Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11273/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th February 2018	**On 28th March 2018**

Before

UPPER TRIBUNAL JUDGE JOHN FREEMAN
DEPUTY UPPER TRIBUNAL JUDGE PROFESSOR SATVINDER JUSS

Between

MR CHRYSOGONUS CHUKWUEMEKA EBEH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I Kumi (Counsel)
For the Respondent: Mr S Kotas (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal against the determination of First-Tier Tribunal Judge Raymond, promulgated on 24th October 2017, following the hearing at Hatton Cross on 25th September 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper-Tier Tribunal, and thus the matter comes before us.

The Appellant

2. The Appellant is a male, a citizen of Nigeria, who was born on 25th November 1971. He appealed against the decision of the Respondent dated 11th April 2016 refusing his application to remain in the UK on the basis of his marriage to a person present and settled in the UK, namely *Miss [JL]*, who was a British citizen, having been born in Hackney on 29th September 1965.

3. The basis of the refusal was expressed in terms that although, "You have a genuine and subsisting relationship with your British partner", and that the Appellant had a British citizen son settled in the UK, nevertheless, the Respondent was not satisfied that there were "insurmountable obstacles in accordance with paragraph EX.2 of Appendix FM" such that there would be "very significant difficulties which would be faced by you or your partner in continuing your family life together outside the UK in Nigeria …" (see page 3 of 7).

4. It is a feature of this appeal that there had been a previous determination, promulgated on 11th May 2015, before IJ Cohen, with respect to a previous refusal letter that was dated 6th November 2013. On that occasion too, the Appellant's application was on the basis of his relationship with his British citizen partner and the refusal letter had stated that the Appellant did not meet the income threshold requirements under Appendix FM or the related evidential requirements under Appendix FM-SE. On the previous occasion, when the hearing before Judge Cohen took place on 29th April 2015 at Taylor House, neither the Appellant nor his British citizen wife had attended the hearing, and this had led the judge to conclude that, "I am not satisfied that the partners are in a genuine and subsisting relationship" such that they did not have a family life together in the UK (paragraph 17).

5. In the present appeal, however, before Judge Raymond at Hatton Cross on 25th September 2017, which led to the decision dated 24th October 2017, both the Appellant and his partner, *[JL]*, had attended to give evidence. Judge Raymond at the outset observed that in the normal course of events involving a second appeal, the strictures of **Devaseelan [2002] UKIAT 00282** would have applied, except that on this occasion both the Appellant and his wife had attended to give evidence, which they had not done in 2015 before IJ Cohen.

6. Judge Raymond noted how, in the circumstances, the current refusal had conceded under E-LTRP.1.7 that "You have a genuine and subsisting relationship with your British partner" (at paragraph 26). At the outset of a rather long and protracted determination (of 26 pages running into 205 paragraphs), Judge Raymond asked rhetorically why this concession had been made, since it failed to take into account IJ Cohen's negative finding on this point. Nor, observed Judge Raymond, did it show any appreciation that what had influenced IJ Cohen was that neither party had appeared for the hearing, with there being no reasonable or credible reason given for their absence (paragraph 27).

7. It was against this background, therefore, that the Appellant's evidence, and that of his partner, was questioned during the hearing before Judge Raymond. The Appellant was asked by Ms Bell, the presenting officer at the hearing, about the nature of the wedding and the arrangements (at paragraphs 47 to 48) and a significant part of the determination is devoted to an analysis of the nature of the marriage.

8. At the end of the evidence, and in her closing speech, Ms Bell, submitted that, given what was heard by the Tribunal from the Appellant and his partner, "such evidence put in doubt the genuineness of the relationship, although she did not formally withdraw the concession in the refusal letter" (paragraph 117).

9. Thereafter, the judge considered the Appellant's claimed relationship with his son, *Daniel Tyrone Simon,* which he considered was not borne out by the evidence, as well as the financial situation of the Appellant, which he equally considered was not such as to enable the Appellant to meet the financial threshold requirements under Appendix FM.

10. The appeal was dismissed.

The Grounds of Application

11. The Grounds of Appeal state that the judge erred in law in questioning the propriety of a concession made in the Respondent's refusal letter of 11th April 2016 and by placing reliance on two cases, neither of which were directly relevant. The first case was **MSM [2015] UKUT 413** and the second case was **Davoodipanah [2004] EWCA Civ 1064**, both of which concerned the formal withdrawal of the concession by the Respondent, which was very definitely not the case here because, despite the judge having given Ms Bell the opportunity to do so, the concession of there being a genuine and subsisting relationship had not been withdrawn. Accordingly, the concession stood as it was made in the refusal letter.

12. On 16th January 2018, the Upper Tribunal granted permission to appeal.

Submissions

13. At the hearing before us on 27th February 2018, Mr Kumi of Counsel, (who did not appear below) submitted that at the first Tribunal hearing before IJ Cohen in 2015 there had been no concession made in the refusal letter of 6th November 2013, as there was now in the latest refusal letter of 11th April 2016 (at page 3 of 7). However, given that there was a concession made quite explicitly in the refusal letter at the outset of the decision in April 2016, the parties had gone to court prepared to deal with whether there were "very significant obstacles" to the Appellant and his wife relocating to Nigeria or not, because the marriage itself had been expressly accepted as being genuine and subsisting. He drew attention to

the Appellant's wife's witness statement where *[JL]* (at paragraphs 8 to 10) addresses the difficulty she would have in bringing up her children in Nigeria, given that they were British citizens, and she had been living in this country herself all her life. Indeed, at paragraph 10 she expressly states that she has no ties to Nigeria herself. The entire focus of the evidence, as planned to be given in the preparations before the Hearing before IJ Raymond, was on relocating to a country outside the UK. It was not on whether the marriage was genuine and subsisting, which had been plainly conceded in the refusal letter.

