th July 2021, despite claiming to have married her husband on 3rd October 2020. In her student visa application, the Appellant had stated that she was single and did not mention the existence of her husband. The Respondent queried the nature of the marriage and invited the couple to two marriage interviews, the first on 12th September 2022 and the second on 6th October 2022. On each occasion, neither party to the marriage attended. In both cases, the Appellant claimed that she was unwell. On each occasion, the Respondent asked her for evidence of her

unfitness to attend the interview and on each occasion, she failed to do so.

Preliminary issue before the Judge - non-compliance with directions

15. At §9, the Judge recorded a primary issue, raised by the Respondent, that the Appellant's bundle had only been served two days before the hearing on 28th July 2023 before the Judge and therefore in breach of directions issued on 21st December 2022 and 27th February 2023.

16. The Judge recorded that Mr Ogunfeibo conceded that the Appellant's bundle had not been filed in time. The bundle had not made its way to the Tribunal's file and was therefore not before the Judge. Mr Ogunfeibo was recorded as stating that the reason for the delay in filing and serving the bundle was due to complications which the Appellant had experienced during her pregnancy, but at §11, the Judge also recorded Mr Ogunfeibo's concession that he did not have any medical evidence to support her claim that she had experienced complications during her pregnancy. The Appellant had obtained two notes from King's College Hospital which showed her attendance at hospital on 12th September and 6th October 2022, but he accepted that the notes were silent as to her reasons for her attendance. At §12, Mr Ogunfeibo also acknowledged that the Appellant's husband had not produced a statement in support of the Appellant's claim.

17. The Judge also recorded at §12, although this element of it is disputed, that Mr Ogunfeibo submitted that the Appellant believed that it was her application and her responsibility only to argue her case and that she did not want to involve her husband in her immigration affairs.

18. The Judge reached her conclusions at §13 to 21. In those reasons, the Judge first considered and found that the Respondent had complied with the directions given on 21st December 2022 for parties to file their evidence, but that the Appellant had failed to comply with the December 2022 directions. As a result (and as the Judge recorded at §15), on 27th February 2023, Legal Officer Cole, exercising delegated powers granted under Rule 3 of the Tribunals Procedure (First tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, (the '2014 Rules') gave directions that the Appellant had 14 days from 27th February 2023 to comply with the directions of 21st December, otherwise the Appellant will be deemed to rely only the grounds of appeal at the substantive hearing. I pause to add that I do not have a copy of the earlier directions on 21st December, but neither representative disagrees with the Judge's recording of those directions. The February 2023 directions continued, as recorded as §16, "You may within 14 days of this notice apply to the Tribunal in writing for the matter to be considered a fresh by a Judge under rule 3(4) of the Tribunal Procedure Rules 2014".

19. The Judge recorded that the Appellant did not apply to vary those directions although, for the first time, before me, Mr Ogunfeibo submitted that he had applied orally to the Judge at the hearing before her to vary those directions. The Judge went on to note that in certain circumstances a pregnancy could involve complications, but that evidence would be readily available of the complications said to have arisen on 12th September and 6th October 2022. In contrast, the Appellant's failure to provide such easily obtainable evidence forced the Judge to conclude that the Appellant was not being truthful. At §18, the Judge also considered that the two notes from King's College Hospital did not explain why the Appellant had failed to attend two marriage interviews and merely stated that she had attended an urgent care centre. The notes did not state whom the Appellant saw, what took place when

she attended, and most importantly, specific details pertaining to the Appellant's health. As a consequence, at §19, the Judge concluded the Appellant had not provided a cogent, plausible or credible explanation for why she failed to comply the directions of the 21st December 2022, or why the terms of the 27th February directions should not stand. The Judge recorded at §20 that she had considered Mr Ogunfeibo's submissions, but her finding was that the 27th February directions should be followed, so that the Appellant could only rely on her grounds of appeal and not her bundle.

20. The Judge went on to reach conclusions on the substance of the Appellant's appeal, which turned on not whether a marriage had taken place, but whether it was a marriage of convenience, noting that the burden was upon the Secretary of State (see the well-known authority of Sadovska and another v SSHD [2017] UKSC 54).

