IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005108
First-tier Tribunal No: EA/00138/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 07 August 2024

Before

UPPER TRIBUNAL JUDGE DANIEL SHERIDAN
UPPER TRIBUNAL JUDGE BULPITT

Between

Ahmed Djemel
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr Collins, Counsel instructed by BMAP
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

Heard at Field House on 22 July 2024

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DECISION AND REASONS

1. By a decision issued on 29 April 2024 a differently constituted Panel set aside the decision of the First-tier Tribunal and decided that the decision should be re-made in the Upper Tribunal. We now re-make the decision.

Background

2. The appellant, who is a citizen of Algeria, applied for leave under the EU Settlement Scheme as a family member of an EEA national who has retained a right of residence following the termination of a marriage. We will refer to the EEA national in question as "the former spouse".

3. In a decision dated 9 December 2022 ("the SSHD decision"), the respondent refused the appellant's application under the EU Settlement Scheme on the basis that (i) he had not provided any evidence to confirm he had been issued the decree absolute; (ii) he had not provided any proof of the former spouse's identity and nationality; (iii) he had not provided any evidence of the former

spouse's residence in the UK for one year of the marriage or at the time of the divorce; and (iv) the respondent's records do not show that the former spouse has been granted leave under Appendix EU and the appellant did not provide any evidence to show that she had.

4. Although not raised in the SSHD decision, an important aspect of the background to this appeal – which is highlighted in Mr Melvin's skeleton argument – is that the First-tier Tribunal has on three occasions (in 2015, 2019 and 2021) found that the appellant's marriage to the former spouse was a "marriage of convenience".

5. The appellant appeals against the SSHD decision under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 on basis that the SSHD decision is not in accordance with Appendix EU of the Immigration Rules. It was open to the appellant to argue that the SSHD decision also breaches rights that he has by virtue of the EU Withdrawal Agreement: see section 8(2) of the 2020 Regulations. However, no such argument was advanced and the appeal before us was solely concerned with the ground specified in section 8(3) of the 2020 Regulations; i.e.: whether the SSHD decision is in accordance with Appendix EU.

Adjournment

6. Shortly before the hearing, the appellant's representatives made an application stating that as there had been a complete breakdown in the relationship between the appellant and the former spouse, they were seeking an adjournment in order to have time to obtain information from HMRC about the former spouse. The Upper Tribunal responded to the application by stating that as there was insufficient time for the respondent to provide a response, the hearing would proceed; but the question of whether to adjourn would be considered as a preliminary matter at the hearing.

7. At the hearing, Mr Collins did not pursue the application to adjourn; and he confirmed, when asked, that an adjournment was not sought. As neither party sought an adjournment at the hearing, we did not consider it in the interests of justice to adjourn and decided to proceed.

Documents

8. The appellant did not file with the Upper Tribunal a bundle of documents, as required by the Standard Directions. However, it was apparent to us from Mr Collins' skeleton argument that a bundle had been prepared. Mr Melvin emailed us a copy of the bundle (which had been emailed to him the day before). Despite the procedural irregularity, we have admitted (and fully considered) the bundle.

The Appellant's Evidence

9. The appellant relied on his witness statement dated 3 July 2024 as well as his oral evidence (given through an interpreter) and the documents in the bundle.

10. We have been able to piece together from the evidence the appellant's marital status. The appellant states in his statement that he married the former spouse in 2013. The bundle includes a decree nisi dated 7 September 2021. In his oral evidence, the appellant stated that he applied about four months ago for the decree absolute but the application is still pending.

11. In his witness statement the appellant describes having a genuine relationship with the former spouse. His explanation, in response to Mr Melvin's questioning, for why three First-tier Tribunal decisions found that his marriage was a marriage

of convenience, was that he was let down by his former solicitors. However, he acknowledged that he has not made a complaint about them.

12. His oral evidence was that he has not had any contact with former spouse since 2016.

13. He stated that he is not in contact with anyone who could vouch for the marriage.

Analysis

14. Mr Collins and Mr Melvin were in agreement that the appellant cannot succeed if his marriage to the former spouse was a "marriage of convenience". Mr Collins suggested that we should address this issue first, as if we are satisfied that the marriage was a marriage of convenience there would be no need to address the evidential shortcomings identified in the SSHD decision. Accordingly, we begin by addressing the question of whether the marriage was a "marriage of convenience".

