Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01465/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 November 2019	**On 10 December 2019**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Mr Hussain Ahmed Appellant
(ANONYMITY ORDER NOT MADE)

And

Immigration officer, Heathrow Respondent

Representation:
For the Appellant: Mr A Swain, of Counsel, instructed by Londonium Solicitors.
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The issue in this case is whether Judge of the First-tier Tribunal Rowlands (hereafter the "judge") materially erred in law in reaching his finding, at para 19 of his decision, that the appellant's wife, Ms Yordanka Bogdanova, a Bulgarian national born on 2 March 1975 (hereafter the "sponsor"), "*had not been in the United Kingdom exercising Treaty rights for at least six months if not longer*" and that therefore the respondent was correct in making his decision of 23 March 2019 to revoke the residence card that had been issued in July 2017 (valid until 14 June 2022) to the appellant, a national of Bangladesh born on 27 June 1982.

2. The appellant came to the attention of the respondent on 23 March 2019 because he travelled to Bangladesh on 2 January 2019 and arrived in the United Kingdom on 22

March 2019. He presented his residence card in order to be re-admitted to the United Kingdom. He was interviewed on the same day, at 21:50 hours. The record of the interview is at pages 34-39 of the respondent's bundle. In the decision notice, the respondent stated:

> "I am satisfied that Yordanka Bogdanova Toleva is not currently in the United Kingdom, that you are not therefore seeking to join an EEA national in the United Kingdom who has a right to reside there under those Regulations and that you do not therefore have a right to be admitted under regulation 11.
>
> When you arrived in the United Kingdom today, you stated that your wife has been out of the United Kingdom for over six months and that she had last been in employment in 2017. You confirmed that your wife has been residing in Bulgaria to take care of her son and help her mother in her mother's accountancy firm. I am satisfied that your wife is not resident in the United Kingdom, not exercising her Treaty Rights and you are not therefore seeking to join a EEA/EU national who is resident **in** the United Kingdom.
>
> You have not sought entry in any other capacity and I therefore revoke your EEA residence permit and refuse your admission to the United Kingdom in accordance with Regulation 24(5)(a) and 23(4)(a) respectively."

3. The respondent's decision was made under the Immigration (European Economic Area) Regulations 2016 (hereafter the "2016 Regulations").

4. At his interview, the appellant had said, inter alia, as follows:

> Qn 8: When was the last time your wife was in the UK?
> Ans: She's been in Bulgaria for more than six months. I even met her there in October [?] year.
>
> Qn 9: Why has she been in Bulgaria for more than six months?
> Ans: Because she is just helping her mother and looking after her son. Her mother looks after her son, only her mother. She was going to bring her son here, but her ex-husband complained not to bring the son here.
>
> Qn 10: So where does your wife live now?
> Ans: She has a house over there, she lives both here and in Bulgaria.
>
> Qn 11: Would you say that your wife is exercising Treaty Rights?
> Ans: On Sunday she is coming back to live with me, she's still my wife.

5. At question 12, the appellant was asked whether he had understood all of the questions and he answered: "yes sir" (page 38 of the respondent's bundle).

6. Before the interview commenced, the appellant confirmed by signing his signature (page 34 of the respondent's bundle) that he was fit and happy to be interviewed. At the end of the interview, the appellant confirmed by signing his signature (page 34) that he had read or had the record of his interview read to him, he had understood all the questions and that the interview record was an accurate record.

The judge's decision

7. There was no issue before the judge over the genuineness of the marriage, entered into on 8 February 2017, between the appellant and the sponsor.

8. The judge noted, inter alia, that the appellant had said in his witness statement that the sponsor had spoken by telephone to one of the immigration officers at Heathrow

explaining her position and that she had returned to the United Kingdom the next day (24 March 2019). He said that she was a self-employed person since 2017; that they have been living together "*since long*"; that due some emergency the sponsor frequently visits Bulgaria as her son from her previous marriage is disabled and she has to look after him "*now and then*"; and that she had never been out of the United Kingdom for more than 6 months at a time. At para 7 of his decision, the judge summarised the following aspect of the appellant's witness statement:

> "7. … he said that she had never been out of the country for more than six months at a time. He couldn't remember saying to anybody that she hadn't been working here. He had left home at midnight and had caught a flight at six o'clock in the morning from Sylhet and it was an eleven hour journey to Heathrow. He hadn't been feeling particularly well on arrival, he said he was suffering from a headache. The interview took place at ten to ten at night."

