Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2023-003002
First-tier Case Number: EA/09113/2022

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 12 September 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MAMADOU MOUSSA
(Anonymity order not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Ume-Ezeuke, Counsel
For the Respondent: Ms S Lecointe, Home Office Presenting Officer

DECISION AND REASONS

Heard at Field House on 29 August 2024

The Appellant

1. The appellant is a citizen of Niger, born on 1 January 1986. He appealed against a decision dated 19 August 2022 to refuse his application (dated 13 May 2022) for settled and pre-settled status under the EU Settlement Scheme (EUSS). The application was based on the appellant's marriage to Priscilla Hessmert (the sponsor), a German national, born on 23 November 1998. She is a 'relevant EEA citizen' for the purposes of the appeal. The

appeal was allowed by Judge of the First-tier Tribunal Rayner on the papers in a decision dated 30 April 2023. In turn the respondent appeals with leave against Judge Rayner's decision. Thus this matter comes before me as an appeal by the respondent but for the sake of convenience I shall continue to refer to the parties as they were known at first instance.

The Decision at First Instance

2. At [8] of his determination Judge Rayner set out the factual background to the appeal. On 15 May 2015 the appellant married Chamssia Hamdou Ali (Ms Ali) in Lagos Nigeria. On 10 October 2020 he married his sponsor Priscilla Hessmert in a customary ceremony in Accra. The appellant applied in January 2021 under the EUSS regulations relying on his marriage to the sponsor. The respondent refused the January 2021 application on 20 August 2021 because the October 2020 marriage to the sponsor was bigamous as the appellant himself accepted in a later witness statement dated 27 November 2022.

3. The appellant's marriage to Ms Ali was dissolved on 8 January 2021. The appellant remarried the sponsor on 26 November 2021 after the dissolution of his marriage to Ms Ali. The appellant then made a second application for status under the EUSS on 13 May 2022 based on the now valid second marriage to the sponsor. It was the refusal of that second application on 19 August 2022 which gave rise to the present proceedings. The respondent's reasons for refusal however did not refer to this second marriage to the sponsor instead the respondent said:

   "You have provided a marriage certificate dated 10 October 2020 as evidence that you are the spouse of [the sponsor]. However, we have noted from our records that you married someone else on 15 May 2015, and the marriage certificate does not state that you are divorced. You have provided evidence that this first marriage has been terminated on 08 January 2021 after the divorce was first petitioned for on 18 November 2020. Therefore, you have not demonstrated that you were free to enter into a marriage with an EEA citizen on 10 October 2020 or, therefore, that the marriage certificate is valid."

4. At [9] of the determination the judge set out his reasons for allowing the appeal. He stated:

   "It is clear that the respondent has had the opportunity to review the documents relating to the marriage that took place on 26 November 2021, [i.e. the second time the appellant and sponsor got married] as they are included in the [respondent's bundle]. However, the respondent has, for an unexplained reason, considered the wrong marriage certificate. She has based her decision on the marriage certificate submitted with the appellant's previous application [made in January 2021]. However, on its face, the marriage certificate for the customary ceremony on 26 November 2021 between the appellant and sponsor appears valid. By that date the appellant's previous marriage to Chamssia Hamdou Ali had been

dissolved. The appellant is required to answer only those issues raised by the respondent. The respondent's sole ground for refusing the application cannot stand, so I allow the appeal on that basis."

5. This however was not the end of the matter because at [10] the judge wrote:

"Although I allow the appeal, the application appears to be defective in ways not addressed by the respondent. The lawful marriage took place on 26 November 2021, and was registered on 18 May 2022. That is some time after the 'specified date' of 2300 on 31 December 2020. The application was made on 13 May 2022, which was after the 'required date' of before 1 July 2021. However, as the respondent has not taken these points, I cannot refuse the appeal on that basis. "

The Onward Appeal

6. The respondent appealed against Judge Rayner's decision arguing that:

"It is not in dispute that the application made under EUSS was on 13/05/22, nor is it in dispute that the marriage that the appellant sought to rely on to bring him within the definition of a 'family member ' and the requirements of rule EU14, took place on 26/11/21 and registered on 18/05/22.