15. The legal burden lies on the respondent to prove that an otherwise valid marriage is a marriage of convenience.

16. Appendix EU defines a marriage of convenience as a:

> marriage entered into as a means to circumvent:
>
> (a) any criterion the party would have to meet in order to enjoy a right to enter or reside in the UK under the EEA Regulations; or
>
> (b) any other provision of UK immigration law or any requirement of the Immigration Rules; or
>
> (c) any criterion the party would otherwise have to meet in order to enjoy a right to enter or reside in the UK under EU law; or
>
> (d) any criterion the party would have to meet in order to enjoy a right to enter or reside in the Islands under Islands law

17. When the First-tier Tribunal decided - in 2015, 2019 and 2021- that the marriage between the appellant and the former partner was a "marriage of convenience" the definition in Appendix EU did not exist. However, "marriage of convenience" was defined in the Immigration (European Economic Area) Regulations 2016 in the following terms:

> A marriage entered into for the purpose of using these Regulations, or any other right conferred by the EU Treaties, as a means to circumvent –
>
> (a) Immigration Rules applying to non-EEA nationals (such as an applicable requirement under the 1971 Act to have leave to enter or remain in the United Kingdom); or
>
> (b) Any other criteria that the party to the marriage of convenience will otherwise have to meet in order to enjoy a right to reside under these Regulations or the EU Treaties; …

18. It was not disputed by Mr Collins that the two definitions are broadly the same; and that factual findings giving rise to a finding that there has been a "marriage of convenience" under the 2016 Regulations would mean that the marriage was also a "marriage of convenience" for the purposes of Appendix EU.

19. Mr Melvin relied on the starred decision *Devaseelan* [2002] UKIAT 00702. He maintained, in accordance with *Devaseelan*, that the previous First-tier Tribunal

decisions are a starting point from which we should only depart if there is a good reason supported by evidence. Mr Collins argued that appellant's oral evidence, considered together with his witness statement and the documents within the bundle, amount to a good reason to depart from the earlier judicial decisions.

20. The starting point is that the previous judges who considered this matter decided that the appellant's marriage to the former spouse was a marriage of convenience. It is significant that those decisions were reached much closer in time to the marriage and while on the appellant's account he was still in contact with the former spouse. These decisions are not a legal straitjacket: we can depart from them if the evidence (in particular evidence that was not before the previous judges) points to a different conclusion.

21. However, there was not any evidence before us that could justify reaching a different conclusion to the previous judges. The appellant's oral and written evidence lacked any detail and amounted to no more than an assertion that the marriage was not a marriage of convenience. The appellant did not provide witness evidence (or even a letter) from any friends, family or acquaintances corroborating the marriage. The documentary evidence in the bundle is extremely limited and Mr Collins did not identify any specific document that supports the appellant's claim that the marriage was not a marriage of convenience. In the light of the previous judicial decisions and the absence of any evidence to justify reaching a different conclusion, we are satisfied that the respondent has discharged the burden of establishing that the marriage was a marriage of convenience.

22. In the light of this finding, it is not necessary to consider whether there are other reasons that the appellant does not meet the requirements of Appendix EU. However, for completeness we observe that Mr Collins accepted (in paragraphs 7 – 8 of his skeleton argument) that the appellant has failed to provide sufficient evidence to establish (i) that a decree absolute has been issued; (ii) that the former spouse was resident in the UK for one year or at the time of the divorce; or (iii) the identity and nationality of the former spouse. Moreover, we note that at the hearing the appellant accepted that the decree absolute had not yet been obtained. For these reasons, even if we were not persuaded by the respondent that the marriage was a marriage of convenience, the appellant cannot succeed because he does not satisfy several of the requirements specified in Appendix EU.

Notice of Decision

23. The appeal is dismissed.

D. Sheridan
Upper Tribunal Judge Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 July 2024