



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-006316

First-tier Tribunal No: HU/51340/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

30th October 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA
and
DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

Mr Buba Sonko
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr S Hingora, counsel instructed by AMH Solicitors

For the Respondent: Mr P Lawson, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 17 October 2023

DECISION AND REASONS

1. The appellant is a national of Gambia. He arrived in the UK on 8 May 2019 and was granted leave to enter as a partner, valid until 17 January 2022. On 17 January 2022, he made an application for leave to remain as the spouse of Kay Beswick (“the sponsor”). The application was refused by the respondent for reasons set out in a

decision dated 14 February 2022. The respondent, *inter alia*, rejected the appellant's claim that he is in a genuine and subsisting relationship with his partner.

2. The appellant's appeal against that decision was heard on 15 November 2022 and dismissed by First-tier Tribunal Judge Shanahan for reasons set out in a decision dated 12 December 2022.
3. The appellant acknowledges that he now lives separately from his wife and her adult son (*the appellant's step-son*) but maintains that they are in a subsisting relationship. He claims the sponsor had been unable to connect via CVP on the date of the hearing, despite the Tribunal's agreement that she could attend via CVP. It is said that there was ample evidence, along with a signed statement from the sponsor, confirming the appellant and sponsor remain in regular contact with each other, and that they are doing everything possible to maintain their relationship. The appellant claims Judge Shanahan failed to properly consider the evidence, including oral evidence presented at the hearing. The appellant claims the sponsor had provided a statement and there was no dispute between the parties as to whether the sponsor had in fact written the statement that was said to have been signed by her. The appellant claims that in concluding that there was insufficient evidence that the statement had been made by the sponsor or that she had understood and agreed its content, the judge referred to a matter that was not raised during the course of the hearing, leading to procedural unfairness. Furthermore, the appellant claims Judge Shanahan also failed to have regard to other evidence of communication between the appellant and sponsor including, WhatsApp messages.
4. Permission to appeal was granted by FtT Judge Dempster on 20 January 2023. Judge Dempster noted the decision of Judge Shanahan to refuse the application for an adjournment is not challenged. She noted however that the evidence of the sponsor was highly probative of the issue in the appeal and it is arguable that the decision is vitiated by procedural unfairness, because the Judge relied upon a matter (*whether the statement before the Tribunal was one made by the sponsor*) that does not appear to have been raised by the respondent or the judge during the course of the hearing.
5. At the hearing of the appeal before us on behalf of the respondent Mr Lawson concedes that in the interests of fairness, the judge's concerns regarding the evidence of the sponsor, set out in a letter, should have been put to the appellant and he should have been given an opportunity to address that concern. He accepts the decision of the First-tier Tribunal Judge is vitiated by procedural unfairness and should be set aside. We record that we were surprised by the concession made by the respondent, but we are not prepared to go behind that concession.
6. We note the human rights claim made by the appellant is summarised at paragraph [5] of the decision. The Judge notes that since being granted entry clearance to join his wife, the appellant has been evicted from his partner's home following difficulties that arose between the appellant and his wife's son. The Judge noted that although the police were involved, the appellant had decided to stay away from the home until matters could be resolved. She noted the claim that he has been living with friends, but has maintained regular daily contact with his wife.

7. At paragraphs [8] to [11] of the decision, the judge noted that Mr Mozham explained that it had not been possible for the sponsor to join the hearing by CVP as directed and that he requested that she be allowed to give evidence by telephone. That application, unsurprisingly, was opposed by the respondent because as we have already noted the respondent was not satisfied that the appellant is in a genuine and subsisting relationship. The presenting officer was understandably concerned, as was the judge, that it would be impossible to satisfy the Tribunal that the individual giving evidence over the telephone, is in fact the sponsor.
8. After exploring other avenues by which the sponsor may be able to participate, the Judge noted at paragraph [9] of the decision, that the appellant had been unable to contact the sponsor. An application for an adjournment followed. That application was refused by the judge for reasons set out in paragraphs [12] to [15] of the decision. The appellant does not challenge the decision to refuse the application for an adjournment. The judge went on to hear evidence from the appellant with the assistance of an interpreter.
9. At paragraph [20], Judge Shanahan recorded that the only remaining issue in the appeal is whether the appellant is able to meet the eligibility relationship requirement. The judge noted, at [21], that with some hesitation the appellant confirmed he had ceased living with his partner in July 2021. At paragraphs [24] and [25], Judge Shanahan said:

“24. I have considered the evidence from the sponsor. This consists of a handwritten letter signed by the sponsor. It is dated 3rd October 2022 with the address given as 11A [Address set out]. There is also a photograph of what is said to be the sponsor signing the letter. I consider there are a number of issues with this evidence.

25. It is not clear who wrote this letter, whether it was written by another person at the dictation of the sponsor or whether it was written by another, and she was simply required to sign it. The sponsor was provided with the opportunity to give evidence by CVP because it was indicated her evidence is essential and she has the equipment and capability to access the hearing. As noted above this did not occur and even attempting to connecting the sponsor by an alternative means proved impossible. Therefore, there was no opportunity to hear directly from the sponsor in relation to her views about the relationship.”

