IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004229

First-tier Tribunal No: EU/56934/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 16 January 2025

Before

UPPER TRIBUNAL JUDGE PINDER

Between

PAUL APPAU
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Hingora, Counsel, instructed by R Spio & Co Solicitors.
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer.

Heard at Field House on 3 December 2024

DECISION AND REASONS

1. The Appellant appeals with the permission of Upper Tribunal Judge Loughran, granted on 27th September 2024, against the decision of First-tier Tribunal Judge Mulholland promulgated on 17th November 2023.

2. By her decision, Judge Mulholland ('the Judge') dismissed the Appellant's appeal against the Respondent's decision to refuse to grant the Appellant pre-settled status/limited leave to remain under the EU Settlement Scheme ('EUSS'). The Respondent had alleged that the Appellant's marriage was one of convenience, entered into to gain an immigration advantage, and thus that he was not entitled to retain his rights of residence following the dissolution of that marriage. His application fell to be refused therefore under the EUSS.

Background

3. Insofar as is relevant to this appeal, the Appellant is a citizen of Ghana who has been residing in the UK since 11th December 2019. His witness statement set out that he had met his wife, Ms Mary Bonsu ('the Sponsor'), who is a Dutch national, in January 2015. They had begun a relationship in December 2016 and got married on 6th July 2019. Following that marriage, the Appellant had applied for a Family Permit under the Immigration (EEA) Regulations 2016 and was granted this on 21st October 2019.

4. On 4th December 2019, the Appellant was stopped by an Immigration Officer on his entry to the UK from Ghana. The Immigration Officer interviewed the Appellant and the Sponsor. Following that interview, the Officer was satisfied that their marriage was one of convenience. This was as a result of inconsistent answers given at the interviews. Whilst the Appellant did enter the UK, the Appellant's Family Permit/leave to enter was cancelled by the Immigration Officer. The Appellant did not appeal against that decision.

5. On 24th July 2023, the Appellant applied for pre-settled status as the family member, with retained rights, of an EEA national, i.e. of the Sponsor. This application, as I have summarised above, was refused on 17th November 2023 on the basis that the Appellant's marriage was one of convenience. The Appellant appealed against that decision and the Appellant's appeal was heard by the Judge on 2nd July 2024.

6. Before the Judge, the Appellant was represented by his solicitor, Mrs Power, and the Respondent by a Presenting Officer. At the hearing, the Judge heard oral evidence from the Appellant, who adopted his statement and was asked questions in cross-examination and re-examination. The Judge then heard submissions from both parties before reserving her decision.

The Decision of the First-tier Tribunal

7. The Judge recorded at [4] of her decision that the burden of proof was on the Respondent on the balance of probabilities. There is otherwise no reference to any leading authorities or any other guidance. The Judge's findings are then set out at [5]-[25] on the issue of whether or not the Appellant's marriage is one of convenience.

8. At [5], the Judge summarised the procedural history insofar as the Appellant's entry into the UK was concerned and the Respondent's earlier decision to refuse him entry into the UK in 2019. At [6]-[10], the Judge summarised the issues that were taken by the Respondent to dispute the Appellant's marriage that effectively arose from the Appellant's and his wife's differing answers during the interviews conducted by the Immigration Officer in 2019. It is appropriate to note at this stage that the full record of those two interviews was not in evidence before the Judge.

9. At [11], the Judge expressly recorded that the Appellant had failed to address the contents of the Notice of Decision dated 11th December 2019, which was the earlier refusal of entry. The Judge noted that this was even though he had been aware of the reasons provided within that notice and which were briefly referred to in the decision under challenge. At [12], the Judge summarised the Appellant's claim in relation to how his marriage had since broken down and that this had happened because of the stress that the interviews had caused them.

10. The Judge then went on to consider at [13] other aspects of the Appellant's case before her, which included the consideration of the Appellant's items of correspondence and other evidence relied upon in support of his relationship being a genuine one and having subsisted for the period claimed by the Appellant. The Judge considered at [14] the photographs that were relied upon for the same reasons. The Judge recorded again at [15] that the Appellant had not appealed against the decision revoking his leave in 2019 and the Appellant's explanation that he had not done so because he had made a fresh application. The Judge recorded the questions that were put to him in cross-examination seeking to challenge that aspect of the Appellant's evidence and at [16], further aspects of the Appellant's evidence concerning what happened at the interview with the Immigration Officer.

11. At [17]-[19], the Judge considered the Appellant's explanations as to some of the deferring responses at interview but effectively does not find that those are plausible or reasonable. At [20]-[23], the Judge considered the paucity of documents in the Appellant's wife's name and/ or in joint names and at [24] the Appellant's evidence in cross-examination on the issue of his divorce.

