Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02975/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 September 2018	**On 26 September 2018**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MUHAMMAD SHAKEEL

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Briddock, Counsel instructed by M & K Solicitors
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION

Background

1. By a decision promulgated on 11 July 2018, I found an error of law in the decision of First-tier Tribunal Judge Gribble dismissing the Appellant's appeal against the Respondent's decision dated 25 February 2016 refusing him a residence card on the basis of retained rights of residence as the former family member (ex-spouse) of an EEA national exercising Treaty rights in the UK. I set aside that

decision and gave directions to re-make the decision. My error of law decision is appended to this decision for ease of reference.

2. The Appellant's immigration history is amply set out at [2] to [4] of my earlier decision and I do not need to repeat that. The salient dates in relation to the issues which I have to decide are the date of the Appellant's marriage to his Latvian spouse, Ms [F], which took place on 25 July 2010 and the date of his divorce from her. In that regard, the decree nisi was pronounced on 5 December 2013 and was made absolute on 6 March 2014. I will also need to deal with the dates when the couple lived together at various addresses and their employment history, but I will do so when considering the evidence below.

3. I referred in my earlier decision to two earlier First-tier Tribunal decisions made on 20 September 2012 and 30 March 2015. However, for the reasons given at [20] to [24] of my earlier decision, I do not take those decisions as my starting point as the earlier findings were not concerned with the issues which I have to determine. I will refer to them, however, as appropriate when dealing with the facts of the case.

The Legal Framework and Issues

4. Turning then to the issues for me to decide and the legal framework, the parties are agreed that the relevant applicable regulations are The Immigration (European Economic Area) Regulations 2006 ("the Regulations"). The relevant provisions of the Regulations are regulations 10 (in relation to retained rights of residence) and 15 (permanent right of residence). Those read as follows (so far as relevant):

> **Regulation 10**
>
> "**Family member who has retained the right of residence"**
>
> 10.- (1) In these Regulations, "family member who has retained the right of residence" means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).
>
> …
>
> (5) A person satisfies the conditions in this paragraph if—
>
> (a) he ceased to be a family member of a qualified person or of an EEA national with a permanent right of residence on the termination of the marriage or civil partnership of that person;
>
> (b)he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;
>
> (c)he satisfies the condition in paragraph (6); and
>
> (d)either—
>
> (i)prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

(ii) ….

(6) The condition in this paragraph is that the person—

(a) is not an EEA national but would, if he were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; or

(b)is the family member of a person who falls within paragraph (a).

….

(8) A person with a permanent right of residence under regulation 15 shall not become a family member who has retained the right of residence on the death or departure from the United Kingdom of the qualified person or the EEA national with a permanent right of residence or the termination of the marriage or civil partnership, as the case may be, and a family member who has retained the right of residence shall cease to have that status on acquiring a permanent right of residence under regulation 15."

Regulation 15

"Permanent right of residence
15.—(1) The following persons shall acquire the right to reside in the United Kingdom permanently—
(a) ….;
(b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;
…
(f)a person who—
(i)has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and
(ii)was, at the end of that period, a family member who has retained the right of residence.
…."

5. The Respondent accepts in his decision letter that the Appellant's marriage to Ms [F] subsisted for at least three years (as is evident from the chronology at [2] above). However, the Respondent did not accept that the marriage was a genuine one and he asserted that the marriage was one of convenience. In addition, issue was taken whether Ms [F] was exercising Treaty rights at the relevant times and whether the Appellant was himself economically active as if he were an EEA national during the relevant periods. Although Mr Duffy accepted in oral submissions that the evidence as to the employment activity of Ms [F] and the Appellant is now more complete, he continued to argue that their earnings were such that any such activity was marginal and ancillary so that it did not amount to genuine economic activity and that the evidence still does not show that they meet the relevant criteria.

6. In relation to the genuineness of their economic activity, Mr Briddock reminded me that the genuineness of economic activity is not dictated by the level of earnings. I refer to what was said by this Tribunal in the case of Begum (EEA- worker –

jobseeker) Pakistan [2011] UKUT 00275 (IAC), the headnote to which reads as follows (so far as relevant):

> *"(1) When deciding whether an EEA national is a worker for the purposes of the EEA Regulations, regard must be had to the fact that the term has a meaning in EU law, that it must be interpreted broadly and that it is not conditioned by the type of employment or the amount of income derived. But a person who does not pursue effective and genuine activities, or pursues activities on such a small scale as to be regarded as purely marginal and ancillary or which have no economic value to an employer, is not a worker. In this context, regard must be given to the nature of the employment relationship and the rights and duties of the person concerned to decide if work activities are effective and genuine…."*

I will consider the evidence as to economic activity below.

7. I set out the case law relevant to the burdens and standard of proof in relation to the issue whether a marriage is one of convenience at [15] to [16] of my earlier decision and I do not need to repeat that. As Mr Briddock submitted and Mr Duffy accepted, the legal position is that the Respondent retains the legal burden of proof throughout to establish that the marriage is one of convenience. At highest, if the Respondent is able to establish a prima facie case that the marriage is one of convenience, the Appellant has an evidential burden to respond to the doubts raised.

The Respondent's Case

8. Turning then to the Respondent's reasons for finding that the marriage was one of convenience, those are set out at page [2/4] of the decision letter as follows:

> "…Furthermore, you were invited to attend an interview at our offices in Liverpool on 12th January 2016. The purpose of the interview was to verify the genuine nature of your marriage to your EEA sponsor when it subsisted.
>
> During the interview you were asked various questions about your EEA sponsor and your marriage. You were asked about your EEA sponsors work and stated that when you met, your EEA sponsor was working as a cleaner. You stated at the point of your divorce your EEA sponsor was a cleaner at Alfa Rose Kebabish Restaurant and could be called anytime to clean between 11am and 11pm. The interviewer found that you were evasive when it came to answering questions in more details. We do not find it credible that your EEA sponsor would just be called into clean whenever and would not have a set shift pattern or working hours.
>
> You had previously been invited on two occasions to attend an interview when you submitted an application in 2013 based on your marriage to your EEA sponsor. You failed to attend on both occasions and failed to provide any compelling reason as to why you did not attend. You stated to the interviewer on this occasion that you did not attend due to depression but you have never provided any medical evidence of this. You did not inform the Home Office that in September 2013 your marriage to your EEA sponsor had broken down, and instead continued with your application and subsequent appeal based on the fact that you were in a relationship with your EEA sponsor.

You have previously made applications for a residence card based on your relationship to your EEA sponsor however on each occasion these were refused as you failed to provide sufficient evidence relation to your EEA sponsors treaty rights.

Due to the evidence above we have doubts as to whether the marriage between you and your EEA sponsor was genuine when it subsisted."

