The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: IA/28886/2014**

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On August 20, 2015	**On September 9, 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ARSHAD MEHMOOD
(NO ANONYMITY DIRECTION)

Respondent

Representation:

Appellant	Mr McVeety (Home Office Presenting Officer)
Respondent	Mr Karnic, Counsel, instructed by Adamsons Law
Interpreters	Mr Asghar (respondent); Ms Losa (sponsor)

DETERMINATION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.

2. The appellant is a citizen of Pakistan. The background to this case is that the appellant came to the United Kingdom in 2000 as a visitor. He overstayed and subsequently married the sponsor, Dominka Gregusova, on October 18, 2012.

3. Two months later he made his first application for a residence card based on the fact he was married to an EEA national who was exercising treaty rights.

4. The respondent called the parties in for interviews and following those interviews the respondent refused the application on February 24, 2013. The appellant appealed that decision and the appeal came before Judge of the First-tier Tribunal Manuel on February 20, 2014. She found the marriage was a marriage of convenience and dismissed the appeal in a decision promulgated on April 9, 2014.

5. The appellant submitted a fresh application for a residence card on May 24, 2014 but the respondent again refused this application on July 1, 2014. The appellant appealed this refusal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 and Regulation 26 of the Immigration (European Economic Area) Regulations 2006.

6. The matter came before Judge of the First-tier Tribunal De Haney on October 21, 2014 and in a decision promulgated on November 19, 2014 the Tribunal allowed the appeal and directed the appellant be issued with a residence card.

7. The respondent applied for permission to appeal on November 21, 2014 submitting the Tribunal had erred. Permission to appeal was initially refused by Judge of the First-tier Tribunal Tiffen on January 6, 2015. Those grounds were renewed to the Upper Tribunal and on Apri 16, 2015 Upper Tribunal Judge O'Connor found it arguable the Tribunal had erred.

8. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I see no reason to make an order now.

ERROR OF LAW SUBMISSIONS

9. Mr McVeety relied on the grounds of appeal and submitted the Tribunal had erred in its approach to the earlier decision of Judge Manuel which had been based on virtually the same evidence and was made approximately 6 weeks before the current application was lodged. Whilst the Tribunal had referred to the case of Devaseelan (Second Appeals, ECHR, Extra-Territorial Effect) [2002] UKAIT 702 it had failed to apply the principles laid down in it. The First-tier Tribunal should have commenced its considerations with Judge Manuel's decision and the Tribunal should then have asked itself whether there was any material change to the facts presented to Judge Manuel. In this current appeal the Tribunal was concerned with the same facts save the sponsor was 30 weeks pregnant with their second child. The Tribunal's whole approach was flawed. The reasons given for allowing the appeal were set out in paragraphs [24] and [25] of the Tribunal's decision and were inadequate. Whilst the Tribunal noted that the respondent's suspicions it failed to give those suspicions (Judge Manuel's findings) any weight when considering the appeal with the Tribunal effectively allowing it on the basis of demeanour as demonstrated by paragraph [29] of its decision.

10. Mr Karnic invited me to allow the decision to stand. He submitted the Tribunal was aware of the legal principles and quoted the appropriate case law. The Tribunal explained why the appeal had been allowed and that decision was open to it. The Tribunal had been entitled to take into account the current circumstances when considering whether the marriage was a marriage of convenience. The Tribunal had taken evidence from witnesses and concluded the marriage was a marriage of substance as against a marriage of convenience. The Tribunal dealt with all the relevant points and was satisfied they were in a loving and genuine relationship. The respondent's submissions amounted to nothing more than a mere disagreement.

FINDINGS ON ERROR IN LAW

11. The respondent's application to appeal the tribunal's decision was based on the premise that the Tribunal had failed to have regard to any of Judge Manuel's findings and consequently its approach was flawed.

12. Having heard the respective submissions and after considering the Tribunal's decision I reached the following conclusions.

13. Firstly, whilst the Tribunal was aware of Judge Manuel's determination I am satisfied that it failed to take those findings as its starting point. The principles of Devaseelan are important because a Tribunal must not fall into the mistake of ignoring findings made on similar facts. To do so would mean that previous decisions would be ignored and large inconsistencies potentially could arise when parties re-litigated the same facts.

