IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006668
First-tier Tribunal No: EA/03825/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 29 May 2024

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOHN OSEI-KOFI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr N. Wain, Senior Home Office Presenting Officer
For the Respondent: Mr E. Ajala, legal representative, Almond Legals

Heard at Field House on 19 February 2024

DECISION AND REASONS

1. Although the appellant in these proceedings is the Secretary of State, I refer to the parties as they were before the First-tier Tribunal ("FtT").

2. The appellant is a citizen of Ghana, born in 1974. On 18 December 2020 (according to the appellant's witness statement dated 21 August 2021) he made an application for settled or pre-settled status under the EU Settlement Scheme ("EUSS"). That application was refused in a decision dated 17 February 2021. The appellant had made previous applications for

a residence card in relation to the same spouse in 2012, 2013 and seemingly twice in 2014.

3. The appellant appealed the latest decision and his appeal came before First-tier Tribunal Judge Davey at a hearing on 21 October 2021, following which his appeal was allowed in a decision promulgated on 17 August 2022. Permission to appeal to the Upper Tribunal ("UT") was granted by a judge of the First-tier Tribunal ("FtT").

Judge Davey's decision

4. Judge Davey referred to the respondent's decision raising doubts about the validity of the appellant's customary marriage (to his ex-wife) in Ghana. He referred to the respondent's contention that a Nigerian and a Ghanian could not have a valid customary marriage in Ghana, the respondent having concluded that because of where the appellant's ex-wife was born (in Nigeria), that she was a Nigerian national. Having considered his ex-wife's birth certificate and her parents' nationality he concluded that the appellant's ex-wife was in fact Ghanian.

5. Judge Davey, in summary, concluded that although the respondent suggested that the appellant's customary marriage to his ex-wife was not valid because she was Nigerian, there was in fact no evidence to support that contention and the evidence indicated that she was Ghanian. He said that no evidence of Ghanian or Nigerian law had been put before him to support the respondent's view.

6. In addition, he stated that although the respondent had asserted that the signature on the customary marriage document said to be that of the appellant's ex-wife was different from that on her passport, neither of those two documents was put before him by the respondent. "even assuming I would be able to detect what was said to be the material differences in the signatures". He added that if the respondent wished to raise those points (about nationality and signatures) there would need to be more than "general assertion", which is all that there was.

7. He concluded that in the absence of proof that the documents were anything other than genuine, there was nothing by way of evidence to doubt the relationship or the fact of marriage between the appellant and his ex-wife.

8. Judge Davey went on to conclude at para 6 that there was nothing to suggest that the appellant's ex-wife was not a Belgian national, as had been asserted by the appellant when she was working during the marriage to the appellant. He noted that no issue was taken as to the length of the marriage or the duration of the marriage before divorce proceedings were commenced "which it would seem likely was at some time at the end of 2000 or 2001". That is clearly an error on Judge Davey's part given that the marriage did not take place until 10 September 2011 and the decree

absolute according to the appellant was on 22 February 2018, but nothing turns on that mistake.

9. At para 7 Judge Davey referred to what was said in the refusal decision about an earlier decision in appeal proceedings in relation to the appellant, and in which the immigration judge did not accept that there was a marriage "for reasons that are not clear". He stated that the respondent had sought to rely on that earlier decision by selectively quoting extracts from the earlier reasons for refusal but had not produced that tribunal decision. He noted that despite directions having been given on 28 July 2021 there was no respondent's bundle "nor any other documents which the Respondent relied upon as raising doubts about the validity of the marriage or any other material aspects of it." He stated that it was a matter of choice for the respondent as to how "these cases" are prepared and that the "case officer" (presumably, presenting officer) "was not provided with the ammunition, if any, on which to proceed to argue a case".

10. At para 8 he stated that the presenting officer had done the best he could with the "limited hand of cards" he had been provided with, and it was the respondent's failure if there was any substance to the criticisms raised.

11. Judge Davey went on to state at para 8 that there was no basis to refuse the appellant a residence card "and no issues are taken on what I would call the nuts and bolts of engaging with the Regulations or the evidence to establish the exercise of treaty rights. It is the dearth of evidence that is the undoing of the Respondent's claims."

12. Under the subheading "Decision" Judge Davey stated that the "appeal is allowed under the EEA Regulations 2016 and there was no apparent impediment to the grant of a residence card and its commutation it would seem under the settlement scheme into a basis to remain."

The grounds of appeal

13. The grounds of appeal contend that Judge Davey materially misdirected himself in law in allowing the appeal under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"), despite that not being a permissible ground of appeal. The appellant's application for settled status had been made under Appendix EU of the Immigration Rules ("the Rules") and the right of appeal was pursuant to The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the Appeals Regulations").

