IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001538

First-tier Tribunal No:
EU/52976/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 28th January 2025

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MOHAMMED AMINE BABAAZI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Aghayere, Counsel instructed by Lawland Solicitors
For the Respondent: Mr J Thompson, Senior Home Office Presenting Officer

Heard at Field House on Monday 20 January 2025

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Cohen dated 20 February 2024 ("the Decision") dismissing his appeal against the Respondent's decision dated 3 May 2023 refusing to grant him status under the EU Settlement Scheme ("EUSS") based on his retained rights of residence as the former spouse of an EEA national, Ms Tavares who is a Portuguese national, now returned to Portugal.

2. The Appellant is a national of Morocco. The Appellant first applied for a residence permit under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") on 4 June 2013 as the spouse of Ms Tavares. They had married on 10 April l2013. The Appellant and Ms Tavares were invited to attend a marriage interview in October 2013. They failed to attend. They also failed to attend a second interview as by that time (August 2014) they had separated. They also failed to attend a marriage interview on 6 October 2014 (see [18] of the First Appeal Decision). It is recorded at [13] of the Decision that the Appellant's application for a residence card was refused on three occasions between 26 September 2014 and 29 May 2019. The Respondent refused residence cards for failure to attend the marriage interviews. The marriage was not accepted to be genuine.

3. The Appellant began divorce proceedings in September 2016. The decree absolute was not granted until 17 July 2021 as the Appellant says that his solicitors failed to seek this.

4. The Respondent contends that the Appellant's marriage was one of convenience. As such, on 11 November 2021, the Respondent refused status under the EUSS because he did not meet the Immigration Rules under Appendix EU. His appeal on that occasion was heard by First-tier Tribunal Judge Swinnerton who, by a decision promulgated on 12 July 2022 ("the First Appeal Decision") dismissed the appeal. I was told by Mr Aghayere that the Appellant challenged the First Appeal Decision but was refused permission to appeal.

5. The Appellant applied again for status, but that application was again refused by the decision under appeal dated 3 May 2023. The basis of the refusal was, once again, that the Appellant's marriage to Ms Tavares had been one of convenience.

6. The Appellant who represented himself in the First-tier Tribunal complains that the hearing before Judge Cohen was procedurally unfair. I will come to the detail of that assertion below. The Respondent was not represented at that hearing.

7. Judge Cohen took as his starting point the findings made by Judge Swinnerton in accordance with the Devaseelan guidelines. Having considered those findings, and the evidence of the Appellant, the Judge concluded that the marriage was one of convenience and dismissed the appeal.

8. The Appellant appeals on three grounds summarised as follows:

   Ground one: procedural impropriety.
   Ground two: the Judge misdirected himself as to the test to be applied.
   Ground three: the Judge made various factual errors.

9. Permission to appeal was refused by First-tier Tribunal Judge I D Boyes on 15 March 2024 in the following terms so far as relevant:

> "..3. The first ground is one of procedural impropriety. The Judge is said to have erred in hearing the case despite what is claimed is a short time frame to consider the papers and with the appellant appearing alone. This is not arguable. The appellant would have had the refusal and bundle of documents otherwise how would he have known to appeal or what to appeal against. There is no merit in the time issue. The appellant should have been prepared. It was his choice not to be if he wasn't.
> 4. The claimed factual errors are not arguable errors of law. The marriage certificate issue is a red herring given that both Judges and the Home Office found that whatever the marriage was it was one of convenience.
> 5. Assessing the case as a whole there is no error of law. The appellant has tried and failed multiple times in relation to this claimed marriage to achieve status in the UK and has on multiple occasions not succeeded. He has not succeeded due to judicial error however.
> 6. Permission is refused on all matters raised."

