Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05529/2016

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 4 September 2018	**On 17 October 2018**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JULIUS AIMUAMWOSA AGHAYERE
(anonymity direction not made)

Respondent

Representation:
For the Appellant: Mrs R Petersen Senior Home Office Presenting Officer.
For the Respondent: Mrs Ekhorohan - Sponsor.

ERROR OF LAW FINDING AND REASONS

1. The Secretary of State appeals with permission a decision of First-Tier Tribunal Judge Hindson in which the Judge allowed the appellant's appeal.

Background

2. Mr Aghayere is a citizen of Nigeria born on 18 March 1965 who appealed to the First-Tier Tribunal a refusal of an application for entry clearance as the spouse of an EEA national. The decision-maker was of the opinion that Mr Aghayere's marriage is a marriage of convenience.
3. The Judge records the nature of the evidence provided before setting out findings of fact from [11] of the decision under challenge in the following terms:

> 11. This is a case in which the burden of proof is on the appellant and the standard of proof is balance of probabilities.
>
> 12. The background is that the appellant's previous application was refused on the same ground and he appealed. His appeal was allowed by a Judge Atkinson in 2015 who found it was not a marriage of convenience. That decision is my starting point. Mrs Brewer told me that the interview evidence now available is such that I can and should go behind that decision and dismiss the appeal.
>
> 13. It has been a difficult case to get to understand because of the poor quality of the respondent's evidence.
>
> 14. I have a transcript of an interview in which the "appellants" name (rather than the name of the person being interviewed) is shown as the appellant. It is dated 03/11/2014. I am told that this is an interview of the appellant. It is what I would describe as a "marriage interview" but it contains nothing to tell me who "the wife" is.
>
> 15. Attached to that document is a further marriage interview conducted on 06/03/2016. Again I am not given the name of the person being interviewed. I am told it is the sponsor.
>
> 16. In the respondent's bundle is a further record of interview. In this document the boxes for the name of the applicant and the date are blank. I am told is an interview of the appellant but have no way of knowing that from the document itself, or when it was conducted. This is again a marriage interview and again the name of the wife is not mentioned.
>
> 17. The evidence of a marriage of convenience comes from these interviews. They are totally inadequate as pieces of documentary evidence to be relied on in a court. I am not satisfied that they can be relied on at all and I have disregarded them.
>
> 18. Absent that "evidence" the respondent has failed to satisfy the evidential burden of showing that there is a case for the appellant to answer and I am not satisfied that this is a marriage of

> convenience. There is certainly not sufficient evidence that would justify me in coming to a different conclusion than did Judge Atkinson.

4. The Secretary of State sought permission to appeal asserting the Judge has made a material error of law in failing to engage with the evidence provided to support the decision and thereby failing to resolve conflicts of fact on material matters. Permission to appeal was refused by another judge of the First-Tier Tribunal but granted on a renewed application to the Upper Tribunal on the basis the grounds were arguable.

Error of law

5. It is in this case worth noting in detail the Secretary of States grounds for asserting the Judge has materially erred in law. They are as follows:

> The Judge of the First-Tier Tribunal has made a material error of law in the determination by failing to engage with the evidence provided to support the decision, and thereby failing to resolve conflicts of fact on material matters.
>
> The appellant applied in October 2014 for a family permit to join his sponsor in the UK, being his EEA national wife, Magdalene Ekhorohan. The ECO refuse that application because he considered the relationship to be a marriage of convenience. An appeal against that decision came before the FTT in December 2015, at which hearing the Presenting Officer sought an adjournment on the basis that new information had come to light regarding the wife having sponsored another man to come to the UK as her spouse, at a time when she was now claiming to have been already living with the appellant. The adjournment was refused and the appeal allowed.
>
> The matter was referred back to the ECO who, in light of the new information about the other husband, decided to re-interview both the appellant and the sponsor, and put these issues to them. The outcome of this reconsideration was a re-refusal in March 2016 (refusal notice attached as Annex A), and the current appeal which finally came before the FTT in October 2017.
>
> The Judge never sets out what the evidence is on which the ECO relies to make the allegation that the marriage is a sham. Rather, he completely disregards the evidence on the basis of superficial complaints about the presentation of the documents.
>
> At paragraph 14 he complains that the November 2014 interview record (attached as Annex B) fails to identify who was being interviewed, nor who the wife is. It clearly identifies the appellant's name and the ECO reference number in the header. The record also clearly identifies the sponsors address, her children's names, the date of marriage, et cetera. There can really be no doubt whatsoever that

this interview record relates to the current application, and the current sponsor.

At paragraph 15 the Judge has criticised the March 2016 interview of the sponsor (attached at Annex C), on the basis that it does not name her at the top of the record. Whilst this is unfortunately true it is again perfectly clear from the questions that follow that it is the sponsor of this application who is being interviewed.

At paragraph 16 the Judge complains that the 3rd interview record (attached as Annex D) fails to give the name of the person being interviewed, or the date on which the interview took place, in the header. Again this is regrettably the case that the Judge is plainly wrong to say that he has 'no way of knowing' who is being interviewed, given the context of the questions recorded, that give such details as the address, the date of the marriage, and the name of the sponsor's children.

The Judge was simply not entitled to reject this evidence out of hand, as he does at paragraph 17, but rather was required to engage with the substance of the ECO's case.

6. Mrs Peterson submitted the application is based upon a narrow point namely that there was a lot of evidence before the Judge but that the Judge excluded that evidence and therefore failed to take the same into account with the other material when arriving at the decision. It is argued there is a lengthy decision of the ECO due to the interview that had taken place and the appellant's history which had been renewed and upheld by an Entry Clearance Manager. It is argued the Judge failed to engage with the evidence and the detailed refusal and that far more was required.
7. The sponsor's position was to repeat the claim made at the hearing that the marriage is "good".
8. I find the Secretary of State has made out her case. The comments of the Judge appear to be based on the form rather than substance of the ECO's evidence. Although, as accepted in the application for permission to appeal, there are deficiencies in certain parts of the decision makers evidence it is clear from reading that evidence that it is possible to ascertain and understand its relevance to these proceedings and who was being interviewed in relation to which issues. The Judge erred in law in a manner material to the decision in excluding such evidence when there was no rational basis or reason for doing so.
9. I find that the decision has denied the ECO, a party to these proceedings, the right to an effective hearing before the First-Tier Tribunal. This amounts to a material error of law in the decision which must therefore be set aside.
10. It is also the case, having considered the fact the evidence has not been properly considered at the First-Tier Tribunal level, and in accordance with the practice direction relating to the remittal of appeals to the First-Tier Tribunal, and in light of the extensive fact-

finding that will be required once the evidence has been properly considered, that it is appropriate to remit the matter to the First-Tier Tribunal sitting at Bradford to be heard by another judge of that Tribunal other than Judge Hindson.

Decision

11. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remit the appeal to the First-Tier Tribunal sitting at Bradford to be heard by a judge other than Judge Hindson.**

Anonymity.

12. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 11th October 2018.