IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003546
First-tier Tribunal No: EA/11840/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 April 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

Chigozie Pascal Osigwe
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms S Saifulahi, Counsel, instructed by Templeton Legal Services
For the Respondent: Mr F Gazge, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 4 April 2023

DECISION AND REASONS

1. The appellant is a national of Nigeria. He made an application under the EU Settlement Scheme as a family member with a retained the right of residence by virtue of a previous relationship with Jessica Carina Pais Mendonca, a relevant EEA citizen. The application was refused by the respondent for reasons set out in a decision dated 21 July 2021.

2. The respondent referred to the requirements to be met by a family member who has retained the right of residence on the basis of the termination of a marriage or civil partnership. The respondent noted that on 2 August 2013 the appellant married Jessica Mendonca, at The Parish Church of St Peter and St Paul, Birmingham and that on 15 January 2014

he was issued with an EEA Residence Card as the family member of an EEA National. The respondent referred to the subsequent application made on 23 November 2018 for a permanent residence card as confirmation of a right to reside in the United Kingdom. That application was refused on 11 February 2019 following an interview on 5 February 2019 that highlighted a number of inconsistencies between answers provided by the appellant and Ms Mendonca. The respondent noted the appellant's appeal against that refusal was dismissed for reasons set out in a determination promulgated on 11 February 2020. The respondent referred extensively to the adverse credibility findings made by the First-tier Tribunal Judge. Having considered the further material relied upon by the appellant, the respondent concluded that the appellant's marriage to Ms Mendonca is one of convenience and appellant does not meet the requirements for settled status as a family member who has a retained the right of residence.

3. The appeal against that decision was dismissed by First-tier Tribunal Judge Young-Harry for reasons set out in a decision dated 13 May 2022. The appellant claims Judge Young-Harry erred in law by failing to make any findings on the oral and written evidence of the appellant's former spouse, Ms Mendonca, who attended the hearing. Ms Mendonca had explained the reasons for her answers during the course of the marriage interview, which had been relied upon heavily by the First-tier Tribunal Judge previously, and by Judge Young-Harry. In addition, the appellant claims Judge Young-Harry failed to make any findings in relation to the additional three witnesses (Mr Koko, Mr Nnamani and Mr Enam) who attended the hearing of the appeal and attested to the relationship between the appellant and Ms Mendonca. The appellant claims no findings of fact have been made in respect of their substantive evidence which is directly relevant to the issue in the appeal. Finally, the appellant claims there are no findings made regarding the various documents that were relied upon by the appellant to support his account of his relationship with Ms Mendonca.

4. Permission to appeal was granted by First-tier Tribunal Judge Kudhail on 14 July 2022. Judge Kudhail said:

> "… The decision does make mention of the wife's evidence, which it is acknowledged was not before the previous Tribunal. However, no reasons have been given for giving this evidence limited weight. This was a key issue in the appeal and thus there is an arguable error of law…"

5. Before me, Ms Saifulahi submits Judge Young-Harry referred to the previous decision of the First-tier Tribunal promulgated on 19th February 2020. The Judge accepted, at [14], that she now had sight of a divorce decree which demonstrates that the appellant did initiate and complete divorce proceedings. The judge also accepted the appellant has provided a birth certificate for Ms Mendonca's child and that the appellant is not named as the father of the child. The Judge therefore accepted the appellant had addressed two of the concerns that were previously referred to by the FtT in the determination promulgated on 11 February 2020. At

paragraph [15] of her decision, Judge Young-Harry also accepted that the appellant has provided evidence to show that the appellant and Ms Mendonca went on a trip together to Portugal in 2018.

6. Ms Saifulahi submits Judge Young Harry referred in paragraph [16] to Ms Mendonca attending the hearing of the appeal before her. Ms Mendonca had not attended the previous hearing before the FtT in 2019. Ms Saifulahi submits the evidence of Ms Mendonca was significant in the appeal but Judge Young-Harry fails to engage with her evidence and fails to give any adequate reasons for rejecting or attaching little weight to it. She accepts it may have been open to the Tribunal to treat that evidence with some caution but here, Judge Young-Harry does not address her evidence, and fails to give reasons explaining why the weight attached to her evidence is reduced. All Judge Young-Harry says is that the claims made by the witnesses are not sufficient to cause her to depart from the 2019 findings, given the clear credibility findings made on that occasion. In her evidence before Judge Young-Harry, Ms Mendonca had explained why she had not attended the previous hearing and it was for Judge Young-Harry to carry out her own analysis of Ms Mendonca's evidence and to explain why it was rejected. The same applies to the evidence of the three other witnesses that had attended the hearing of the appeal and gave oral evidence.