9. The interview record runs to some twenty-four pages. The Appellant was asked a number of questions about his relationship, including Ms [F]'s background and family circumstances, when they met, when they started living together and where, the wedding arrangements and the divorce. No issue is taken with the Appellant's answers to those questions. Of course, by the time of the interview, on 12 January 2016, the Appellant was already divorced and, on his account, no longer in contact with Ms [F] so that she could not be interviewed.

10. The relevant exchange between the interviewer and the Appellant on which the Respondent relies is as follows:

"Interviewer:	How many hours of work did your ex wife work, how many hours did she work at the …as a cleaner? Wat that her only job in the restaurant, or did she work elsewhere as well?
Applicant:	No, just for work last (inaudible)
Interviewer:	So what were her hours of work? How long did…What time did she start work and what time did she finish work?
Applicant:	It different times when they calling, but it's less than 20 hours.
Interviewer:	So what time did she start work?
Applicant:	It's different times.
Interviewer:	When you say different times, what do you mean by that?
Applicant:	When they calling, when they calling.
Interviewer:	What times of day would they call?
Applicant:	They start 11, 11 to 9, 10, no it's 11am to 11pm
Interviewer:	She would be called anytime from 11am to 11pm?
Applicant:	Yes, anytime, yes.
Interviewer:	But if she's working in a restaurant, surely they don't want her cleaning when they've got customers in that restaurant, so what times would she go to clean?
Applicant:	It's not exactly time, I told you it's not exactly time, it's different times.
Interviewer:	What time did she normally go to work?
Applicant:	It's not different time, it's four times…
Interviewer:	So you don't know what time your wife would usually go out to work?

Applicant: No, I know, but sometimes I'm going to my job and she's going there. I told you in between times she's going.

Interviewer: So it's a restaurant, is it a restaurant that has customers sitting down in? Is this restaurant has customers sitting down?

Applicant: Yeah.

Interviewer: So she's a cleaner, OK, so surely she would go before they opened or when they finished, so when did she go?

Applicant: Most of the time, sometimes before starting.

Interviewer: So what time would the restaurant open?

Applicant: I think they open at 10 to 11, yeah, this time.

Interviewer: They opened at 10 o'clock in the morning?

Applicant: Yeah. But that's different timing every day.

Interviewer: So she'd clean while there were customers in the restaurant?

Applicant: She's cleaning, it's a cleaning job.

Interviewer: She would clean while there were customers in the restaurant? Did she clean out in the restaurant or did she clean kitchen, toilets, where did she clean?

Applicant: I don't know what she doing there, but she is working there as a cleaning, yeah."

11. The Appellant was invited to interview with Ms [F] on two occasions, in August and September 2013, in connection with an earlier application made on 3 April 2013 for a residence card. They failed to attend. The Appellant was asked about this and the breakdown of their marriage at the interview in January 2016 in the following exchange:

"Interviewer: So tell me about your application in 2013. You were asked to attend an interview like you're in an interview today, why didn't you and your wife attend the interview?

Applicant: In 2013?

Interviewer: Yes, in 2013.

Applicant: Because basically at this moment, at that time it's, we are, I think I told you, [inaudible] it's basically that times I'm too much disturbed and I'm medical unfit, yeah, last time, that's the reason I did not come on the interview. We give our medical certificate for the doctor, we sent it.

Interviewer: Yes. But, OK. So, OK, so you were medically unfit at that time. What was wrong with you?

Applicant: Too much stress and tension and stress, yeah. I'm still on occasions have stress today because I am completing the tablets and everything because last three, four years.

Interviewer: We received confirmation from you in August 2013 to say that you could not attend the marriage interview due to medical reasons.

Applicant: Yes, yes.

Interviewer: You were then asked to attend a second interview in..OK, let me check…You were asked then to attend a marriage interview on 2nd September, sorry, on 3rd September 2013, OK. Why didn't you attend for that one?

Applicant: Because I'm sick.

Interviewer: You were sick as well for that one?

Applicant: Yeah, I'm still using my medicine, in my pocket, yeah.

Interviewer: So you've not attended because for medical reasons.

Applicant: Yes, yes.

Interviewer: You've said to me that you started having, so in September 2013, you moved out of the address.

Applicant: Yes

Interviewer: So why did you not inform the Home Office of your problems with your marriage at that time?

Applicant: My marriage, my marriage continue, always continue.

Interviewer: OK, but you moved out of your property in September 2013.

Applicant: Yes

Interviewer: Why did you not inform the Home Office that you were having problems in your marriage and that you had moved, that you have moved out of your home with your wife? Why did you not inform us?

Applicant: It's, it's a medical problem.

Interviewer:

Representative: No, no, no. The lady's asking you, you moved out from your house, you left your wife there and you moved out in 2013, September. Why didn't you tell the Home Office?

Interviewer:

Applicant: OK, OK, yeah. It's out case is already in court [phonetic] in between time, in between our case is already in court at that time, yeah.

Interviewer: Yes it's in the Home Office, but at no point have you said at that time that you've moved out of your house to us and that you were having problems with your marriage in 2013.

Applicant: No it's basically at that moment we are, our case is in Home…[inaudible] in court.

Interviewer: But you didn't inform us, we've requested you to come to an interview, you didn't attend the interview because you said you had medical problems. However, you did not tell us that you were having problems in your marriage at that time.

Applicant: It's basically, I told you in the medical stuff I send you.

Interviewer: But you did not tell us that you were having problems in your marriage at that time. Why did you not tell us? Why did you not inform us?

Applicant: I told you at the moment because our case is already done in the course.

Interviewer: The application was going through, however at no point did you tell that you were having marriage difficulties. Why did you not tell us?

Applicant: This is a nature, this is a nature, a human body, if we have some problem in life, in couple, in the home, we want to try to solve this problem, we want to try.

Interviewer: But you left in September 2013.

Applicant: Yes.

Interviewer: You left your marital home in September 2013, in September 2013, you were requested to attend a marriage interview with your wife. So at no point…you did not attend that interview and at no point after that, after September, did you tell us that you had separated from your wife.

Applicant: Not separated, we start the separation probably.

Interviewer: You had left the marital home. At no point did you inform us, why was this?

Applicant: I informed my solicitors everything, I …

Interviewer: Your solicitors did not inform us, OK, so why did…the onus isn't just on yourself, it is on your…the onus isn't just on your solicitor, it is also on yourself to inform us that…of any changes in your circumstances.

Applicant: How can I tell you because it's our case is already in court. We are running our case in court.

Interviewer: It wasn't in Sept…it wasn't in September when you split, when you separated from your wife. So…

Applicant: No. It's basically it's our case is all in court, we are fighting our case, at that times.

Interviewer: So why didn't you tell us that your wife and yourself had separated? Why did you not tell the courts? Why did you not inform anyone?

