IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-000813
First-tier Tribunal No: EA/01690/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 17 May 20223

Before

UPPER TRIBUNAL JUDGE HANSON

Between

LOURDES LUISA VILLEGAS GARCIA
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DPEARTMENT

Respondent

Representation:
For the Appellant: Mr H Semega-Janneh of Counsel.
For the Respondent: Mr C Bates, a Senior Home Office Presenting Officer.

Heard at Manchester Civil Justice Centre on 18 April 2023

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Frantzis ('the Judge'), promulgated on 12 October 2021, in which the Judge dismissed her appeal against the refusal of an application for a family permit under the EU Settlement Scheme (EUSS) and ruled there was no valid claim under the ECHR the Judge was required to determine.
2. The appellant is a citizen of Peru born on 5 June 1975. The basis of her application for leave to remain was as a family member who had retained rights of residence by virtue of her status as the former spouse of a relevant EEA national, Mr Szabo.
3. The EUSS application was refused by the Secretary of State as it was said that the appellant's marriage to Mr Szabo was a marriage of convenience, such that the appellant had never been a family member of a relevant EEA citizen for the purposes of Appendix EU 11.
4. The Judge's findings are set out from [18] of the decision under challenge. The Judge in this paragraph starts consideration of the status of an earlier decision by First-tier Tribunal Judge White, promulgated on 4 February 2020, in which Judge White found the marriage was always a marriage of convenience. The appellant argued that this decision was a nullity as she had withdrawn the

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appeal prior to the hearing and that the Judge should not place any reliance upon the earlier findings in accordance with the Devaseelan principles.

5. Having undertaken a thorough examination of the factual matrix and relevant law, the Judge finds that the earlier appeal had been withdrawn and that the parties to the appeal before the Judge agreed that that decision should be treated as a nullity [28]. The Judge does, however, set out the proper direction at [29] that it is permissible to have regard to Judge White's recital of the evidence before him, even though the findings of Judge White could not be relied upon.
6. The Judge considers the question of whether the marriage was a marriage of convenience from [30]. The Judge sets out the correct burden and standard of proof noting that if it is alleged by the Secretary of State that a marriage is a marriage of convenience the burden for establishing that fact initially lies upon her. At [38] the Judge finds sufficiently weighty concerns have been raised in the evidence that the appellant should be expected to answer.
7. The Judge noted the concerns recorded in the reasons for refusal letter relating to the content of the marriage interview. The Judge considered the appellant's explanation for those answers but found the claim her mental health issues, and the claim that medication impacted on her answers, did not adequately address the concerns.
8. The Judge consider the context of the evidence in relation to the fact that the appellant and Mr Sazabo had lived in the same accommodation, but with others, together with both the written and oral evidence.
9. At [44 – 46] the Judge writes:

> 44. I am acutely aware that the Appellant was issued with a residence card on the basis of her marriage and that the Respondent accepts the Appellant and Mr Szabo were friends who at times shared addresses. I remind myself again that the legal burden in this appeal lies on the Respondent. However, the decision of the Respondent dated 22 August 2019 and the Decision Letter carry serious repercussions for the Appellant and the assertions that the Respondent makes, for the reasons I set out above, carry evidential weight. It is thus surprising that since August 2019 the Appellants response has been so lacking in substance (for the reasons that I set out above).
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> 45. I have stood back and carefully considered all the evidence before me. Taking all the issues together I find on the balance of probability that the Respondent has shown that the Appellant's marriage was always one of convenience because it was entered into by both the Appellant and Mr Szabo with the predominant purpose to secure the Appellant right to reside in the United Kingdom.
>
> 46. In these circumstances, the appeal against the Respondent's decision under the EUSS must fail.

10. Permission to appeal was refused by another judge of the First-tier Tribunal but granted on a renewed application by Upper Tribunal Judge Pickup on 28 April 2022, the operative part of the grant being in the following terms:

> 1. Much of the overly lengthy renewed grounds amount to a disagreement with the findings of the First-tier Tribunal and an attempt to reargue the appeal. However, it is at least arguable that having concluded that the earlier appeal had validly been withdrawn, the judge was wrong to rely on any findings made, and in making findings in relation to that earlier appeal, such as investigating whether and why the appellant did not 'put her withdrawal of appeal on record'.
> 2. Whilst permission is granted on all grounds, some grounds overlap or are repetitious, and some have little apparent merit. The appellant is, therefore directed to submit a concise skeleton argument setting out the principle and primary grounds relied on, bearing in mind that it is well-established law that the weight to

be given to any particular factor in an appeal is a matter for the judge and will rarely give rise to an error of law, see Green (Article 8 -new rules) [2013] UKUT 254.