12. Drawing those assessments and findings together, the Judge concluded at [25] that, having considered all of the information, individually and together and on account of the number of inconsistencies that went to the core of the account of the relationship and marriage, she was satisfied that the Respondent had discharged the burden of proof. Namely, that on the balance of probabilities, the Appellant's marriage was one of convenience entered into to gain an immigration advantage. The Judge went on to consider whether the Appellant had retained a right of residence but in light of her earlier findings on the marriage that also fell to be considered against the Appellant.

The Appeal to the Upper Tribunal

13. Permission to appeal was granted on all grounds on the basis that it was arguable that, despite the correct self-direction at [4] - that the burden of proof rested on the Respondent - the Judge had shifted the burden onto the Appellant. It was also deemed arguable that the Judge had erred in her evaluation of the evidence, as pleaded in the Appellant's third ground of appeal. The Appellant's second ground of appeal

specifically pursued errors on the issue of whether or not the Appellant had retained rights of residence but Mr Hingora before me quite properly accepted that that ground was entirely dependent on the Appellant's first and main ground of appeal succeeding. I do not therefore summarise this second ground of appeal any further.

14. The Respondent had not sought to file a response under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Mr Hingora, who appeared on behalf of the Appellant, made oral submissions before me maintaining the Appellant's first and third grounds of appeal and mainly concentrating on the first ground of appeal pursued. Mr Tufan responded accordingly on behalf of the Respondent maintaining her position to defend the Judge's decision. I have addressed those respective submissions in the section below when setting out my analysis and conclusions.

15. It is also appropriate to record that Mr Tufan formally applied to adduce an earlier appeal determination of the FtT in relation to the Appellant under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. Mr Tufan had been able to share a copy of this determination with Mr Hingora but this application was opposed by Mr Hingora on the basis that there was no reason for the delay in seeking to make this application and why this had not been submitted in evidence much earlier. I briefly heard from both parties and both parties agreed that the Appellant's marriage and relationship with his former spouse had been considered in this determination, albeit this appeal concerned the Appellant's earlier protection claim and so the issue of the Appellant's marriage was not centre-stage, so to speak.

16. After hearing brief oral submissions, I refused the Respondent's Rule 15(2A) application, not because this was late in the day since it is arguable that both parties should have sought to place this in evidence. Mr Hingora accepted that whilst those instructing him were not aware of this determination, the Appellant would have been. I refused to admit this decision insofar as the errors of law pursued and my determination of the same were concerned. This is because both parties agreed that this earlier determination from 2021 had not been before Judge Mulholland either. It could not therefore support either parties' positions for the Judge not to have considered earlier findings of fact by an earlier judge if those findings were not in evidence before her.

17. After hearing the parties' respective oral submissions on the errors of law pursued by the Appellant, I was able to indicate at the end of the parties' respective submissions that I would be finding in favour of the Appellant on the first ground of appeal pursued, which in my view amounted to a material error of law sufficient to set aside the Judge's decision. I gave brief reasons for my decision orally at the hearing and set these out in full below.

Analysis and Conclusions

18. Whilst it is correct that the Judge directed herself to the burden of proof resting on the Respondent at [4] of her decision, I accept Mr Hingora's submission that the Judge appears to have taken the Respondent's case on the marriage interview and what was said to have been inconsistent at face value. This is difficult when the record of the interviews had not been disclosed by the Respondent.

19. I am also concerned that the Judge recorded at [11] that the Appellant had failed to address the contents of the notice of decision dated 11th December 2019, even though he was aware of the reasons provided within that notice. It is difficult to understand what the Judge meant by the Appellant having failed to "address" since the Appellant had quite plainly addressed the contents of the refusal in his second witness statement dated 25th June 2024, placed in evidence before the Judge. If the Judge meant that the Appellant had not appealed against the decision of 11th December 2019, which is far from clear, then the Judge has seemingly failed to consider the Appellant's explanation recorded at [15], namely that he had made a fresh application, with the help of his wife. Either way, I am satisfied for these reasons that the Judge has erred in law by failing to consider relevant evidence from the Appellant and that these errors are materials since the evidence pertained to the core issues in dispute.

20. Furthermore, from [12], the Judge proceeded to consider the Appellant's evidence as to why the marriage broke down and at [13]-[16] whether the Appellant had placed sufficient evidence to demonstrate that he had been in a relationship with his wife. The Judge then returned to the matters raised by the Respondent in relation to the Appellant's and his wife's interviews at [17]-[19], without considering – as I have addressed above – the matters set out by the Appellant in response in his written statement. Those matters included detailed explanations as to why there may have been discrepant answers at interview and also concerning the Appellant's state of mind at the time of the interviews, namely that he was nervous, scared and had not been afforded an interpreter.