9. The judge then summarised the witness statement of the sponsor, which was in similar terms, at paras 9 and 10. At para 11, he summarised her oral evidence. Paras 10 and 11 read:

> "10. She said that she had not been out of the United Kingdom for more than six months at a time, she had to travel because of her son. She was in Bulgaria at the time when her husband returned but she came back two days later. She had gone there around 27th December and had actually worked the day before she left.
>
> 11. In cross-examination she confirmed that the day before she left was Boxing Day. She had no documents with her. The office required to cleaned before it opened again. She worked cleaning an office in Camberley in Surrey. In answer to a question from me she said it was a big office but she couldn't identify it any further. That was the end of the evidence."

10. At para 16, the judge said that he had considered all of the evidence in reaching his decision. He then gave his reasons for his decision at paras 17-18, assessing the appellant's explanation for the answers he gave at his interview at para 18. Paras 17-18 of the judge's decision read:

> "17. There is no issue over the genuineness of their marriage, the only issue is whether, when he returned to the United Kingdom she was actually exercising treaty rights or had done so recently. The answers given by the Appellant in interview seemed to suggest that she had been out of the country for "over six months". I had produced to me a boarding pass indicating that she returned on 24th March 2019 from Sofia. There is no evidence at all supplied of her date of departure for Bulgaria. In fact, the first time it was mentioned at all was by her at the hearing when she claimed to have been working up until Boxing Day and returned to Bulgaria after that. I find it rather surprising that she should do so when she has a son in Bulgaria with apparent health problems who she had not seen for Christmas. I also note that the Appellant himself said that he visited her in Bulgaria in October. I am satisfied that the Respondent was right to conclude that she had been out of the country, as the Appellant himself said, for more than six months. The financial documents showed no payments made to her from income only from the Appellant and the tax document related to tax year 2017/2018 which ended in April 2018. There is no evidence whatsoever of her having any income or employment since April 2018.
>
> 18. At the hearing, the Appellant tried to suggest that he was tired and confused when interviewed but he has never suggested this until now. In

> the grounds of appeal he states that he answered the Immigration Officers questions "very honestly and sincerely" yet he now suggests that the answers are unreliable. I reject this completely as an attempt to disassociate himself from the answers that he gave which undermine his entitlement to a residence card. Nowhere in the grounds of appeal is there any mention whatsoever of those answers being unreliable."

11. At para 20, the judge purported to consider Article 8, concluding that the decision was not unlawful. He then proceeded to dismiss the appeal on EEA grounds and purported to dismiss the appeal on human rights grounds.

The grounds and the grant of permission

12. The application for permission contained two grounds. Ground 2 challenged the judge's reasoning in relation to Article 8. Mr Swain accepted at the hearing that the judge had no jurisdiction to consider Article 8 pursuant to the judgment of the Court of Appeal in Amirteymour [2017] EWCA Civ 353. Accordingly, he agreed that he could not pursue ground 2. Furthermore, it was agreed at the hearing before me that the judge's decision to dismiss the appeal on human rights grounds had to be set aside for lack of jurisdiction.

13. Ground 1 challenged the judge's finding that the sponsor had not been exercising Treaty rights in the United Kingdom for at least 6 months if not longer.