3. For the reasons explained above, an arguable material error of law is disclosed by the grounds.

11. The Secretary of State opposes the appeal in a Rule 24 response dated 18 October 2022, where it is written:

> 2. The respondent opposes the appellant's appeal. In summary, the respondent will submit inter alia that the judge of the First-tier Tribunal directed himself appropriately.
> 3. Much of the repetitious grounds relate to the alleged reliance on and erroneous consideration/application of the decision of Judge White. It is submitted that the FTTJ did not err in finding that the previous appeal had been withdrawn [27-28], whilst taking in to account any observations or recital of the materials before Judge White. Clear reference is made to EN, and the fact that the FTTJ was not bound by any findings of Judge White [32, 37]. There is no indication that the FTTJ considered any previous findings as a starting point. Any reference at [34] to the appellant failing to 'put in record with the Tribunal' that her previous appeal had been withdrawn must be viewed in the context as set out at [32 (ii)]- the appellant believed she had withdrawn her appeal, but on receiving the unexpected decision of the Tribunal, that of Judge White, did nothing to draw the attention of the Tribunal to her notification of withdrawal. Again, that fact is not in dispute. As set out in [34] and [35] these concerns/observations provide a background context against which the FTTJ appropriately considered the evidence.
> 4. As noted in the refusal of permission to appeal at the FTT, the SSHD concurs with Judge Veloso that the grounds fail to dispute that neither Dr Awan or Dr Siddiqui's evidence established that the appellant was not fit enough to attend the marriage interview in July 2019. Nor do the grounds identify any medical evidence that supports such an assertion. Clear reasons are given for giving limited weight to Dr Siddqui's report; it is submitted that these reasons should be read as a whole and are wholly reasonable. There were clear inconsistencies within the marriage interview, as identified by both the SSHD and the FTTJ, and these were viewed in the round with the rest of the evidence and the shortcomings set out in the decision. It is submitted that much of the grounds amount to mere disagreement as noted by Judge Pickup and Judge Veloso.

12. As there was no evidence of a concise skeleton argument having been filed in accordance with the direction of Judge Pickup, Mr H Semega-Janneh was asked at the outset of the hearing whether such document existed. He indicated it did and had allegedly been sent. An email filing the same clearly shows this did not occur until shortly after 10 AM on the morning of the hearing. He was therefore asked to provide a further copy of the document to the Tribunal and the Presenting Officer, which he did. The document does not comply with the direction of Judge Pickup and on the whole repeats the text in the unstructured application for permission to appeal under the heading of a skeleton argument. The content of the document has, however, been properly considered together with the submissions made before me.

Discussion and analysis

13. In the section of the skeleton argument headed "Schedule of Issues" it is written:

> The issues raised for resolution, in support of the grounds of appeal, are: -
>
> Issue 1 – Did the Judge err by making contradictory findings between her statements at para. 34(ii) and those at paragraphs. 26, 27 and 28 of her decision?

Issue 2 – Did the Judge err in finding that the Appellant did not put her the withdrawal of her appeal on record?
Issue 3 – Was the Judge procedural unfair to the Appellant when she made certain findings on a matter without first giving the appellant a fair opportunity to explain?
Issue 4 – Did the Judge err in undertaking a judicial inquiry into why the Appellant had withdrawn her appeal, after the Judge had already found that the appeal had been validly withdrawn emanating in misplaced concerns?
Issue 5 – Did the Judge err in failing to make findings on and give weight to the Appellant's ex-partner's attendance at the home office interview and submissions made by the appellant's counsel?
Issue 6 - Did the Judge fail to give adequate consideration and weight to the Appellant's inability to recall matters that took place some 2 years and 6 years before the marriage interview.

14. It is accepted on the appellant's behalf that Issues 1 and 2 somewhat overlap. The appellant asserts the Judge has contradicted herself in relation to the question of whether the appeal before Judge White had been withdrawn, for the reasons set out at [12 – 16] of the skeleton argument.
15. I find no contradiction made out sufficient to amount to a material error of law. The Judge clearly states that [28] that the early appeal before Judge White had been withdrawn. There is nothing in the determination to show that having made such a finding the Judge made a contradictory finding. It was accepted that the decision to withdraw was not before Judge White which is why Judge White went on to determine the merits of the appeal. The Judge does at [34 (ii)], specifically referred to in the skeleton argument, note that no attempt had been made to challenge the decision of Judge White which is clearly a reference to the lack of there being any application to appeal that decision, rather than leaving it to be determined by the Judge at the outset of the hearing of the appeal before her, and put on the record that the appeal had been withdrawn. That is not contradictory. It is a statement of fact. The chronology later established by the Judge showed that a decision had been made by the Secretary of State which the appellant appealed. It later transpired before the Judge that the appellant had sought to withdraw that appeal but that notice of that had not come to the attention of Judge White. Judge White's determination was therefore promulgated. Neither the appellant not a legal representative sought permission to appeal that decision. On the facts that appears to be a factually correct analysis. The Judge finds the appeal before Judge White had been withdrawn but that is the first finding by any judicial body that that had occurred. No material legal error arises.
16. Issue 3 asserts procedural unfairness claiming the Judge had made findings on certain matters without giving the appellant a fair opportunity to explain. The ground specifically refers to [34 (iii)], [14], and [22].
17. [14] is a section of the determination in which the Judge is recording oral evidence given in response to questions from the Presenting Officer relating to why the appellant had not attended the hearing before Judge White, which she stated she thought been cancelled, and the lack of any explanation as to why there was no challenge to that decision. The Judge notes that it was not known why the appellant sought to withdraw the previous appeal rather than seek an adjournment if it was said it was because the appellant was unable to attend the hearing as a result of not being 'in the right state of mind'. No material legal error arises.
18. At [22] Judge notes the position in this appeal was that the appellant intended to withdraw the early appeal and instructed her solicitors to do so, whilst the Secretary of State questioned the appellant's motives, although the fact she intended to do so, and instructed her solicitors accordingly, was not put in issue.

