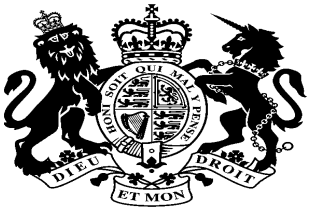

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: UI-2021-000580
UI-2021-000619
EA/02533/2020 & EA/02535/2020

THE IMMIGRATION ACTS

Heard at: Field House
On: 24th February 2022

Decision & Reasons Promulgated
On: 21st March 2023

Before

The President, Mr Justice Lane
Upper Tribunal Judge Bruce

Between

The Secretary of State for the Home Department

Appellant

And

Nickesha McKoy
Kavaughna Ash

Respondents

For the Appellant: Mr S. Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr S. Kumar, Capital Solicitors

DECISION

1. The Respondents are, respectively, a mother and her adult son. They are both nationals of Jamaica. On the 3rd November 2021 the First-tier Tribunal (Judge CJT Lester) allowed their linked appeals with reference to the Immigration (European Economic Area) Regulations 2016. The Secretary of State now has permission to appeal against that decision.

Background and Matters in Issue

2. The matter in issue before the First-tier Tribunal had been whether Ms McKoy was entitled to a retained right of residence under regulation 10. It was accepted that she had formerly been married to a Polish national exercising treaty rights in the United Kingdom, but the Secretary of State was not satisfied that the couple had resided together in the UK for at least one year prior to the marriage coming to an end. Her application, and that of her son, were refused on that basis.

3. When the appeal came before the First-tier Tribunal Ms McKoy gave oral evidence via video link, as did Mr Ash, and his partner Ms Kayleigh Droght. All of these witnesses gave evidence from the offices of their solicitor, Mr Kumar. Arrangements had been made for a video link to a fourth witness, a woman named Irone Corbin who is said to be the mother of Ms McKoy. Ms Corbin was for health reasons confined to her home. The video link to Ms Corbin could not however be established so the First-tier Tribunal heard her evidence by telephone.

4. Having had regard that testimony, and the documentary evidence presented, the Tribunal allowed the appeals on two alternative grounds.

5. First, the Tribunal was satisfied that the appellants before it did meet the requirements of reg 10 (5)(d)(i):

> (i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership, the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

The Secretary of State had refused a residence card believing that Ms McKoy and her Polish husband had only resided in the UK for 11 months of their marriage, that being the length of time between her last date of entry to the UK and her divorce. What the Secretary of State had not taken into account, however, was that the couple had in fact lived together in the UK between 1999 and 2006. The appeal was therefore allowed on that basis.

6. Second, the Tribunal accepted that Ms McKoy had been a victim of domestic violence during her marriage. This was not a matter addressed by the refusal letter but it had been something raised in her application, and she had now brought evidence which satisfied the Tribunal that this was indeed the case: in addition to Ms McKoy's testimony, there was the evidence Ms Corbin and Mr Ash and "police logs and paperwork from the Metropolitan Police". The appeal was therefore allowed in the alternative with reference to reg 10(5)(d)(iv):

> (iv) the continued right of residence in the United Kingdom of A is warranted by particularly difficult circumstances, such as

where A or another family member has been a victim of domestic violence whilst the marriage or civil partnership was subsisting.

7. Upon receipt of the First-tier Tribunal's decision the Secretary of State sought permission to appeal to this Tribunal on the following grounds:

i) Unfairness/Procedural irregularity

Counsel who had appeared for the Secretary of State (Ms Masih) had objected to the evidence of Ms Corbin being taken by telephone. She had submitted that she, and the Tribunal, would be disadvantaged by the video link not being operational. The identity of the witness could not be verified; it was not known whether she had access to the "interview record", or whether she was being coached. Counsel was unable to effectively cross examine the witness because she could not see her. As such it was unfair/procedurally irregular for the Tribunal to have admitted her telephone evidence and/or to have denied the adjournment request to enable the hearing to be convened with a working video link.

ii) Misdirection

Although the Tribunal directed itself to the authority of Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702 it failed to apply the principles therein. Two previous decision makers had found that Ms McKoy did not meet the requirements of reg 10 and although new evidence was here presented, the Tribunal failed to give reasons why it gave weight to that evidence, which could have been available at an earlier stage.

iii) Failure to provide reasons

The Secretary of State submits that the decision is flawed for a lack of reasons as to why the appeal was allowed on either limb of reg 10.

iv) Failing to resolve a conflict of fact

The reports produced by the Metropolitan Police show that Ms McKoy gave differing accounts to the police at the time of the alleged incident of violence. It is in the Secretary of State's submission "clear" that she "lied to them about what happened to her".