"At [10], notwithstanding the shortcomings identified in the SSHD decision, it was incumbent on the FTTJ to consider the application against the requirements of the rules having both identified them at [8] and made findings at [10] that due to the marriage post-dating the specified date (31/12/20), and the application post-dating the required date (01/07/21). The FTTJ has materially misdirected himself- the only outcome should have been that the appeal fell to be dismissed."

7. Permission to appeal was granted by the First-tier because:

"It is arguable that despite no review being filed by the respondent and the point not having been taken by the respondent, **Kwok On Tong [2006] UKAIT 00039** should still be followed, and as the ground of appeal was that the decision was not in accordance with residence scheme immigration rules, the judge should have considered that on his own case the appellant could apparently not qualify."

The Hearing Before Me

8. In consequence of the grant of permission the matter came before me to determine in the first place whether there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then I would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.

9. At the outset of the hearing the Presenting Officer cited the case of **Lata [2023] UKUT 00163.** This case dealt with whether a party might be

permitted to amend their case during the onward appeal process particularly if the new ground was "Robinson" obvious, for which see **R v Secretary of State for the Home Department ex p Robinson [1997] 2 WLR 199**.

10. The headnote to **Lata** states:

"*Unless a point was one which was Robinson obvious, a judge's decision cannot be alleged to contain an error of law on the basis that a judge failed to take account of a point that was never raised for their consideration as an issue in an appeal. Such an approach would undermine the principles clearly laid out in the Procedure Rules.*

"*A party that fails to identify an issue before the First-tier Tribunal is unlikely to have a good ground of appeal before the Upper Tribunal."*

11. The respondent's argument was that the fact of the appellant's second application being out of time was "Robinson obvious" as Judge Rayner himself had identified the very same point at [10] of his determination. The judge had allowed the appeal at first instance because the respondent had not considered the second marriage of the appellant to the sponsor but instead had looked at the first marriage to the sponsor. It was not in dispute that the second marriage to the sponsor had taken place on 26 November 2021 and been registered the following year in May 2022. The burden of establishing that the appellant met the requirements of the EUSS scheme lay on the appellant but he had not been able to meet those requirements (in the January 2021 application) because of the overlapping dates identified in the refusal letter. The main issue was that the first marriage to the sponsor overlapped with the marriage to Ms Ali.

12. For the appellant, counsel noted that the appellant had requested a paper appeal and paid the appropriate fee. There had been an earlier determination by Judge Malik on 26 April 2021 under EA/13982/2021 dismissing the appellants appeal against the respondent's August 2021 decision to refuse status. I was supplied with a copy of this determination during the hearing before me. Although not in the first instance bundle, this determination were referred to by Judge Rayner when allowing the appellant's appeal, see [8vii] of Judge Rayner's determination. Judge Malik decided that when the appellant married the sponsor for the first time on 10 October 2020 the appellant was in fact already divorced from Ms Ali stating that the appellant and Ms Ali divorced on 8 April 2020. Judge Malik dismissed the appellant's appeal against the respondent's August 2021 decision but for a different reason which was that the marriage certificate for the first marriage to the sponsor on 10 October 2020 did not state that the appellant was divorced. On the register for the customary marriage the appellant was recorded as being a bachelor. The statutory declaration which the appellant relied on which was sworn in February 2021 by the appellant's representative in Ghana also referred to the appellant as a bachelor. It was unclear why this would be so held Judge Malik given that the appellant was a divorcee.

13. The appellant relied on the authority of **Devaseelan** (**Secretary of State for the Home Department v D (Tamil) [2002] UKIAT 00702)** to the extent that Judge Malik had found in favour of the appellant on the issue of whether the first marriage to the sponsor was bigamous. The respondent should not be able to reintroduce the argument in this second appeal that the appellant's marriage to the sponsor was bigamous. There had been a finding that the appellant was divorced and that was the appellant's case in his witness statement. The appellant and Ms Ali divorced in April 2020 in Ghana. Judge Malik had taken into account this 2020 divorce which meant that the subsequent first marriage to the sponsor was valid. Even if the tribunal still found that the first marriage to the sponsor was bigamous the appellant should still qualify for pre-settled status as an extended family member of the sponsor. The relationship between the appellant and sponsor had started in 2019 before the deadline of 31 December 2020. The only reason why Judge Malik had dismissed the appeal against the 2021 refusal was because of the description of the appellant as a bachelor instead of as a divorcee. The judge was therefore wrong to say that the application was defective.

