



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/11532/2016

THE IMMIGRATION ACTS

Heard at Civil Justice Centre,
Manchester
On 4th June 2018 & 5th June 2018

Decision & Reasons Promulgated
On 26th June 2018

Before

UPPER TRIBUNAL JUDGE COKER

Between

MUSTAFA KELEPIRCIOGLU

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Thathall, UK Immigration Law Chambers
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a Turkish citizen who first entered the UK on 10th November 2009 as a student. An application for leave to remain under the Turkish EC Association Agreement was refused on 21st July 2010 and again on 6th May 2011. He remained unlawfully in the UK and on 28th October 2013 was served with notice as an overstayer. He and Serife Demir, a German citizen, underwent a civil marriage in London on 14th June 2014. On 28th October 2014 they attended a marriage interview in Liverpool and his application for a residence card as the family member of an EU citizen exercising Treaty Rights was refused for reasons set out in a decision dated 3rd November 2014 (“the 1st decision”) because the

respondent considered the marriage was a marriage of convenience His appeal against that decision was dismissed for reasons set out in a decision of the First-tier Tribunal 14th January 2015 (the (“1st First-tier Tribunal decision”) and an appeal to the Upper Tribunal was dismissed. He was refused permission to appeal to the Court of Appeal.

2. The appellant then made a human rights claim which was refused on 25th January 2016. He then made an asylum claim which was refused on 25th April 2016.
3. The appellant then made a further application for a residence card which was refused on 6th September 2016. His appeal against that decision was refused for reasons set out in a First-tier Tribunal decision (the “2nd First-tier Tribunal decision”) promulgated on 10th October 2017. The appellant was granted permission to appeal that decision on the grounds that the judge arguably erred in law in failing to have adequate or any regard to evidence before him in the context of the previous First-tier Tribunal decision. It is that appeal that comes before me.
4. Mr Duffy correctly confirmed that it was not evident from the decision that the First-tier Tribunal judge had engaged with the evidence before him in deciding the extent to which he followed the earlier adverse decision.
5. Mr Thathall drew attention to the evidence that had been before the First-tier Tribunal judge about the marriage having been arranged; he submitted that the judge had signally failed to engage with that evidence.
6. In the light of the submissions of both parties and the apparent failure of the First-tier Tribunal judge to engage with the evidence that was before him, I am satisfied the First-tier Tribunal judge materially erred in law and I set aside the 2nd First-tier Tribunal decision to be remade.
7. There was no interpreter present. I adjourned the hearing to 2pm on Tuesday 5th June 2018 to enable the hearing to proceed with oral evidence from the appellant and his spouse. There was no application for the resumed hearing to be heard on a later date to enable other witnesses to attend.

Remaking the decision

8. On 5th June 2015, I heard oral evidence from the appellant and his wife Serife Demir, through an interpreter. I heard submissions from Mr Thathall and Mr Duffy.
9. As is well established, the guidelines set out in *Devaseelan* [2002] UKIAT 00702* are always to be applied to the determination of a factual issue, the dispute as to which has already been the subject of judicial determination in an appeal against an earlier immigration decision involving the same parties. See for example *AS and AA (Effect of previous linked determination) Somalia* [2006] UKAIT 00052, (approved by the Court of Appeal in [2007] EWCA Civ 1040), *Mubu and others (immigration appeals – res judicata)* [2012] UKUT 00398(IAC)
10. It is worth setting out the Guidelines in full. Too often they are condensed and viewed as simply taking the earlier decision as a starting point and then

considering whether there is anything that could change that. The Devaseelan Guidelines are as follows:

(1) The first Adjudicator's determination should always be the starting-point. It is the authoritative assessment of the Appellant's status at the time it was made. In principle issues such as whether the Appellant was properly represented, or whether he gave evidence, are irrelevant to this.

(2) Facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator. If those facts lead the second Adjudicator to the conclusion that, at the date of his determination and on the material before him, the appellant makes his case, so be it. The previous decision, on the material before the first Adjudicator and at that date, is not inconsistent.

(3) Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second Adjudicator. The first Adjudicator will not have been concerned with such facts, and his determination is not an assessment of them.

(4) Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection. An Appellant who seeks, in a later appeal, to add to the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility. (Although considerations of credibility will not be relevant in cases where the existence of the additional fact is beyond dispute.) It must also be borne in mind that the first Adjudicator's determination was made at a time closer to the events alleged and in terms of both fact-finding and general credibility assessment would tend to have the advantage. For this reason, the adduction of such facts should not usually lead to any reconsideration of the conclusions reached by the first Adjudicator.

(5) Evidence of other facts – for example country evidence – may not suffer from the same concerns as to credibility, but should be treated with caution. The reason is different from that in (4). Evidence dating from before the determination of the first Adjudicator might well have been relevant if it had been tendered to him: but it was not, and he made his determination without it. The situation in the Appellant's own country at the time of that determination is very unlikely to be relevant in deciding whether the Appellant's removal at the time of the second Adjudicator's determination would breach his human rights. Those representing the Appellant would be better advised to assemble up-to-date evidence than to rely on material that is (ex hypothesi) now rather dated.