10. The Appellant renewed his application to this Tribunal. Permission to appeal was granted by Upper Tribunal Judge Sheridan on 22 November 2024 in the following terms:

> "1. It was arguably procedurally unfair to give the appellant only 20 minutes to review the bundle received on the day of the hearing when he stated that 20 minutes was insufficient time for him to prepare (as recorded in paragraph 22 of the decision).
> 2. I do not restrict the grounds that can be pursued. However, I make the observation that the other grounds appear weak given that, even if the judge erred in the ways described, this would not appear to undermine the judge's decision to, in accordance with *Devaseelan (Second Appeals – ECHR – Extra-Territorial Effect) Sri Lanka* * [2002] UKIAT 00702, make findings in line with the previous judge."

11. The Respondent filed a Rule 24 Response on 28 November 2024 seeking to uphold the Decision. I will come to that as relevant below. The Appellant filed a Rule 25 Response dated 6 January 2025. The Rule 25 Response and the grounds were both drafted by the Appellant's solicitors and/or Mr Aghayere.

12. The appeal comes before me to decide whether there is an error of law. If I determine that the Decision does contain an error of law, I then need to decide whether to set aside the Decision in consequence. If I set the Decision aside, I must then either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

13. I had before me a bundle running to 240 pages containing the documents relevant to the appeal to this Tribunal, and the Appellant's and Respondent's bundles before the First-tier Tribunal. I refer to documents in that bundle as [B/xx]. That bundle was filed by the Appellant's solicitors electronically on 14 January 2025, but Mr Thompson did not have that because it was not separately served on the Respondent. Mr Aghayere said that his instructing solicitors had not been directed to do that. There is however a Senior President of

Tribunal's Practice Direction dated 31 August 2023 which makes clear that the filing of a bundle on CE file does not constitute service on the other party and that service must be carried out separately.

14. It was not possible to email the bundle to Mr Thompson due to its size. However, he was able to use the documents on the First-tier Tribunal system to access the majority of the documents referred to and the Tribunal was able to provide him with paper copies of documents to which he did not otherwise have access. The hearing was therefore able to proceed.

15. Having heard from Mr Aghayere and Mr Thompson, I indicated that I would reserve my decision and provide that with my reasons in writing which I now turn to do.

DISCUSSION

Ground One: Procedural Impropriety

16. I begin with [22] of the Decision to which Judge Sheridan referred in the grant of permission to appeal. That reads as follows:

> "The appellant gave oral evidence before me in English. He adopted his witness statement as part of his evidence in chief. He relied on the documentary evidence submitted in support of the appeal. **He indicated that he had not received the bundle in respect of the previous appeal and the 20 minutes allocated to him and his representative were insufficient to prepare for the same**…."
> [my emphasis]

17. As is pointed out in the Appellant's grounds, the Appellant did not have a representative at the hearing before Judge Cohen. Judge Cohen was clearly aware that this was the case. I had thought therefore that this reference might have been to what had happened at the hearing before Judge Swinnerton. In the First Appeal Decision ([§7] at [B/235]) reference is made to Mr Aghayere (who represented the Appellant before Judge Swinnerton) being given time to consider the Respondent's bundle because he did not receive it until after the hearing had resumed. However, Mr Aghayere, on instructions, satisfied me that this was not the case. The reference to needing more than twenty minutes to consider the bundle did relate to this hearing.

18. However, the Judge referred to "the bundle in respect of the previous appeal". It is difficult to know what the Appellant actually told the Judge as there is no witness statement from the Appellant. However, Mr Aghayere said (on instruction) that the Appellant may have been referring to a lack of access to the bundle submitted in the previous appeal. If that is the position, then the Appellant's reason for needing more time has no merit since the bundle in the previous appeal was not before Judge Cohen and therefore formed no part of the documentation in this appeal. In any event this does not appear to be the Appellant's

pleaded case as that refers to a "205 pages combined bundle" which is the length of the "stitched bundle" in this appeal.

19. The Appellant says in the grounds that he "only received the hearing link in the middle of the day after chasing the court profusely" and says that he was then told that the case was in a "float list" and was given only "17-20 minutes to read the voluminous 205 pages combined bundle". Mr Aghayere said in submissions that the Appellant was given the link at 1051 hours and told to join the hearing at "11 something" approximately seventeen minutes later. The Appellant is said to have complained to the Judge that he had only had twenty minutes and was told that this was enough.