8. Permission to appeal on all grounds was granted by First-tier Tribunal Judge Grant on the 6th December 2021.

9. At the hearing before us we heard submissions from Mr Whitwell and had regard to a detailed skeleton argument prepared on behalf of

the Secretary of State by Mr Whitwell and his colleague Mr Melvin. Mr Kumar replied on behalf of Ms McKoy and Mr Ash and asked us to uphold the decision below. We reserved our decision, which we now give.

Ground (i): Telephone Evidence

10. Mr Whitwell does not dispute that telephone evidence is admissible, or that since the pandemic it has become a regular feature of cases in many jurisdictions, including this one. The Secretary of State's position is that such evidence is in general satisfactory, on the proviso that safeguards are put in place to eliminate risk: the witness must be identifiable, clearly heard, and measures should be in place to ensure that the witness is not being coached or, for instance, reading from a script or referring to documents. Crucially the technology must allow for effective cross examination. That being the case, it is the Secretary of State's case that where there are contentious facts, telephone evidence should be the exception rather than the norm.

11. Mr Whitwell submitted that the courts have consistently held that the 'gold standard' of live evidence is to have everyone is present in the courtroom. For instance, in Re P (a child: remote hearing) (Rev 3) [2020] EWFC 32, a case concerning care proceedings heard in April 2020, the President of the Family Division Sir Andrew McFarlane held that where an evaluation had to be made of a witness – there a mother accused of fabricating the illness of her child – video evidence would be a "very poor substitute" for physical presence in court, because otherwise it would not be possible to assess her demeanour as she gave her evidence. In Nare (evidence by electronic means) Zimbabwe [2011] UKUT 00443 (IAC) the concern expressed by Vice President Mr CMG Ockelton was the possibility that a remote witness may be being assisted by someone "off camera". If remote evidence was to be afforded the weight it deserved, then it should be given from a proper place where the judge could be confident that the evidence was unpolluted by the interference of others, for instance a British embassy abroad, or a solicitors' office. Where, as here, the evidence is given by telephone from the individual's home, there was no means of knowing whether the witness was being coached or otherwise assisted.

12. As we understand the Secretary of State's case, there were three objections to the way that Ms Corbin's evidence was given.

13. The first is that the identity of the witness could not be verified. It is of course the case that the same might be said of witnesses who appear before the Tribunal in person, or by video: in this jurisdiction we are regularly tasked with hearing evidence from individuals with no documentary proof of identity at all. Sometimes that will be pertinent, but very often it is largely immaterial to the decision we must reach. Mr Kumar, who was present at the hearing before the First-tier Tribunal, confirmed that Ms Corbin was asked precisely the

same questions that she would have been had she been present in court: her name, address, date of birth and on what basis she appeared as a witness. We are unclear as to why Counsel for the Secretary of State might have been unsatisfied by these responses: there was not, on the face of it, any reason to doubt that Ms Corbin was who she said she was. She had provided a copy of her passport with her witness statement, she had in fact appeared by video link on an earlier occasion (when the appeal was adjourned because a new issue was raised by the Secretary of State), and it was not disputed that Mrs McKoy's mother does live in the UK.

14. The second is that the taking of evidence by telephone somehow precluded or inhibited cross examination. We reject that contention. It is said that Ms Masih, Counsel on the day, objected that she was unable to effectively test the evidence because she, and the Tribunal, were unable to see the witness. The Secretary of State's skeleton amplifies that submission with reference to the decision in Re P, in which Sir Andrew McFarlane was concerned that a remote hearing might deny the trial judge an opportunity to properly assess the demeanour of the witness. In the setting of the Family Division, and in the context of that particular case, that was no doubt a legitimate concern. In this jurisdiction, however, we have learned to rarely attach significant weight to the demeanour of the witnesses before us, since cultural variations may give rise to wholly misleading impressions if we do: see for instance SK (Removal Directions) DRC [2003] UKIAT 00014 in which the panel remarked that "judging demeanour across cultural divides is fraught with danger". It cannot therefore be said that the denial of the opportunity to make such a physical assessment should obviously give rise to concern.

15. Furthermore, in this case Counsel did in fact cross examine the witness, and no evidence or submissions have been made to the effect that she had any difficulty in doing do. Whilst we appreciate that it may be onerous or challenging to test very lengthy or detailed evidence by telephone, particularly where the witness is to be referred to documentation, we see no inherent difficulties in doing so in a case like this. We note in this regard that similar submissions by the Secretary of State were rejected by the Tribunal in Nare [at §12]:

> "There is simply no basis for saying that the Presenting Officer was prevented from cross-examining: and in the absence of any cross examination, there is no basis for the Secretary of State to say that cross examination by telephone posed any disadvantages in this case".