14. Ground 1 opens by stating "*This is a perversity challenge*". It then states that the judge's finding that there was no evidence that the sponsor was exercising Treaty rights in the United Kingdom for at least 6 months was incorrect for two reasons as follows:

    (i) The judge placed *undue weight* on the interview record but failed to consider the appellant's circumstances at the time of his interview that rendered him incapable of understanding and responding to the questions put to him accurately. It is contended that the appellant was physically and emotionally exhausted during his interview, he did not understand the questions and does not remember what was said exactly. The interview record was therefore rendered unreliable and inadmissible due to the respondent's failure to observe the procedures of the interview such as to ensure that the appellant was physically fit to understand the questions and, furthermore, the appellant was not given an opportunity to read the interview sheet before signing it.

    (ii) The appellant had provided "*background evidence*" to show that the sponsor had been working as a self-employed person before leaving in late December 2018 and that "*further evidence submitted with this application also supports this assertion".*

15. Permission was granted by Judge of the First-tier Tribunal Page (hereafter the "*permission judge*"). His reasons are set out at para 2 of his decision which reads:

> "I am satisfied that an arguable error of law has been identified in the judge's decision that could cause the Upper Tribunal to interfere. The appellant's grounds of appeal engage with what the judge decided, beyond disagreement with the judge's conclusions. In the judge's conclusions at paragraphs 16-20 there is a paucity of reasoning to explain why he concluded that the respondent was correct to find that the appellant's wife had been out of the UK for over 6 months - and the judge has strayed into considering the appeal under Article 8. The complaint made is that the judge has erred in finding that the appellant's wife was not exercising treaty rights as claimed and made mistakes of fact. The judge

> accepted the marriage was genuine. Permission to appeal is granted on all grounds argued."

Submissions

16. Mr Swain informed me that the "*further evidence*" referred to in the grounds was the sponsor's tax return for the tax year 2018/2019. He informed me that this tax return was not submitted to the judge and he therefore accepted that it could not be relied upon in order to impugn the judge's decision. Likewise, he confirmed that the fresh evidence submitted to the Upper Tribunal under cover of a letter dated 26 November 2019 from Londonium Solicitors was fresh evidence that could not be relied upon in order to impugn the judge's decision.

17. Mr Swain said that the appeal to the Upper Tribunal concerns the *weight* that the judge accorded to the appellant's answers at his interview. The appellant's evidence was that he left his home in Bangladesh at midnight and flew from Sylhet at 6 a.m. He endured an 11-hour journey to the Heathrow, arriving at 5 p.m. local time. The interview took place just before 10 p.m. The interview had placed the appellant under strain which was compounded by his journey. Neither the judge nor the respondent had challenged the appellant's evidence about the length of his journey.

18. Mr Swain submitted that there should have been some acknowledgement on the part of the judge of the circumstances of the appellant, as explained in the previous paragraph, whereas the judge had completely rejected the appellant's explanation. He acknowledged that it was not argued in the grounds that the judge should have taken some account of the appellant's explanation as opposed to rejecting it completely.

19. In addition, the permission judge had said that there was a paucity of reasoning in the judge's decision.

20. Mr Swain submitted that the fact that it was accepted that the appellant and the sponsor had a genuine marriage should have been factored into the judge's reasoning in making his finding as to whether or not the sponsor was away from the United Kingdom from 28 December 2018 or longer. He submitted that the fact that the marriage was genuine means that it can be assumed that the parties meet each other regularly. He submitted that the fact that the judge did not take into account the fact that the appellant and the sponsor had a genuine and subsisting marriage shows that the judge had an unbalanced approach in assessing the evidence and deciding whether the sponsor was away from the United Kingdom from 27 December 2018 or from October 2018.

21. Finally, Mr Swain submitted that the judge should have taken into account the tenancy agreement that was before the judge. I informed Mr Swain that this was not part of his grounds. He replied to say that he would leave the matter there as he did not think that he needed to rely upon the tenancy agreement. This was, of course, a matter for Mr Swain as I told him.

22. I heard briefly from Mr Tarlow who essentially said that the appellant was merely trying to re-argue his case and disagree with the judge's reasoning.

23. In his submissions in reply, Mr Swain attempted to raise yet another new issue, i.e. that the judge was wrong to criticise the appellant for not submitting a tax return for

the 2018/2019 tax year because the deadline for submitting this tax return is 31 January 2020.