21. In the circumstances, the Respondent had relied upon the Appellant making a student visa application, when she was married, claiming she was a single woman. The Judge regarding it as implausible that woman who was party to a marriage which was not one of convenience would make such a mistake that she was single. By completing the visa form as a 'foreign student', and not as the spouse of an EEA national, the Appellant would incur substantially increased college fees. It was implausible that any couple would subject themselves unnecessarily to higher college fees, had the marriage not been one of convenience.

22. The Judge also concluded that there was no explanation for the circumstances of the marriage, in particular why the Appellant had entered a proxy marriage and why her husband was unable to attend the marriage ceremony. The Judge regarded the suggestion that the Appellant wished to pursue her case alone without the support of her husband as extraordinary, in light of the Respondent's concern that she was party to a marriage of convenience. Although not part of the grounds of appeal, the Judge finally noted that there was a birth certificate naming the Appellant's husband as the father of a child, and there was a presumption that the father of a married woman's child was her husband, but that was rebuttable and it might be necessary to obtain DNA evidence in any future proceedings.

23. The judge concluded that the Appellant was party to a marriage of convenience.

Grounds of Appeal and the Appellant's submissions

24. In the grounds of appeal to this Tribunal, the Appellant makes the following points.

25. First, at §1 of the grounds, the Appellant says that the Judge misrecorded Mr Ogunfeibo's submissions that the Appellant believed that it was her application and her responsibility only to argue her case, whereas in fact he had submitted that it was only for the Appellant to explain why she did not attend the marriage interview and not for her husband, as she was the one who had received the interview invitations. That was a material error.

26. Second, the Judge's decision not to allow the Appellant to rely on evidence she had provided, albeit late, was grossly unfair and contrary to the Overriding Objective as per Rule 2 of the 2014 Rules, to which the Judge had failed to give effect. In particular, Rule 6 stated that that non-compliance with directions did not necessarily render proceedings void and that more importantly, the failure to comply with directions did not materially prejudice the Respondent. In simple terms, the Judge could have waived the non-compliance. In that context, the Appellant relied on a

number of cases and I do no more than summarise the propositions. The first case of Meflah v SSHD [1997] Imm AR 555 was authority for the proposition that a judge should exercise extreme caution before deciding an appeal without a hearing because of non- compliance with directions.

27. MD (good reasons to consider) Pakistan [2004] UKIAT 00197 confirmed that a judge should be conscious that part of the overriding duty was to ensure a just disposal and to disallow evidence and oral testimony handicapped an appellant in these cases, as compared to a Secretary of State, who would have suffered no detriment.

28. Next, SSGA (Disposal without considering merits; R25) Iraq [2023] UKUT 00012 (IAC) stated that if credibility were an issue, and the appellant was present and prepared to give evidence, it was a draconian step to exclude evidence.

29. Finally, the case of AK (Admission of Evidence – Time Limits) Iran [2004] UKIAT 00103, supported the proposition that on the one hand, a Tribunal had to ensure that its directions on were not flouted with impunity, but on the other hand, available evidence needed to be tested in cross-examination where credibility was an issue. The same applied to this case.

30. In oral submissions, as already referred to earlier in these reasons, Mr Ogunfeibo says he made an oral application to the Judge to vary the February 2023 directions. When I queried where this was recorded either in the Judge's decision or indeed in the grounds of appeal which he had drafted, he was only able to refer me to §3 of the grounds, which he recited in full and which, for completeness, I do so here:

> "It is further submitted that the decision of the Immigration Judge goes against the letter and spirit of Rule 6 of the Tribunal Procedure Rules 2014 in that the non compliance with the direction did not materially or substantially prejudice the position of the Secretary of State in the matter, as the evidence could have still been considered at the hearing by the Immigration Judge. In this regard, the Immigration Judge did not properly exercise her discretion under Rule 6 to waive the non compliance , particularly given that the Appellant's credibility was in issue at the hearing."

31. He added, although not included in the grounds, that the lack of prejudice to the Respondent was illustrated by the fact that he had filed the skeleton argument only two weeks late, at the end of March 2023, and the Appellant's witness statement on 3rd June. The hearing was not until 28th July 2023, so that the Respondent had ample time to have considered at least the witness statement. Moreover, there was an explanation for the non-compliance with the December 2022 directions, to which the Judge had failed to attach adequate weight. In particular, in the context of the 'balance of convenience', the Judge's decision to exclude evidence was unfair and unjust, in prejudicing the Appellant.