16. The third objection is that the Tribunal could not be satisfied that the witness was not being coached. That is of course correct, but we would observe that Counsel had raised no objection to Mrs Corbin giving her evidence by *video* from her home. It was only when the video link could not be established that the point was made. There seems to be little logic in that. "Off camera" coaching is perfectly

possible in both scenarios, and it is a legitimate concern. In Nare it led the Tribunal to say that there was an expectation that remote evidence would be supervised. That expectation must however be tempered by contemporary realities, where the use of such technology has become commonplace. As the Tribunal point out in Agbabiaka (evidence from abroad; Nare guidance) [2021] UKUT 00286 (IAC) the nature of hearings has changed dramatically in the decade since Nare was heard. During the pandemic judges in all jurisdictions have become adept at managing such risks and it will therefore be for the "First-tier Tribunal to have regard to the risks to the quality and weight of the evidence, if it is given from a place where supervision of the kind envisaged in Nare is unavailable" [at §55]. Comments to similar effect have recently been made by the Lord Chief Justice in Yilmaz and Arman v Secretary of State for the Home Department [2022] EWCA Civ 300:

> The use of remote technology in legal proceedings, including hearing evidence by phone or computer link, became ubiquitous in all jurisdictions during the Covid pandemic. Many reservations about its use have been dispelled but there remains a central issue about fairness and the interests of justice that is best considered on a jurisdiction by jurisdiction basis with an eye to the different types of case and participation under consideration.

17. Here the First-tier Tribunal took precisely the kind of steps envisaged in Agbabiaka: as it explains at paragraph 6 of its decision, Ms Corbin gave her evidence first, and with Mr Kumar undertaking to confine his clients to his waiting room where they could be supervised to ensure that no contact was being made with the witness.

18. Having had regard to the nature of the evidence given by Ms Corbin we are not satisfied that there was any procedural error in the First-tier Tribunal proceeding as it did. In addition to the matters we have set out, the Tribunal properly took into account the overriding objective, noting that this was an appeal that had already been adjourned on two occasions. Extensive efforts were made to try and establish the video link: we are told by Mr Kumar that the hearing was delayed by well over an hour whilst this was attempted. Importantly we are not satisfied that the Secretary of State's complaints, even if established, were in any way material. The only evidence given by Ms Corbin that features in the Tribunal's reasoning is that recorded at paragraph 13 of the decision. The Tribunal there takes into account her evidence that she saw a bruise on her daughter after she had collected her from the police station where she had reported an incident of domestic violence. Since the police log in respect of the same incident records the police officer in attendance as having seen the same bruise, it is difficult to see on what basis the evidence of Ms Corbin on the matter could have been challenged.

19. We are not therefore persuaded that this ground is made out on the facts, nor that there should be any presumptive procedural approach to the giving of evidence by telephone. Whilst it may be correct to say

that the 'gold standard' is to hear live evidence from a witness in court, that is not to say that telephone evidence is so deficient that the norm should be to exclude it.

Ground (ii): Devaseelan

20. The First-tier Tribunal was aware that this was not the first appeal brought by Ms McKoy and Mr Ash. At §14 it acknowledges that in 2014 Judge Freestone[1] had found Ms McKoy incapable of meeting the requirements of reg 10(5)(d)(i), and at §15 it directs itself to the authority of Devaseelan. At §16 it records that the documentary evidence now produced by Ms McKoy was not available to this earlier Tribunal, and then says this: "this is one of the exceptional cases as referred to above where the circumstances surrounding the first appeal were such in that the documentary evidence was not before the tribunal, and that it is right for this tribunal to look at the matter as if the first determination had never been made".

21. The Secretary of State submits that if that last sentence was the sum total of the Tribunal's reasoning on Devaseelan it had fallen into error. There was no suggestion that there were any "exceptional circumstances" here. Insofar as Mr Kumar had criticised his lay clients' previous representatives, there was nothing to show that they had made formal complaints or the like against these firms. In fact this was simply a case where evidence had been adduced which could have been provided at an earlier hearing, and no good reason is given for the failure to do so. That being the case, Devaseelan held that this was evidence which should be ordinarily be viewed with the "greatest circumspection".

22. We agree with the Secretary of State that it is hard to discern what the First-tier Tribunal might have meant at its §16 when it refers to "exceptional circumstances". There is no analysis of why the evidence was not before Judge Freestone, and no explanation of why it is being given credence now.

23. That said we do not find these omissions to be material. The new evidence fell into two parts. In respect of Ms McKoy's claim under reg 10(5)(d)(i) that she had in fact lived in the UK with her EEA national husband between 1999 and 2006, she now produced copies of her GP notes. The Tribunal records that at "pages 12, 13, 15, 38, 39, 63, 64, 65 and 67 of the medical records were recorded matters which are dated between 1999 and 2006. There is also an entry covering 2009 at page 63" [at §10]. Importantly, the Tribunal records that Ms McKoy was not cross examined about these records. The second tranche of new evidence related to Ms McKoy's claim under reg 10(5)(d)(iv), to have been the victim of domestic violence during her marriage. The evidence about this came from the Metropolitan Police logs of which the Tribunal said [at its §13]:

[1] A second negative decision on this point was made by First-tier Tribunal Judge GJ Ferguson on the 2nd August 2019. This was a decision shown to us, but not Judge CTJ Lester.