Applicant: We told the courts everything when we went to there, the court everything, we told them medical stuff, we showed them absolute decree, we…

Interviewer: Did you tell them that you had separated?

Applicant: Who, for who?

Interviewer: Did you tell anybody in September that you had separated? Did you tell the Home Office, the courts, anybody that you had separated, that there had been a change of circumstances?

Applicant:	No, we, we, just start in September in mutual understanding, but we do the same papers then in March 2014.
Interviewer:	Yes.
Applicant:	We are case, we are fighting case in court.
Interviewer:	Yes but at no point did you say to us that you have separated. Did you… Why was this?
Applicant:	Because we [inaudible] at the moment is at court.
Interviewer:	But you're missing the point here, is that you didn't tell us that you were separated, so then you could've got, if you had separated, you could've then maybe looked at a different, different application at that time, why did you not tell us?
Applicant:	How can I showed you at the moment because it's already we are fighting case in court, because we showing the court everything, we telling everything, before this situation and after with the situation."

12. The application made on 3 April 2013 was not refused by the Respondent until 1 October 2013. It was refused on the basis that the Appellant had not shown that Ms [F] was exercising Treaty rights. The Respondent noted that the company which owned the restaurant for which she was said to be working had applied for voluntary strike off on 20 August 2013 and that there was insufficient evidence of her working prior to that date and at the date of application. In addition, the Respondent did not accept that the relationship was genuine and subsisting. That was based in part on the earlier First-tier Tribunal decision but also the failure to attend the interviews in August and September 2013. The Respondent did not however go so far as to assert that the marriage was one of convenience from the outset. Of course, however, the Respondent had not at that time been made aware that the relationship had broken down.

13. The Appellant appealed the refusal of 1 October 2013 which appeal culminated in the decision of First-tier Tribunal Judge Lloyd promulgated on 30 March 2015. As is noted at [6] of the decision of First-tier Tribunal Judge Gribble, Judge Lloyd was not satisfied that Ms [F] was a qualified person at the time of the termination of the marriage. Judge Lloyd was however, provided with evidence that the marriage was by that time at an end and did not make any findings about the genuineness of the relationship as a result (see also what I say at [22] of my earlier decision about the extent of the finding made earlier by Judge James about the relationship).

14. I will come on to consider the Respondent's reasons for refusal after I have set out the Appellant's evidence in response to the Respondent's case.

The Appellant's Evidence

15. The Appellant produced the bundle of documents which were before Judge Gribble (hereafter referred to as [AB/xx]. In addition, in response to my earlier decision and directions, the Appellant filed a supplementary bundle of documents (hereafter referred to as [ABS/xx]. Mr Duffy did not have a copy of that supplementary bundle so one was provided to him at the hearing and he was given a short time to read it.

16. I also received oral evidence from the Appellant and four other witnesses. Notwithstanding the very clear direction in my earlier decision that the Tribunal should be informed if an interpreter was required, none was requested. I was told that the Appellant would have preferred to give evidence via an interpreter but since none was requested and in order to avoid an adjournment, he was content to give evidence in English. The Appellant came to the UK in 2007 and has studied here. I was therefore satisfied that he ought to be able to proceed with his evidence in English. He was told that if he did not understand a question and needed it to be repeated or re-phrased, he should ask and that questions would be asked slowly to ensure he was not in any way disadvantaged. I was satisfied that he understood the questions asked of him and was able to convey what he meant by his answers in English.

17. I begin with the evidence as to the nature of the relationship between the Appellant and Ms [F]. The Appellant has provided a detailed statement which appears at [AB/32-38]. The Appellant says that they met in Luton in 2009 and started to live together at [~] St Mildreds Avenue from early 2010. They married in a registry office on 25 July 2010. There are photographs of the wedding ceremony and reception. At [AB/71-73] is a tenancy agreement dated 1 March 2011 for one year of the property at [~] St Mildreds Avenue. The property is described as "one bedroom with setting [sic] room". There are a few bills relating to a TV licence sent individually to the Appellant and Ms [F]. There is some overlap between those. For example, the documents at [AB/74] and [AB/79] suggest that the Appellant was paying for the TV licence which was in the name of Ms [F]. There are no bills issued to them in joint names. There is no earlier tenancy agreement showing that they moved into the property at any earlier date. There is no evidence from the landlord of that property.

18. The Appellant corrected his statement in oral evidence concerning the date when they moved address to [~] Freeman Court. He says at [5] of his statement that he and Ms [F] moved there in 2013. They moved in with Ms Claire Langley who is the wife of a friend of the Appellant who died in Pakistan, he says, in October 2013. He confirmed though that this was an error in year and that the statement should read that his friend died in Pakistan in October 2012. That is consistent with Ms Langley's letter at [AB/53-54] which letter is dated 1 July 2014. The dates are also then consistent with the Appellant's evidence that the move followed the death of his friend which could not be the case if he died in

October 2013 as the Appellant's case is that he moved out of Freeman Court in September 2013 when the marriage broke down.

19. Ms Langley's letter confirms that the Appellant and Ms [F] lived with her for almost a year and that the Appellant moved out when the couple separated in September 2013. She says that Ms [F] remained at that address until December 2013. I note that this is inconsistent with other documents in the bundle, such as the witness statement from HMRC at [AB/110-112] which gives Ms [F]'s address held as [~] Freeman Court. That is consistent also with other documents in the bundle addressed to Ms [F] from HMRC being sent to that address after December 2013. There is also a discrepancy in this regard in relation to the evidence concerning the Appellant as a letter from his accountants dated 22 March 2017 at [AB/141] also refers to [~] Freeman Court as his address. This may be an error by the accountants, however, since the same accountants have provided what the Appellant says is his correct address in a letter dated 9 September 2015 ([AB/142]). The documents relating to Ms [F] are more difficult to explain. However, the content of the HMRC statement refers (as at 10 October 2017) to having records of employment only to 2013-14. It is therefore plausible that, since there have been no tax returns filed or PAYE paid since 31 March 2014, HMRC would have no updating address.

20. Although Ms Langley refers to Ms [F] as the Appellant's wife and to them moving in with her together and thereafter separating, the letter written by Ms Langley says nothing about the nature of the relationship. As Mr Briddock pointed out, the letter is dated prior to the Respondent's decision under appeal challenging the genuineness of the relationship prior to the separation. However, I note that it post-dates the earlier decision of Judge James which, whilst not finding that the marriage was one of convenience, had cast some doubt about whether the relationship was genuine and subsisting in 2012.

21. Ms Langley has not provided any subsequent statement and was not called to give evidence. She is said to have lived in the same property as the Appellant and Ms [F] and that is therefore a surprising omission in the evidence. However, the Appellant explained that Ms Langley has since re-married, that her new husband does not like her continuing contact with the Appellant and, as a result, he has lost contact. That is a plausible explanation for the omission.

