Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01252/2019

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 20 December 2019	**On 13 January 2020**

Before

Upper Tribunal Judge Pickup

Between

Muhammad Naveed Tariq
[Anonymity direction not made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: No attendance and no representation
For the respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Herwald promulgated 5.8.19, dismissing his appeal against the decision of the Secretary of State, dated 25.2.19 to refuse his application made on 8.1.19 for an EEA Residence Card as confirmation of a right to reside in the UK as the family member of an EEA National exercising Treaty rights in the UK, namely Ms E Molnar, a Hungarian national.

2. The application had been refused by the respondent because previous applications had been refused the marriage on the basis that the marriage with Ms Molnar was one of convenience and no further evidence had been

adduced. Each refused application had been appealed to the First-tier Tribunal and the appeals dismissed, in 2016 (Judge Malik) and 2018 (Judge Alis), all on the same basis, that the marriage was one of convenience. Likewise, Judge Herwald dismissed the appeal, also concluding that it was one of convenience.

3. First-tier Tribunal Judge Simpson granted permission to appeal on 28.10.19.

4. There was no attendance by or on behalf of the appellant at the Upper Tribunal appeal hearing before me on 20.12.19. I was satisfied that notice of the hearing had been sent to the appellant at the only address held on file for him by first-class post on 15.11.19. There has been no subsequent correspondence and no explanation for his absence. Noting that the appellant also failed to attend the First-tier Tribunal appeal hearing, I was satisfied that it would be in the interests of justice to proceed with the appeal hearing in his absence, and that this would be consistent with the overriding objective of the Tribunal to deal with cases fairly and justly.

Error of Law

5. I heard the submissions of Mr Bates and then reserved my decision, which I now give.

6. For the reasons set out below, I found no material error of law in the decision of the First-tier Tribunal.

7. The handwritten grounds argue that the First-tier Tribunal Judge erred in refusing to grant an adjournment and that the decision was based on the previous decision of the tribunal, most of which had been copied and pasted into Judge Herwald's decision.

8. Further typed grounds are attached to the Notice of Appeal. These accept that as this was a subsequent appeal the matter should not be relitigated unless there was new evidence that could lead to an alternative conclusion. It is submitted that there was new evidence in the form of the witness Mr Amir, which had been accepted. However, the grounds confuse the impugned decision with that of the previous First-tier Tribunal Judge, Judge Alis in 2018. It was Judge Alis and not Judge Herwald who heard evidence from Mr Amir, said to be a new witness in comparison to the first appeal heard by Judge Malik. No witness gave evidence before Judge Alis. The appeal to the Upper Tribunal is not an opportunity to challenge the decision of Judge Alis, which, pursuant to Devalseelan must be considered as determinative of the facts on the evidence before that tribunal and was the starting point for Judge Herwald's consideration of the latest appeal. What has to be considered is whether Judge Herwald made an error of law in the making of his decision.

9. The typed grounds also suggest that the judge erred in law when attaching no weight to the findings made by him, including in relation to

Mr Amir and the sponsoring wife, together with photographs produced in evidence. However, once again these grounds confuse the decision of Judge Herwald with that of Judge Alis. The same point must be made in relation to the remaining typed grounds. It may be that the typed grounds were drafted in relation to the decision of Judge Alis from 2018 and these have been redeployed unaltered in the appellant's appeal against the decision of Judge Herwald.

The Absence of the Appellant/Sponsor and the Adjournment Decision

10. At the outset of the appeal before Judge Herwald, the appellant's representative, Mr Khan, explained that the sponsor was not feeling well, and he might have to apply for an adjournment. The sponsor may have been at the Tribunal, but it was agreed that she should attend a NHS Walk-in Centre and the appeal hearing was stood down to await her return. At noon, the Tribunal was informed that the sponsor was still at the Walk-in Centre. This was still the position at 13:40 and Mr Khan confirmed that she still did not feel well and, therefore, he applied for an adjournment. This was opposed by the Home Office representative, who suggested that, given the previous findings of the Tribunal that the marriage was one of convenience, and reliance was made on Devaseelan, the matter could be decided on submissions.