14. In reply the Presenting Officer argued that the respondent had not accepted that the relationship of the appellant and sponsor was genuine.

Discussion and Findings

15. Although the point in issue in this case is a relatively narrow one the matter is not without difficulty. In order to qualify under the EUSS scheme the appellant had to have been entitled to apply before 31 December 2020. The appellant argues that he was entitled to apply in January 2021 because he had married the sponsor before the cut-off date of 31 December 2020. However the appellant had not contracted a valid marriage before the cut-off date of 31 December 2020 because he was still married to Ms Ali when he married the sponsor for the first time. It appears from the papers that the second marriage to the sponsor was following legal advice received by the appellant. By the time he did contract this valid marriage the cut off date of 31 December 2020 and the "required" date of 30 June 2021 had long since passed.

16. The appellant relies on [8] of the determination of Judge Malik who said that she had been provided with a decree absolute from the Family Court at Bury St Edmunds (not as was submitted to me from Ghana) to confirm that the appellant was divorced as at 8 April 2020. She noted that the respondent had referred to the appellant's first marriage having been terminated on 8 January 2021 but there was no evidence before her as to where that data came from. As a result she found that when the appellant married the sponsor for the first time on 10 October 2020 he was already divorced from Ms Ali. The problem with that paragraph in Judge Malik's determination is that she appears to be wrong in her reference to a decree absolute from the Family Court at Bury St Edmunds. There is indeed such a decree absolute from that court but it shows the date 8 January 2021. The answer to Judge Malik's question as to where that date came from is

that it came from the decree absolute of divorce issued by the Bury St Edmunds Court on that date. It was that decree which terminated the marriage contracted in 2015 between the appellant and Ms Ali.

17. Judge Malik nevertheless went on to dismiss the appellant's appeal because of the misdescription of the appellant on his customary marriage certificate. Judge Rayner was therefore correct to find that the first marriage to the sponsor was bigamous. I do not agree with the submission made by the appellant that Judge Rayner erred in not following Judge Malik's determination. The factual situation before Judge Rayner was quite different to that before Judge Malik and Judge Rayner had strong reasons not to apply **Devaseelan**. Judge Rayner was aware of Judge Malik's determination, see [8vii] of his determination although Judge Malik's determination was not considered in any detail. That matters not because the end result was the same the appellant could not rely on the first marriage he made with the sponsor because it was bigamous, he was not validly divorced from Ms Ali at the time he married the sponsor (the first time).

18. That still leaves open the main issue in this appeal which is whether the judge was correct in law to allow the appellant's appeal on the basis that the respondent's refusal letter was restricted to considering the wrong marriage certificate. It appears that the respondent's second refusal notice was almost word for word the same as the first refusal dated August 2021. The respondent argues that because the appellant could not satisfy the requirements for the EUSS scheme the judge should have dismissed the appeal in any event. What the judge did instead was to say that all the appellant had to meet was the objection raised in the refusal letter. The appellant was able to do that quite easily because the refusal letter had considered the wrong marriage certificate.

19. In the case of **Kwok On Tong**, a decision on paragraph 320 of the Immigration Rules, the head note states: "*an Immigration Judge cannot allow an appeal on the ground that the decision was not in accordance with the Immigration Rules unless satisfied that the requirements of the Immigration Rules were (or are, as appropriate) met.*" This is taken to mean that where a judge becomes aware that an appellant cannot succeed under a different paragraph of the immigration rules to the one in contention before them, the judge must dismiss the appeal. The refusal notice is not a pleading.

20. It appears from Judge Rayner's determination that the question of whether the appellant's second application for status was doomed to failure because it was after the cut-off date was not raised by either party. I note that Judge Rayner was determining this matter on the papers (just as Judge Malik had). It was open to Judge Rayner once he had identified the problem of the appellant's application being out of time, to invite the parties to make further written or oral submissions on the issue of the validity of the appellant's application under the scheme. In the event he did not, but he did draw the parties attention to the procedural difficulty

surrounding the appellant's late application. The parties were therefore on notice that this difficulty existed.