20. As noted above, there is no witness statement from the Appellant in support of the assertion of procedural impropriety to explain what is said to be unfair. It is suggested in the grounds that the Appellant needed more than twenty minutes to consider the documents. Judge Sheridan indicated in the grant of permission that the Appellant did not have the documents until the morning of the hearing. He may have inferred that from what is said in the pleaded grounds. However, that is not borne out by what is shown on the First-tier Tribunal's electronic system to which I was able to refer in the course of the hearing and the relevant content of which I set out below.

21. The 205 page hearing bundle was put together on 3 January 2024 and therefore available from that date, one week ahead of the hearing. Nearly 100 pages of the bundle are documents generated by the Appellant himself earlier in the appeal. The Respondent's documents are 82 pages in length but comprise mainly the application submitted by the Appellant and the decision refusing his application both of which he would have had. The Respondent's review is dated 14 October 2023. That, together with the First Appeal Decision which is appended to the review, would therefore have been available to the Appellant on the electronic system some time before the hearing. There is mention at [17] of the Decision to the Appellant having responded to that review which therefore confirms that the Appellant had this prior to the hearing.

22. As is pointed out by the Respondent in the Rule 24 Response at [§4-5] ([B/26-27]:

> "4. This is an appeal for which all documents can be accessed on the HMCTS platform. The hearing took place on 10th January 2024. The only hearing documents uploaded to the HMCTS platform on behalf of the SSHD were the Home Office bundle and the Home Office review. The bundle was uploaded on the 15th June 2023 and the review on 15th October 2023.
> 5. The hearing bundle consists of all the documents from the Tribunal and both parties. This was uploaded ahead of the hearing on 03rd January 2024 (sic). Having reviewed the documents on the HMCTS platform, there is nothing in the combined bundle that A would not have been aware of prior to the hearing. It contains the documents uploaded in support of his

application and the Home Office documents referred to above, which were uploaded in good time. As such, it is not accepted there was procedural unfairness as there was no new evidence presented to A on the day of the hearing."

23. In response to that, in the Rule 25 Response at [§ 6] ([B/30]) the Appellant says this:

> "It is asserted that the Appellant would have had the refusal and appellant bundle of documents, but what the Appellant did not have until moments before the hearing was the 205 pages combined bundle to which he was given 17-20 minutes to read before the commencement. The FTJ failed to give the Appellant sufficient time to adequately prepare for his hearing where he was representing himself. Various factors on the day combined placed an inexperienced Appellant on the back foot of a very important day of his life. This includes the hearing being converted to CVP at the last minute, the delayed starting time further to put the case on a float list, where it was not even explained to him how the float list works."

24. As I have already pointed out, none of what is said in the grounds or Rule 25 Response is supported by any witness statement from the Appellant. Nevertheless, the suggestion that the Appellant did not have the 205 page bundle is undermined by evidence on the First-tier Tribunal's system showing it was available on 3 January 2024 (which was not the date of the hearing contrary to what is said in the Respondent's Rule 24 Response). The Appellant therefore had access to the bundle seven days prior to the hearing. Even if he did not trouble to access that bundle, he had all of the documents which were in the bundle well in advance of the hearing, the majority of those documents being ones he had himself generated or submitted.

25. I turn next to the method of hearing and what the Appellant did or did not know about that. The hearing before Judge Cohen was in a "float list". It was listed on 29 November 2023 to be heard on 10 January 2024. The hearing was originally intended to be face-to-face. However, on 5 January, it was converted to a CVP hearing due to a tube strike. That was confirmed by a document of that date which included guidance about joining a remote hearing with link to a guide about such hearings.