24. I informed Mr Swain that not only was this not part of his grounds, it is based upon a misreading of the final sentence of para 17 of the judge's decision where he said that "*there is no evidence whatsoever of her having any income or employment since April 2018"* and not that the appellant had not submitted the 2018/2019 tax return.

25. I reserved my decision.

Assessment

26. I have considered the grounds, the grant of permission and Mr Swain's submissions very carefully.

27. The opening sentence of ground 1, that "*This is a perversity challenge*", is in truth the only real ground. I will deal with it after I have disposed of the two reasons advanced in the grounds in support of this perversity challenge and Mr Swain's submissions.

28. I can dispose of the second reason advanced in the written grounds (para 14.(ii) above) in brief terms. As I said (para 16 above), the *"further evidence"* referred to was not before the judge. There was simply no "*background evidence*" to show that the sponsor had left the United Kingdom in late December or that she had been working in the United Kingdom before leaving at that time. The only evidence to this effect was the oral evidence of the sponsor which she mentioned for the first time at the hearing and which the judge plainly considered.

29. The first reason advanced in support of the grounds (para 14 (i) above) was also hopeless. The submission that the interview record was inadmissible was misconceived. The interview record was admissible but evidence about the circumstances explained by the appellant to the effect that he was exhausted after his journey and tired etc go to the weight to be given to the answers he gave at his interview.

30. The remainder of the first reason advanced in support of the grounds plainly amounts to no more than a disagreement with the judge's reasoning and an attempt to re-argue his evidence.

31. The weight to be given to it was a matter for the judge. He plainly took into account the appellant's explanation and was entitled to reach the conclusion he reached for the reasons he gave.

32. There was therefore nothing at all in the appellant's written grounds that could be said to give rise to any arguable error of law, let alone any arguably material error of law, even if one leaves aside the fact that the opening sentence of ground 1 contended that the challenge was in reality a perversity challenge.

33. At para 90.2 of R (Iran) and others v SSHD [2005] EWCA Civ 982, the Court of Appeal said, in giving guidance:

> "2. A finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence."

34. Any challenge on the ground of perversity was doomed to fail in the instant case, given that it is plain from paras 17 and 18 of the judge's decision that he gave the following reasons for his finding at para 19 that the sponsor had not been exercising Treaty rights in the United Kingdom for at least 6 months if not longer:

    i) that there was no evidence at all before him of the date of her departure from the United Kingdom;

    ii) that she mentioned at the hearing for the first time that she had been working up until Boxing Day and returned to Bulgaria after that;

    iii) that it was surprising that she would return to Bulgaria after Boxing Day given that she has a son in Bulgaria with apparent health problems who she had not seen for Christmas;

    iv) that the appellant had himself stated that he had visited the sponsor in Bulgaria in October 2018;

    v) that there was no evidence before him at all that the sponsor had received any income from employment since April 2018; and

    vi) that the appellant had said in his grounds of appeal to the First-tier Tribunal that he had answered the questions at his interview "*very honestly and sincerely*" and had not suggested until his witness statement that he was tired and confused when interviewed.

35. For all of the above reasons, I have no hesitation at all in rejecting ground 1 as advanced in the appellant's written grounds.

36. I turn to Mr Swain's submissions to the extent not already dealt with.

37. Mr Swain suggested that the fact that the marriage was genuine was relevant and should have been factored into the judge's reasoning. There is simply no basis at all for Mr Swain's submission that the fact that the marriage was genuine means that it can be assumed that the parties meet each other regularly. This is a submission that Mr Swain ought not to have advanced as he could not properly make it. Judges in this jurisdiction often deal with applications for entry clearance from parties who are in genuine marriages but have lived apart for considerable periods. There is therefore simply no basis for Mr Swain's submission that the judge's failure to factor into his reasoning the genuineness of the marriage shows that he had an unbalanced approach in assessing the evidence. Mr Swain is in effect clutching at straws.