7. Finally, Ms Saifulahi submits there was corroborative documentary evidence as identified in paragraph [5] of the decision of Judge Young-Harry. She submits the judge did not adequately assess or consider the documents. My attention was drawn to a letter from the Heart of England NHS Trust to the appellant's GP dated 22nd July 2015 (page B8 of the appellant's bundle). The letter refers to a diagnosis of possible sleep apnoea and states *".. His wife has reported that he stops breathing in the middle of the night on a number of occasions..."*. That was evidence that was not before the FtT previously, but is evidence that corroborates the appellant's account of his relationship with Ms Mendonca in 2015.

8. Ms Saifulahi submits that here there was evidence before Judge Young-Harry that was not before the FtT previously and that in Patel v SSHD [2022] EWCA Civ 36, the Court of Appeal noted that although a second judge will necessarily look for a very good reason to depart from earlier findings, a very good reason may be that the new evidence is so cogent and compelling as to justify a different finding. Ms Saifulahi submits taken holistically, all of the evidence that was before Judge Young-Harry was capable of undermining the findings previously made, and should have been properly addressed by the Judge.

9. In reply, Mr Gazge adopted the respondent's rule 24 response dated 27 July 2022. The respondent submits that at paragraph [12] of her decision, Judge Young-Harry rejected the explanation advanced by the appellant and Ms Mendonca for the significant inconsistencies in the interview. The respondent submits that at paragraph [16] of the decision, Judge Young-Harry properly noted the appellant relies on the oral testimony of the various witnesses who attended the hearing to attest to his relationship.

She also noted Ms Mendonca had attended the hearing before her, unlike at the hearing before the Tribunal in 2019. Judge Young-Harry noted that none of the appellant's friends attended the hearing in 2019 to attest to his relationship. There was no explanation provided for the failure of the witnesses to attend the hearing before the FtT in 2019 and the respondent submits the grounds of appeal do not specify what it is about the witness evidence that was so 'cogent and compelling' so as to justify a different finding to that previously made regarding the appellant's relationship with Ms Mendonca. The respondent submits the appellant has failed to identify how the documents that were relied upon by the appellant are capable of materially undermining the earlier Tribunal's conclusions. Mr Gazge submits Judge Young-Harry considered all the evidence that was before the Tribunal. Having applied Devaseelan, and taken the previous decision of the First-tier Tribunal as a starting point, it was open to Judge Young-Harry to dismiss the appeal for the reasons given by her.

Error of Law

10. The guidelines set out in Devaseelan v SSHD [2003] Imm AR 1 make it clear that the decision of the First-tier Tribunal promulgated on 19th February 2020 stood as an authoritative assessment of the claim that the appellant was making at the time. It was open to Judge Young-Harry to make her own assessment of facts that have occurred since that decision. Devaseelan makes it clear that evidence that was available previously or should have been available previously, and was not relied on or brought to the attention of the First-tier Tribunal in a prior decision, must be treated with the greatest of circumspection.

11. In SSHD v Patel [2022] EWCA Civ 36, the Court of Appeal held that where there were different parties to different appeals, but a material overlaps of evidence, the Devaseelan principles of fairness applied with appropriate modification. The Court of Appeal held the First-tier Tribunal had erred in refusing to consider and make findings on new evidence from the SSHD in an immigration appeal, instead relying on the earlier findings of another FtT made in the appellant's husband's appeal. The Court of Appeal held that without considering the new evidence, the second tribunal had not been in a position to properly determine whether there was a very good reason for departing from the other tribunal's findings.

