IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001219

First-tier Tribunal No: EA/09862/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 23 October 2023

Before

UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON

Between

AN ENTRY CLEARANCE OFFICER

Appellant

and

RAYEN OCHI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Lawson, a Senior Home Office Presenting Officer.
For the Respondent: Mr Hosen, Solicitor with Richard Nelson LLP
Hungarian interpreter: Ildiko Balogh

Heard at Birmingham Civil Justice Centre on 10 October 2023

DECISION AND REASONS

1. The Entry Clearance Officer (ECO) appeals with permission a decision of First-tier Tribunal Judge Athwal ('the Judge'), promulgated on 30 January 2023, in which she allowed the above respondent's appeal against the refusal of his application for a Family Permit under Appendix EU (Family Permit) of the Immigration Rules. The application was made on 4 April 2022 and refused on 14 September 2022.
2. The above respondent is a citizen of Tunisia who argued he met the requirements of Appendix EU because his wife, Anett Ochi ('the Sponsor'), a Hungarian national, was legally divorced from her first husband and free to marry him. The Judge records at [4(i)] that the only issue was whether the Sponsor's divorce certificate from her first husband, provided by the above respondent, establishes that the marriage between him and the Sponsor is valid.
3. The Judge's findings, set out from [13] of the decision under challenge, can be summarised as follows:

a. The respondent's submission, that the fact the Tunisian marriage contract and the Hungarian divorce decree recorded different names for the Sponsor's first husband undermines the reliability of the divorce certificate, was not accepted by the Judge who found on balance the names recorded on both documents are the same [14 – 16].
b. No other objection was raised by the ECO or other evidence to challenge the reliability of the Hungarian divorce certificate. The Judge attached significant weight to the divorce certificate and was satisfied the Sponsor divorced her first husband before marrying the above respondent [17]. The Judge was satisfied that the marriage between the above respondent and the Sponsor is valid, and so allowed the appeal [18].

4. The ECO sought permission to appeal asserting the Judge erred by relying on evidence provided by the court interpreter when that is not the interpreters function, and relying on the evidence of the appellant's representative, both of which events are said to be procedurally unfair. The grounds assert the Judge's conclusions at [16] are based solely on the evidence of the above respondent's advocate with the Judge failing to refer to any objective basis for the finding that the difference in spelling on the divorce certificate was due to errors in interpretation.

5. The grounds also assert the Judge made a material misdirection of law by failing to treat a previous determination of First-tier Tribunal Judge Juss as her starting point when determining the outcome of the appeal as per the Devaseelan principles. The grounds assert that in the previous determination findings were made in relation to the reliability and validity of the marriage certificate. No formal concession was made before the Judge and insufficient reasoning has been provided for departing from previous findings.

6. Permission to appeal was refused by another judge of the First-tier Tribunal but granted on a renewed application by Upper Tribunal Judge Jackson on 9 May 2023, the operative part of the grant being in the following terms:

> The grounds of appeal are that the First-tier Tribunal erred in law in (i) relying on evidence given by the Court interpreter and given by the Appellant's representative; in the absence of any objective evidence as to the translations; and (ii) failing to treat the previous determination as the starting point and misconstruing the concession by the Respondent that she no longer relied on the previous finding that it was a marriage of convenience, but the validity of the marriage and documentation was still in issue and earlier findings relevant.
>
> The grounds are both arguable. There is nothing on the file to suggest any documentary or other evidence as to the different names on different documents for the Sponsor's first husband; nor as to what the interpreters were supplied with. It is arguable that what was said by the interpreter and the representative was evidence and as such should not have been relied upon, particularly in the absence of any other evidence. Further, the decision in paragraphs 5 and 6 arguably set out the Respondent's position that (a) the validity of the marriage was in issue and (b) the previous decision that it was a marriage of convenience was no longer relied upon, but the latter does not preclude earlier findings on matters such as the validity of the marriage still being the starting point. There appears to be no further consideration at all of the earlier decision or whether any part of it remained relevant.
>
> The First-tier Tribunal's decision does not contain any arguable error of law capable of affecting the outcome of the appeal and permission to appeal is therefore granted.

7. We accept the reference in the final paragraph of the grant of permission to the First-tier Tribunal not containing any arguable error of law is a typographical error as it is clear from reading the grant as a whole that Judge Jackson finds the grounds to be arguable.

