IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005158

First-tier Tribunal No:
EA/05334/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:

18th March 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Appiah DANQUAH
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms G Fama of Counsel instructed by BWF Solicitors

Heard at Field House on 4 March 2024

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of First-tier Tribunal Judge Morgan promulgated on 12 February 2021 allowing an appeal against a decision dated 18 September 2019 to refuse to issue a residence card under the Immigration (European Economic Area) Regulations 2016.

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2. Although before me the appellant is the Secretary of State and the respondent is Mr Danquah, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to the Secretary of State as the Respondent and Mr Danquah as the Appellant.

3. The appeal was heard by the First-tier Tribunal in February 2021, and a Decision promulgated the same month. An application for permission to appeal to the Upper Tribunal was refused by First-tier Tribunal Judge Nightingale on 4 March 2021. For reasons that are unclear the subsequent renewed application for permission to appeal was not allocated to a Judge of the Upper Tribunal until 26 January 2024: on the same date Upper Tribunal Judge Norton-Taylor granted permission to appeal. Although the delay was noted by the Appellant's representative before me, there was no application or submission from either party to suggest that the Tribunal was not seised of jurisdiction.

4. The Appellant is a citizen of Ghana born on 2 December 1969. His application under the 2016 Regulations was based on being the spouse of Ms Akua Agyeman Bans (d.o.b. 5 January 1965), a citizen of Germany – (the 'Sponsor').

5. The Appellant claims to have entered the UK unlawfully in 2014. There was seemingly no attempt to regularise his immigration status until November 2016 when he made his first application for a residence card under the 2016 Regulations. Then, as now, the Appellant relied upon his marriage to the Sponsor by way of a proxy ceremony in Ghana on 17 April 2015 (both the Appellant and the Sponsor being present in the UK on that date).

6. The Appellant and the Sponsor were interviewed by the Respondent separately on 23 June 2017. In consequence of the interviews the Respondent determined that the Appellant's marriage was a marriage of convenience and accordingly his application was refused on 23 June 2017.

7. The Appellant appealed to the IAC. His appeal was heard on 4 June 2018 and dismissed for reasons set out in a 'Decision and Reasons' of First-tier Tribunal Judge Wylie promulgated on 25 June 2018 (ref. EA/05893/2017).

8. For completeness I note that there appears to have been two further applications for a residence card: one made on 18 July 2017, rejected on 24 August 2017, and another made on 14 March 2019 rejected on 2 April 2019. (The first of these appears to have been made whilst appeal EA/05893/2017 was pending.)

9. On 8 April 2019 the Appellant made a further application for a residence card, the refusal of which is the basis of these proceedings.

10. The application was refused for reasons set out in the decision letter of 18 September 2019. The decision letter draws extensively on the interviews of 23 June 2017, and further on the findings of Judge Wylie. The application was again refused on the basis that the Respondent considered the Appellant's marriage to be a marriage of convenience.

11. The Appellant appealed again to the IAC.

12. The Appellant's appeal was allowed for reasons set out in the 'Decision and Reasons' of First-tier Tribunal Judge Morgan promulgated on 12 February 2021.

13. Permission to appeal was granted by Upper Tribunal Judge Norton-Taylor on 26 January 2024. In material part the grant of permission states:

> "*4. Although the judge properly directed himself to Devaseelan, it is arguable that he did not engage with the aspect of the guidance set out at [40(4)] in respect of evidence which could and perhaps should have been adduced in the previous proceedings.*
>
> *5. Although I note the judge's use of the words "were not" in line 3 of [10], it is also arguable that he focused on the current state of the relationship, rather than the intention of the parties at the inception of the marriage.*"

14. The grant of permission to appeal was not restricted in any way (see paragraph 6 of the decision of Judge Norton-Taylor). The Grounds include a 'reasons' challenge – see paragraphs 2(a) and (b).

Consideration of the 'error of law' challenge

15. In the premises it is to be noted that although the interview transcripts of 23 June 2017 were not available to the First-tier Tribunal, the Respondent's perception of the difficulties arising from such interviews was set out in considerable detail in the decision letter of 18 September 2019. This included: an apparent mutual lack of knowledge of respective backgrounds; the Sponsor's apparent unfamiliarity with the Appellant's immigration history; the Appellant's limited knowledge of the Sponsor's marital history; the Appellant's limited knowledge of the lives of the Sponsor's older children; differing accounts as to when information about each other's children was first shared; differing accounts as to the circumstances of first meeting, and a lack of detail as to how a relationship developed; differing dates for the commencement of cohabitation; differing accounts as to the circumstances of any proposal to marry, and in respect of an engagement ring; and differing accounts in relation to the proxy marriage ceremony.

16. Further to the above, it is apparent that the Appellant sought to address some of these matters in the previous appeal proceedings: e.g. see Decision of Judge Wylie at paragraphs 9-10. However, Judge Wylie ultimately rejected such explanations.