11. Before ruling on the adjournment application, Judge Herwald noted that that there had been a previous adjournment at the request of the appellant, again because the sponsor was said not to be available. Judge Herwald referred Mr Malik to the decision of the Upper Tribunal in IS (marriages of convenience) Serbia [2008] UKAIT 00031, which held that the relationship giving rise to any rights under EU law and the Regulations "is the marriage, formerly valid, and entered into at a specific time and place. It is the ceremony and the act which, in the circumstances that give rise to it, amount to or do not amount to a 'marriage of convenience'." The Tribunal rejected the concept that the development of a real relationship after the marriage was entered into could convert what was a marriage of convenience into one that was not. The judge also referred to VK (Kenya) [2004] UKAIT 00305, in which the Upper Tribunal held that the correct test to identify a marriage of convenience was not cohabitation or even intention to cohabit. The test was whether, in all the circumstances, the marriage had substance. Marriage of convenience is a phrase which describes the state of the marriage at its inception. A marriage which began as a marriage of substance could not, save in highly unusual circumstances, degenerate into a marriage of convenience. Further, the correct date for assessing the marriage was the date of the Secretary of State's decision. In Rose [2016] EWCA Civ, also cited by Judge Herwald, it was held that the focus in relation to a marriage of convenience ought to be on the intention of the parties at the time the marriage was entered into, whereas the question of whether a marriage was subsisting looked at whether the marital relationship was a continuing one.

12. It was in the light of those authorities that Judge Herwald considered at [9] of the decision that, whilst it would normally be unusual to refuse an adjournment request made because the appellant or a witness has fallen ill, the issue in the appeal was narrow and could only be whether the marriage was at its inception one of convenience. That issue had twice been determined against the appellant, in relation to which the previous Tribunal findings formed the starting point for any further consideration of that same issue. It is not clear that the appellant appreciated that fact. It follows that any further evidence on behalf of the appellant that bore on the continuing subsistence of the alleged relationship could only be of limited relevance as to whether or not the marriage when entered into was one of convenience. It is clear that the evidence relied on by the respondent set out in the refusal decision and including the previous marriage interview from 2014, was sufficient to raise a suspicion that the marriage was one of convenience, so that the evidential burden transferred to the appellant. In the absence of any evidence to the contrary, the respondent would succeed in discharging the legal burden of proof. As I observed above, the refusal decision noted that the appellant had adduced no further evidence when making this third application for an EEA Residence Card.

Assessment of the Impugned Decision in the Light of the Grounds

13. As Mr Bates pointed out in his submissions, Judge Herwald was tasked with deciding the appeal in the light of two previous First-tier Tribunal appeal decisions, in respect of both of which, permission to appeal to the Upper Tribunal had been refused. Each of those two decisions found as a fact that at the point the marriage was entered into it was a marriage of convenience. That was the starting point for Judge Herwald. On the authorities cited by the judge, summarised above, no matter whether the relationship was now genuine or durable a marriage of convenience can never become a marriage qualifying the appellant to an EEA Residence Card. Mr Bates also observed that at no time has the appellant ever applied for a Residence Card on the basis of a durable relationship and that issue was never raised by his representative at the First-tier Tribunal appeal hearing.

14. Judge Herwald noted at [16] of the decision that he had new statements from the appellant and his wife (although both were unsigned and undated). The Judge noted that the focus of the appellant's assertions was the denial that his marriage was a 'sham marriage'. Whilst the statements raise a few criticisms about the marriage interview, neither he nor his wife addressed the findings in the previous Tribunal decisions that the marriage was from its inception one of convenience. I note that both statements are rather short in both length in detail, mainly comprising assertions and I agree that they do not address the crucial issue. At [20] of the decision Judge Herwald also took account of the up to date documentation in the appellant's bundle, which had not been before Judge Malik or Judge Alis, which supported the claim that the couple live together, together with two brief supporting statements of witnesses who were not called to give

evidence, Mr Tariq and Mr Amir. Little of this documentary evidence addressed the crucial issue of the appeal, whether or not the marriage when entered into was one of convenience.

15. After reciting a large part of Judge Alis' decision, including all the findings, Judge Herwald concluded that on the available and limited evidence the appeal must be dismissed.

16. In granting permission to appeal, Judge Simpson considered it arguable that the First-tier Tribunal erred in proceeding to determine the appeal in the absence of both the appellant and the sponsor, refusing the representative's application for an adjournment on the basis that the sponsor had been taken ill and had attended a NHS walk-in centre on the morning of the appeal hearing. Judge Simpson considered it arguable that the appellant had been unjustly deprived of the opportunity of the case being freshly heard and determined beyond the strictures of a decision relying in most part in its reasoning on the previous judges' reasoning," and that, "the decision disclosed overall an inadequacy of reasoning."

17. In relation to the adequacy of reasoning, Judge Herwald adopted the findings and reasoning of Judge Alis, which he was obliged to take as his starting point. Given the limited nature and focus of the documentary evidence that was before Judge Herwald, it follows that the dismissal of the appeal was inevitable. I am satisfied that there was no cogent evidence before the Tribunal that on any view could either displace those findings or discharge the evidential burden on the appellant. In any event, the grant of permission failed to comply with the guidance of the Upper Tribunal in Durueke (PTA: AZ applied, proper approach) [2019] UKUT 00197 (IAC), promulgated before the grant of permission. In that decision, the Upper Tribunal held that "particular care should be taken before granting permission on the ground that the judge who decided the appeal did not "sufficiently consider" or "sufficiently analyse" certain evidence or certain aspects of a case… Permission should usually only be granted on such grounds if it is possible to state precisely how the assessment of the judge who decided the appeal is arguably lacking and why this is arguably material." It follows that not only is there no arguable merit in this ground but that permission should not have been granted on this basis.