(6) If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator, and proposes to support the claim by what is in essence the same evidence as that available to the Appellant at that time, the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated. We draw attention to the phrase 'the same evidence as that available to the Appellant' at the time of the first determination. We have chosen this phrase not only in order to accommodate guidelines (4) and (5) above, but also because, in respect of evidence that was available to the Appellant, he must be taken to have made his choices about how it should be presented. An Appellant cannot be expected to present evidence of which he has no knowledge: but if (for example) he chooses not to give oral evidence in his first appeal, that does not mean that the issues or the available evidence in the second appeal are rendered any different by his proposal to give oral evidence (of the same facts) on this occasion.

(7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be, as it were, held against him. We think such reasons will be rare. There is an increasing tendency to suggest that unfavourable decisions by

Adjudicators are brought about by error or incompetence on the part of representatives. New representatives blame old representatives; sometimes representatives blame themselves for prolonging the litigation by their inadequacy (without, of course, offering the public any compensation for the wrong from which they have profited by fees). Immigration practitioners come within the supervision of the Immigration Services Commissioner under part V of the 1999 Act. He has power to register, investigate and cancel the registration of any practitioner, and solicitors and counsel are, in addition, subject to their own professional bodies. An Adjudicator should be very slow to conclude that an appeal before another Adjudicator has been materially affected by a representative's error or incompetence; and such a finding should always be reported (through arrangements made by the Chief Adjudicator) to the Immigration Services Commissioner.

Having said that, we do accept that there will be occasional cases where the circumstances of the first appeal were such that it would be right for the second Adjudicator to look at the matter as if the first determination had never been made. (We think it unlikely that the second Adjudicator would, in such a case, be able to build very meaningfully on the first Adjudicator's determination; but we emphasise that, even in such a case, the first determination stands as the determination of the first appeal.)

11. Mr Thathall submitted that the significant issue in this appeal was that the marriage was an arranged marriage and that there had been a failure to identify that as the basis of the marriage by both the respondent and the First-tier Tribunal Judges in both appeals. The 2nd First-tier Tribunal decision was set aside by me on 4th June with no findings preserved. My task is to consider the evidence before me taking the 1st First-tier Tribunal decision as a starting point as per *Devaseelan*. Of particular relevance to this appeal are guidance numbered (2), (4) and (6).
12. There was a written witness statement dated 17th December 2015 signed by the mother and two brothers of the appellant. They did not attend to give oral evidence before me and there was no application for the hearing on 5th June to be adjourned to enable them to attend to give oral evidence. There was no updating statement. There was no written evidence from Serife Demir's parents and they did not attend to give evidence to the 1st First-tier Tribunal. Although characterized by Mr Thathall as an arranged marriage it does not appear that this was how it was put to the 1st First-tier Tribunal. There were discrepancies in the evidence the couple gave in interviews to the respondent and their oral evidence which led the 1st First-tier Tribunal to conclude that the marriage was a marriage of convenience.
13. The findings of fact by the 1st First-tier Tribunal can of course be disturbed but there has been no reason adduced before me why evidence from either the appellant's family or Serife Demir's family was not adduced to the First-tier Tribunal. That evidence was or could have been available at the date of the 1st First-tier Tribunal decision. Although explanations for the discrepancies were given by the appellant and Serife Demir before me, such explanations in so far as they differed from the evidence given to the 1st First-tier Tribunal can only be an attempt to add to the already available facts to obtain a more favourable outcome. The issues they sought to adduce further explanation for have already been settled by the 1st First-tier Tribunal. The lack of explanation for evidence from both families to the 1st First-tier Tribunal, their lack of attendance at the 1st First-tier Tribunal, the lack of evidence before the 1st First-tier Tribunal and the lack of evidence that could be cross examined before me renders the attempt to adduce further facts to reach different findings suspect. This is not a case where

the appellant did not know the case against him or was unaware of evidence which he claims exists to show that it was an arranged marriage. The 1st First-tier Tribunal heard oral evidence closer to the events the subject of appeal and heard evidence fresh from the appellant.

14. The scale of the discrepancies was adjudicated upon by the 1st First-tier Tribunal. There has been no evidence before me that could lead to me interfering with the findings of fact made by the 1st First-tier Tribunal. The hearing before me is not an appeal against that decision.
15. A second limb of Mr Thathall's submissions was that, in the light of *Sadovska and another v SSHD (Scotland)* [2017] UKSC 54 the analysis of what is a marriage of convenience by the respondent in the decision the subject of this appeal is tainted by illegality.
16. The factual matrix in *Sadovska* was very different to that of this case. There appeared to have been procedural irregularities in the Home Office interviews, there was considerable documentation before the First-tier Tribunal in that case that established at the very least that there had been a relationship prior to marriage. And most importantly the First-tier Tribunal had failed to address the issues on the correct burden of proof. *Papajorgji (EEA spouse – marriage of convenience) Greece* [2012] UKUT 00038 (IAC) was drawn to the attention of the Supreme Court and there is no indication that the Tribunal had erred in its assessment of what makes a marriage of convenience or how it should be litigated.
17. Although I have not been provided with the applications before the Upper Tribunal and the application for permission to the Court of Appeal as related to the 1st First-tier Tribunal for this appellant, if there had been an error in analysis by that Tribunal it would have surfaced at that time.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision

I re-make the decision in the appeal by dismissing the Mr Kelepircioglu's appeal against the decision of the Secretary of State to refuse him a residence card



Date

Upper Tribunal Judge Coker