



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/03172/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 1 July 2019**

**Decision & Reasons Promulgated
On 14 August 2019**

Before

**UPPER TRIBUNAL JUDGE PLIMMER
UPPER TRIBUNAL JUDGE OWENS**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

O

(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Miss J Isherwood, Senior Home Office Presenting Officer

For the Respondent: Mr Oliviera- Agnew, Counsel

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

1. We have made an anonymity order because it is accepted that the respondent ('Mr O') is a vulnerable person and this decision refers to sensitive medical evidence relating to him.
2. The appellant ('the SSHD') has appealed against a decision of the First-tier Tribunal ('FtT') sent on 4 January 2019 in which it allowed Mr O's appeal on EEA grounds, against a decision dated 5 April 2018, refusing to issue him with a residence card as the former family member of an EEA national exercising Treaty rights in the UK who has retained a right of residence.

Background

3. Mr O is a Nigerian citizen. He married Ms [W] ('the sponsor') on 20 February 2010. In 2010 he was issued with a residence card valid for five years as the spouse of an EEA national. On 14 November 2014, he applied for a further residence card as a family member who retained the right of residence pursuant to Regulation 10(5) of the Immigration (EEA) Regulations 2016 ('the 2016 Regulations'). He was asked to attend a credibility interview on 30 April 2015. His application was refused on 12 May 2015 and the SSHD also took a decision to revoke the existing residence card. An appeal against those decisions was dismissed by FtT Judge Andrews on 21 November 2016. An application for permission to appeal to the FtT was refused on 23 May 2017 and a further application for permission to appeal to the Upper Tribunal ('the UT') was refused on 4 July 2017.
4. On 26 January 2018 Mr O submitted a fresh application on the basis that he had retained a right of residence. The application was refused on 5 April 2018.
5. The SSHD refused this application because it was considered that the marriage was one of convenience because there were numerous discrepancies in the credibility interview which took place on 30 April 2015. The decision was upheld by FtT Judge Andrews on subsequent appeal.
6. In his grounds of appeal to the FtT, Mr O asserted that he entered into a genuine marriage. His marriage was not one of convenience. He was issued with a residence card in 2010 and he has retained a right of residence in accordance with Regulation 10(5) of the 2016 Regulations.

FtT decision

7. The FtT considered that there was new material before her to depart from the findings of FtT Judge Andrews, in particular a psychiatric report prepared by Dr Balu dated 29 November 2018. This set out Mr O's memory difficulties. Dr Balu recorded;

'I attempted to do a Mini Mental State Examination and he couldn't remember the date, day and month. He was very distressed that he couldn't answer my questions and stopped communicating. He was staring into space and I couldn't communicate with him any further. He almost became dissociated and mute and I had to stop my interview to give him time to relax and bring him back into the room and try and engage with him'.

8. Dr Balu further stated;

"I am of the opinion that Mr O suffers from high level of anxiety and severe depressive symptoms as evidenced by his restlessness, inability to engage in a conversation, withdrawn behaviour. It would be fair to conclude that he suffers from pseudo-dementia at this stage as a differential diagnosis. He also presents with some symptoms of dissociative disorder and I wondered if there is any underlying previous psychological trauma."

9. Dr Balu concludes;

"Mr O suffers with symptoms suggestive of Severe Depressive Disorder with Pseudo-Dementia type presentation. He has difficulty with spatial orientation and registering and recall of information".

10. The FtT relied on the contents of the psychiatric report. The FtT found at [41]

"The report raises a real possibility that the reason why the appellant was not able to give satisfactory answers to the questions at the credibility interview upon which the respondent founded in her refusal letters was because of the mental health problems from which he suffers and the resultant difficulties and disabilities identified by Dr Balu".

11. The FtT concluded that (i) the marriage was not one of convenience (ii) Mr O and the sponsor had been working at the relevant periods (iii) Mr O retained the right of residence pursuant to Regulation 10(5) of the 2016 Regulations. The appeal was allowed.

Grounds of appeal

12. The SSHD's grounds of appeal are as follows:

(1) *The material misdirection of law challenge*

The Tribunal misdirected itself in relation to the application of Devaseelan v SSHD [2002] UKAIT 00702 because FtT Judge Andrews had already found in 2015 that the marriage was one of convenience and the FtT was not entitled to go behind those findings based on later evidence. It is also

asserted that the FtT contradicts itself in relation to the burden of proof.

(1) *The failure to give reasons*

The FtT failed to give adequate reasons as to why the psychiatric report presented in 2018 applied to the appellant in 2015.

(1) *Irrationality*

The Tribunal's approach to the medical report was irrational and the Tribunal gave too much weight to the report.

Permission to appeal

13. Permission to appeal was refused by FtT Judge Kelly on 29 January 2019.
14. Permission to appeal was granted by UT Judge Chalkley in a decision dated 13 March 2019 on all grounds.

History of the appeal

15. The appeal was originally listed for hearing on 10 April 2019. On that occasion the appeal was adjourned by UT Judge Plimmer with directions to Ms Isherwood to take further instructions. This because the SSHD was not represented before the FtT, when Dr Balu's report was submitted. The SSHD was also given an opportunity to comment on whether the psychiatric report constituted a 'new matter' in accordance with Mahmud (s85 NAA 2002 'new matters': Iran [2017] UKUT 488 (IAC).
16. In response Miss Isherwood provided a position statement in which she indicated that the SSHD would continue to pursue the challenge. Miss Isherwood's position was that the psychiatric report was not a 'new matter' pursuant to section 85 (6) of the Nationality, Immigration and Asylum Act 2002 as amended ('the 2002 Act'), but was evidence offered in support of the Mr O's assertion that his marriage was not one of convenience and to support his assertion that the inconsistencies in his credibility interview were as a result of his poor memory. She also made it clear that in so far as the medical report was a 'new matter' the SSHD would not object to it having been considered by the FtT.
17. In view of Mr O's vulnerability because of his mental health condition, Upper Tribunal Judge Plimmer also made an anonymity direction.

