



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002279
First-tier Tribunal No:
EU/53722/2023
LE/02312/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 08 October 2024

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SHAKHBOZ MUKHITDINOV
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Krushner of counsel, instructed by Direct Public Access
For the Respondent: Mr Tufan, Senior Presenting Officer

Heard at Field House on 7 October 2024

DECISION AND REASONS

1. The appellant appeals with the permission of Upper Tribunal Judge O'Brien against the decision of First-tier Tribunal Judge Farrall, who dismissed his appeal against the respondent's refusal of his application for leave to remain under Appendix EU of the Immigration Rules.

Background

2. The appellant is a national of Tajikistan who was born on 17 April 1996. His full immigration history is not before me. It is however clear that he was granted a Residence Card as the spouse of an EEA national on 22 May 2019. That document was declaratory of his right to reside in the United Kingdom as the spouse of Nayara Charlyne De Pina Gomes Tavares, a Portuguese national who the appellant had married at Brighton Town Hall on 28 January 2019.
3. On 9 February 2023, the appellant applied for leave to remain under the EU Settlement Scheme, relying on his relationship with Ms Tavares. The appellant

and his wife were invited to attend interviews with the respondent on two occasions but they did not attend. On 30 May 2023, therefore, the respondent refused the appellant's application for leave to remain. She did so because she had concluded that the marriage was one of convenience.

The Appeal to the First-tier Tribunal

4. The appellant appealed to the First-tier Tribunal on 8 May 2023. He contended that the decision was wholly wrong and that he and his wife were a 'real couple'. Evidence including various exchanges between the appellant and his wife were uploaded to MyHMCTS on 12 September 2023.
5. On 30 October 2023, the respondent reviewed the decision under challenge in light of what had been said by the appellant in his appeal. She maintained the refusal. She identified the single issue before the Tribunal as being "Whether A's marriage is one of convenience." She also responded to something said by the appellant about the interviews. He had asserted in his appeal that he had withdrawn his application for leave to remain, and had consequently been puzzled by the invitations to interview. The response to that was that the respondent was not required to treat the application as withdrawn just because the appellant had invited her to do so. She cited R (Qadeer) v SSHD [2015] EWHC 505 (Admin) in support of that statement.
6. The appeal was listed to be heard at Taylor House on 4 January 2024. That hearing was adjourned at the request of the appellant, who stated that he was having difficulties with the MyHMCTS system and that he was in the final stages of preparing for his examinations at the University of Brighton. That request was granted by a Tribunal Legal Officer.
7. The hearing was relisted to be heard on 4 March 2024. The appellant instructed Mr Krushner of counsel to represent him at the hearing, under the Direct Public Access Scheme. On the day before the hearing, Mr Krushner was contacted by Ms Tavares. She stated that her relationship with the appellant had broken down but that she wished to attend the hearing because she did not wish her 'character and honesty to be questioned'. She wrote a short, handwritten note to that effect, to which she attached her Portuguese identity card. She stated that she was not able to secure leave from her work as a Critical Care Nurse in the limited time available but that she would be able to attend if she was given 3-4 weeks' notice of a hearing date.
8. Mr Krushner applied for an adjournment in order that Ms Tavares could attend the hearing. He relied on Ms Tavares' note in support of the application. The judge refused that application and proceeded with the hearing. The reasons given for refusing the adjournment appear at [11] of the judge's decision:

In considering whether to allow the adjournment I took account of the overriding objective and the importance of dealing with matters without delay. I note that this appeal relates to an application made in 2021. This hearing had previously been listed in December 2023 for a substantive hearing and adjourned on the appellant's request as he was not available. There was no mention of the sponsor's evidence until the morning of the hearing. The appellant had a significant amount of time to prepare for this appeal and he did not contact the sponsor in time for her to attend the hearing. Considering the

appellant's lack of attendance at two interviews and the previous adjournment I did not consider it to be in the interests of justice to incur further delay. I balanced this against fairness to the appellant as the sponsor, according to her letter, was willing to attend to give evidence in this appeal. There are no details in this letter as to what she intended to say, but I infer that it would be supportive as she has raised concerns about her honesty and integrity being called into question. Mr Krushner submitted that it would be unfair to refuse an adjournment and proceed in the absence of a key witness. It was open to the appellant to obtain a witness statement from the sponsor which could have been admitted in support of this appeal which he had not done. I note the submissions about lack of contact following the breakdown of the relationship, which the appellant says has led to the delay in contacting the sponsor, but a statement could have been prepared between 28 February 2024 and the hearing date. In my view there was no reasonable explanation for this not having been done. This is especially so as Mr Krushner indicated that he had been in direct contact with the sponsor. I took into account the fact that I would have the benefit of hearing evidence from the appellant and the documentary evidence relied on by the appellant in support of the appeal. These were balancing factors against any disadvantage to the appellant by refusing to adjourn. I therefore decided that I was able to deal with the matter fairly and justly without any further delay and refused the application to adjourn.