26. I accept that the guidance given is not precisely what happened in this case as the Appellant was not sent the remote hearing link until the day of the hearing. However, the Appellant was given contact details for the Tribunal if he had any queries. The Appellant contacted the First-tier Tribunal on 9 January 2024 querying when he would receive the link for the remote hearing. He must therefore have been aware of the conversion on 5 January of the hearing to a remote hearing. He was told by the Tribunal on 9 January that the hearing was in the "float list" and that he would receive a link up to 3pm on the day of the hearing. If he did not understand what a "float list" was, he had ample opportunity to ask. He was however told that he would get the remote

link at any time up to 3pm on the day of the hearing and must therefore have been aware that the start of the hearing might not be at 10am. There is incidentally no record of the Appellant contacting the Tribunal on the day of the hearing itself.

27. The other point made in the Rule 25 Response is at [§4] ([B/30] as follows:

> "Further, the Appellant would say that he expected the Home Office to be present, and that the judge would be neutral listening to both sides before making a decision. However, the Appellant found the whole experience to be far from expectation, with the absence of the Home Office Presenting Officer, and the judge asking questions on behalf of the Home Office which in his view did not appear to be neutral or independent of the Home Office."

28. There are two difficulties with this submission on which Mr Aghayere sought to rely. First, there is no witness statement from the Appellant in support of what may amount to an allegation of bias. Second, and more importantly, it was not part of the grounds on which permission to appeal was sought. Mr Aghayere accepted this to be the case and did not seek permission to amend. Had he done so and had permission been granted, that would have necessitated an adjournment in order to seek comments from Judge Cohen and to obtain a recording of the hearing. As it was, since it was not raised at the appropriate time none of that had been done.

29. In any event, if the complaint made is only that the Judge asked questions in the absence of a representative from the Home Office, that is not inconsistent with the "Surendran guidelines" (as set out in STARRED MNM (Surendran guidelines for Adjudicators) (Kenya) [2000] UKIAT 00005).

30. Although concerned with adjournments, the guidance given in Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) makes clear that whether a hearing is fair is an objective test; the test is not whether the First-tier Tribunal Judge acted reasonably. However, the question of what fairness demands depends on the circumstances. In this case, the Appellant had ample notice of the hearing. The documents to which he needed to have access were mostly generated by him and were in any event all available well ahead of the hearing. Even the bundle itself was available seven days in advance of the hearing.

31. Whilst the conversion of the hearing to a remote one at the last minute was regrettable, there was good reason for it and the Appellant was given advance notice of the change, guidance about the form of the hearing and the opportunity to contact the First-tier Tribunal if he needed assistance (which opportunity he used to contact the Tribunal on the day before the hearing).

32. I reiterate the point which I have already made that none of the allegations of unfairness including those which might amount to an allegation of bias are properly evidenced by a witness statement from the Appellant. However, having regard to what is said in the grounds seeking permission to appeal as expanded upon in the Rule 25 Response, I am satisfied that the hearing before Judge Cohen was not procedurally unfair or improper.

33. No error of law is made out on ground one.

Ground Two: Misdirection in law

34. This ground as initially pleaded is that Judge Cohen did not apply the correct test to whether the Appellant's marriage had been one of convenience. However, in the Rule 25 Response, that case is altered somewhat to assert also that Judge Swinnerton did not adopt the correct test. That arises from the Respondent's reliance on the First Appeal Decision which it is said was not challenged by the Appellant. The Appellant says that it was in fact challenged.

35. Mr Aghayere submitted that Judge Cohen had been wrong to adopt the findings made by Judge Swinnerton because Judge Swinnerton had adopted the wrong test. He said that permission to appeal the First Appeal Decision had been sought but refused.

36. Although Mr Aghayere did not take me to it, the refusal of permission to appeal by the First-tier Tribunal in that appeal appears at [B/33]. It appears from the refusal that the grounds were that Judge Swinnerton had failed properly to apply the test under the EEA Regulations. As is there pointed out, however, the refusal under appeal before Judge Swinnerton was, as before Judge Cohen, a refusal of status under Appendix EU. The EEA Regulations were of no relevance. Even if they were, the Appellant had previously been refused a residence permit on several occasions when the EEA Regulations were in force on the basis that the genuineness of his marriage was not accepted.