38. In any event, as is plain from the judge's decision, he was fully aware that the marriage was a genuine one. He referred to it in the opening sentence of para 17.

39. Finally, in view of the decision in AZ (error of law: judge; PTA practice) Iran [2018] UKUT 00245 (IAC) and Durueke (PTA: AZ applied, proper approach) [2019] UKUT 00197 (IAC), it is appropriate that I should turn to the decision of the permission judge. In head-note (3), the Upper Tribunal said:

    "3. Permission to appeal to the Upper Tribunal should be granted on a ground that was not advanced by an applicant for permission, only if:

        (a) the judge is satisfied that the ground he or she has identified is one which has a strong prospect of success:

            (i) for the original appellant; or

            (ii) for the Secretary of State, where the ground relates to a decision which, if undisturbed, would breach the United Kingdom's international Treaty obligations; or

> (b) (possibly) the ground relates to an issue of general importance, which the Upper Tribunal needs to address."

40. The permission judge referred to there being "*a paucity of reasoning*" in the decision of the judge. It is important to note that the written grounds that were before the permission judge did not contend that the judge's reasons were inadequate, much less that there was a paucity of reasoning in the judge's reasoning. The permission judge therefore raised an issue that was not advanced in the written grounds that were before him.

41. The permission judge did not state why he was raising a ground that had not been raised in the grounds before him.

42. At para 90.3 of R (Iran), the Court of Appeal explained the test that has to be applied before a decision can be set aside for inadequacy of reasons, as follows:

> "3. A decision should not be set aside for inadequacy of reasons unless the adjudicator failed to identify and record the matters that were critical to his decision on material issues, in such a way that the IAT was unable to understand why he reached that decision."

43. Mr Swain did not identify any evidence or aspect of the evidence that had not been considered by the judge other than his submission that the judge had failed to take into account the genuineness of the marriage which was not advanced in the written grounds and therefore was not before the permission judge. He did not submit that the judge's reasoning was such that one is unable to understand why he reached his decision.

44. To the contrary, the judge gave several reasons for reaching his conclusion at para 19 of his decision, as I have set out at my para 34 above.

45. In view of what I have said at paras 42-44 above, it is impossible to see how the permission judge could have reached the view that there was arguably a paucity of reasoning in the decision of the judge. His view was simply untenable and the fact that this was so is demonstrated by Mr Swain's failure to substantiate this ground in any way save to say that he relied upon the permission judge's view that there was a paucity of reasoning in the decision.

46. The permission judge referred to the judge having made mistakes of fact but he made no attempt to explain what mistakes of fact he had in mind. He referred to the fact that the judge had accepted that the marriage was genuine. If it was in his mind that this was a relevant factor in deciding whether the sponsor was absent from the United Kingdom or had been exercising Treaty rights, he was plainly wrong, for the reasons I have given.

47. Finally, the permission judge recognised that the judge had strayed into considering the appeal under Article 8 and yet granted permission "*on all grounds argued*", i.e. including ground 2.

48. For all of the reasons give above, I have no hesitation in saying that this was a hopeless appeal to the Upper Tribunal and that permission should not have been granted.

49. Mr Swain did not pursue the points I have described at my paras 21 and 23-24. In any event, he did not have permission to argue that the judge had failed to take into

account the tenancy agreement and the issue described at paras 23-24 was based on a misunderstanding of para 17 of the judge's decision as stated at my para 24.

50. As explained at para 12 above, it was agreed that the judge's decision to dismiss the appellant's appeal on human rights grounds stands to be set aside for want of jurisdiction. This did not warrant a grant of permission. It could have been dealt with adequately by the permission judge.

Decision

The decision of the First-tier Tribunal to dismiss the appellant's appeal on human rights grounds is set aside for want of jurisdiction.

The decision of the First-tier Tribunal to dismiss the appellant's appeal on EEA grounds did not involve the making of any error of law. The appellant's appeal to the Upper Tribunal on EEA grounds is dismissed.

Signed Date: 7 December 2019
Upper Tribunal Judge Gill