9. The judge directed herself impeccably as to the law in marriage of convenience cases at [16]-[17], before making findings of fact from [18] onwards. At [27], she found that it was "more probable than not that the appellant and the sponsor are in a marriage of convenience", and therefore that the appellant did not qualify for a grant of leave under Appendix EU.

The Appeal to the Upper Tribunal

10. There are two grounds of appeal. The first is that the refusal to adjourn the hearing to enable Ms Tavares to attend was unfair. The second is that the judge failed to take material matters into account in deciding that the marriage was a sham.
11. There is no rule 24 response to the grounds of appeal.
12. Mr Krushner submitted that the judge's refusal to adjourn had been unfair. Ms Tavares had made unsolicited contact with him on the day before the hearing and he had sought an adjournment so that she could attend. She had explained in her letter that she needed between three and four weeks' notice to secure a day off work. It seemed that the judge's principal concern was that the case had been in the system for a long time but that was not because the appellant had been seeking to protract matters unjustifiably. The first adjournment had been granted by a Legal Officer at the appellant's request because of his studies. The judge should have considered whether the appellant needed an adjournment in order to meet the case against him. The judge had not considered the letter from Ms Tavares, whether in deciding not to adjourn or in her substantive consideration of the marriage. The judge had also held against the appellant the fact that he had not attended the marriage interviews but she had failed to take account of his explanation for that. It was notable that the Presenting Officer had

assured the judge that the appellant and the sponsor would be given another interview date in the event that the hearing was adjourned but that too had been overlooked.

13. Mr Tufan submitted that the refusal to adjourn had been fair. There was no real prejudice to Ms Tavares in the findings made by the judge. It was notable that the sponsor had not attended today's hearing. There had clearly been a history of non-attendance, and it appeared that the appellant and the sponsor had even failed to attend interviews in 2019, although the residence card was nevertheless granted. There was real lack of evidence in this case, as seems to have been accepted by the appellant himself. The signature on Ms Tavares' letter appeared to be different from the signature on the Portuguese ID card, although Mr Tufan accepted that he was not an expert.
14. In reply, Mr Krushner submitted that any failure to attend an interview in 2019 was not part of the judge's finding and it was impermissible to raise it in an attempt to justify the refusal *ex post facto*. The reality here was that the sponsor was worried about aspersions being cast upon her character but she had had no opportunity to rebut those assertions at the hearing. That was relevant to the refusal to adjourn but had been left out of account by the judge.
15. I indicated at the end of the submissions that I was satisfied that the refusal of the adjournment application was unfair, and that the decision would be set aside accordingly. Mr Krushner invited me to remit the appeal to the FtT to be heard *de novo* by a different judge. Mr Tufan agreed that that was the proper relief. I indicated that I would order accordingly. My reasons for reaching those conclusions are as follows.

Analysis

16. In deciding whether the judge erred in law in refusing the application to adjourn, the question is not whether her decision was open to her but whether it was fair: SH (Afghanistan) v SSHD [2011] EWCA Civ 1284, at [13].
17. As Mr Krushner submitted, the judge was plainly concerned about delay. She was concerned that the appellant and the sponsor had not attended the interviews with the respondent and she was concerned that the appeal had already been adjourned once. Ordinarily, those would have been valid concerns but the difficulty with the judge's approach is that she took no account of the appellant's explanation for those past events. The appellant had given a specific reason in the notice of appeal for not attending the interviews. He said that he believed that he did not need to attend them because he had sought to withdraw his application. The appellant had also given a specific reason for seeking the first adjournment of the hearing, and that explanation had seemingly been accepted by the Legal Officer who had granted that application on the papers. If the judge thought that the appellant was seeking to game the system and delay matters - which was seemingly her concern - then it was incumbent upon her to consider whether the past events actually supported that conclusion. In failing to do so, I consider that she left material matters out of account.
18. There is a much more fundamental difficulty with the judge's refusal to adjourn, however. The finding that she was asked to make by the respondent, and the finding which she did ultimately make, was that the appellant and the sponsor were parties to a marriage of convenience. The appellant obviously attended the