37. That is in fact a complete answer also to the ground pleaded in this case. As a refusal of status under Appendix EU, the only grounds available to the Appellant were that the decision was contrary to Appendix EU or to the agreement between the EU and UK on the UK's exit from the EU ("the Withdrawal Agreement"). The Appellant does not raise any challenge under the Withdrawal Agreement. He therefore needed to show that he met Appendix EU.

38. Whilst I accept that neither Judge Cohen nor Judge Swinnerton made reference to the test applicable to whether a marriage is one of convenience under Appendix EU, the test which applied in both appeals is to be found in the definition in Annex 1 of Appendix EU as follows:

> "a civil partnership, durable partnership or marriage entered into as a means to circumvent:

> (a) any criterion the party would have to meet in order to enjoy a right to enter or reside in the UK under the EEA Regulations; or
> (b) any other provision of UK immigration law or any requirement of the Immigration Rules; or
> (c) any criterion the party would otherwise have to meet in order to enjoy a right to enter or reside in the UK under EU law; or
> (d) any criterion the party would have to meet in order to enjoy a right to enter or reside in the Islands under Islands law"

Nothing in either the Decision or the First Appeal Decision suggests that either Judge was adopting the wrong approach to that issue. More importantly, the Appellant has not pleaded a challenge of misdirection in relation to the law which applies.

39. I add for completeness that, if and insofar as the Appellant relies on an error made by Judge Swinnerton, the ground is misconceived. As I pointed out to Mr Aghayere, it is no function of a Judge to deal with an appeal from another Judge of equal jurisdiction. A Judge can decline to follow a judgment or decision of another Judge of equal jurisdiction, but it is the function of the appellate courts to overturn a decision or judgment which is wrongly decided. Here, the First Appeal Decision was not set aside on appeal and therefore stands.

40. Furthermore, the Devaseelan guidance relates to the findings of the previous Judge forming the starting point for a second Judge and not the outcome. It is for the second Judge to form his or her own conclusions as to whether any legal test is made out, having regard to any further evidence relied upon by an appellant. That is the exercise which Judge Cohen conducted.

41. For those reasons, ground two is not made out.

Ground Three: Factual Errors

42. Before turning to consider the factual errors asserted, some of which are made out but make no difference to the outcome, I address a point made at [§12] of the grounds that the errors "question the integrity of the judges [sic] overall assessment of the Appellant's case". There is nothing in the errors asserted to support that submission.

43. I accept that Judge Cohen misstated the Appellant's date of birth at [1] of the Decision giving it as "14 April 2001". It is not clear from where that date comes. It is however evidently a slip. The Judge thereafter correctly sets out the chronology and must have been aware that the Appellant could not, for example, have married in April 2013 if only born in April 2001. Mr Aghayere said it made a difference because it was part of the Appellant's identity. That is not the test. Whilst I accept that it is an unfortunate slip, it does not impact on the findings made or the outcome of the appeal. As such, the error is not material.

44. Mr Aghayere made much of an error which he said was made at [6] of the Decision which reads as follows:

> "The respondent noted that the appellant submitted an Islamic marriage certificate issued in the UK on 14 September 2022 as evidence that he was the spouse of a relevant EEA citizen. All marriages which take place in the UK, to be recognised as valid in the UK, must be carried out in accordance with the requirements of the relevant marriage legislation. A UK Islamic marriage certificate is not evidence of such a marriage."

There is no further reference to this point in the part of the Decision where the Judge reaches his own findings. However, even if the Judge could be said to be adopting the Respondent's position, the error is not material.