10. Judge Shanahan nevertheless went on to consider the content of that letter relied upon in support of the appellant’s claim. The judge said there was insufficient evidence that the sponsor had made that statement herself or understood and agreed its content.
11. In Maheshwaran v SSHD [2002] EWCA Civ 172; [2004] Imm AR 176, the Court of Appeal held that where an individual asserts a fact before the Tribunal which the SSHD did not challenge and the Judge did not raise with the individual any doubts as to the truthfulness of his assertion, the Judge was not obliged to accept the assertion as proved. Lord Justice Schiemann said:

“3. Those who make a claim for asylum must show that they are refugees. The burden of proof is on them. Whether or not a claimant is to be believed is frequently very important. He will assert very many facts in relation to events far away most of which

no one before the adjudicator is in a position to corroborate or refute. Material is often adduced at the last minute without warning. From time to time the claimant or the Home Secretary are neither there nor represented and yet the adjudicator carries on with his task. He frequently has several cases listed in front of him on the same day. For one reason or another not every hearing will be effective. Adjudicators can not be expected to be alive to every possible nuance of a case before the oral hearing, if there is one, starts. Adjudicators in general will reserve their determinations for later delivery. They will ponder what has been said and what has not been said, both before the hearing and at the hearing. They will look carefully at the documents which have been produced. Points will sometimes assume a greater importance than they appeared to have before the hearing began or in its earlier stages. Adjudicators will in general rightly be cautious about intervening lest it be said that they have leaped into the forensic arena and lest an appearance of bias is given.

4. Undoubtedly a failure to put to a party to litigation a point which is decided against him can be grossly unfair and lead to injustice. He must have a proper opportunity to deal with the point. Adjudicators must bear this in mind. Where a point is expressly conceded by one party it will usually be unfair to decide the case against the other party on the basis that the concession was wrongly made, unless the tribunal indicates that it is minded to take that course. Cases can occur when fairness will require the reopening of an appeal because some point of .. significance – perhaps arising out of a post hearing decision of the higher courts – requires it. However, such cases will be rare.

5. Where much depends on the credibility of a party and when that party makes several inconsistent statements which are before the decision maker, that party manifestly has a forensic problem. Some will choose to confront the inconsistencies straight on and make evidential or forensic submissions on them. Others will hope that 'least said, soonest mended' and consider that forensic concentration on the point will only make matters worse and that it would be better to try and switch the tribunal's attention to some other aspect of the case. Undoubtedly it is open to the tribunal expressly to put a particular inconsistency to a witness because it considers that the witness may not be alerted to the point or because it fears that it may have perceived something as inconsistent with an earlier answer which in truth is not inconsistent. Fairness may in some circumstances require this to be done but this will not be the usual case. Usually the tribunal, particularly if the party is represented, will remain silent and see how the case unfolds.

6. The requirements of fairness are very much conditioned by the facts of each case. This has been stressed in innumerable decisions ..."

12. Although Maheshwaran v SSHD was concerned with a claim for international protection, the general principle set out by Lord Justice Schiemann are of general application. Here, the sole issue in the appeal was whether the appellant and his partner are in a genuine and subsisting relationship. It will have been obvious to the appellant's representatives that the evidence of the sponsor would be central to that issue. The respondent had said from the outset that she does not accept the appellant and his partner are in a genuine and subsisting relationship. The evidence of the sponsor is set out in a letter written in manuscript and dated 3 October 2022. She refers to there being a "situation of late", and explains that because she is not feeling

very well she was moved to another address where carers come to look after her. She claims her husband is always coming there to assist her. She claims in that letter that she is happily married to her husband although they are not living together because there is an issue between her husband and her son. The letter is vague and as Judge Shanahan noted at [21], with some hesitation the appellant confirmed he had ceased living with his partner in July 2021. That is some 15 months before the hearing of the appeal.

13. It is clear from the history set out by Judge Shanahan that the appellant's representatives would have had every opportunity to address the need for evidence to support the claim that the appellant and his partner are in a genuine and subsisting relationship.
14. At paragraph [27], despite what is said by the appellant the judge referred to the WhatsApp messages. They are described by the judge to be "generally very brief and there are many missed video calls", that cover a three-month period between 25 May 2022 and 12 August 2022. At paragraph [28] of the decision, the judge refers to the absence of evidence to support the claim regarding the role he plays in his partner's life. At paragraph [29] the judge referred to other evidence in the form of correspondence addressed to the sponsor but found that that evidence does not support the claim that the appellant is in a genuine and subsisting relationship with his wife. At paragraph [31], Judge Shanahan said:

"As stated above the burden is on the Appellant to demonstrate, on the balance of probabilities, that he meets the requirements of the Immigration Rules. However, I find that he has failed to discharge that burden and has not established he is in a subsisting relationship with the sponsor, therefore he does not meet the Requirements of the Immigration Rules."
15. We have made extensive reference to the decision of the First-tier Tribunal simply to explain why we were surprised by the concession that is made on behalf of the respondent. In the end, the respondent however concedes that the decision is vitiated by procedural fairness and as we have already said, we are not prepared to go behind that concession.
16. It follows that we allow the appeal and set aside the decision of the First-tier Tribunal.
17. As to the disposal of the appeal, as the decision of the First-tier Tribunal is set aside for reasons of procedural unfairness, to do justice in the appeal, the appropriate course if for the appeal to be remitted to the FtT for a fair hearing. To do so reflects the guidance given in Begum (remaking or remittal) Bangladesh [2023] UKUT 46 (IAC).

Notice of Decision

18. The appeal to the Upper Tribunal is allowed.
19. The decision of First-tier Tribunal Judge Shanahan is set aside.

20. The appeal is remitted to the First-tier Tribunal for hearing afresh with no findings preserved. The parties will be advised of a hearing date in due course.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

17 October 2023