hearing and had an opportunity to answer that allegation, but the sponsor did not. She asked in her letter for an opportunity to attend the hearing. She stated that she was concerned that her integrity was being questioned by the respondent. At no point in her consideration of the adjournment request, however, did the judge consider whether fairness demanded that there should be an adjournment in order to give the sponsor an opportunity to clear her name. In my judgment, this was clearly a case in which the assessment of fairness concerned not only fairness to the parties; the judge should also have considered fairness to Ms Tavares.

19. I asked Mr Tufan about fairness to Ms Tavares during his submissions. He acknowledged my concern in that respect but he submitted that the adverse finding caused her no real prejudice. I am unable to accept that submission. There is currently a judicial finding of fact that Ms Tavares was a party to a sham marriage. On any proper view, that is a serious matter for a foreign national who is subject to immigration control. Under the Immigration (EEA) Regulations 2016, it was stated that it was consistent with public policy considerations to refuse, terminate or withdraw any right conferred by the Regulations where a person had entered a marriage of convenience: schedule 1, paragraph 6(a) refers. Following the UK's withdrawal from the EU, corresponding provision is made at paragraph A3.4(b) of Appendix EU of the Immigration Rules. The Secretary of State would be entitled, in reliance on the judge's finding of fact, to consider curtailing any leave to remain which Ms Tavares might have under Appendix EU.
20. The significance of the judge's finding is even broader than that. In the event that Ms Tavares were to sponsor a family member to enter the United Kingdom, the respondent would be entitled to take account of her previous conduct. In the event that she wished to marry again, or to sponsor the application of a third country national spouse, any such application could legitimately be refused in reliance on the judge's finding that she had previously been a party to a marriage of convenience. It is, in sum, a finding of fact which carries with it the most serious of consequences for a person in Ms Tavares's situation, and the judge apparently paid no heed to those consequences in deciding not to adjourn for four weeks so that she could give evidence. I am satisfied that the judge erred in so deciding. It was unfair to reach that decision, and it was a refusal which was in any event reached by failing to have regard to material matters.
21. I am also satisfied that the judge erred in her substantive assessment. She erred, as Mr Krushner submitted, in failing to turn her mind to the appellant's explanation for failing to attend the second of the two interviews which the respondent had arranged. The judge turned her mind to this sequence of events at [22]-[23] of her decision, and concluded that the failure to attend the second interview was 'not reasonable' but she did not consider the appellant's witness statement or his oral evidence, in which he had stated that he had called the EUSS Resolution Centre and had been told not to worry about the emails or the interviews. As far as I can tell, there was no documentary evidence from the respondent which cast any doubt on that assertion and it was at the very least for the judge to engage with it. In failing to do so, she again failed to take account of a material matter.
22. In the circumstances, the decision of the judge is vitiated by legal error and cannot stand. As both advocates recognised, the proper course is for the appeal to be remitted to the FtT and heard afresh by another judge.

23. I note one final matter, which was helpfully brought to my attention by Mr Krushner at the end of the proceedings. He noted that the appellant has now petitioned for a divorce from Ms Tavares. The petition was issued online on 25 September 2024, using the new non-fault procedure. They have both consented to the divorce, and were in contact with each other via mutual friends in order to arrange it. It is expected that the divorce will be finalised within 6 months or so. Mr Krushner assured me that there are no other orders currently in place (I was concerned, in particular about non-molestation orders) and that there is no reason as far as his client is concerned that any such orders might be sought. I indicated that I would note this for the benefit of the next judge, but that there was currently no reason to take any steps such as delaying the hearing before the FtT or invoking the Protocol on Communications.
24. For the avoidance of doubt, I was assured by Mr Krushner that Ms Tavares still wishes to give evidence before the FtT, and that she will require a month's notice of any hearing. It might well be advisable for the FtT to hold a case management hearing upon remittal, so that consideration can be given to listing on a date which will be suitable for her.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law. That decision is set aside. The appeal is remitted to be heard afresh by a judge other than Judge Farrall.

Mark Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 October 2024