14. I have set out earlier the history and importantly Judge Manuel heard the appellant's first appeal on similar facts. In considering whether to grant a residence card it was therefore incumbent to take those findings as a starting point. Negative findings were detailed in Judge Manuel's decision and the mere fact the parties presented themselves, at a second appeal hearing, as a couple expecting a second child did not alter the approach the Tribunal should have taken to the earlier findings.

15. Judge Manuel had found that this was a marriage of convenience even though the parties were married with a child. The Tribunal's finding that this was not a marriage of convenience was based primarily on how they appeared on the last occasion. In paragraph [29] the Tribunal referred to how "the appellant naturally took his child from his wife" and "how the sponsor handed their sleeping daughter over to her husband". Cases should not be decided on demeanour.

16. The Tribunal failed to consider any of the negative findings made by Judge Manuel including the fact that they were both unreliable witnesses and the fact that merely having a child did not make their relationship or marriage genuine. Judge Manuel had concluded in paragraph [28] of her decision that the appellant entered into the marriage to enable him to remain in the United Kingdom and this was where the Tribunal should have commenced its considerations.

17. I am therefore satisfied that the Tribunal erred in its approach and consequently the decision must be set aside.

18. I raised with the parties whether we could proceed further at this hearing. Mr Karnic wished to call additional evidence and I indicated that I would give leave for that evidence and thereafter both parties could make submissions on how I should deal with the case.

ADDITIONAL EVIDENCE

19. The appellant adopted a recent statement and confirmed that the sponsor had miscarried their third child approximately three months ago. He confirmed that they spoke to each other in English and sometimes in Urdu. Although his wife's Urdu skills were limited she understood what he asked and answered her correctly. He believed that if his application was refused his wife and children would face a life without him. Under cross examination he confirmed that his wife learnt Urdu over a period of time. When they first met in January 2012 he explained that his English was okay and that was how they spoke to each other. He also stated that during the first of three months and they were together the sponsor agreed to change her religion to his because he wanted her to and because she liked the Muslim religion.

20. The sponsor adopted her witness statement and confirmed that they conversed in English and Urdu. She explained that she learnt his language because she liked it and they wanted to be able to speak Urdu together. She disputed the respondent's claim that the marriage was not genuine explaining that they had been together for over three years, had two children and had recently lost their third child. She explained that she had given different answers to the interviewing officer because she was stressed and worried that the appellant would be removed from the country. When asked what she would do if the appellant lost his appeal she stated that she did not know and she would not let him leave. She indicated that her daughter had problems with her heart and their son had problems with his leg and she did not believe she would be able to live without her husband here. She would be unable to work if her husband was not present as she would have to look after the children. Under cross-examination she agreed that she had arrived on January 1, 2012 intending to visit a friend. She explained that she met this appellant in the middle of January and that by the end of January 2012 they had moved in together. She was 18 or 19 years of age at the time and understood why the respondent was suspicious about their relationship. She confirmed that she had learned some English in school but she learnt other languages as well. She stated she was able to undertake a conversation about religious conversion in the early part of 2012 and said that when they did not understand words they used the Internet and a mobile to translate. When asked why he had not learned her language she explained that her language was difficult to learn. She denied that their first meeting was arranged and maintained it had been a chance meeting in a café shop.

CLOSING SUBMISSIONS

21. Mr McVeety submitted that the Tribunal in April 2014 had adjudicated on these very facts and found that it was a sham marriage. He pointed to the fact that the sponsor had supposedly come in January for a visit but this claim and the rest of their claim had been rejected and that decision had not been appealed. He invited me to uphold the original decision made by Judge Manuel and not to go behind what she had said. The mere fact they were still together and had another child did not alter the conception that the marriage was a marriage of convenience at its inception. However, if the Tribunal felt those matters were relevant Mr McVeety invited me to find that the lack of affection in the witness statement by the appellant and the fact that he was only concerned with the sponsor converting were significant matters when considering whether this was a marriage of convenience. He submitted this was a sham marriage to enable him to stay. He was here illegally and was an overstayer and this was his last opportunity to try and stay. He invited me to dismiss the appeal.