14. The respondent's grounds to the UT refer to reg 8 of the Appeals Regulations which provide that an appeal such as this must be brought on one or both grounds which are limited to asserting a breach of the appellant's rights under the Withdrawal Agreement ("WA") or that the decision is not in accordance with the Rules. The respondent's grounds contend that Judge Davey incorrectly treated the appellant's appeal rights

as being derived from reg 36 of the EEA Regulations. The grounds continue that as the appellant's application was not made or refused with reference to the EEA Regulations, there was no reg 36 appeal before it.

15. It is further argued that no findings were made in relation to either permissible ground (under the WA or under the Rules). The grounds rely on *Batool and others (other family members: EU exit)*[2022] UKUT 00219 (IAC).

16. It is also argued that Judge Davey's decision fails to apply the principles in *Devaseelan v Secretary of State for the Home Department* [2002] UKIAT 00702, in failing to treat the previous findings as to the validity of the appellant's Ghanian proxy marriage as the starting point in the appeal. In particular, para 18 of the earlier decision of the FtT was quoted in the refusal letter, and in which it was found that the sponsor (the appellant's ex-wife) is a Belgian citizen and has "no Ghanian lineage", and that the customary marriage is not in accordance with Ghanian law and is not valid in Ghana. It is argued that Judge Davey "has not addressed the discrepancies between the previous and current appeal in relation to his claimed ex-wife's Ghanian lineage or treated them with the circumspection" as set out in *Devaseelan*.

The parties' oral submissions

17. Although the FtT judge who granted permission to appeal said in the body of the decision that permission to appeal was not granted (i.e. was refused) in relation to the *Devaseelan* point, and that only the ground in relation to appeal rights was arguable, the grant of permission is not effective in limiting the grounds of appeal, applying the UT's decision in *Safi and others (permission to appeal decisions)* [2018] UKUT 00388 (IAC). That part of the standard form document that contains the decision (as distinct from the reasons for the decision) does not limit the grant as it should. The parties before me agreed that in the circumstances the grant of permission was not limited.

18. In his submissions on behalf of the respondent Mr Wain stated that he did not presently have the earlier decision of the FtT but would be able to provide a paper copy (although it has not to date been provided).

19. Mr Wain relied on the grounds of appeal, reiterating the Judge Davey did not have jurisdiction to allow the appeal under the EEA Regulations, given that the appeal was under Appendix EU and the grounds of appeal were limited as set out in the grounds. It was submitted that Judge Davey's conclusions at para 8 that there was no basis to refuse a residence card under the EEA Regulations, and no issue taken on the exercise of Treaty rights, were conclusions that had no relevance to the permissible appeal grounds.

20. In relation to the *Devaseelan* point, Mr Wain accepted that the respondent had not provided the previous decision or the documents referred to by

Judge Davey. However, the refusal letter in the instant appeal referred to relevant paragraphs of the earlier decision of the FtT in relation to the proxy marriage and whether the appellant's ex-wife was a national of Ghana or in fact a Belgian national. Judge Davey had not said why he departed from the findings made in the earlier decision and had not referred to any new evidence on the relevant issues.

21. Mr Wain accepted that although *Batool* was referred to in the grounds, it was not strictly relevant because the appellant's application was made before the specified date and was an application under Appendix EU.

22. Mr Ajala relied on his skeleton argument for the hearing before me. He submitted that Judge Davey's decision was properly reasoned and any "mistake" was not material to the outcome. It was submitted that Judge Davey only made a mistake in the way that he expressed himself. It was submitted that it was clear from para 8 that he was well aware that the appeal was under Appendix EU.

23. It was further submitted that Judge Davey had dealt with all the relevant issues. There was no difference between the EEA Regulations and Appendix EU in relation to a retained right of residence. As regards the EEA Regulations, there would need to be evidence of the exercise of Treaty rights but that was not material to Appendix EU. The appellant only needed to show a genuine relationship with the sponsor, that the marriage had lasted three years, that there was residence in the UK for a period of a year, and that the marriage had broken down. The appellant did not need to provide evidence of the exercise of Treaty rights so this was not a material error.

24. It was submitted that all that Judge Davey had done was to quote the wrong rules. That was not a material error, it was submitted and there was no unfairness to the respondent. Judge Davey had dealt with the main issues, it was submitted. Under the 'Decision' subheading he had referred to the EUSS.

25. Mr Ajala further submitted that Judge Davey had clearly dealt with the *Devaseelan* point at para 7 so it was not correct to say that he had not considered the earlier decision. He had referred to it at paras 2 and 3 and there was evidence before him that was not before the previous judge. In reply to my enquiry as to what additional evidence Judge Davey had before him that was not before the first judge, Mr Ajala referred to para 2 line 9 of Judge Davey's decision, which is a reference to the appellant's ex-wife's mother's birth certificate, although Mr Ajala was unable to point to where Judge Davey had said that this was additional evidence that was not before the previous judge.

26. In response to a further question from me in terms of whether Judge Davey needed to identify what additional evidence he had before him but also to indicate why it persuaded him that it made a difference in the appeal before him, Mr Ajala submitted that the respondent had not

complied with directions to provide the earlier decision of the FtT. He submitted that Judge Davey could not have erred by not considering evidence that was not put before him.