22. There is a discrepancy in the documentary evidence between a Council tax bill naming the Appellant alongside Ms Langley and Ms [F] as occupying [~] Freeman Court as at 28 March 2013 ([AB/86]) and a P45 issued by Euro 1 Stop Cash & Carry dated 1 October 2013 which gives the Appellant's address as St Mildred's Avenue. After a short exchange during his oral evidence, the Appellant confirmed that the address held by his former employer must have been incorrect at the time. It is plausible that the Appellant had either failed to change his address with his employer when he moved or that his employer simply provided a wrong address.

23. There are four witness statements from friends in the Appellant's bundle and supplementary bundle and a number of letters from other individuals which, as with Ms Langley's letter, contain little evidence of the nature of the relationship. I heard oral evidence from Mr Mahzar Abbass, Mr Mohammad Sarwar, Mr M Choudhury and Mr Zahoor Sharif.

24. Mr Abbass knew the Appellant when he lived in Luton. He has provided a statement which appears at [AB/39-40]. He says that, when the Appellant and Ms [F] lived together in Luton, he would "often" visit them and they would also come to his home. He did not provide evidence about the number of such occasions. He says that he "always saw them like a genuine loving couple" and "never had any doubts about their relationship and marriage". When he was asked on what that opinion was based, he said that he saw them out shopping and generally out and about together. They looked out for each other and held hands. He also said that he socialised with them sometimes as the Appellant was a work colleague. Mr Abbass is a married man and considered the Appellant's relationship with Ms [F] to be similar to his own relationship.

25. Mr Sarwar has known the Appellant since before he came to the UK. He also said in oral evidence that the Appellant is his uncle and that they re-established contact when the Appellant came to the UK. Mr Sarwar says in his statement ([AB/42-43]) that he saw the Appellant with Ms [F] on "multiple occasions" when they lived in Luton. However, when asked how many times, he said only "more than a couple". He pointed out that they lived in Luton and then Wellingborough and he lives in High Wycombe. He said however that he saw them as a "normal couple" and "did not observe anything out of the ordinary". In oral evidence, he said they were a loving couple. He became aware of problems in the marriage after 2010 as the Appellant had confided in him but the Appellant was trying to resolve those problems. That is incidentally inconsistent with what the Appellant said in oral evidence that the problems only occurred in September 2013 when they separated although consistent with what the Appellant said in interview in January 2016 that, after one year of marriage, his wife started going out a lot drinking and that is when the problems started [G18 of the Respondent's bundle] and what is said at [6] to [7] of his written statement.

26. Mr Choudhury is the owner of Akash Tandoori Restaurant. He has written a letter dated 16 July 2014 which appears at [AB/52]. There is no witness statement from him. He says that he met Ms [F] a few times as a customer in his restaurant when she was with the Appellant. He did so on "two to three times maximum". The Appellant had introduced her as his wife. He also expanded on that evidence and said that they had a "few parties" in his restaurants. He thought that one "was to do with their marriage".

27. Mr Sharif provided a witness statement most recently on 6 August 2018 which appears at [ABS/1-2]. He says that he met Ms [F] first in 2011 in Luton town centre when he was introduced to her as the Appellant's wife. Thereafter, he

visited them at home from "time to time" and he saw Ms [F] living with the Appellant. He says that "to the best of [his] knowledge" the couple were "genuinely married and living together as husband and wife". He was "content that there is nothing non-genuine about their relationship". In his oral evidence, Mr Sharif said that he visited the couple a few times per month. They were living together like a normal couple, socialised like a normal couple, went shopping together and acted like a "normal happy couple". He did add that "after what happened" he "didn't know about them". He did go on to say though that he is a married man and the Appellant's relationship was like his own.

28. The Appellant deals in his witness statement with the reasons why he did not attend the interviews in August and September 2013 and why he did not inform the Home Office of his marriage breakdown as follows:

> "[23] The Home Office also state that I have not attended previous interviews that I was invited to on two occasions in support of my applications based on my marriage to my EEA wife. The Home Office state that my explanation for not attending due to my medical issues namely, depression is not accepted as I did not provide any medical evidence of this. I would like to mention that the Home Office have always been aware that due to my medical circumstances due to which I have not been able to attend the interviews which they previously invited to. As explained I suffered a lot mentally due to my marital breakdown. I suffered from depression and took medication to help me during 2012 and 2014. I was stressed due to my wife's behaviour and trying to complete my studies. Everything got on top of me and I couldn't cope so I went to my doctor who gave me medication to help me.
>
> [24] The Home Office also states in September 2013, I did not inform the Home Office that my marriage to my EEA Sponsor had broken down and instead continued with my application and subsequent appeal that was based on the fact that I was in a relationship with my EEA Sponsor. I would like to explain that I didn't think that the start of this separation that I had to notify the Home Office about immediately as I did mention it to my solicitor but was we had an ongoing case, I didn't tell the Home Office about my marital problems as these things are common in life but it does not mean that a separation has to be permanent."

29. Mr Briddock confirmed that there was no medical evidence in support of the Appellant's depression but pointed out that the extract from the interview which I have set out at [11] above, does confirm that some medical evidence had been provided to the Home Office to explain the Appellant's failure to attend interview in August 2013. He submitted that it was not implausible that mental health problems would be exacerbated by the separation and subsequent divorce and that this was good reason for the Appellant's failure to attend both interviews.

30. The difficulty with that submission is that, although the Home Office interviewer accepts that there was something which suggested that there were medical reasons for the non-attendance at the August interview, it is not said what those

reasons were and there is no detail in the Appellant's statement as to the nature of any mental health condition nor any supporting evidence to corroborate the timing and extent of any such condition. I am not satisfied on the evidence that the Appellant was suffering health problems which prevented his attendance at the interviews in August/ September 2013. I think it more likely, particularly given the timing of those interviews, that the Appellant did not attend as his marriage was breaking down at that time and he either thought or knew that Ms [F] would not support his application.

31. I accept however Mr Briddock's submission that the Appellant was not obliged to tell the Home Office that his marriage either was in the process of or already had broken down. As he pointed out, this is not a right to remain under the Immigration Rules where the breakdown of the marriage would bring to an end that right to remain and ought to be notified to the Home Office. Until the date of the termination of the marriage, the Appellant was still entitled to exercise his rights as the family member of an EEA national (provided Ms [F] was still exercising her Treaty rights) and then and thereafter was entitled to rely on retained rights of residence if he is able to establish that he meets the criteria.

32. I deal finally with what the evidence shows about the exercise of Treaty rights by Ms [F] and the Appellant.

33. I begin with Ms [F]. The Appellant is no longer in contact with her and therefore I accept that his access to documents concerning her employment is more limited.