Discussion and analysis

8. The application for the Family Permit was refused by the ECO as he or she was not satisfied the above respondent had provided any divorce certificates for the Sponsor's previous marriage meaning it could not be confirmed that the Sponsor was legally able to marry him.
9. During the course of the hearing reference was made by Mr Hosen to documents which he claimed had been submitted to the Upper Tribunal in July 2023, which neither we nor Mr Lawson had seen. The Tribunal is grateful to Mr Hosen who has clearly undertaken enquiries with his colleague back in the office and provided a further copy of those documents to the Upper Tribunal post hearing which we have now been able to consider.
10. Mr Hosen asserted in his submissions that the documents specifically requested by the Upper Tribunal on 18 May 2023 were provided on 10 July 2023. We have seen a copy of an email sent by the Upper Tribunal Administration setting out a specific direction made by Judge Jackson when granting permission to appeal who noted that neither bundle provided for the purposes of the hearing before the First-tier Tribunal, by both the appellant and respondent, contained the two key documents relevant for the error of law hearing which are (i) the Sponsor's first marriage certificate and (ii) the earlier determination of First-tier Tribunal Judge Juss.
11. The letter of 10 July 2023 confirmed the Sponsor no longer has the original marriage certificate from her first marriage and that the Sponsor contacted the Hungarian registry office and was provided with a certified copy of the proof of marriage and dissolution from the court which was provided together with a letter of explanation from the previous translators correcting an error in relation to the name of her ex-husband on her marriage certificate, and a newly translated version of the Tunisian marriage certificate with the above respondent from a certified UK-based translator.
12. It does not appear, however, that these documents were before the Judge and their relevance to the specific challenge to the Judge's decision by the ECO, bar the Devaseelan point, has not been made out.
13. In relation to the Devaseelan point, First-tier Tribunal Judge Juss in a decision promulgated on 7 September 2021 considered the above respondent's appeal against a refusal to issue him a Permanent Residence Card as confirmation of his right to reside as the family member the Sponsor, a Hungarian national exercising treaty rights in the UK.
14. Judge Juss noted that to provide evidence of his relationship the above respondent provided a Hungarian and Tunisian marriage certificate with French to English translations. It is also said the certificates confirmed the marriage as having taken place on 7 September 2015 and that although passports provided showed each individual signature, neither of the marriage certificates carried either party's signature which Judge Juss found cast doubt upon the legitimacy of the marriage certificates.
15. Judge Juss was not satisfied that the appellant before him (the respondent above) had discharged the relevant burden of proof especially was it was one thing for the above respondent, who is a Tunisian national, to say that the Tunisian authorities do not require a signature on a Tunisian marriage certificate of the parties to the marriage contract whereas it was quite another thing for

him to say that the Hungarian authorities do not require a signature on their marriage certificate either. Judge Juss concluded that it is not a genuine marriage certificate.

16. Again, it does not appear that Judge Juss' determination was before the Judge who records at [6] "*Ms Bibi clarified that the Respondent promulgated on 7 September 2021. The Respondent upon reviewing the new evidence did not seek to argue that this was a marriage of convenience.*"

17. It does not appear that the statements to the Judge indicated it was that only a limited part of Judge Juss' determination that was not being relied upon as it appears that the Presenting Officer informed the Judge that none of that decision was being relied upon. We find it is understandable that the Judge, having received such a submission, makes no reference to the Devaseelan principles or takes as a starting point the decision of Judge Juss. We find no legal error made out on this point. If the matter is heard again the ECO must clarify which aspects of Judge Juss' decision (if any) are being relied upon in accordance with the Devaseelan principle.

18. It is correct, as asserted in the grounds, that in Mohamed (role of interpreter) Somalia [2011] UKUT 00337(IAC) the Tribunal reconfirmed AA (Language diagnosis; use of interpreters) Somalia [2008] UKAIT 00029 and said the function of a court appointed interpreter is to interpret on behalf of the Tribunal what is said at the hearing, including the appellant's evidence. It is no part of the interpreter's function to be drawn into a position where he or she has to give "evidence" at a hearing of anything, including the language being spoken by a witness.

19. At [15] the Judge specifically confirms that she relied upon the statement by the court interpreter in relation to the pronunciation of the letter Zs in the Hungarian alphabet and concludes that the letter Zs is pronounced with a soft G similar to that in the name George, as a result.

20. There is insufficient evidence by way of a witness statement or otherwise from the interpreter to show that the letter Zs is pronounced as claimed or the interpreter's expertise in relation to this point. As the representatives were advised at court, it is the Tribunal's understanding that Z is in fact pronounced as either 'Ze' or Z as in 'Zoo'. It is not made out the interpreter is an expert in Hungarian phonetics, or it was appropriate in all the circumstances for the interpreter to give such evidence.

21. That impacts upon the Judge's acceptance that Zs should be read as being pronounced with a soft G meaning the names 'Gult' and 'Zsolt' are the same name. The Judge also accepts, as a result of coming to that conclusion, the evidence provided by the advocate when it is not an advocate's role to give evidence.

22. It is not disputed before us that what the Judge records as having been said to her by the interpreter and the above respondents advocate on the day was actually said. The parties differ in relation to the capacity of the person who made such statements when doing so.

23. In his skeleton argument filed on 9 October 2023 Mr Hosen submitted that the first ground is unsustainable as there was no indication in the determination that the court interpreter was asked to give evidence at any point and that all the interpreter did was to confirm the above respondent's evidence to the Judge from Hungarian into English. It is argued that the interpreter's confirmation simply attested to the accuracy of the interpretation provided during the proceedings which is a routine and essential part of the interpreters role and should not be construed as the interpreter providing evidence or opinions.