12. Here, Judge Young-Harry was undoubtedly right to treat the determination of the FtT promulgated on 19th February 2020 as her starting point. At paragraph [10] of her decision, Judge Young-Harry noted Ms Mendonca, was not present at the hearing before the FtT previously. At paragraph [11] of her decision, Judge Young-Harry referred to findings previously made in respect of the evidence before the FtT previously, and the reasons set out in the previous decision. At paragraph [12] Judge Young-Harry noted the FtT had previously rejected the appellant's and Ms Mendonca's claim, that the inconsistencies in interview were intentional. She went on to say, *"In line with the findings of the previous tribunal, I do not accept the explanation provided for the significant inconsistencies in*

the interview". Judge Young-Harry had therefore considered the explanation advanced by the appellant and Ms Mendonca for herself.

13. I accept as Ms Saifulahi submits, that at paragraphs [13] to [15], Judge Young-Harry accepted, on the strength of the evidence before her, that; (i) the appellant did initiate and complete divorce proceedings; (ii) the appellant had provided a birth certificate for Ms Mendonca's child which shows the appellant is not named as the father, and (iii) the appellant has provided photographs of himself and Ms Mendonca on their trip to Portugal in 2018 such that Judge Young-Harry accepted that the trip did take place.

14. However as far as the other evidence before the Tribunal is concerned, including the evidence of Ms Mendonca and the three other witnesses that were called to give oral evidence, Judge Young-Harry simply said:

> "16. The appellant relies on the oral testimony of the various witnesses who attended the hearing to attest to his relationship. I note, unlike the hearing in 2019, Ms Mendoca was present on this occasion. I note with interest, that none of the appellant's friends attended the hearing in 2019 to attest to his relationship. Despite the claims made by the appellant's friends, who have an interest in giving evidence on the appellant's behalf, I do not find their claims are sufficient to cause me to depart from the 2019 findings, given the clear credibility findings made on that occasion. A number of other friends have provided supporting letters, I attach limited weight to the letters, given the evidence is untested.
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> 17. The 2019 tribunal commented on the lack of supporting evidence, demonstrating love and affection between the appellant and Ms Mendoca, such evidence is still absent. The tenancy agreement provided, along with the letters in joint names, including a bank statement in both names, based on the dates on the documents, would have been available at the last hearing. As the 2019 tribunal found, the documents which do have the appellant's name on them, could have simply been added by asking the utility company to add an additional name, this is not evidence of a genuine relationship."

15. A party appearing before a Tribunal is entitled to know, either expressly stated by it or inferentially stated, what it is to which the Tribunal is addressing its mind and the basis of fact on which the conclusion has been reached. Although brevity is often to be commended, having been taken to the relevant evidence that was before the First-tier Tribunal, it is difficult to discern from what is said by Judge Young-Harry what she made of the evidence of Ms Mendonca in particular, who had not previously given evidence before the Tribunal in 2019. As Ms Saifulahi acknowledges, it may have been open to Judge Young-Harry to say that she treats the evidence of Ms Mendonca with the greatest of circumspection or that she attaches little weight to it setting out, even briefly, her reasons for doing so.

16. However the findings and conclusions reached by Judge Harry-Young in what are two short paragraphs, are without any adequate explanation and

fail to demonstrate that the judge had in mind the evidence now before the Tribunal. Notwithstanding the force of the submissions made in the Rule 24 response and by Mr Gazge before me, I am satisfied that the decision of First-tier Tribunal Judge Young fails to adequately engage with the evidence that was before the Tribunal and fails to give adequate reasons for rejecting the evidence of the witnesses in particular.

17. It follows that I am satisfied the decision of Judge Young-Harry is vitiated by a material error of law and must be set aside. As to disposal, given the nature of the error of law and the extent of fact-finding that is required, I am satisfied that the appropriate course is for the appeal to be remitted to the First-tier Tribunal with no findings preserved, to be determined by a judge other than Judge Young-Harry.

Notice of decision

18. The decision of First-tier Tribunal Judge Young-Harry is set aside.

19. The appeal is remitted to the First-tier Tribunal for rehearing, with no findings preserved.

20. The parties will be notified of a date for the hearing of the appeal by the First-tier Tribunal in due course.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4th April 2023