34. The Appellant's bundle includes at [AB/98-105] the following evidence:

    2010/11 self-assessment tax calculation: profit from self-employment shown as £15,802. That is inconsistent with the tax calculation provided by HMRC at [AB/103] which shows profit from self-employment as only £5,114. It is however consistent with the tax calculation at [AB/98] which shows tax due of £2,672.36. Those discrepancies are largely irrelevant to the issue which I have to decide. It may be that the discrepancy is explained by earnings from paid employment in addition to self-employment.

    2011/12 tax calculation: profit from self-employment shown as £5,477

    2013/14 tax calculation: profit from self-employment shown as £6,864

35. In addition to those documents, HMRC has provided a statement at [AB/110-112] to which I have already referred at [19] above (in relation to Ms [F]'s address). That statement confirms that returns were filed for 2010-11, 2011-12 and 2013-14 and that taxable profits were as I have indicated above. There is no evidence of any earnings at all for 2012-13.

36. The only other documents relating to Ms Filinova's employment are at [AB/91-96] which are a letter and payslips issued by Al Fairoz Kebabish Northampton. Those indicate that Ms [F] worked for that organisation to May 2014. The

payslips cover the period October 2013 to February 2014 and show earnings of £620 per month paid in cash. The name of that restaurant is consistent (phonetically) with the name of Ms [F]'s employer given by the Appellant at interview in January 2016. I assume that it is not the same employer as the one for whom Ms [F] was said to be working when the 2013 application was made, particularly since the decision letter in that case asserted that the employer for whom Ms [F] was said to be working had applied for voluntary strike-off. That evidence does not therefore show that Ms [F] was working from 2012-13. The earnings level though is consistent with Ms [F] having worked throughout most of 2013-14 (by reference to the tax calculation for that year).

37. In relation to the Appellant himself, Mr Briddock directed my attention to the evidence at [AB/122-292] and [ABS/4-36] which he said showed that the Appellant has been economically active throughout the relevant periods. He also drew my attention to [19] and [20] of the Appellant's statement which he said summarised what the documents show. I deal with the evidence in chronological order.

38. There is a letter from HMRC dated 27 August 2015 ([AB/123]) which confirms that the Appellant was working for Euro 1 Stop Cash & Carry from 1 August 2011 to 28 September 2013. There is also evidence (which is not relevant to the issues I have to decide) that he worked for that company in 2007-2009 ([AB/144-145]). From his employment with that company, the Appellant earned £3,385 in the tax year 2011-12, £5,853 in the tax year 2012-13, and £2,414 in the tax year to 5 April 2014.

39. The Appellant also declared self-employed profits of £3,120 for the tax year 2013-14 ([AB/195]). In the tax year 2014-15, the Appellant declared self-employed profits of £8,705 ([AB/180]). In the tax year 2015-16, the Appellant declared self-employed profits of £3,102 ([AB/216]). There is no tax return for 2016-17 (which would be due to be filed by end January 2018).

40. The Appellant worked for Al-Hamra Supermarket from 23 January 2017 (confirmed by letter at [AB/125]) earning £172.80 per week. The P60 at [AB/140] indicates that he earned £1,735.20 for the tax year to 5 April 2017 (which is consistent with earnings from January 2017 to the end of that tax year). A P60 at [ABS/26] indicates that he earned £12,675 from employment with that company in the 2017-18 tax year. There are payslips for the Appellant's employment with that company up to end June 2018 ([ABS/4-25]). Although the bundle does not include a payslip for July 2018 and the supplementary bundle was not filed until 7 August 2018 (so that could have been included), I am prepared to assume that the Appellant continues to work for that company as at date of hearing.

41. The Appellant has produced some bank statements for the period 6 July 2011 to 6 August 2017 ([AB/217-292]). There is some difficulty with ascertaining earnings from those statements as the Appellant says he is paid in cash. Some of the credits to the account, for example, in 2011 show names of individuals paying in

to the account. The Appellant said in evidence that he thought that the individuals concerned were his employer at the time. The cash or cheque payments in are not of a regular amount or on a regular basis and it is therefore difficult to use that evidence as corroboration of employment. In the period for which there is no other corroboration of earnings, namely from 6 April 2016 to 23 January 2017, the total credits shown in the bank account are £2,835. However, of those credits, two (of £170 and £800 respectively) are matched by debits to the account on the same day with the description "Zoya Travel Shakeel" which casts doubt on the basis of the source of the funds as being from employment. The remainder as cash payments in do not substantiate earnings from employment.

42. I appreciate that the Appellant must have been in receipt of some money on which to live. However, when questioned by Mr Duffy about his income for 2013-14, the Appellant said that he was able to live on the low level of earnings which he received when he was working because he lived with friends, shared expenses and it was therefore very cheap to live. I note also that the Appellant's witness statement which is dated 22 March 2017 says that he worked as a self-employed teacher "between 2013 and 2016" and has been employed by Al-Hamra Supermarket "since January 2017". It may be that the Appellant was helped out financially by friends in the period April 2016 to January 2017. It is not for me to speculate. There is no detail of any earnings from April 2016 to January 2017 and no documentary evidence to confirm that the Appellant was economically active in that period.

Discussion and Conclusions

43. I begin by considering the evidence concerning the genuineness of the Appellant's relationship with Ms [F] as, if the relationship were not genuine then the Appellant cannot succeed.

44. As Mr Briddock points out, the Respondent's decision gives four reasons for concluding that the marriage is one of convenience:

    (1) The Appellant's answers in interview were evasive;

    (2) It was not credible that the Appellant would not know his wife's working hours if the relationship were genuine;

    (3) The Appellant and Ms [F] failed to attend the interviews in August and September 2013;

    (4) The Appellant did not inform the Respondent that his marriage had broken down in September 2013.

45. As Mr Briddock submitted and I accept, the Respondent does not point to any instances in support of the Appellant being evasive in interview other than in relation to the answers given about his ex-wife's working patterns. That does

not prevent me considering whether the interview record suggests evasiveness. It is possible for example that the exchange which I have set out at [11] above could be seen as such an example. However, I am satisfied that this, as with the exchange concerning working patterns, is simply an example of the Appellant missing the point of the question (as is evident from the need for the representative to intervene to explain what the interviewer was asking). I observed much the same reaction from the Appellant when he was asked about the discrepancy of addresses which I record at [22] above. I am satisfied that, overall, the interview record does not suggest that the Appellant was deliberately seeking to avoid answering questions.