45. The Appellant's marriage certificate appears at [B/70]. Whilst that states that the marriage was "solemnized at Islamic Centre of England", it is a marriage certified pursuant to the Marriage Act 1949. It is said to be a marriage "according to the rites and ceremonies of the Muslims" but as a marriage registered under the Marriage Act 1949, it would appear to be a legally valid marriage. However, the Respondent has misunderstood this and, if the Judge could be said to have adopted the Respondent's position, he too may have made an error. That is however an error in their understanding that this was only an Islamic marriage which was not legally valid. I do not read what is said at [6] of the Decision as being a rubber-stamping of the Respondent's decision as Mr Aghayere sought to suggest but a record of the Respondent's misunderstanding about what the evidence showed albeit not one which the Judge corrected.

46. Even if both the Respondent and the Judge erred in their understanding of this evidence, the error could not make any difference to the outcome for several reasons. First, whether a durable partnership of convenience or marriage of convenience, the test under Appendix EU is the same (see the definition set out above). Second, the Respondent's reason for refusing the Appellant's application was that this was a marriage of convenience. It was not that the marriage was not legally valid. The motive behind the marriage – whether legally valid or not – was the issue for the Judge to determine and which he did determine. His misunderstanding and the error made therefore does not impact on the findings made or the outcome of the appeal.

47. The Appellant next says that the Judge failed to record the Appellant's full evidence in relation to the finding made at [23] of the Decision. The Judge there says the following:

> "When he and the sponsor married they did not celebrate as the sponsor was working. She worked for a cleaning agency at the time. He did not remember the name of the same. It was based around Hackney. His last contact with the sponsor was in 2022. She provided a witness statement and her passport copy. Their contact then ceased."

48. It is said in the grounds of appeal (although yet again unsupported by any witness statement) that the Judge told the Judge that Ms Tavares had two jobs and also worked in a kitchen in Leyton (as evidenced by a contract of employment which is at [B/200-203]). It is however difficult to see what difference this makes to the Judge's finding. The Judge's finding is based on the Appellant's inability to provide the name of Ms Tavares' employer. It is not said that the Appellant gave the name of the other employer. It is not said that the Appellant gave the name of an employer which was inconsistent with the documentary evidence. The fact that the Appellant could not name the company for whom his wife worked was a point which the Judge was entitled to take against the Appellant.

49. That was in any event not the only factor on which the Judge relied. In common with Judge Swinnerton, the Decision largely turns on discrepancies between the addresses of the Appellant and Ms Tavares as shown in the documentary evidence.

50. Mr Aghayere drew my attention to two documents which he said clearly showed that the Appellant and Ms Tavares were living together for one year (they would need to show cohabitation for twelve months). Those are two tenancy agreements at [B/80-86]. They relate to an address at 22 Bestwood Street, London SE8 5AW. The two agreements are dated from 1 May 2013 to 31 October 2013 and 1 November 2013 to 1 May 2014.

51. That Ms Tavares was living at the 22 Bestwood Street address for that period is confirmed by a few documents, for example, utility bills (see [§22] of the First Appeal Decision at [B/238]) but is undermined by payslips and other financial documents which give an address of 16 Woodbury Street (see [B/105-111]). Those indicate that Ms Tavares lived at that address from before the start of the tenancy agreements, continued to do so throughout the period covered by those tenancy agreements and after the end of the tenancy agreements (which is around the time the couple are said to have separated).

52. This was a point taken by Judge Swinnerton at [§20] of the First Appeal Decision ([B/237]). Judge Swinnerton set out at [§21] of the First Appeal Decision the Appellant's explanation for this that "Ms Tavares had failed to inform her employer of the change in her address to 22 Bestwood Street". Judge Swinnerton did not accept that explanation.

53. Before Judge Cohen, the Appellant relied on a statement which appears at [B/87] where he says that the discrepancy arose because "the agencies we were working with did not update our address information".