24. We do not agree. The Judge records at [15] the Sponsor confirming in her oral evidence that the name of her first husband was Zsolt Soregi. That appears to

be the extent of the evidence given by the above Sponsor that the interpreter was required to interpret. The Judge records, however, "*the court interpreter confirmed that the Zs in Zsolt was pronounced with a soft G similar to the G in George. Soregi would be phonetically spelt as "Shor-a-gee".*

25. We do not doubt that the interpreter was trying to help the Judge but clearly the statement provided by the interpreter in relation to pronunciation of the letter Zs, rather than just interpreting what had been said by the Sponsor, went beyond the role of an interpreter, when considering the case law relied upon by the ECO. As noted above, there is evidence in the public domain which would suggest the pronunciation of the letter Z in the Hungarian alphabet is not the same as the letter G as in George. At this stage we do not know which is correct as it was not made out the interpreter is an expert able to give an opinion on the basis of any particular expertise possessed in relation to the Hungarian language, rather than being a person familiar with that language and able to translate spoken phrases in that language between Hungarian and English and vice versa. It is not made out the interpreter was qualified to give an expert opinion on the pronunciation of the relevant letter or that in doing so all the interpreter was doing was interpreting what the Judge had been told.

26. In relation to the challenge to statements by the appellant's representative, the above respondent's skeleton argument asserts there is no merit in the claim in the grounds of evidence being given by the above respondent's advocate. The above respondent's case is that there was no evidence of the legal representative provided any evidence and that legal submissions could not be considered as evidence. Within the skeleton argument is a reference the Judge's findings at [16] and acceptance of a reasonable explanation for the different spelling of the names, which is in part based upon the statements made by the court interpreter and support for the claim that more than the representative submissions was taken into account. The above respondent seeks to rely, however, on material that was not before the Judge in support of his challenge to this aspect where it is written:

> "8. Further to the above, the R has now also provided further evidence including official evidence provided from the Government of Hungary, which serves to substantiate the accuracy of the information previously presented before the FTJ. Furthermore, the R has provided a letter from the previous translators, which attests to an error in the initial translation, and a corrected translation performed by a certified UK based translator. As a result, any lingering doubts regarding the authenticity of the name and its accurate spelling should be effectively dispelled".

27. So far as the documents being referred to are those in the missing bundle, which we refer to above, they were not before the Judge. So far as there are any additional documents being referred to, they were not before the Judge nor before us for the purposes of this hearing.

28. We accept that submissions are not evidence, but representatives need to be very careful when making submissions to ensure they do not stray into giving evidence in relation to matters they think may strengthen their case. Submissions made by an advocate should bear some relationship to the evidence given during the course of the hearing and will ordinarily form a summary of the evidence, indicating points of strength in an individual's case and of weakness in an opponents, reference to legal points, and conclusions that should be drawn from a proper application of the facts to the law.

29. Mr Hosen was asked whether he could refer us to any point within the evidence where the matters recorded at [16] as having been advanced by the above respondent's representative were placed before the Judge prior to the submissions being made. He could not. There was no transcript of the evidence

given at the hearing or reference to a recording of the same that may have assisted. Mr Hosen accepted this but sought to argue that the burden of proof and responsibility for providing the same lay upon the Secretary of State as it was her appeal.

30. The general maxim that 'he who alleges must prove' applies in relation to this matter. As it is the above respondent who is alleging that the statements made by the representative were mere submissions rather than the giving of additional evidence, the point is for him to prove by provision of a transcript or recording , if required. He did not.

31. There does not appear to have been any evidence to show that the interpreter had not been provided with the first husband's name spelt in the Roman alphabet or any of the issues raised by the representative. It is also appears that the Judge, based upon such material provided by the representative, proceeded to analyse that by including the findings made at [15] in relation to the pronunciation of the letter Zs in the Hungarian alphabet, before concluding she had been provided with a reasonable explanation for the different spellings of the same name in the two documents.

32. Having given the matter further consideration we come to the conclusion the Secretary of State has made out her case.

33. Reliance by the Judge upon inadmissible evidence in coming to her conclusion means the Secretary of State has been denied the opportunity for the issues at large to be determined fairly. It is not made out that had this evidence not been taken into account the decision would have been the same, as the issue of the discrepancy in the names between the two certificates of someone who purports to be the same person would not have been adequately addressed.

34. The Court of Appeal have made it clear that where a decision is infected by procedural unfairness none of the findings can be preserved and that the matter must be heard afresh. In light of our findings, the guidance from the Court of Appeal, and consideration of the Upper Tribunal decision in Begum, we conclude that it is appropriate in all the circumstances to remit the appeal to the First-tier Tribunal sitting at Birmingham to be heard afresh by a judge other than Judge Athwal.

35. We also record at this stage the observations made by Mr Lawson that "the representative prior to the next hearing could obtain and serve on the parties written confirmation from the Tunisian Authorities that Mr Soregi's name was recorded on the marriage certificate as Gult Cuami and the reason thereof. This may negate a further hearing dependant on the presenting officer's view of the evidence in totality".

Notice of Decision

36. The First-tier Tribunal materially erred in law. We set the decision aside. We remit the appeal to the Upper Tribunal sitting at Birmingham to be heard *de novo*.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11 October 2023