18. However, I turn to the consideration as to whether the documentary evidence together with the absent oral evidence could have persuaded a First-tier Tribunal Judge that the marriage when entered into was not one of convenience. That in turn requires consideration as to whether the decision to proceed in the absence of the appellant and the sponsor amounted to procedural unfairness so that the decision of the First-tier Tribunal should be set aside to be remade.

19. I note that on 4.6.19, when the substantive appeal hearing was listed for 13.6.19, the appellant's representatives requested an adjournment. The supporting evidence supplied with the request included a handwritten letter alleged to be from the sponsor stating that she was returning to

Hungary because her mother had fallen ill and was awaiting kidney surgery on 12.6.19. It was said that there was no one to look after her following the surgery so the sponsor urgently needed to return to Hungary "for a couple of weeks." There was also a handwritten note from the appellant supporting the adjournment request and attaching the sponsor's flight booking from Liverpool to Budapest on 11.6.19, with a return on 20.6.19. His request was for a two week adjournment. This was granted and the appeal relisted for the substantive hearing on 23.7.19, notice of which was sent out to all parties on 20.6.19.

20. As set out above, it was asserted at the hearing on 23.7.19 that the sponsor was unwell. The Record of Proceedings records that the judge was told she felt sick and had a headache, was not able to give evidence, and wanted to see a doctor. The judge put the matter back to enable her to seek medical treatment. By early afternoon, the sponsor had not returned from the Walk-in Centre and was, allegedly, still feeling unwell. The Home Office Presenting Officer objected to the adjournment request, observing that there was no evidence that she was unable to attend and although the appellant could attend, he had chosen not to return to the Tribunal. No information appears to have been provided as to what in particular was wrong with the sponsor. Other than as set out above, there is no reference to any condition, symptom, diagnosis, treatment, or medication. It was not clear why the sponsor was, allegedly, still at the Walk-in Centre if she went there shortly after 10am. Nor was it clear why the appellant had not returned to the Tribunal.

21. I have the Tribunal's case file before me and observe that the appellant has adduced no further evidence to support the claim that the sponsor was unwell and thereby unable to attend the appeal hearing before Judge Herwald. Nor has there ever been provided any justification for the appellant's absence. Having considered the matter carefully, I am satisfied that it would have been reasonably open to the appellant to obtain and adduce evidence to confirm that the sponsor was actually so unwell that she was unable to attend the hearing. Neither is there, even now, any explanation as to why the appellant himself, who was not ill, was unable to attend the appeal hearing even if the sponsor was not. It does not appear that any other witness referred to in the grounds attended in support of the appeal; certainly Mr Malik did not call any such witness. At [9] of the decision, Judge Herwald noted that "there was no suggestion by Mr Khan that he would, in the event of proceeding, wish to call the appellant, but he has taken the matter proceeded by way of submissions." In the circumstances, I am not satisfied that absence of the appellant and the sponsor was justified or reasonable. Consequently, I cannot be satisfied that the decision to proceed with the appeal in the absence of the appellant and the sponsor caused any procedural unfairness, as alleged in the grounds.

22. I am satisfied that given the paucity and poverty of the further evidence adduced by and on behalf of the appellant at the appeal hearing, and given its limited relevance to the central issue of marriage of convenience,

the inevitable outcome was a dismissal of the appeal. I cannot be satisfied on the basis of the arguments raised in the grounds that even had either or both of the appellant and the sponsor given oral evidence before Judge Herwald that the outcome could or would have been any different.

23. In the circumstances, and given the appellant's absence from the hearing before me, I find no material error in the decision of the First-tier Tribunal sufficient to set it aside. I am satisfied that the decision to proceed without the appellant and the sponsor was one which was justified and which, in all the circumstances, gave rise to no procedural unfairness. I cannot see that the so-called new evidence, being little more than assertions by the appellant and the sponsor that their relationship is genuine, could have been on any basis sufficient to discharge the evidential burden to show that the marriage was not one of convenience. In the circumstances, and in particular in light of the findings of the two previously First-tier Tribunal decisions, the inevitable outcome of the appeal was a dismissal, on the basis that the marriage was one of convenience.

Decision

24. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

Signed

Upper Tribunal Judge Pickup

Dated 20 December 2019

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed DMW Pickup

Upper Tribunal Judge Pickup

Dated: 20 December 2019