14. Mr Kumi also submitted that it ought to come as no surprise if the refusal letter of April 2016 did in fact concede that the marriage was genuine and subsisting because the parties were still living together, some five years after the first refusal letter of 2013, and evidence had been sent to the Respondent in the form of a marriage certificate and the like since then. He submitted that the Appellant was bound to have been prejudiced by being asked now to answer a case which had already been conceded, and remained conceded throughout the lengthy hearing before IJ Raymond, during which time there was no withdrawal of the concession, when he and his partner had come to a court to answer an entirely different case.

15. For his part, Mr Kotas submitted that the concession had been "implicitly withdrawn during the course of the hearing" before Judge Raymond as is clear from the cross-examination, and especially at paragraphs 47 to 48 of the determination. The Appellant was not prejudiced because he was represented, and Mr D Riok, his representative, did not object to the marriage now being questioned once again in the manner that it was, but instead sought to answer the allegations that were put before the witnesses by willingly participating in this new line of inquiry before IJ Raymond.

16. Second, and in any event, even if there had been some procedural unfairness, any error of law that there was had not been a material error given that ultimately the appeal hinged upon whether the Appellant could satisfy EX.1. This was why the judge states (at paragraph 189) that,

> "Even if I were wrong about there not being a genuine and subsisting marriage, which I do not accept is the case, and given that the couple could not meet financial requirements, so that EX.1 applies, I find that there would be no insurmountable obstacles to the Sponsor living with the Appellant in Nigeria".

This particular basis of the refusal, which was known to the Appellant from the outset because it had been flagged up in the refusal letter, was not in any way infected by a concentration on whether the marriage was genuine and subsisting. Instead, on the question of whether there were "insurmountable obstacles", the case put forward by the Appellant was flimsy in the extreme as is clear from the attempt to bring medical evidence to the aid of the Appellant. The Appellant's partner was referred

to the respiratory clinic at King's College Hospital, because of her asthma condition, but the evidence (at paragraphs 75 to 78) showed that the asthma did not limit her activities at all. In fact, any necessary treatment was available in Nigeria (paragraph 79). Therefore, the case could not have succeeded in any event.

17. There was no reply by Mr Kumi.

Error of Law

18. We are satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that we should set aside the decision and remake the decision. Our reasons are as follows.

19. First, the second refusal letter of 11th April 2016, (notwithstanding a first refusal letter of November 2013 to the contrary) carried an express concession that, "You have a genuine and subsisting relationship with your British partner", and given that this was written in the wake of evidence from the Appellant and his partner that they were still, as it turned out, together after some five years, the Respondent was justified in making that concession. Contrary to the situation in **Devaseelan**, there had been a significant change of circumstances.

20. Second, that concession was expressly not withdrawn by Ms Bell. Nor did the judge give the Appellant the opportunity to have the appeal adjourned, so that he could be prepared to deal with this point, if the judge were to deal with it himself. The Appellant had to meet the case against him, and any point not taken in it needed to be expressly raised.

21. Third, and no less importantly, there is considerable confusion here as to precisely what that case is. The judge at the outset, having raised the possibility that this was not a genuine and subsisting marriage (at paragraph 27) allowed the Appellant's evidence to be challenged on that basis by Ms Bell, who in her closing submissions stated that the "evidence put in doubt the genuineness of the relationship", but then curiously went on to just as emphatically state that, "she did not formally withdraw the concession in the refusal letter" (paragraph 117). This led the judge to then conclude that "the core issue" in this appeal was "whether there is a genuine and subsisting relationship" (paragraph 123). In view of the concession, not resiled from at the hearing, it needed to be brought to the Appellant's attention that the judge regarded himself as entitled to depart from it.

22. Fourth, given that the concession had been expressly made in the refusal letter, and maintained at the hearing, the judge was not entitled to deal with it as withdrawn on the basis of the Court of Appeal authority in **Davoodipanah [2004] EWCA Civ 106** and the Tribunal decision in **MSM [2015] UKUT 413**, suggesting that, "that in the absence of prejudice, if a

party has made a concession which appears in retrospect to be a concession which would not have been made, then probably justice would require that the party be allowed to withdraw that concession" (paragraph 121). The judge failed to note that the concession was not being withdrawn by Ms Bell.

23. Finally, the judge's approach to **Devaseelan [2002] UKIAT 00282** is misconceived, where it is said that the determination by IJ Cohen in 2015, "which has not been called into question due to permission to appeal against having been refused, falls to be taken into account by me under the **Devaseelan** guidelines" (paragraph 21). This is because although that is plainly "the starting point" (see **Devaseelan**), the fact is that there was a material difference in that on that occasion the parties to the marriage had, without credible explanation, not turned up at the hearing to give evidence, which was not the case before IJ Raymond in September 2017. There had also been a significant change of circumstances, if after the passage of time their relationship remained in place, and the Respondent's expressed view on this needed to be given proper weight.

Notice of Decision

The decision of the First-Tier Tribunal involved the making of an error of law such that it falls to be set aside. We set aside the decision of the original judge. We remake the decision as follows. This appeal is allowed to the extent that it is remitted back to a judge other than Judge Raymond under Practice Statement 7.2(a) because the effect of the error hereby identified has been to deprive a party before the First-Tier Tribunal of a fair hearing or other opportunity for the party's case to be put and considered by the First-Tier Tribunal. Unless the Respondent expressly withdraws the concession in the refusal letter, the re-hearing should be concerned with the points which were taken there. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 16th March 2018