IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006179

First-tier Tribunal No: EA/03809/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

3rd November 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ABDEL GHANI KESMY
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETAY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Choudhury instructed by IJN Law Solicitors.
For the Respondent: Ms Young, a Senior Home Office Presenting Officer.

Heard at Phoenix House (Bradford) on 25 October 2023

DECISION AND REASONS

1. The Appellant appeals with permission a decision of First-tier Tribunal Judge Saffer ('the Judge'), promulgated on 19 July 2022, in which the Judge dismissed the Appellant's appeal against the refusal of his application for a Residence Card as a spouse/partner of Mrs Badia Laghmich ('the Sponsor'), a Belgian national, born on 1 January 1953.
2. The Appellant is a male citizen of Morocco born on 9 November 1979. He applied on 24 December 2020 for a residence card which was refused on 22 February 2021 as the decision-maker was not satisfied there was adequate evidence the Appellant and Sponsor were married, or that the Sponsor was exercising Treaty rights.
3. Having considered the oral and documentary evidence the Judge sets out his findings from [10] of the decision under challenge.
4. The Judge makes a core finding at [12] where it is written:

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> 12 I put it to both of them that there was a very significant age gap with her being 26 years older than him, and it appearing it may have been a relationship designed purely to get around EEA rules. They both denied this. I do not believe them and I am not satisfied that the Appellant or Mrs Laghmich were married when the application was submitted, or that they work durable partners in a genuine and subsisting relationship at the date of application, date of decision, or now for these reasons.

5. The Judge's reasons, in summary, are that they were not married when the application was submitted as an Islamic marriage is not the same as a marriage recognised by the Registrar of Marriages [13]. The Judge noted in the statements the Appellant and Sponsor's claim they met in November 2020 yet in their oral evidence they stated it was November 2015 and in the application March 2015. The Judge does not accept the discrepancy was due to interpreter error but notes it transpired that the friendship was platonic from 2015 to 2020 [14]. The Judge find the Appellant misled the person who undertook the Islamic marriage as on the document it says he was divorced whereas his Registrar marriage certificate states he was single [15]. There are no documents to confirm they attempted to contact the Registrar of Marriages in December 2020 [16]. Sharing accommodation and appearing on the bills is not the same as being in a marital relationship [17]. The Judge finds the haste in marrying was due to the looming 31 December 2020 deadline, as there was no other reason made out, and that the formation of the relationship is purely for that purpose [19].
6. At [20 – 22) the Judge makes further core findings in the following terms:

> 20. I am satisfied it is a marriage and relationship of convenience and is neither genuine nor durable. I am satisfied it is and always has been simply platonic. To put it simply, as soon as he has status I am satisfied the Appellant will leave Mrs Laghmich.
>
> 21. Given the discrepant timeline, the discrepant information given, and the fact she is much older than him, I am satisfied that whilst she may be naïve and not realise this, he has no long-term intentions with her.
>
> 22. I accept that Mrs Laghmich was receiving a state pension at the date of the application and accordingly falls within the definition of a worker as explained in Yusuf. I am therefore satisfied that all relevant times Mrs Laghmich was exercising EEA Treaty rights.

7. The Appellant sought permission to appeal asserting the Judge's reasoning for not finding the evidence suitable is inadequate and insufficient. The Grounds repeat the claim that the English marriage registration prior to the submission of the application was not completed due to error, that the Appellant and his wife are in a durable relationship where the age difference is irrelevant, with them having every reason and intention of living together as a married couple, that the Appellant and his wife confirm they have known each other since 2015 with the actual relationship starting in 2020 although the Judge refused to accept the evidence and doubted the relationship, that the Judge failed to set out a structured approach to proportionality when considering Article 8 ECHR, and failed to appreciate requirements of Regulation 6 of the Immigration (EEA) Regulations 2016.
8. Permission to appeal was granted by another judge of the First-tier Tribunal, the operative part of which is in the following terms:

> 2. Paragraphs 5, 7 and 9 of the grounds of appeal do raise an arguable error of law.

3. This is an appeal under the 2016 EEA Regulations; therefore, the Tribunal did not have jurisdiction to consider the Appellant's claim of family life pursuant to Article 8 ECHR. There is no merit to the grounds raised in paragraph 10 of the grounds of appeal.
4. Consequently, permission to appeal is granted on the grounds raised in the paragraphs identified above.

9. The Secretary of State opposes the appeal in a Rule 24 response dated 4 January 2023, the operative part of which is in the following terms (copied verbatim):

1. The respondent to this appeal is the Secretary of State for the Home Department. Documents relating to this appeal should be sent to the Secretary of State for the Home Department, at the above address.

2. For clarity the grounds of appeal appear to argue that,

   i) Inadequate reasoning regarding the evidence of co-habitation,
   ii) Age difference is irrelevant to a durable relationship,
   iii) The reasons given for rejecting the appellant's evidence are inadequate.

3. It is respectfully submitted that the grounds of appeal have no merit and permission should not have been granted.
4. A Presidential panel have helpfully given further guidance in Joseph UKUT 00218 [2022] IAC holding that (headnote 3) *Applications for permission to appeal should be made by reference to the established principles governing errors of law. Judges considering applications for permission to appeal should resist attempts by appellants to dress up or repackage disagreements of fact as errors of law.*
5. The presidential panel helpfully [41] set out the guiding principles.