> "This documentation was objective evidence. From the paperwork it was clear that the police regarded this as a domestic incident from the outset. From the logs the Appellant had initially described an argument with her husband which had led her to phoning the police. Two days later on 2 November 2011 the Appellant attended at the police station and provided full details of the incident including the violence. I note at page 53 of the appellant bundle the entry from PC Ashmore includes that the Appellant had a bruise to her upper left arm. As to why the Appellant had not initially mentioned this the log notes "*when asked why no allegations were made at the time she stated she told police what happened but did explain that she was not sure at the time if she wanted anything to happen etc...*". The log also notes on page 55 that she gave a statement to the police. The log on page 56 does record that the initial failure to provide the full details of what took place could potentially undermine the case due to inconsistency. However it also notes "*as it stands an allegation of assault has been made and Nickesha did have a visible bruise on her arm*"..."

24. The new evidence was, in both instances, from what the First-tier Tribunal rightly describes to be "objective" sources: the family GP, and the Metropolitan Police. There was no challenge to the *bona fides* of that evidence. Even if the Appellants could legitimately be criticised for the failure to provide this material earlier, it was plainly open to the Tribunal to admit it, since it was highly pertinent to the matters in issue. Thus whilst this was evidence which fell under the rubric of the third Devaseelan principle - and ordinarily therefore attracting the "greatest circumspection" – the nature of the evidence was such that the Tribunal was entitled to attach the weight to it that it did.

Grounds (iii) and (iv): Reasons

25. It is trite that the losing party must be able to understand why he has lost. Here there can be no doubt at all in the mind of the Secretary of State why this appeal has been allowed.

26. In respect of reg 10(5)(d)(i) Ms McKoy was able to produce medical records showing that she was living in London during 7 years of this marriage, between 1999 and 2006. That evidence was unchallenged by the Secretary of State. The Judge was further shown, and was satisfied with, documentary evidence placing her husband at the same address, and that he was economically active during that time. The Judge was also satisfied that she was working during the relevant period. Reg 10(5)(d)(i) requires Ms McKoy to show that she and her husband were residing together in the UK for at least 12 months of a marriage which subsisted more than three years. On the evidence before it, the First-tier Tribunal was satisfied that this was the case. No more reasons need be given.

27. In respect of reg 10(5)(d)(iv) the decision is similarly clear. The Judge had regard to the evidence of all of the witnesses, but apparently giving the most significant weight to the contemporaneous

notes of the police officers who investigated the case, accepted that there had been at least one incident of domestic violence. No challenge was made to the veracity of the police documents. In those circumstances we do not accept that the Secretary of State can be in the dark about why she has lost.

28. A related point, developed in ground (iv), is that there was conflict in the evidence which the Tribunal "failed to resolve". This arose from what Ms McKoy had said at various times about the incident: see for instance the matters set out by the First-tier Tribunal at its §13 and reproduced above at our §23. The grounds assert that the inconsistency in Ms McKoy's evidence demonstrates that she was clearly lying about what had happened to her.

29. Even if the Secretary of State would like more detail about why her criticisms of the discrepancies in the evidence were rejected, we do not think this a good point. It is well documented that victims of domestic violence are in a great many cases unwilling to testify against the perpetrators, and given the difficult and painful situation in which they find themselves, may deny that any assault ever took place. That this is so it well illustrated by the log kept by PC Ashmore, who explains that although Ms McKoy had initially described the incident simply as an argument, she did nevertheless have a "visible bruise on her arm" when she attended the police station two days after they had attended the family home.

30. Although it is not now material we would add that we did have our own reservations about the way in which the Tribunal approached reg 10(5)(d)(iv). That regulation provides that a right of residence may be retained where:

> (iv) the continued right of residence in the United Kingdom of A is warranted by particularly difficult circumstances, such as where A or another family member has been a victim of domestic violence whilst the marriage or civil partnership was subsisting.

We could not in the First-tier Tribunal decision discern any analysis of whether the one incident of domestic violence in October 2011, which is said to have brought Ms McKoy's marriage to an end, amounted to a "particularly difficult circumstance" warranting a right being retained where the application otherwise failed. This was not however a matter raised in the grounds, or upon which we heard argument, and the appeal before us nevertheless fails on the grounds that the Tribunal's findings on reg 10(5)(d)(i) were open to it on the evidence, and free of any material error of law.

Decision and Directions

31. The Secretary of State's appeal is dismissed.

32. The decision of the First-tier Tribunal is upheld.

33. We make no order for anonymity.

Upper Tribunal Judge Bruce
4th April 2022