That merely reflects the situation as explained to the Judge. No material legal error arises.

19. Issue 4 - At [34 (iii)] the Judge writes:

> "Ms Malomo noted that the Appellant had answered questions clearly in the hearing on 15 June 2021 and questioned why she had not attended her the appeal hearing in January 2020. The Appellant replied that she was not in the right frame of mind. Two matters arise in my mind. Firstly, it is explained by an adjournment was not sought in those circumstances rather than withdrawing an appeal and leaving the Respondent's decision of 22 August 2019 to stand and secondly, why the Appellant relies upon her medical presentation in January 2020 has no medical evidence of a specific presentation at time been placed before the Tribunal? As the Appellant herself stated, had she known she would have provided a statement from her GP. The Appellant did know, however, as she makes a medical presentation directly relevant in her witness statement.

20. There is merit in [33] of the ground seeking permission to appeal which questions why the Judge expressed concerns regarding the withdrawal. There is, however, no merit in the claim the Judge did so improperly or without jurisdiction. The Judge was entitled to consider matters she considered relevant albeit that the reason for withdrawing the appeal that came before Judge White does not impact upon the fact the Judge found the appeal had been withdrawn. There is no contradiction in the determination in that respect. I do not find any merit in the argument that the fact the Judge considered this matter somehow tainted her overall consideration of the merits of the appeal. No procedural unfairness is made out or legal error on any other basis.
21. Issue 5 asserts legal error in the Judge failing to make findings on and give weight to (A) the fact the appellant's ex-partner attended the Home Office marriage interview though not the hearing and (B) submissions made by the appellant's barrister.
22. If what the appellant is claiming is that greater weight should have been given to the answers given at the marriage interview because the appellant and her ex-partner attended and answered questions, no material legal error is established as weight is a matter for the Judge.
23. The Judge was well aware that both the appellant and Mr Szabo attended the marriage interview as it was contradictions between their respective answers in relation to material aspects of the claim that were of particular concern to the Judge.
24. The Judge was well aware of the reason why Mr Szabo did not attend the hearing.
25. The Judge considered both the positive and negative aspects of the marriage interview and clearly considered the evidence in the round before coming to the conclusions set out in the decision. The ground is, in effect, seeking reasons for reasons and alleging that because the Judge did not set out in specific terms something the appellant's representative would have wished to see, the Judge somehow erred in law.
26. It is settled law that the Judge was not required to set out each and every aspect of the evidence or submissions made, in the determination. The Judge clearly considered the evidence with the required degree of anxious scrutiny and made clear findings on the key issue which is whether the appellant's marriage was a marriage of convenience. That aspect of the decision is clearly reasoned, and a reader can understand not only what the decision is but also why the Judge cane to the conclusion it was.
27. The Judge was not considering an appeal against the decision of Judge White but was entitled to refer to aspects of the evidence that appeared in the refusal letter in relation to the decision being appealed before the Judge that also

appeared in the earlier refusal letter. It is not made out the Judge material erred in relation to this issue.

28. Issue 6 – asserts the Judge failed to give adequate consideration and weight to the appellant's inability to recall matters that took place over two years and six years before the marriage interview. This ground does not establish material legal error. The Judge took into account the chronology and the appellant's claim that her memory may not be as accurate as it could otherwise be as a result of the passage of time and medication, but rejected the explanation as not being satisfactory. The ground is, in effect, a further challenge to the weight the Judge gave to the evidence.
29. The Judge specifically noted from the marriage interview, in addition to the other evidence, contradictions in relation to whether the appellant and Mr Szabo spent the night before their wedding together and how they travel to the wedding ceremony, for which they gave different answers, and whether they both attended a party together, one claiming they did in London when the other claimed that they were in a completely different place.
30. The Court of Appeal have referred to an unacceptable practice of individuals trying to pick individual points out of decisions which they then dress up as errors of law and attempt to have the decision overturned. A number of challenges in the grounds fall into this category. The core question the Judge was required to consider is whether, in light of the Secretary of State having adduce sufficient evidence to discharge the evidential burden upon her to show that the marriage was a marriage of convenience, the appellant was able to provide a satisfactory explanation for the discrepancies relied upon. The Judge's conclusion that the appellant could not is a finding within the range of those reasonably open to the Judge on the evidence and is adequately reasoned.
31. Suggesting alternative findings, attempting to reargue points considered by the Judge, disagreeing with the findings and the weight given to the evidence, or the issues relied upon in the grounds, does not establish legal error material to the decision to dismiss the appeal.

Notice of Decision

32. The First-tier Tribunal has not been shown to have erred in law in a manner material to the decision to dismiss the appeal. The determination shall stand.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 April 2023