54. Judge Cohen dealt with this evidence, starting with Judge Swinnerton's finding at [§28-29] of the Decision as follows:

> "28. The previous Immigration Judge found that there was a discrepancy permeating the appellant's evidence in that correspondence and employment documentation was submitted in support of the appellant's application and appeal relating to the sponsor which indicated her to be at a different address to that provided by the appellant for the pertinent period. That situation continues before me. The appellant has submitted documentation for the sponsor showing her to be at a third address for the time that they claim to have been residing at 22 Bestwood St under assured short hold tenancy agreements. I do not find the appellant's attempts to explain these away to be convincing. I find that there is a plethora of documentation providing discrepant addresses for the sponsor at a time that the appellant and sponsor claim to be living together and I find this to be damaging to the credibility of this appeal.
>
> 29. The appellant has submitted extremely limited evidence to show that the sponsor was living at the 22 Bestwood address with him for the approximate one year that he claims that they resided there together and I find this to be indicative of the fact that the parties were not in a valid and subsisting marriage."

55. It is of note that Ms Tavares herself does not deal with this point in her statement which appears at [B/63-65] and [B/207-209]. She confirms that she lived with the Appellant at 22 Bestwood Street but offers no explanation for the discrepancy in the documents as to addresses. It is of note incidentally that this statement was evidently prepared for the previous appeal as it pre-dates the hearing of that appeal. That is therefore evidence which would have been taken into account in the First Appeal Decision.

56. The Judge took into account that the Appellant had sought to explain the discrepancies in what is said at [§28] of the Decision. He was not bound to accept that explanation and was entitled to reach the finding he did in that regard.

57. That brings me on to the Appellant's complaint about the Judge's finding in relation to Ms Tavares' statement. At [§32] of the Decision, the Judge said this:

> "32. I acknowledge that the appellant has submitted additional documentation in support of the appeal including a witness statement from the sponsor and photograph of her holding her passport. However, she did not attend the appeal to give live evidence before me or open herself to questioning. In these circumstances, I attach very limited weight to the sponsor's witness statement."

58. As I have already pointed out, Ms Tavares' statement was before Judge Swinnerton. It is referred to at [§17] of the First Appeal Decision ([B/236]). As on this occasion, Ms Tavares did not attend to give evidence.

59. It is said in the grounds seeking permission to appeal the Decision that Judge Cohen failed to take into account Ms Tavares' explanation

for not being able to attend to give evidence which is said to be because her current partner would not permit her to do so.

60. That is inconsistent with her statement which indicates that she would be willing to attend remotely if the date of the hearing were convenient but might not be able to do so as she is now "living [her] own life". That does not indicate that she was unable to attend.

61. As I pointed out to Mr Aghayere, the reason why the Judge did not give weight to the statement is because Ms Tavares' evidence could not be tested. The Judge had no opportunity to see her give oral evidence. Weight is a matter for a Judge. Judge Cohen was entitled to give the evidence less weight as a result of her not attending.

62. Finally, a point is taken about the wording of [§36] of the Decision which reads as follows:

> "36. In the light of my findings above, I find that the parties **are in a marriage/relationship of convenience.** The appellant does not meet the eligibility requirements for limited leave to enter under Appendix EU to the Immigration Rules. The appellant is not eligible for indefinite leave to remain."
> [my emphasis]

63. As the grounds point out, the parties are on any view now divorced. Mr Aghayere submitted that the use of the present tense was therefore an error. The application was one for a retained right of residence.

64. A Judge's decision is not to be interpreted as if it were statute or a contract (Volpi and anor v Volpi [2022] EWCA Civ 464). The Judge clearly recognised at [1] of the Decision that the application and refusal was on the basis of a previous relationship and not a current one. The use of the present tense is simply a slip. It could make no difference to the outcome. The issue was whether the Appellant could meet Appendix EU. For the reasons given, he could not and the Judge was entitled so to conclude.

65. Ground three is for those reasons not made out.

CONCLUSION

66. For the reasons set out above, the Decision does not contain any material error of law. I therefore uphold the Decision with the result that the Appellant's appeal remains dismissed.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge Cohen dated 20 February 2024 does not involve the making of an error of law. I uphold the Decision with the result that the Appellant's appeal remains dismissed.

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 January 2025