Appeal to the Upper Tribunal ('UT')

18. At the hearing before us, Miss Isherwood clarified that she relied upon the three separate grounds of appeal which are set out at paragraph 9 above.
19. Both representatives made submissions which are set out in more detail below in the discussion on the individual grounds.

20. We reserved our decision.

Discussion

Ground 1 - the material misdirection of law

21. The FtT based its starting point on the findings of FtT Judge Andrews in relation to Mr O's marriage at [12]. The FtT had regard to the principles in Devaseelan (supra) which was quoted at length at [23]. The FtT rationally concluded that the existence of the new psychiatric report contained facts which were beyond dispute at [42], that this evidence was not before FtT Judge Andrews and that there was a '*real possibility*' that the new evidence threw light on the evidence provided by Mr O at his credibility interview. The FtT rationally found that it was open to it to make new findings based on the evidence and did not misdirect itself in law.
22. The FtT applied the correct standard and burden of proof in relation to marriages of convenience at [20] and [21], referring correctly to Papajorgi (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 and Sadovska and Another v SSHD [2017] UKSC 54. Miss Isherwood submitted that there is a contradiction between [40] and [48], however having read the decision as a whole we are satisfied that this is not the case. At [40] the FtT is setting out the position as it was before FtT Judge Andrews. The FtT states that there can be no departure from FtT Judge Andrews' findings for the reason that the respondent did not put forward any evidence to justify calling the appellant to a credibility interview in the first place. At [48], the FtT finds instead, that a departure from those findings is warranted because of the psychiatric report. The FtT comes to a rational conclusion that the evidence from the SSHD was insufficient to justify a reasonable suspicion that the marriage was one of convenience because the appellant's inconsistent answers could be explained by his poor mental health. In any event we are satisfied, considering the decision as a whole, that the FtT rationally found having considered all of the evidence in the round before it that the respondent had not discharged the legal burden of proof in respect of demonstrating that the marriage was one of convenience.

Ground 2 - The failure to give reasons

23. Miss Isherwood submitted that the FtT gave inadequate reasons for why the report which was dated 29 November 2018 was able to shed light on Mr O's ability to answer questions in a credibility interview in 2015. We are satisfied that the FtT gave adequate reasons for accepting that the psychiatric report could go some way to explaining Mr O's state of mind in 2015. In particular the report confirmed that on examination Mr O had very serious, far reaching symptoms, presented as '*dissociated and mute*' and had significant difficulties in processing retaining and relaying back information.

24. The FtT not only took into account the psychiatric report in this respect but also gave detailed consideration to the answers that Mr O gave at his interview in 2015 in which he expressly stated that he had problems with his memory and had difficulties understanding basic questions. The FtT additionally gave weight to the remainder of the evidence including Mr O's previous evidence that he had difficulty remembering things in the interview including the name of his solicitor. The inference drawn by the FtT that Mr O's memory problems were likely to have been in place for some time was rational and adequately reasoned looking at the body of the decision as a whole. We are satisfied with reference to UT (Sri Lanka) v SSHD [2019] EWCA Civ 1095 that the FtT's reasoning on this issue was 'tolerably clear'.

Ground 3 -Irrationality

25. Miss Isherwood submitted that the FtT irrationally accepted the conclusions of the psychiatric report. She submitted that the psychiatrist did not take any history from Mr O and relied on the comments of a friend who accompanied Mr O. It is not recorded what Dr Balu was told by the friend. The psychiatrist did not have access to any GP records because Mr O is not registered with a GP. Further the psychiatrist recommended further investigations which did not take place. We note in this respect that there was no detailed critique of the psychiatric report in the grounds of appeal and that these more detailed arguments were raised by Miss Isherwood for the first time at the hearing.
26. Although Dr Balu did not have access to medical records, we are satisfied that the FtT took full account at [25] and [26] that the report was prepared by an experienced and qualified consultant psychiatrist whose opinion was based on a consultation in which he used his expertise to examine the appellant and observe his symptoms for himself. The report did record the concerns of the person who accompanied the appellant to the examination. The results of the mental state examination were set out at length at [25]. In summary the FtT was entitled to accept the conclusions of Dr Balu and conclude that Mr O had serious and significant symptoms notwithstanding the concerns at [17]. It was rationally open to the FtT to give weight to the findings of the report.
27. The FtT was also entitled to take into account other evidence in relation to Mr O's memory including his previous evidence that he suffers from memory problems, the difficulties he had explaining himself in the credibility interview and his presentation at his appeal. Mr O was not able to give oral evidence at the FtT. At [30] the FtT recorded
- "However there was no indication from him that he understood or even heard me. He did not speak at all or make eye contact. His presentation before me appeared consistent with Dr Balu's description of his presentation in his medical report".*
28. The FtT fully considered the contents of the psychiatric report and was entitled to attach weight to it. The FtT's factual findings in respect of the

report in light of the contents of the report itself and the additional matters set out above do not reach the high threshold of perversity alleged.

Conclusion

29. It follows that none of the SSHD's grounds of appeal are made out and his appeal is dismissed.

Decision

30. The FtT decision does not contain an error of law and we do not set it aside.

Signed

Date

UTJ Owens
Upper Tribunal Judge Owens

7 August 2019