The Respondent's submissions

32. Mr Clarke submitted that the February directions were, in essence, an 'unless' order, with which the Appellant had plainly not complied. It was open to the Appellant to apply at any stage to vary those directions or for relief from sanctions. Contrary to the Mr Ogunfeibo's submissions, the Appellant had never made such application. Instead, as §9 of the Judge's reasons made clear, it was the Respondent herself who had raised the issue of non- compliance. The need for procedural rigour was clear: see R (Onowu) v First-tier Tribunal (Immigration and Asylum

Chamber) (extension of time for appealing: principles) IJR [2016] UKUT 00185 (IAC), SSHD v SS (Congo) and Others [2015] EWCA Civ 387 and Denton v TH White Ltd [2014] EWCA Civ 906. The Judge could hardly be criticised fairly for failing to engage with an application that had never been made, but in any event, she had considered the substance of her discretion. In particular, the Judge had considered at §15 that there had been no application to vary the February 2023 directions. The Judge considered at §17 the question of pregnancy-related illness as the reason for non- compliance and rejected this. The authorities relied upon by the Appellant were either not on point or could be distinguished. In relation to Meflah, that dealt with a case of reaching a decision in the absence of the hearing. The Judge had held a hearing, at which Mr Ogunfeibo had made submissions. MD was distinguishable on the basis of being an asylum claim where there had been no 'unless' order and more importantly, an application with reasons. The case of SSGA was in the context of a Judge 'deeming' that an appeal was no longer pursued, which ignored the statutory duty them under Section 86 of the Nationality, Immigration and Asylum Act 2002 to 'determine (i.e. to consider and decide) any matter raised as a ground of appeal. Once again, in AK there was no unless order. Finally, in relation to §1 of the grounds of appeal, the contention that the Judge had misrecorded the submissions was not backed up by any witness statement from Mr Ogunfeibo and was simply an assertion, in the absence of evidence.

Discussion and Conclusions

33. I bear in mind the broad discretion open to a Judge to case manage the appeal before them and the need for procedural rigour. That discretion requires consideration of the Overriding Objective in the exercise of any powers (see Rule 2(3) of the 2014 Rules) but there is also an obligation on the parties to help the Tribunal to further the Overriding Objective and co- operate with the Tribunal generally (Rule 2(4)). It is correct that Rule 6 confirms that any irregularity resulting from a failure to comply with any requirement of a direction does not of itself render void the proceedings or any step taken in the proceedings and if a party has failed to comply with such a requirement, the Tribunal may take such action as it considers just, which may include waiving the requirement (see Rule 6(2)(a)).

34. The key point is that a Tribunal must not lose sight of, and must continue to consider, its discretion. However, the importance of that discretion is not lessened by the structure by which that discretion may be approached, particularly the well-known 'tripartite' test set out in SS (Congo) (§§93 to 95) and Denton (§§24-38) for the relief against sanctions, namely:

> "i) The first stage is to identify and assess the seriousness or significance of the failure to comply with the rules. The focus should be on whether the breach has been serious or significant. If a judge concludes that a breach is not serious or significant, then relief will usually be granted and it will usually be unnecessary to spend much time on the second or third stages; but if the judge decides that the breach is serious or significant, then the second and third stages assume greater importance.
>
> ii) The second stage is to consider why the failure occurred, that is to say whether there is a good reason for it. It was stated in Mitchell (at para. [41]) that if there is a good reason for the default, the court will be likely to decide

that relief should be granted. The important point made in Denton was that if there is a serious or significant breach and no good reason for the breach, this does not mean that the application for relief will automatically fail. It is necessary in every case to move to the third stage.

iii) The third stage is to evaluate all the circumstances of the case, so as to enable the court to deal justly with the application. The two factors specifically mentioned in CPR rule 3.9 are of particular importance and should be given particular weight. They are (a) the need for litigation to be conducted efficiently and at proportionate cost, and (b) the need to enforce compliance with rules, practice directions and court orders. As stated in para. [35] of the judgment in Denton:

> "Thus, the court must, in considering all the circumstances of the case so as to enable it to deal with the application justly, give particular weight to these two important factors. In doing so, it will take account of the seriousness and significance of the breach (which has been assessed at the first stage) and any explanation (which has been considered at the second stage). The more serious or significant the breach the less likely it is that relief will be granted unless there is good reason for it …."