22. Mr Karnic submitted that this was a marriage of substance. They had lived together since the end of January 2012 and had married in October 2012. They had therefore been living together for over 3 ½ years. The fact that they were still together and had two children were matters that had to be taken into account when considering whether the marriage was a marriage of convenience. The respondent had interviewed the appellant and sponsor but had not provided Form 4605 and following the decision of Miah (interviewer's comments: disclosure: fairness) [2014] UKUT 00515 reliance on the interviews were unfair. He invited me to find that this was a marriage of substance.

CONSIDERATION AND FINDINGS

23. The respondent opposed this application on the basis that it was a marriage of convenience. Reliance is placed upon an earlier Tribunal decision of Judge Manuel in which she concluded the appellant and sponsor were unreliable and they had entered into the marriage to enable the appellant to remain in the United Kingdom. In reaching that decision Judge Manuel have regard to the interviews given by the parties and their oral evidence.

24. Before considering the facts and circumstances of this appeal I believe it would be helpful to set out the relevant legislation.

25. There is no definition of marriage of convenience or sham marriage within the Rules but both parties referred to Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038(IAC). The case refers to the Citizens Directive (EP and Council Directive 2004/38/EC) which sets out the basic rules of European Union law regulating the admission of spouses of EU citizens who are not such citizens themselves (third country nationals).

26. Preamble 28 is as follows:

> "To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures."

27. Article 35 which is headed 'Abuse of Rights' then provides:

> "Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience."

28. The European Commission Handbook has a 'Definition' section and at section 2.1 and there is a definition of 'sole purpose' which includes the following:

> "… Therefore, the notion of 'sole purpose' should not be interpreted literally (as being the unique or exclusive purpose) but rather as meaning that the objective to obtain the right of entry and residence must be the predominant purpose of the abusive conduct."

29. Thus in the case of Miah, at paragraph 5, when the President of the Tribunal summarised the ratio of Papajorgii and stated that, "However there is an evidential burden on the Claimant to address evidence justifying reasonable suspicion that the marriage in question was undertaken for the predominant purpose of securing residence rights" he was using a definition that was entirely consistent with the Council Directive and the definition provided in the guidance in relation to the issue of marriages of convenience.

30. There has been a previous finding by Judge Manuel that the marriage was a marriage of convenience. Although Mr Karnic argues that I should have regard to the relationship as it now is I am satisfied that the correct approach to assessing whether a marriage is a marriage of convenience, when considered for the purposes of an EEA residence card, is to assess the position when the marriage took place and if the sole purpose of that relationship was to enjoy the right of free movement when the marriage was contracted it was a marriage of convenience and continues to be so. Judge Manuel found the mere fact parties had had a child did not alter the appellant's intention when he entered into the marriage and similarly the fact the parties have had a second child, and are apparently intent on remaining together, does not alter the fact that serious concerns about their intentions when the marriage was entered into remain unanswered and unaddressed.

31. In considering whether the appellant is a family member based on marriage I am satisfied that their marriage remains a marriage of convenience and consequently the appellant is not entitled to a residence card as a spouse.

32. Mr Karnic did not argue any alternative provisions under the EEA regulations and it may well be that in light of their time together and their current circumstances that the appellant and sponsor may now be able to satisfy the respondent that they are in a genuine and subsisting relationship and that they intend to remain together. Even if I accepted this was the case the respondent has a discretion when it comes to

granting residence cards to partners and such an application must therefore be considered by the respondent.

33. Mr Karnic did raise an issue over their interview records but it seems to me from the limited papers before me that Judge Manuel had an interview record as she makes various references to that document. Whether the Form 4605 exists is a matter that I'm unable to make any finding of because it was an issue raised at this hearing for the first time and the respondent was not put on notice that it would be an issue and the relevant enquiries were therefore not be made.

34. In summary therefore I am satisfied this was a marriage of convenience when it was entered into and in light of the legislation I am satisfied that this is the relevant date.

35. I therefore dismiss the appeal.

DECISION

36. There was a material error. I set aside the original decision and I remake it and I dismiss the appeal under the 2006 EEA Regulations.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

No fee award made.

Signed: Dated:

Deputy Upper Tribunal Judge Alis