17. I note the following features of the previous decision:

> (i) The evidence as to cohabitation (at an address in Connaught Road, Chatham) was essentially limited to the testimony of the Appellant and the Sponsor. No weight was accorded to an un-signed and undated statement from the Sponsor's brother, Daniel Tabiri. (See paragraphs 20 and 26.)
>
> (ii) The Judge found further difficulties in the circumstantial evidence in respect of where the Appellant and the Sponsor might be living, in particular with regard to the Sponsor's youngest son: e.g. see paragraphs 22-25.

18. Before First-tier Tribunal Judge Morgan it was argued on behalf of the Appellant whilst the previous decision was "*the starting point*", further evidence had now been provided of cohabitation and that "*the evidence has moved on significantly... particularly given the oral evidence of the two witnesses*". The reference to 'two witnesses' is to the Sponsor's brother, Daniel Tabiri, and one of the Sponsor's sons. (See paragraph 3, and similarly paragraph 8.)

19. Judge Morgan was "*persuaded by [the] submissions*" (paragraph 9). The seemingly determinative findings and reasoning in the appeal are also set out at paragraph 9:

> "*Whilst I note the concerns that led the previous judge to conclude that the couple were party to a marriage of convenience, I have had the benefit of oral evidence from the appellant's brother-in-law and stepson who live with the appellant in the family home. Further this evidence was given from the family home. I find the stepson's evidence to be particularly telling. He stated that he saw the appellant as a father figure and confirmed that the appellant had been living with his mother for the past five years. The stepson noted in particular the support given by the appellant to his mother with her younger son, his brother, who suffers from sickle-cell. He also confirmed that the appellant had started to help him following the birth of his own child when he and his partner were at work.*"

20. I note that whilst the Decision contains references to the fact of the Respondent's reliance upon the interviews (paragraph 6), and the "*previous judge's concerns*" (paragraph 7), there is no articulation within the Decision of exactly what the Respondent perceived the difficulties arising from the interviews to be, and there is no articulation of the nature and reasons for Judge Wylie's adverse evaluation of the Appellant's evidence and case. Whilst of course it is not incumbent upon a Judge to make detailed reference to every aspect of an appeal, these matters constituted the substance of the Respondent's case. It is unsatisfactory that the substance of the Respondent's case was not clearly articulated within the Decision. This is the more so when ultimately the Judge was setting other evidence against such the Respondent's case, and finding that the other evidence prevailed.

21. In this context, and generally, paragraph 10 of the Decision requires scrutiny:

> "*In light of the oral evidence of the appellant and his witnesses particularly the brother with whom they live and the stepson, I find that the appellant has demonstrated on a balance of probabilities that he and his wife were not and are not parties to a marriage of convenience. Both the appellant and his wife have provided further explanations for the discrepancies identified by the judge in the previous determination. Given the oral evidence outlined above, which was not before the previous judge I find that a lengthy consideration of these responses not to be particularly helpful. I find in line with the previous determination that the judge's concerns about the discrepancies at the previous interview remain, despite the non-provision of that interview by the respondent. However given the fresh evidence before me I find that the appellant has sufficiently responded to those concerns and demonstrated on a balance of probability that he and his partner are not party to a marriage of convenience.*"

22. I note the following in respect of paragraph 10:

> (i) The Judge observes that the Appellant and the Sponsor had "*provided further explanations for the discrepancies identified by the judge in the previous determination*". However, the Judge declines to identify what those explanations were, suggesting that "*a lengthy consideration of these responses not to be particularly helpful*". This is unsatisfactory in itself, both generally, and especially because this amounts to a failure to address the substance of the Respondent's case. (This compounds the unsatisfactory feature of the Judge not having expressly articulated the Respondent's case in any event.)

(ii) Then, confusingly, the Judge appears to conclude that whatever the responses offered by the Appellant might have been they did not in substance explain the discrepancies: "*I find in line with the previous determination that the judge's concerns about the discrepancies at the previous interview remain*".

(iii) In such circumstances it is incomprehensible on what basis the Judge then concluded that the Appellant "*has sufficiently responded to those concerns*".

23. In circumstances where the Judge seemingly in terms acknowledged that the Appellant had failed to explain away all of the difficulties that informed the Respondent's previous decision, and the previous decision of the Tribunal, it is not apparent, and there is seemingly no attempt to explain, how such a history was reconciled with the Judge's acceptance of the persuasive nature of the oral testimony offered at the hearing. In my judgement the reader of the decision is left to make the inescapable inference that because the Judge found the oral evidence plausible and consistent it was to be accepted without more. This was to fail to evaluate the evidence in the round and to explain why the apparent credibility of the oral testimony overcame all of the other difficulties in the case that had informed the previous adverse decisions; moreover it was to fail to address the substance of the Respondent's case.

24. In conclusion on this point, it is my judgement that it is not apparent that the evaluation of the Appellant's evidence and his supporting witnesses included any proper assessment of the matters that had informed the earlier appeal decision. In particular there is no engagement as to why in the earlier proceedings not only had the Appellant and the Sponsor failed to explain extensive and significant differences in their respective interviews (which also revealed significant lack of knowledge of each other), but the Appellant had been unable to provide any persuasive evidence of cohabitation with the Sponsor - there being unsatisfactory evidence as to the place of residence. What the Judge perceived as the apparent credibility of the Appellant and his witnesses is not sufficient if that credibility has not been evaluated 'in the round' with the unsatisfactory nature of the evidence presented previously and the (seemingly continuing) failure to explain away the issues raised in consequence of the interviews.