   There are many authorities on the approach of an appellate tribunal or court to reviewing a first instance judge's findings of fact. We have set out above the need to "resist the temptation" to characterise disagreements of fact as errors of law, as it was put by Warby LJ in AE (Iraq). The constraints to which appellate tribunals and courts are subject in relation to appeals against findings of fact were recently (re)summarised by the Court of Appeal in Volpi v Volpi [2022] EWCA Civ 464 in these terms, per Lewison LJ:

   "2. The approach of an appeal court to that kind of appeal is a welltrodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:

   i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
   ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
   iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
   iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

6. The FtT (Judge Saffer) is very clear why this appeal fails. Having oral heard evidence from the appelalnt and sponsor and reveiwed the evidence that was not before the Secretary of State when the decision was made.
7. The complaints made are no more that arguemnts with the FtT fact finding which, as set out above, are a matter for the Judge.
8. It will be submitted that it was open to the judge to find that this was a marriage of convenience entered into to circumvent the EEA Regulations.
9. In relation to co-habitation it will be submitted that the findings [17] were based on the scant evidence provided ie the tenency agreement dated 1 December 2020 [9] and outside of the oral evidence, which was rejected by the judge for the reasons given, there was no other evidence of cohabitation prior to this date.
10. The age difference formed part of the FtT's decision making and the decision wass not based solely on this issue. The FtT was entitled to treat this significant age difference alongside the evidence of a plutonic friendship prior to the application as weighing against the sudden idea of marriage just before the UK left the EU.
11. There is no indication in the Grounds of appeal that the FtT left out any information ie letters from friends supporting the genuineness of the realtionship the grounds are focussed on arguments with the fact finding of the judge.
12. The FtT judge has identified obvious discrepancies within the evidence and no issue appears to be taken with these in the grounds of appeal which solelt is an argument with the fact finding and do not reveal any material errors in law.
13. The respondent opposes the appellant's appeal. In summary, the respondent will submit inter alia that the judge of the First-tier Tribunal directed himself appropriately.

Discussion and analysis

10. Ms Chowdhury in her submissions accepted that the discrepancies identified by the Judge exist, but claimed they arose from the Appellant's witness statement. It was submitted, however, that that was not sufficient to support the Judge's findings as at the hearing the Appellant became aware of an error in his witness statement which he corrected, to which there is no reference by the Judge. It is therefore submitted that the discrepancies were not discrepancies based upon the facts arising form a correct interpretation of the Appellant's evidence, but rather as a result of an issue of interpretation.
11. A supplementary bundle sent in on the Appellant's behalf contained evidence that it was accepted was not before the Judge, with the exception of the marriage certificate which had been provided at the hearing. Material that the Judge was not provided with or asked to consider will rarely establish material legal error in a decision made by reference to the evidence the Judge was asked to look at, and this appeal is no exception.
12. The obligation upon any judge is to consider the evidence with the required degree of anxious scrutiny. The Judge was not assisted by a Presenting Officer and the Appellant appeared in person without legal representation at that stage. The Appellant was however represented previously by solicitors who I was told had prepared and filed the witness statements on his behalf.
13. The Judge specifically refers to the evidence from [5] of the decision under challenge. I do not find it made out that the Judge failed to consider that evidence with the required degree of anxious scrutiny.

14. The Judge had the benefit of not only the written evidence but also hearing oral evidence given by the Appellant and Mrs Laghmich.
15. The Judge sets out the core of the Appellant's evidence, referring to the statement at [6] and the Appellant's oral evidence at [7] in which this recorded the Judge drew to the Appellant's attention different dates as to when he and Mrs Laghmich met. The Judge records the Appellant claiming he could not remember what was on the application form and that there could have been a misunderstanding via the interpreter at his solicitor's office. The Judge therefore took into account the point being advanced on the Appellant's behalf today in an attempt to explain the discrepancies.
16. The Judge also notes at [8] Mrs Laghmich stating the same as the Appellant in her statement and in her oral evidence regarding the development of the relationship. The Judge therefore had same evidence from two sources.
17. In [10] the Judge notes discrepancies had arisen regarding the history of the relationship since the refusal letter and that it was incumbent upon him to put that to the Appellant and Mrs Laghmich to enable them to deal with it, which he did. Claiming the Judge should have come to a different conclusion based upon the replies given is no more than disagreement with the findings the Judge actually made after deciding what weight could be given to the evidence.
18. Although the Judge refers to the significant age gap of 26 years, Mrs Laghmich being much older than the Appellant, that was not the reason why the Judge dismissed the appeal.
19. At [12] the Judge did not find the denial that the relationship was a means to get round the EEA rules was credible. The Judge was not satisfied that the parties were married when the application was submitted or that they were durable partners in a genuine subsisting relationship at the date of application or date of decision.
20. The Judge at [14] rejects the suggestion that the discrepancy in the claim in their statements they met in November 2020, whereas in their evidence they claimed it was November 2015, was due to interpreter error, in the absence of anything from the Solicitors to that effect. That has not been shown to be a finding outside the range of those reasonably available to the Judge on the evidence.
21. The Judge also finds it [15] that the person who undertook the Islamic marriage was misled as the Appellant claimed that he was divorced whereas the Registrar's Marriage Certificate says he was single. That is a finding within the range of those reasonably open to the Judge on the evidence.
22. The Judge's finding that sharing accommodation and appearing on bills was not the same as being in a marital relationship is a finding within the range of those reasonably open to the Judge on the evidence. The Judge's reference to single adults or students sharing accommodation is a good example of this.
23. Having considered the evidence holistically the Judge concludes that the marriage is a marriage of convenience and neither genuine nor durable. This has not been shown to be finding outside the range of those available to the Judge on the evidence.
24. Whilst the Appellant disagrees with the Judge's conclusions and seek a more favourable outcome to enable him to remain in the United Kingdom, he has failed to establish legal error material to the decision to dismiss the appeal.

Notice of Decision

25. There is no material legal error in the decision of the First-tier Tribunal. The decision shall stand.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 October 2023