Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: EA/06176/2018
EA/00146/2019

THE IMMIGRATION ACTS

Heard at Field House
On 15th July 2019

Decision & Reasons Promulgated
On 25th July 2019

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MR QUDUS ARIF
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr F Khan, Counsel, instructed by Hudson Legal
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

For ease of reference, in I shall refer to the parties as they were before the First-tier Tribunal. The Secretary of State is once more the Respondent and Mr Arif is the Appellant.

This is a challenge by the Appellant to the decision of First-tier Tribunal Judge Cohen ("the judge"), promulgated on 10 April 2019, dismissing his appeals against the Respondent's decisions of 3 September 2018 (refusing to issue a

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permanent residence card) and 5 November 2018 (revoking an existing residence card). Both decisions were made under the Immigration (European Economic Area) Regulations 2016.

The Appellant had married a Lithuanian national ("the EEA national") on 24 February 2013. In applying for an initial residence card, the Respondent had asserted that the marriage was one of convenience. The Appellant was successful on an appeal to the First-tier Tribunal. First-tier Tribunal Judge Keane emphatically found in the Appellant's favour, concluding that both he and the EEA national were credible witnesses. As a result of the successful appeal a residence card was issued. The Appellant divorced the EEA national on 21 February 2017. He applied for and was granted a residence card on the basis of retained right of residence. This ran from 29 August 2017 until 23 August 2022. On 8 May 2018 the Appellant made his application for a permanent residence card.

The Respondent's refusal of that last application was once again based on the allegation that the Appellant's marriage to the EEA national had been one of convenience only. This allegation was now based upon the outcome of criminal proceedings in relation to the activities of a criminal gang. Evidence was relied on to show that the gang had operated by bringing Lithuanian nationals to the United Kingdom to be married to individuals in this country, particularly nationals of African and South Asian countries. Two members of the gang had been shown to have connections to the EEA national.

The judge's decision

On appeal, neither the Appellant nor the EEA national gave evidence although both had provided statements. The specific evidence before the judge in relation to the criminal proceedings consisted of a witness statement from an Immigration Officer dated 21 May 2018 and a copy of an indictment relating to two individuals who had been convicted by a jury in 2017 of being part of the criminal gang. The judge noted the application of the principles set out in Devaseelan [2003] Imm AR 1, but found that the evidence relating to the criminal proceedings all post-dated the decision of the previous First-tier Tribunal Judge and therefore needed to be considered in that context.

The judge found there to be a direct link between the EEA national and the two individuals named in the indictment. The judge noted a number of payments going from the two individuals to the EEA national and some going in the opposite direction. He also noted that the Appellant's marriage had been one of those identified by the investigative team as being a sham marriage.

The judge goes on to consider the nature of the link between the EEA national and the two co-defendants in the criminal trial. He notes some similarities between the *modus operandi* of the gang and the circumstances of the Appellant's marriage. In noting the previous First-tier Tribunal Judge's decision

he found it "entirely plausible" that the parties could have rehearsed their evidence before the hearing. [23] reads as follows:

> "I find in the light of the fact that the convicted individuals were both clearly connected with the Sponsor and that there were financial transactions passing to and from them on frequent occasions for significant amounts of money and in the light of the details of the statement of offence in respect of the convicted individuals that the marriage between the Appellant and Sponsor was a sham marriage and marriage of convenience and I find that the Respondent's refusal of the Appellant's application for a permanent residence card and revocation of the Appellant's residence card were correct in all the circumstances."

The grounds of appeal and grant of permission

The grounds of appeal are threefold, first, that the judge failed to apply the correct burden of proof, second, that the judge failed to apply the Devaseelan principles, third, that the judge failed to give reasons on material matters. Permission to appeal was granted by First-tier Tribunal Judge Chohan on 10 June 2019.

The hearing

At the hearing before me I heard helpful submissions by both representatives. Mr Khan relied on the grounds of appeal. He urged me to conclude that the judge had not in fact applied the correct burden, which had clearly rested with the Respondent. On the Devaseelan point and related to the third ground, Mr Khan submitted that the judge had failed to conduct a proper balancing exercise between the evidence of the criminal proceedings and the previous decision of the First-tier Tribunal in 2015.

Mr Whitwell submitted that as a matter of substance the judge had correctly applied the burden of proof, with specific reference to [23] (quoted above). On grounds 2 and 3 Mr Whitwell submitted that the judge had been entitled to take account of significant new evidence relating to the criminal proceedings and that all relevant evidence had in fact been properly considered by the judge.

Decision on error of law

I conclude that there are no material (and I emphasise that) errors of law in the judge's decision such that I should exercise my discretion under section 12(1)(a) of the Tribunals, Courts and Enforcement Act 2007 and set it aside.

At the outset I would state that the judge's decision is by no means a model of a well-structured, detailed determination of an appeal. Having said that, I have endeavoured to read it holistically, sensibly, in the context of the evidence before the judge, and with reference to substance over form.