27. In response to my enquiry as to whether the appellant's representatives had the earlier tribunal's decision, Mr Ajala indicated that although he did not have the earlier decision, he thought that the appellant's representatives did have it.

28. In reply, Mr Wain submitted that the judge in the earlier appeal dismissed the appeal with reference to reg 10 of the EEA Regulations in terms of retained rights of residence and reg 8 as to a durable relationship, as set out in the refusal letter. Mr Wain submitted that Judge Davey clearly, and wrongly, had in mind the EEA Regulations. This was a further indication of error in considering the *Devaseelan* point. He did not refer to *Devaseelan* at all or what effect the new evidence had on that earlier decision.

Assessment and conclusions

29. It is an undisputed fact that there was an earlier appeal before the FtT, in 2014. That appears to have been an appeal pursuant to the Immigration (European Economic Area) Regulations 2006 (as distinct from the 2016 Regulations), against a refusal to grant a residence card as a spouse. That application was in relation to his ex-wife and in respect of whom this appeal relates.

30. To say that it is regrettable that the respondent did not comply with directions made by the FtT to provide that earlier decision by the immigration judge is a considerable understatement, quite apart from the fact that such a direction should not have been necessary in any event.

31. That failing was compounded by the fact that the earlier decision was not provided to me by the respondent. Given that one of the two respondent's grounds of appeal rely on the asserted failure of Judge Davey to have had proper regard to that decision and the principles in *Devaseelan*, it is almost impossible to understand why the decision was not available at the appeal before me. Judge Davey was entirely justified in his criticisms of the respondent made in para 7 of his decision.

32. Having said all that, the respondent's decision refusing the application for a residence card in the instant appeal contains a summary of the earlier decision with direct quotations from it on what appear to be the material issues that led to the appeal being dismissed. It is not said on behalf of the appellant that the references to that earlier decision, or the quotations, are inaccurate.

33. At para 7 of his decision Judge Davey said that the refusal letter relied on an earlier determination by an immigration judge who, "for reasons that are not clear" did not accept that there was a marriage "of some sort". Although he noted that the decision had not been provided to him, it is

difficult to see why he concluded that the reasons given in that earlier decision by the judge were not clear; he had referred to those reasons at paras 2-4 of his decision.

34. In fact, although he did refer at para 2-4 to those reasons given by the judge in the appeal in 2014, he did not in those paragraphs give any indication that he was aware that he was dealing with reasons given in an earlier appeal by another judge. He does not say so in paras 2-4. Unfortunately, there is no indication from Judge Davey's decision that he had in mind the guidance in *Devaseelan*.

35. It is not apparent what submissions were made to Judge Davey in terms of any new evidence that was not before the judge who decided the appeal in 2014. On enquiry from me Mr Ajala was not able clearly to identify what additional evidence was provided to Judge Davey that was not provided at the appeal in 2014. The appellant's witness statement refers to the evidence he provided in support of the instant appeal but I was not given any clear indication of what the additional evidence was.

36. Furthermore, an aspect of the guidance in *Devaseelan* is a consideration of why any additional evidence was not provided at the time of the earlier appeal. There is no such consideration in Judge Davey's decision.

37. Whilst the primary responsibility for making good the case in relation to the earlier decision of the FtT lies with the respondent who relies on it, it seems to me that it was open to the appellant's representatives themselves to produce the earlier decision to Judge Davey, or indeed to me, in support of any submissions pertaining to additional evidence that was not before the first judge. Mr Ajala indicated to me that he thought that the representatives did have a copy of the earlier decision, and of course it is a decision that would have been provided to the appellant himself at the time.

38. Notwithstanding the respondent's default in relation to the earlier decision of the FtT, I am satisfied that Judge Davey erred in law in failing to apply the guidance given in *Devaseelan* in relation to the earlier decision. He would have been entitled to refer to the limitations on his consideration of that decision given that only extracts of it were before him, but they were clearly material parts of that decision. As I have already stated, it is a fact that there was that earlier appeal and there has been no dispute as to the accuracy of those parts of it relied on by the respondent.

39. That error of law requires the decision to be set aside.

40. As regards the ground in relation to appeal rights and the misapplication of the EEA Regulations, it is clear that Judge Davey misdirected himself as to the basis of the appeal in terms of appeal rights and the basis upon which the appeal could succeed. The reference to the appeal being allowed under the EEA Regulations was incorrect in law. However, given that Judge Davey went on to refer to "the settlement scheme", I would

not, otherwise, have regarded that error of law alone as being a sufficient basis to set the decision aside. It is, however, a matter that requires the decision to be set aside when considered with the error of law in relation to *Devaseelan*.

Decision

41. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision to allow the appeal is set aside and the appeal is remitted to the First-tier Tribunal for a hearing *de novo* with no findings of fact preserved, before a judge other than Judge T. Davey.

A.M. Kopieczek

Upper Tribunal Judge Kopieczek 24/5/2024