46. Turning then to Ms [F]'s working pattern, as Mr Briddock submitted, what the Appellant appears to be describing is a type of "zero hours" contract where Ms [F] would be called in at different times of day. I understand why the interviewer would have thought it strange that Ms [F] would be asked to come into the restaurant to clean when there were customers eating. However, what the Appellant actually says in his answers is that she might be called at any time between 11am to 11pm and told when to come in not that she actually went in at those times. Further, it is not necessarily strange for a cleaner to be asked to clean after a restaurant has closed. I was not provided with any detail about the nature of the restaurant or employer, but this is not said to be a mainstream chain restaurant which might have a number of cleaners working formal shift patterns. It is not implausible therefore that Ms [F] might have been working irregular hours and on call.

47. As I indicate at [30] above, I do not accept the Appellant's evidence that he did not attend the interviews in August and September 2013 because he was suffering from depression. As I have there indicated, I think it more likely that he did not do so because he thought or knew that Ms [F] would not attend with him and that he would be obliged to disclose that the relationship had broken down. That is an indication that the relationship had by then broken down and was no longer subsisting but that fact and the fact that the Appellant did not wish to tell the Respondent about the breakdown is not of itself an indication that the marriage was always one of convenience. The Appellant may well have thought that he would not be allowed to remain once the relationship had broken down and for that reason may deliberately have avoided telling the Respondent but that is only evidence that the relationship was no longer subsisting which is the Appellant's case.

48. The evidence in the Appellant's statement (which was not tested in cross-examination) is that he married Ms [F] because he loved her and that the problems in the marriage arose because she would not stay at home with him and wanted to go out socialising. That may well be an indication that Ms [F] was not committed to the relationship, but, again, is not of itself an indication that the Appellant married Ms [F] only to secure an immigration benefit.

49. I did not find of much assistance the evidence of those who gave oral testimony about the nature and genuineness of the relationship. They only had intermittent contact with the couple and provided little detail about the nature of the relationship. However, as Mr Briddock pointed out, Mr Duffy did not suggest that any of them were lying; merely that they may have been mistaken. In any event, as I indicate at [7] above, it is for the Respondent to make out a prima facie case before any evidential burden is placed on the Appellant. For the foregoing reasons, I am not satisfied that the Respondent has made out a prima facie case that the marriage was one of convenience. It follows that the Appellant is entitled to rely on the marriage in relation to retained and/or permanent rights of residence. Regulation 10(5)(d)(i) is therefore satisfied.

50. I turn to consider whether Ms [F] was exercising Treaty rights at all relevant times. I accept as did Mr Duffy that there is evidence that she was working from October 2013 to March 2014. As the Court of Appeal has now made clear in the case of Baigazieva v Secretary of State for the Home Department [2018] EWCA Civ 1088, the relevant date for the exercise of Treaty rights by an EEA spouse in order to acquire a right of residence is the date when divorce proceedings are initiated. In this case, that is at some point prior to 5 December 2013 when the decree nisi was pronounced.

51. Notwithstanding the lack of evidence as to Ms [F]'s employment before October 2013, I am prepared to infer that she was working for most of the tax year 2013-14 (see [36] above) and that she was exercising Treaty rights when divorce proceedings were begun. I do not accept Mr Duffy's submission that Ms [F]'s earnings are such as to be marginal and that they do not show genuine economic activity. As is made clear in Begum (see [6] above), the level of earnings is not necessarily any indication that those are not genuine if there is evidence that work is genuinely being carried out as I accept (based on the HMRC evidence) is the case here. As such, Regulations 10(5)(a) and (b) are satisfied.

52. It is relevant to the Appellant's case that he is entitled to permanent residence to reach a finding about when Ms [F] was exercising Treaty rights prior to the divorce. For the reasons given at [36] above, I am not satisfied on the evidence that Ms [F] was working in the tax year 2012-13. As such, the earliest date from when the Appellant might be able to claim a continuous period of five years is from 6 April 2013, depending on what the other evidence shows.

53. I turn then to whether the Appellant is able to show that he has been exercising Treaty rights as if he were an EEA national in order to satisfy Regulation 10(6). Mr Briddock submitted that, in relation to the retained right of residence, the Appellant has to show that he is exercising Treaty rights as at the date of the hearing. I have accepted at [40] above, that the Appellant continues to work for Al-Hamra Supermarket Ltd as at the date of the hearing. The Appellant is now said to be earning £12,675 per annum and there is evidence that this income is

derived from genuine employment. Accordingly, Regulation 10(6) is met and the Appellant is entitled to a retained right of residence.

54. Although the application made by the Appellant was one for a retained right of residence and not a permanent right of residence and that is the basis on which the application was considered by the Respondent, Mr Briddock submitted that it was open to me to find on the evidence that the Appellant is now entitled to a permanent right of residence.

55. I accept that I could find that the Appellant is entitled to a permanent right of residence if that is what the evidence before me shows. However, I do not accept that the evidence goes this far. As I have found at [52] above, there is no evidence to show that Ms [F] was exercising Treaty rights in the tax year 2012/13. There is a lack of any corroboratory evidence about what she was doing in that year. Accordingly, the earliest that the continuous five years' period could begin is 6 April 2013.

56. If that were the only evidential difficulty, I accept that the Appellant may be entitled to permanent residence on 6 April 2018 and therefore prior to the hearing depending whether the earnings in that period were all considered to be derived from genuine economic activity. I do not need to consider that issue because there is a gap in the evidence as to the Appellant's exercise of Treaty rights as I identify at [41] above. There is no evidence as to what the Appellant was doing from the start of the tax year 2016 to 23 January 2017, a gap of over nine months. I am not satisfied therefore that there is evidence that he was exercising Treaty rights as if he were an EEA national from 6 April 2013 to 6 April 2018. It follows that the Appellant is not entitled to permanent residence. If he has evidence of economic activity in that period and evidence that he has been genuinely economically active throughout the period from April 2013, it is open to him to make another application to the Respondent.

DECISION

I allow the Appellant's appeal on the basis that he is entitled to a residence card showing that he has a retained right of residence.

Signed Dated: 20 September 2018

Upper Tribunal Judge Smith

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02975/2018

THE IMMIGRATION ACTS

Heard at Field House
On Wednesday 4 July 2018

Determination Promulgated

…11 July 2018……

Before
UPPER TRIBUNAL JUDGE SMITH

Between

MUHAMMAD SHAKEEL

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Briddock, Counsel instructed by M & K Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

ERROR OF LAW DECISION AND DIRECTIONS

Background

1. The Appellant appeals against a decision of First-tier Tribunal Judge Gribble promulgated on 9 January 2018 ("the Decision") dismissing the Appellant's appeal against the Respondent's decision dated 25 February 2016 refusing him a residence card on the basis of retained rights of residence as the former family member (ex-spouse) of an EEA national exercising Treaty rights in the UK.