35. The case of SSGA, is a reminder that regardless of any directions given, those directions should not be seen as preventing judges from exercising their discretion, or to put simply, to consider either varying to those directions or giving relief from sanctions.

36. I turn to the specific paragraphs of the grounds before me, in respect of which permission had been granted on all grounds on 2nd October 2023.

37. I accept first, in relation to §1 of the grounds, Mr Clarke's submission that where, as here, there is an allegation that there is a material error of law based on the recording of a submission before a Judge, the Appellant has adduced no evidence for this contention. In particular, Mr Ogunfeibo has not sought to recuse himself in order to adduce his own witness evidence, bearing in mind that he appeared below. I accept Mr Clarke's second submission that the issue is not, in any event, material such that if it were correct, the Judge's decision is not safe and cannot stand. The ground seeks to draw a distinction between why the Appellant had only sought to adduce her own witness evidence, and not that of her husband. This ignores the central point that the Respondent had adduced evidence (specifically the terms of the Appellant's later visa application as a single woman) to discharge the burden of proving a marriage of convenience, where the Appellant had adduced no evidence from one party to that marriage. I do not accept that that the Appellant has shown that the Judge misrecorded submissions or that, when read in context of the appeal, any such misrecording (which for the avoidance of doubt I do not accept) would have rendered the Judge's decision unsafe.

38. I turn next to the core of this appeal: the Judge's duty to consider the Overriding Objective, her ability to exercise discretion and to waive any breach of directions.

39. First, I accept Mr Clarke's submission and reject that of Mr Ogunfeibo that the latter applied at the hearing before the Judge to vary the February 2023 directions or apply for relief from sanctions. I do so for two reasons. First, the Judge specifically recorded that there had been no application to vary the directions and that is recorded at §16. Second, despite reciting §3 of the grounds of appeal to this Tribunal, the grounds do

not actually suggest that the Appellant had made an application at the hearing as Mr Ogunfeibo now contends. That puts the nature of the Judge's consideration of the issue, which was raised by the Secretary of State, in a very different context, particularly in the relation to the tripartite test. Mr Ogunfeibo now says that his application for variation or relief placed particular reliance on the Appellant's credibility in the underlying appeal, and the Judge had erred in her rejection of that application. In fact, no application was made. Instead, the Judge had focussed on the seriousness of the breach, in particular the length of the delay in producing the bundle until the last possible moment, which, although Mr Ogunfeibo sought to suggest had less practical effect than as contended, was obviously significant; and the absence a satisfactory explanation for that delay. The Judge had rejected the reason proffered for the delay (the second stage of the test), recording that the hospital notes did not set out any evidence about the Appellant's ill-heath as justifying the default. That evidence would have been easily available.

40. In relation to the third limb of the tripartite test, this is not a case where the Judge had failed to consider discretion at all, notwithstanding the terms of the unless order. The Judge recorded at §20 she had carefully considered Mr Ogunfeibo's submissions, and she had found that the non-compliance direction should be followed. I accept Mr Clarke's submissions that this was not a case where there was no hearing. It was rather that the Appellant's bundle (which contained a brief witness statement by the Appellant, Mr Ogunfeibo's skeleton argument and the two hospital notes), was not admitted. I also accept Mr Clarke's submission that the Judge had not 'deemed' that the Appellant was not pursuing her appeal. There were clear directions, with which the Appellant had failed to comply. The Appellant did not apply to vary those directions or seek relief from the sanction. The Judge considered her discretion and, contrary to Mr Ogunfeibo's assertion that more weight should have been attached to the evidence said to support medical reasons for non-compliance, the question of weight to be placed on the evidence was a matter for the Judge. The breaches were serious and, the Judge concluded, there was no good reason for those breaches. The Judge did not disregard her discretion or fail to consider all of the circumstances of the case, in maintaining the February 2023 direction. The Judge in any event considered the hospital notes and heard Mr Ogunfeibo's submissions.

41. For the above reasons, the grounds disclose no error of law.

Notice of Decision

42. The Appellant's appeal fails and is dismissed. The judgment of First-tier Tribunal Judge Munonyedi stands.

Judge J Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

22nd December 2023