21. I am also concerned that the Judge had reached findings grounded on the plausibility of certain matters. For instance at [19], the Judge found that it was implausible that the wedding celebration at the Appellant's wife's home would take place one week before the Registry Office. I am satisfied that the Judge failed to consider matters relating to the Appellant's and his wife's cultural and customary norms, also contained in his statement, when reaching this finding on plausibility grounds. The Appellant had stated at §5 that the earlier ceremony was their customary marriage. The only reason for the Judge accepting the Respondent's case on the discrepant answers given at interview on the issue of the Appellant's marriage ceremony/ies, was that the Appellant's evidence was implausible, as summarised immediately above. In the context of marriages in Ghana and there often being a customary ceremony as well as a civil marriage, I am satisfied that the Judge's

finding is perverse or at the very least lacking in a reasoned consideration of the Appellant's evidence.

22. Mr Hingora submitted that in light of the lack of evidence submitted by the Respondent to support the allegation of a marriage of convenience being raised, the Appellant did not need to provide any further evidence since the Respondent should not have been regarded as having discharged the burden of proof that there were reasonable grounds to suspect such a marriage of convenience. I note that this argument was expressly made at §7iv of the Appellant's skeleton argument before the Judge. This is an issue that is not resolved or even addressed in any way by the Judge in her decision and when reaching her ultimate conclusion that the Respondent had discharged the burden of proof that the marriage was one of convenience at [25].

23. For the reasons above, I am satisfied that the Judge has made material errors of law in failing to engage with the written evidence and further information and explanations provided by the Appellant as part of his second witness statement. There is information at §3-6 of that statement that directly responded to the matters raised by the Respondent in the earlier refusal decision of 11th December 2019 and which was rehearsed in the most recent decision of the Respondent, the subject of the appeal proceedings before the Judge. Coupled with the Judge's recording at [11] that the Appellant had failed to address the issues raised against him, which he had not - addressed above at §19 - satisfies me that the Judge made material errors of law.

24. Mr Tufan submitted that the Judge was correct to note that the Appellant had not sought to appeal the decision refusing him entry to the UK and first raising the allegation of a marriage of convenience. He submitted that this meant that the refusal decision continued to stand. Whilst it is correct that the Appellant did not appeal against that decision, the Appellant had provided an explanation for this and I am satisfied that this was not considered by the Judge – see §19 again. Instead the Judge appears to hold this against the Appellant, when it was incumbent of her to give reasons as to why she might have rejected such an explanation, if indeed that was the case.

25. Mr Tufan also very fairly acknowledged that there was no reference by the Judge to the Appellant's second witness statement but he submitted that that was not sufficient in itself to demonstrate that the Judge had erred materially in law. This was because it was far from clear that the Judge would have decided matters in the Appellant's favour had she expressly gone through that statement in her decision. I accept that that may very well ultimately be the case but considering the seriousness of the allegations raised against the Appellant, I cannot be satisfied that a failure to refer, and to seemingly engage with the matters addressed by the Appellant in that statement, would not have been material to the outcome of this appeal.

26. Similarly, I do not accept Mr Tufan's submission that the disclosure of the interview records would not have made a material difference considering the fundamental and significant nature of the issues raised by the Respondent and which formed the substance of the purported discrepancies between the Appellant's and his wife's accounts at interview. Again, considering the seriousness of the allegation made and the burden resting on the Respondent in raising and in proving the said allegation, and in light of the Appellant raising the lack of disclosure as part of his case that the Respondent had not discharged this burden (see §22 above), the Judge should have engaged with the issue of disclosure and reached a reasoned conclusion either way. She did not.

27. For the reasons above, and as indicated at the hearing, I am satisfied therefore that the Judge has materially erred in law and the Judge's decision to dismiss the appeal is therefore set aside pursuant to s.12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

28. Both parties agreed that since a decision needs to be re-made in respect of the core of the Appellant's appeal and the core of the Respondent's case against him, pursuant to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal at [7.2], it is appropriate to remit the matter back to the FtT for a hearing *de novo.* This is considering the level of fact-finding that will need to be re-made.

29. Both parties also agreed that the earlier appeal determination, promulgated by First-tier Tribunal Judge Shiner on 6th August 2021 should be now admitted into evidence under Rule 15(2A). Despite the lack of any satisfactory explanation as to why this was not filed by either party, whether in the FtT or in the Upper Tribunal, I am satisfied that this is clearly a document that should be in evidence, particularly since it records evidence given by the Appellant at the time concerning his relationship and marriage and makes findings on that evidence. I would expect this document to form part therefore of either party's evidence before the FtT at the remitted hearing.

Notice of Decision

30. The decision of the First-tier Tribunal is set aside. No findings of fact from Judge Mullholland's decision are preserved.

31. The Appeal is remitted to the First-tier Tribunal for a hearing *de novo*, before any Judge of the First-tier Tribunal, other than Judge Mullholland.

Sarah Pinder

Judge of the Upper Tribunal
Immigration and Asylum Chamber

08.01.2025