2. The Appellant is a national of Pakistan. He claims to have entered the UK in 2007 and was granted leave to remain as a student until 31 December 2011. On 17 September 2010, he applied for a residence card as the spouse of a Latvian national, Ms [F], who he had married on 25 July 2010. That application was refused as was a second application on the same basis. The Appellant appealed the latter refusal decision which was dismissed by First-tier Tribunal Judge James in a decision promulgated on 20 September 2012.

3. A third application on the same basis was again refused. The Appellant and his spouse were invited to interview on two occasions but failed to attend. An appeal against the third refusal was once again dismissed by a decision of First-tier Tribunal Judge Lloyd promulgated on 30 March 2015.

4. The Appellant was divorced from his wife on 6 March 2014. On 17 September 2015, he made the application which led to the decision now under appeal. In refusing the application, the Respondent accepted that the marriage had subsisted for at least three years and that the Appellant had resided in the UK for at least one of those years. However, it was not accepted that his wife was exercising Treaty rights as at the date of divorce. The Respondent also did not accept that the Appellant himself had been economically active following the divorce. The Respondent refused the application under the Immigration (EEA) Regulations 2006. The Respondent also did not accept that the marriage had ever been a genuine one; in other words, he decided that the marriage was one of convenience.

5. The Judge found that the marriage was indeed one of convenience and dismissed the appeal on that basis.

6. The Appellant initially appealed on three grounds. The first ground took issue with the way in which the Judge approached the facts and evidence surrounding the marriage. The second asserted that the Judge had wrongly concluded at [53] of the Decision that she did not need to consider whether Ms [F] was in fact exercising Treaty rights. The third asserted that the Judge had wrongly applied the Devaseelan principles when considering the earlier appeal decisions.

7. Permission was refused by the First-tier Tribunal but granted by Upper Tribunal Judge Rimington on 10 April 2018 for the following reasons so far as relevant:

> "…The grounds are arguable. The judge applied Devaseelan [2002] UKIAT 00702 but having clearly assessed all evidence as a whole – see [46], it is arguable that the judge's social expectations displaced an objective analysis of the evidence as a whole. For example the judge's opinion on what couples achieve by way of photographic evidence eg 'from restaurants' at the start of a relationship may be an arguable error."

8. Under cover of a letter dated 28 June 2018, the Appellant's solicitors sought permission to amend their grounds. Mr Briddock addressed me briefly on that

application and indicated that Mr Walker did not object to the amendment. I therefore agreed to permit the amendment. Mr Walker did not seek an adjournment to respond to the amended grounds. Having heard from Mr Briddock on the merits, for reasons which follow and in light of Mr Walker's further concession that the amended grounds disclose an error of law in the Decision, I also grant permission to appeal in relation to the amended grounds.

9. The amended grounds include the original ground three (application of Devaseelan) re-numbered as ground four ("Ground four"). Ground three is, in essence, the same ground as the original ground two. Ground two is similar although not identical to the original ground one. The complaint there pursued is that the Judge erred by imposing a subjective view of the evidence rather than considering that evidence objectively.

10. The main ground pursued by the Appellant is that the Judge applied the wrong burden and standard of proof (Ground one). The other remaining ground (Ground Five) focusses on the Judge's treatment of the evidence arising from the record of an interview with the Appellant in 2016.

11. I indicated at the end of the hearing that I found a material error of law, in particular on Ground one, Ground four and Ground five and that I would elaborate on my reasons for so finding in writing which I now turn to do.

DISCUSSION AND CONCLUSIONS

Ground one

12. The Appellant challenges the way in which the Judge has approached the burden and standard of proof when determining whether the Appellant's marriage is one of convenience. The Judge sets this out at [22] of the Decision as follows:

> "In terms of the burden of proof, I have followed the reasoning of the recently decided Supreme Court decision of **Sadovska v SSHD [2017] UKSC 54.** This case was published on 26.6.17 and effectively repeated the ruling in **Rosa** which itself confirms the position in **Papajorgii (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC).** The theme of the cases is that in cases of this nature the respondent bears the primary burden of proof to show the marriage is one of convenience on the balance of probabilities. Thereafter the appellant has to show on balance that the marriage is not one of convenience."

13. The Judge's approach is reiterated at [43] of the Decision where the Judge says that "the respondent had discharged the initial burden to the required standard. The burden shifts to the appellant to provide evidence on the balance of probabilities that the relationship was genuine".

14. Mr Briddock fairly accepted that the Appellant had expressly indicated in the original grounds of appeal that this was the correct approach ([3] of those grounds) but submitted that the Appellant should not be fixed with a concession wrongly made in law. I accept that submission.

15. Mr Briddock drew my attention to what was actually said in the relevant case law. In Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC) the relevant part of the headnote reads as follows:

> *"i) There is no burden at the outset of an application on a claimant to demonstrate that a marriage to an EEA national is not one of convenience.*
> *ii) IS (marriages of convenience) Serbia [2008] UKAIT 31 establishes only that there is an evidential burden on the claimant to address evidence justifying reasonable suspicion that the marriage is entered into for the predominant purpose of securing residence rights."*

16. The Judge also drew attention to the Court of Appeal's judgment in Rosa v Secretary of State for the Home Department [2016] EWCA Civ 14. Mr Briddock directed my attention to the relevant part of the judgment as follows:

> "[24] In my judgment, the legal burden lies on the Secretary of State to prove that an otherwise valid marriage is a marriage of convenience so as to justify the refusal of an application for a residence card under the EEA Regulations. The reasoning to that effect in *Papajorgji*, as endorsed in *Agho*, is compelling.
>
> …
>
> [29] What I have set out above does little more than to expand upon paragraphs 33 to 37 of the decision in *Papajorgji* and to reject Mr Kellar's criticisms of the reasoning in those paragraphs. It seems to me that paragraph 14 of the decision in *IS Serbia*, which prompted the tribunal in *Papajorgji* to say what it did about the legal burden of proof, was seriously confused. It stated that the burden of proving that a marriage is not one of convenience lies on the appellant, but it also stated that if there is no evidence that could support a conclusion that the marriage is one of convenience, the appellant does not have to deal with the issue. If, however, the legal burden lies on the appellant, the appellant has to adduce some evidence in order to discharge that burden: in the absence of any evidence either way, the appellant will fail. I do not think that that can have been the result intended by the tribunal. The result that I think the tribunal must have intended is achieved if the legal burden of proof lies on the Secretary of State throughout but the evidential burden can shift, as explained in *Papajorgji*. In my judgment, that is the correct analysis."

17. In the paragraphs to which I refer at [12] and [13] above, the Judge has clearly understood the position to be that, once the Respondent satisfies the evidential burden on him, the entire burden of proof then shifts to the Appellant. That is incorrect. Even though, as the Court of Appeal indicates, there is an evidential burden on the Appellant once the Respondent has provided sufficient evidence to discharge the evidential burden on him, the legal burden to show, on the balance of probabilities, that the marriage is one of convenience lies with the Respondent. The Judge has clearly applied an erroneous approach. Mr Walker conceded as much.