I acknowledge that at [15] the judge provides what may be described as a standardised statement of the burden of proof applicable to the generality of cases, namely that the onus rests with an appellant. He does not at that stage modify the location of the burden of proof in cases concerning allegations of marriage of convenience. It is right to say that more care should have been taken to tailor the decision to the nature of the specific appeal being considered.

However, as mentioned above, it is right to look not simply at the form but at the substance of any judge's decision to see what has actually been done. Mr Whitwell is in my view correct to submit that when one reads the decision as a whole and in light of the evidence, and ultimately arrives at [23], it is tolerably clear that the judge has as a matter of substance concluded that the Respondent had shown that the marriage was one of convenience only. In my view this does show that he has ultimately, correctly located the burden of proof in this case.

Three particular points need to be made in respect of my conclusion on this issue. First, the judge has not stated, for example, that the "Appellant failed to prove that his marriage was genuine". When the core conclusion is set out, it is apparent that there is no clear reversal of the burden.

Second, it is of significance that the Applicant did not give evidence before the judge. That was a matter of choice for the Appellant, but its effect was that the judge had before him untested (and relatively brief) written evidence contained in the witness statement. Furthermore, although I was told that the EEA national now lives in Scotland, I cannot see any evidence (at least none that was before the judge) to indicate that she was unable and/or unwilling to give testimony at the hearing. As with the Appellant's statement, the judge was left to consider the untested evidence contained in her affidavit. It is clear from [21] that the judge found there to be several important unanswered questions relating to the EEA national's connections to the criminal gang. The unsatisfactory nature of the evidence emanating from the Appellant is highly likely to have increased the strength, or at least in no way undermine, the Respondent's evidence.

Third, and following on from the point just made, there is the nature of the evidence produced by the Respondent. The indictment confirmed that two individuals were implicated in the criminal gang. The Immigration Officer's witness statement clearly linked these individuals to the EEA national (she herself had accepted the existence of *a* link, albeit not to the extent alleged by the Respondent). The link set out in the witness statement related to financial transactions at the material time (leading up to and subsequent to the marriage to the Appellant). It was undisputed that the two individuals named in the indictment were in fact convicted by a jury on 5 January 2017.

A final, and very significant, aspect of the evidence emanating from the Respondent is the fact (not challenged in the grounds of appeal) that the Appellant's marriage was one of twenty-six chosen by the authorities as an example of a sham marriage. As I read the Immigration Officer's witness statement, those twenty-six specimen marriages were in fact put before the jury. That jury of course convicted (applying the criminal standard of proof to the evidence) the two individuals with whom the EEA national had had connections.

Alternatively, I conclude that even if the judge has erred by failing to place the legal burden of proof on the Respondent, this would have made no material difference to the outcome. On the strength of the new evidence before him, the absence of live evidence from the Appellant and the EEA national, and the applicable standard of proof, it is extremely likely that the judge would have come to the same conclusion.

In respect of the Devaseelan point, Mr Khan is right to say that the judge has not set out a detailed consideration of the previous judge's decision, although he rightly acknowledged the favourable credibility assessment that had been made. However, it is undoubtedly the case that what the judge considered to be significant evidence relating to the criminal proceedings post-dated that decision, at least in respect of the outcome of the criminal investigation, which had only cumulated in 2017 when the convictions were obtained. The judge was undoubtedly right to state that he had to consider the new evidence in that context. For the reasons set out in paragraph 16 and 17, above, the context also included the fact that the new evidence produced by the Respondent was very significant.

I would also add that there is no question in this case of the new evidence having been produced at the time of the hearing before the previous judge. The criminal investigation was ongoing, and the disclosure of information then would obviously have been highly determinantal, if not fatal, to the outcome.

In light of what I have said, above, it was open to the judge at [22] to find that there was a strong enough possibility of the Appellant and the EEA national having rehearsed their evidence before the previous judge.

To the extent that there is a lack of more detailed analysis by the judge of the 2015 decision, and to the extent that this may constitute an error, I conclude that the new evidence was in any event sufficiently strong to justify a departure from the previous findings.

I conclude that the judge himself has taken into account evidence put forward by the Appellant and the EEA national in the appeals before him. It is of some note that the EEA national, whilst having divorced the Appellant back in February 2017, had clearly maintained contact and had provided an affidavit in March of this year in support of the appeals.

Although it is right that not each and every feature of the *modus operandi* of the criminal gang was present in the Appellant's case, the judge recognised this in [21].

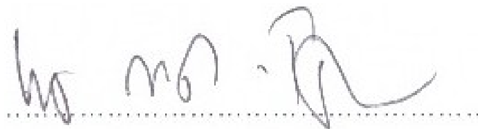
In all the circumstances, the conclusions reached by the judge were tolerably open to him. and the Appellant's appeals to the Upper Tribunal must be dismissed.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law requiring it to be set aside under section 12(1)(a) of the Tribunals, Courts and Enforcement Act 2007.

The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed  Date: 22 July 2019

Upper Tribunal Judge Norton-Taylor