25. This inadequacy of reasoning is compounded by the Judge's apparent failure to direct himself in accordance with the guidance in **Devaseelan** to treat the evidence of the two witnesses "*with the greatest circumspection*" (paragraph 40(4)).

26. Mr Tabiri's testimony before Judge Morgan was essentially similar to that offered in the unsigned and undated statement before Judge Wylie:

however, there was seemingly no exploration or consideration of why he had not supported his testimony by way of either or both a signature and attendance at the appeal hearing before Judge Wylie.

27. Although the Sponsor's son that gave evidence is not expressly identify by name in the Decision, and his witness statement does not give his date of birth, it is apparent that it was not the Sponsor's youngest son because the witness made reference to his younger brother. It is apparent from the decision letter that this son, the witness, was born in 1996 and was a 21 year old student at the time of the interviews. As such he would have been an adult with full capacity at the date of the hearing before Judge Wylie. There was no exploration as to why he offered no evidence in the previous proceedings.

28. In all such circumstances I conclude that the Respondent's challenge to the decision of Judge Morgan succeeds. The decision of Judge Morgan requires to be set aside.

29. The remaking of the decision in the appeal will require a comprehensive reappraisal of all of the available evidence, including oral testimony. In all the circumstances the most appropriate forum is the First-tier Tribunal: the appeal will be remitted accordingly.

Further observation

30. The ongoing management of the appeal will be a matter for the First-tier Tribunal. It will also be a matter for the parties as to what if any further evidence they may wish to rely upon, and what particular submissions they may wish to advance before the First-tier Tribunal. Notwithstanding that these are not strictly speaking matters for me, bearing in mind the somewhat perfunctory treatment of the issues before the First-tier Tribunal, including little consideration to the documentary evidence, and bearing in mind that I have had the opportunity of scrutinising with some care the materials on file, I consider it appropriate to make the following observations. I do so cognisant of the fact that these were not the subject of discussion before me – (in circumstances where the Respondent's Grounds were adequately made out it was unnecessary for me to invite discussion on any further issues).

31. An aspect of the previous proceedings was the unsatisfactory nature of the evidence in respect of where the Appellant and the Sponsor claimed to be cohabiting. It had been said that they lived at Mr Tabiri's address in Connaught Road. In the present proceedings it was again said that they continued to live with Mr Tabiri, albeit now at a different address (Ballens Road, Chatham). There was no suggestion in the witness statements of any of the Appellant, the Sponsor, Mr Tabiri, or Bornda Danquah (the Sponsor's son) that either the Appellant or the Sponsor had resided at any

other address or addresses since cohabiting. However, other addresses appear on the various documents, and do so in some part in a manner that – without further clarification - might undermine the notion of cohabitation. For example:

(i) Money transfers in the Sponsor's name dated 8/9/17, 15/9/17, 3/1/19, and 7/2/19 give her address as being in Oak Bank, Croydon.

(ii) Money transfers in the Sponsor's name dated 5/4/19 and 6/5/19 give ger address as being in Corner Road, Kent.

(iii) Money transfers in the Sponsor's name dated 10/6/19, 1/9/19, 5/10/2019, 4/11/19, and 2/12/19 seemingly have the Sponsor back at Oak Bank, Croydon.

(iv) There is no evidence that ties the Appellant to either Oak Bank or Corner Road. Indeed his statements only refers to in living at Connaught Road and Ballens Road.

(v) The Appellant's NHS registration letter dated 12/2/19 uses the Connaught Road address; a GP letter dated 9/10/19 gives the Appellant's address as Ballens Road. These addresses are seemingly not readily reconcilable with the Sponsor's money transfer addresses approximate to those dates. Nor is the Sponsor's employer's letter of 27/2/19 which uses the Connaught Road address.

32. It may be seen that the evidence raises issues of the extent to which the Sponsor in particular has lived at either the Connaught Road or Ballens Road addresses, and whether or not such addresses are used by either or both the Appellant and the Sponsor primarily as correspondence addresses: e.g. see the Appellant's application form in which he expressly referred to the Connaught Road address as a correspondence address whilst giving a different address as his home address.

33. Clarification of such matters is likely to impact on any evaluation of other aspects of the testimonies that have been offered in these proceedings.

34. Further, there is a money transfer in the name 'Kwadwo Danquah' dated 5/12/18 in which his address is given as the Oak Bank address. This approximates to the period in which the Sponsor was seemingly at the Oak Bank address. It is unclear who 'Kwadwo Danquah' is. It is apparent from the decision letter that the Sponsor had a child with a 'Quda Danquah'. Some further clarification in respect of this particular money transfer may be helpful.

Notice of Decision

35. The decision of the First-tier Tribunal contained a material error of law and is set aside.

36. The decision in the appeal is to be remade before the First-tier Tribunal, with all issues at large, by any Judge other than First-tier Tribunal Judge Morgan or First-tier Tribunal Judge Nightingale.

Ian Lewis

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

13 March 2024