21. In the case of **Virk v Secretary of State for the Home Department [2013] EWCA Civ 652** it was held that although the Secretary of State had failed to raise before the First-tier Tribunal the issue of that Tribunal's jurisdiction to entertain an application for leave to remain, the Upper Tribunal was entitled to dismiss the appellants' subsequent appeal against the First-tier Tribunal's decision on the basis that the First-tier Tribunal had not had jurisdiction, notwithstanding that the point had not been raised below. In **Virk** it was said at [23]: "Statutory jurisdiction cannot be conferred by waiver or agreement; or by the failure of the parties or the tribunal to be alive to the point". It was also said however that if the issue had not previously been raised then fairness required that the parties should be given the opportunity to address it.

22. In **Lata** the Upper Tribunal indicated a disapproval of parties changing their case as the tribunal proceedings progressed, parties to litigation should have their case in order before going to trial. As I have indicated the appellant wished to have his appeal determined on the papers. The respondent did not accept that either of the appellant's two marriages to the sponsor were genuine. The respondent did not in consequence put her mind to the fact that so much time had elapsed by the time of the second marriage that the appellant could no longer bring himself within the EUSS scheme because the cut-off date had passed. I do not consider that this situation comes within the scope of being "Robinson obvious", because this is not an international protection or human rights claim or pursuant to an international obligation.

23. However I do find that this case comes within the ratio of **Kwok On Tong** as explained in **Virk**. It was apparent from the documents before the judge that the appellant's second application had been made out of time and was not therefore valid for that reason even if he was free by then to contract the second marriage to the sponsor.

24. For those reasons I consider that there was a material error of law in Judge Rayner's determination allowing the appellant's appeal when as he himself pointed out, there was evidence before him to suggest that the appellant's application was defective because it was out of time. I therefore set the decision of the First-tier aside. The facts of this case are not in dispute and it is not necessary for the parties to repeat their earlier submissions which were made to me during the error of law proceedings. The appellant's application for settled or pre-settled status under the EUSS scheme was out of time and therefore bound to fail. The respondent was entitled to refuse the application.

25. The appellant's complaint in this case is not so much the suggestion that that the second application fails because it was out of time since the appellant takes no issue with that contention. Rather, the appellant sought to argue before me that the first application made back in January 2021

should not have been refused because the first marriage to the sponsor was not bigamous. That argument is weakened by the fact that the appellant chose (on advice) to marry the sponsor a second time. The appellant could not produced documentation to establish that the first marriage was not bigamous. Importantly, he accepted in his witness statement that the respondent was quite right to refuse the January 2021 application because of the bigamous nature of his marriage.

26. The respondent did not refuse the second application for being out of time which has led to a considerable amount of litigation and I have some sympathy with the fee award made by Judge Rayner below. I do take into account that proceedings in the First-tier were decided on the papers which meant given the complexity inherent in EUSS litigation that neither side fully argued their case. I am satisfied however that that has now been rectified and both parties are aware of the issues and have been able to put their respective cases which I have summarised above. The parties have been on notice since receipt of Judge Rayner's decision that the appellant's application had a serious problem, being out of time. **Vird** indicates that fairness requires an opportunity being given to the parties to put their case. In the instant case before me the parties have had that opportunity and little purpose would be shown for an adjournment for the parties to consider what they already knew. There is very little if any dispute regarding the factual matrix as found by Judge Rayner.

27. Having overturned the decision below I am therefore in a position to remake the decision in this case as Judge Rayner's findings of fact are largely undisturbed. The appellant's application was out of time and could not succeed under the EUSS. In the light of the decision in **Vird** that the First-tier had no jurisdiction to allow an appeal where the rules were not satisfied, I remake the decision in this case by dismissing the appellant's appeal against the respondent's decision of 19 August 2022. For the reasons given by Judge Rayner at [6] of his determination the appellant cannot rely on Article 8 in this appeal. Any such claim with supporting evidence would have to be made to the respondent separately.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

I remake the decision in this case by dismissing the appellant's appeal.

Signed this 4th day of September 2024

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Judge Woodcraft
Deputy Upper Tribunal Judge