18. That is though not the end of the matter as the error might not be material if the Judge's approach to the evidence would have led to the result that she was entitled to find that the Appellant had not discharged the evidential burden on

him and if the evidence shows that the Respondent could thereby satisfy the legal burden. For that reason, I turn to the other grounds on which I indicated I found an error of law.

Ground four

19. This is the originally formulated ground three. It concerns the Judge's application of the Devaseelan principles. Those principles concern the approach of a second Tribunal to the findings of a first Tribunal between the same parties and emerge from the case of Secretary of State for the Home Department v D (Tamil) [2002] UKIAT 00702). The principles apply as follows (taken from [39] to [41] of the judgment in that case):

    (1) The first Judge's determination should always be the starting-point.

    (2) Facts happening since the first Judge's determination can always be taken into account by the second Judge.

    (3) Facts happening before the first Judge's determination but having no relevance to the issues before him can always be taken into account by the second Judge.

    (4) Facts personal to the Appellant that were not brought to the attention of the first Judge, although they were relevant to the issues before him, should be treated by the second Judge with the greatest circumspection.

    (5) Evidence of other facts may not suffer from the same concerns as to credibility, but should be treated with caution.

    (6) If before the second Judge, the Appellant relies on facts that are not materially different from those put to the first Judge the second Judge should regard the issues as settled by the first Judge's determination and make his findings in line with that determination.

    (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 Judge should not be held against him.

    Those principles are said by the Tribunal not to be exhaustive.

20. In this case, there are two previous appeal decisions, that of First-tier Tribunal Judge James promulgated on 20 September 2012 and that of First-tier Tribunal Judge Lloyd promulgated on 30 March 2015. The Judge, at [29] of the Decision, referred to what had been decided in the first of those decisions as follows:

    "[29] It was put to [the Appellant] that a judge in 2012 did not believe he was in a relationship. The appellant responded that he had been given permission to marry…."

21. That point is reinforced by the Respondent's submissions recorded at [36] of the Decision and the Appellant's answer to that submission as recorded at [37] of the Decision. The Judge accurately sets out the Devaseelan principles at [44] of the Decision. She records at [45] of the Decision the evidence which was before Judge James before going on to consider evidence which was not considered in 2012. The Judge then goes on to record at [49] of the Decision the submission that there was "evidence sufficient to neutralise the past findings about the marriage" which submission she indicates that she finds "superficially an attractive argument". Having considered the more recent evidence, however, and for reasons set out at [50] to [52] of the Decision, the Judge reaches the conclusion that the marriage is indeed one of convenience.

22. Although the Judge did not expressly state in the Decision that she adopted the findings made by Judge James, it is clear from what I say at [20] and [21] above, that the Judge took as her starting point the finding that she considered that Judge James had reached that the relationship was not a genuine one. As Mr Briddock pointed out, however, by reference to [21] of Judge James' decision, what was at issue there was not whether the marriage was a marriage of convenience for the purposes of EU law but whether there was a "genuine and subsisting relationship" for the purposes of an assessment of family life under Article 8 ECHR. The Judge found that there was not. As it happens, the Judge may well have been right about this at that time as even on the Appellant's case, his marriage developed problems at an early stage. Be that as it may, Mr Briddock is right to point out that there is a difference between a finding that a relationship is not genuinely continuing and a finding that a relationship has not been genuine from the outset.

23. Although the point was not made to me in submissions, I also observe that Judge James appears to have fallen into the same legal error as Judge Gribble in finding that the burden in EU law lies on the Appellant ([6]).

24. For those reasons, the Judge has also erred by adopting as her starting point a finding that the marriage was not a genuine one and therefore was a marriage of convenience. That was not the finding made.

Ground Five

25. Mr Briddock directed my attention to the Respondent's decision letter refusing the application. As he rightly pointed out, the only reason for finding the marriage to be a sham which relates to the Appellant's answers given in interview is that the Appellant did not know his wife's shift working pattern. The Judge deals with this at [42] of the Decision as follows:

> "The interview in 2016 was, I appreciate, undertaken some two years after the divorce, however the appellant knew so little of his wife's former employment that I cannot find his responses demonstrate that he knew much about his wife's jobs, which given they had been together on his account since late 2009 was simply not credible."

26. I was not particularly impressed by Mr Briddock's attempts to explain what the Appellant's answers show about his wife's working patterns. I do not though intend to comment on that further as it will be a matter for submission and evidence when it comes to the re-hearing. However, I accept Mr Briddock's more general point that the Judge does not there refer to the parts of the interview on which she relies, does not expand on her reasoning and does not draw attention to the other parts of the interview (which was lengthy) and to what the remainder of the Appellant's answers showed. I am satisfied that this discloses a further error of law. Again, Mr Walker expressly conceded as much.

Summary

27. For the above reasons, I find an error of law on Ground one, Ground four and Ground five. Mr Briscock did not develop Ground two and accepted that Ground three stood or fell depending on the Appellant's case on the other grounds. In light of what I say above, I do not need to deal with those grounds.

Resumed hearing

28. Both parties accepted that, having found an error of law, I should retain the appeal in the Upper Tribunal. Mr Briddock asked though that the hearing be adjourned in order that the Appellant's witnesses could attend to give evidence. Mr Walker agreed that there should be an adjournment. Although the directions indicate that parties should be ready to proceed with a hearing to re-make the decision on the same day, in this case I agreed it was appropriate to adjourn. Mr Walker only had notice of the amended grounds immediately prior to the hearing before me and may have formed the view on the original grounds that it was unlikely that an error of law would be found. He was therefore unlikely to have considered the need for cross-examination of witnesses. Their evidence is in any event likely to assist the Tribunal and I therefore considered for reasons of fairness that it was appropriate to adjourn the hearing to a later date for re-making. I have given directions in relation to further evidence and for that hearing below.

DECISION

The First-tier Tribunal Decision involves the making of a material error on a point of law. I therefore set aside the First-tier Tribunal Decision of Judge Gribble promulgated on 9 January 2018. I make the following directions for the re-making of the decision.

DIRECTIONS

1. **Within 28 days from the date when this decision is sent, the Appellant shall file with the Tribunal and serve on the Respondent any further evidence on which he relies which should include signed witness statements of any person who the Appellant intends to call as a witness at the next hearing.**
2. **The resumed hearing will be listed on the first available date after 35 days from the date when this decision is sent. Time estimate is half a day. An interpreter**

will not be booked unless the Appellant's representatives inform the Tribunal at least fourteen days before the resumed hearing that one is required in order for the Appellant or any of his witnesses to give evidence.

Signed Dated: 5 July 2018
Upper Tribunal Judge Smith