Upper Tribunal
(Immigration and Asylum Chamber) Appeal ref: EA/01257/2019 (P)

THE IMMIGRATION ACTS

Decided under rule 34 Decision & Reasons Promulgated
On 1 October 2020

Before

UT JUDGE MACLEMAN

Between

ENTRY CLEARANCE OFFICER

Appellant

and

Cyprien NGALEMO-TCHOKOTCHIEU

Respondent

DETERMINATION

1. Parties are as above. For continuity and ease of reference, however, the rest of this decision refers to them as they were in the FtT.

2. The appellant is a citizen of Cameroon, born on 1 June 1992.

3. On 6 August 2018, the appellant applied for entry clearance as the husband of an EEA national, Geanina Nistor, a citizen of Romania, residing in the UK. The marriage took place on 4 April 2017.

4. The ECO refused the application by a decision dated 17 September 2018, finding the relationship not to be "a suitably subsisting one" for these reasons:

(i) discrepancies over dates of beginning of relationship, first meeting, and last seeing each other, between application form and covering letter from solicitors;

(ii) 18 month gap in evidence of contact, prior to marriage;

(iii) 7 month gap in evidence of contact, after marriage;

(iv) no supporting evidence for claim of financial support from sponsor to appellant.

5. The appellant lodged notice of appeal to the FtT on 11 December 2018, case reference EA/07760/18. In his grounds he said that he was complaining about errors made by his former solicitors in the application, and that he would be represented by counsel at the hearing.

6. That appeal came before FtT Judge Suffield-Thompson on 10 June 2019. The appellant was not represented, and provided no further evidence. The sponsor did not attend.

7. In her decision, promulgated on 13 June 2019, Judge Suffield-Thompson found the evidence of the relationship lacking, and dismissed the appeal.

8. In the meantime, on 11 January 2019, the applicant applied again for an EEA family permit. The ECO refused his application by a notice dated 21 February 2019. The notice does not refer back to previous reasons. It is based on inconsistencies between the answers given by the appellant and the sponsor at interviews held on 20 February 2019, giving "reasonable grounds to suspect that the marriage … is one of convenience for the sole purpose of you obtaining an immigration advantage".

9. The appellant lodged notice of appeal to the FtT on 12 March 2019, which has the present case reference, EA/01257/2019. He asked for this to be "linked to his existing appeal" (which had not yet been heard). He said that he was attaching two witness statements, and would be sending other evidence, detailed at section 3, but none of that has been produced, either with the application, or since. His grounds are that the respondent reversed the burden of proof; the interviews were not properly reflected in the refusal; and although the interview record was requested, it had not been provided. He says that he would be represented by counsel at the hearing.

10. This appeal came before FtT Judge Bell on 4 October 2019. Again, the appellant was not represented, and provided no further evidence, and the sponsor did not attend. The respondent's presenting officer provided copies of the decision of Judge Suffield-Thompson and of the sponsor's interview. She asked for an adjournment to provide a copy of the appellant's interview. The judge declined, because copies of both ought to have been provided in compliance with the FtT's directions.

11. In her decision, promulgated on 8 October 2019, Judge Bell directed herself correctly on the burden of proof on the ECO. At [26] she declined

to "rely" on the decision of Judge Suffield-Thompson because it "does not appear to deal with the issue of marriage of convenience and does not apply the burden of proof to the respondent". She held at [28-30] that the ECO's "suspicions" were not enough to shift the burden to the appellant, and allowed the appeal. However, she suggested finally at [31] that it would be wise to re-interview the parties on "whether there had been a relevant change of circumstances such as that the sponsor is no longer living in the UK or the marriage has ended".

12. The SSHD sought permission to appeal, on these grounds:

    (i) inadequate reasons / misdirection in law – nothing to warrant departure from previous decision, in terms of *Devaseelan*; glossing over dearth of evidence from the appellant;

    (ii) procedural irregularity – interview record crucial to discrepancies; case should have been adjourned for a decision based on all relevant evidence.

13. Permission was granted by a decision dated on 28 January 2020 and issued on 3 March 2020, on the view that Judge Bell arguably misunderstood the earlier decision, which found the relationship not to be genuine, and so in effect did deal with whether it was a marriage of convenience; and that it was arguably unfair not to adjourn, given the importance placed on absence of a transcript, and the suggestion of re-interview.

14. The UT issued directions on 7 April 2020 with a view to deciding without a hearing whether the FtT erred in law and, if so, whether its decision should be set aside. An opportunity was also given to submit on whether the UT should proceed without a hearing.

15. In a response dated 1 May 2020, the respondent relied upon the grounds and asked the UT to decide the case "on the papers".

16. The case came before me for further decision. There was nothing on file from the appellant in response to directions. I noted that he had been served with those, and with the response on behalf of the ECO, to the email address he provided. In my decision and directions issued to parties on 3 July 2020, I took the view that the UT might justly proceed to decide the above questions without a hearing. The substance of that decision is repeated herein.

17. On ground (i), Judge Bell was right in noting a deficiency in the previous decision. Judge Suffield-Thompson treated the case the case as one where the burden was on the appellant, rather than initially on the ECO.

18. However, Judge Bell was wrong in thinking that Judge Suffield-Thompson had not considered whether this was a marriage of convenience; in substance, that is what the previous decision was about, and it stood unappealed.

19. This may not have been a classic instance for applying *Devaseelan* principles and taking the previous decision as the starting point; but the reasons for leaving it entirely out of account do not stand up to scrutiny.

20. It is not obvious that on a correct appreciation of the initial burden of proof, the decision of Judge Suffield-Thompson would have been different.

21. The appellant had said he would address the issues raised in the first decision of the ECO, which remained relevant, but had never done so. Those are matters which Judge Bell overlooked as a result of her error, so it was material.

22. On ground (ii), the respondent was at fault for not making the transcript of the appellant's interview available to the FtT; and despite founding on the point in the grounds, the transcript has still not been tendered.

23. However, although this is not quite the point made by ground (ii), the decision under appeal specified clear discrepancies. The judge, in my view, was entitled to refuse an adjournment, and non-production of one of the transcripts might have weighed in her conclusion; but she was wrong to think that non-production automatically meant that the burden did not shift. The ECO was entitled to an answer to the case on discrepancies set out in the decision.

24. The grounds show that Judge Bell fell into two traps, which misled her into failing to consider the substance of the case.

25. The decision of Judge Bell was **set aside**. Directions permitted parties to make further submissions within 14 days of 3 July 2020. As of 28 September 2020, no submissions are on file from either side.

26. There is a record on the file, dated 7 April 2020, that the sponsor stated to a member of the tribunal's administrative staff over the telephone that she no longer supported the appeal.

27. The evidence is sufficient for the respondent to discharge the initial onus of showing a marriage of convenience; and taken as a whole, the evidence does not show that the appellant is entitled to an EEA family permit as the spouse of an EEA national.

28. No anonymity direction has been requested or made.

Hugh Macleman

UT Judge Macleman
28 September 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.