Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04172/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th December 2018	**On 25 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MR MAHBUB HASAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Malik, Counsel
For the Respondent: Mr S Kotas, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge I. M. Scott dismissing his appeal against the refusal of an application for indefinite leave to remain on the basis of having completed ten years' continuous lawful residence under paragraph 276B giving rise to the Appellant's Article 8 private life under the European Convention of Human Rights. Judge Scott's decision promulgated on 25th June 2018 was appealed against and permission to appeal was granted by Upper Tribunal Judge Hanson in the following terms:

> "There is arguable merit in the submission the Judge erred in proceeding on the basis that the principle of *res judicata* applied to this appeal and that the issue of the marriage of convenience cannot be reopened when the correct approach would have been to apply the *Devaseelan* principles and take into account evidence and facts set out in the witness statement and documents in the appeal bundle which were not before the decision maker in June 2016.
>
> The need to determine the issue of whether the marriage is a marriage of convenience is highly material to the success or otherwise of the appeal for had the appellant succeeded on this point he would have established 10 years continuous lawful residence in the United Kingdom entitling him to a grant of leave on the basis of long residence under the Immigration Rules or if assessing the proportionality of the decision.
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> Permission to appeal is granted on all grounds which raise arguable issues requiring further consideration by the Upper Tribunal."

2. I was not provided with the Rule 24 response from the Respondent but was given the indication that the appeal was resisted.

Error of Law

3. At the close of the decision I indicated I would reserve my decision which I shall now give. I do find that there are errors of law in the decision such that it should be set aside. My reasons for so finding are as follows.

4. In respect of the Grounds of Appeal as framed Mr Kotas accepted that the grounds correctly identified that the judge had erred at paragraph 28 of the decision in stating that:

> "I find, however, that the time spent here following the appellant's marriage to an EEA national cannot be taken into account in addition because, quite simply, the First-tier Tribunal dismissed his appeal against the respondent's decision that the marriage was one of convenience. That matter has already been determined against the appellant; the First-tier Tribunal refused permission to appeal to the Upper Tribunal; an attempt to obtain permission from the Upper Tribunal itself was withdrawn; and I find that the matter cannot be reopened in the present appeal."

5. As such it was accepted that the proper starting point for the First-tier Tribunal was that identified in the starred decision of *Devaseelan* [2002] UKIAT 00702 and the principles espoused at [39] to [42] of that authority. Given the starred nature of this authority it is plain that there was an error in the approach taken by the judge in considering that the findings of First-tier Tribunal Judge Maxwell from the hearing on 15th June 2016 could not be reopened in the present appeal.

6. Mr Kotas sought to persuade me that the error was immaterial as a consequence of the materials that were before First-tier Tribunal Judge Maxwell. I shall turn to this momentarily.

7. I pause to note that this is an extremely unhappy appeal in that the representation by the Appellant's solicitors in this matter is substandard and below what one would expect of a professional firm of solicitors. Albeit a separate issue, accurate instructions were not provided to counsel in that Mr Malik was not told that there was a previous decision of the First-tier Tribunal when this matter came before Judge Scott, and equally it appears that the bundle before the First-tier Tribunal which I have before me consisting of 44 pages, does not mirror the bundle which Mr Malik was provided with when he was instructed to appear before the First-tier Tribunal (which contains a far greater number of documents). Equally Judge Scott had not been provided with a any of the paperwork or evidence or that was before Judge Maxwell so that Judge Scott could have known what documentation was contemporaneous to Judge Maxwell's decision, and what was new, and thereby apply the *Devaseelan* principles accordingly. The only excuse given by the instructed solicitors in this matter fro these lapses are that some of the earlier documents relating to the Appellant had been "misfiled" and the unnamed 'person' who gave instructions to counsel did not have the benefit of those earlier documents including the earlier appeal determination. Thus, it is plain that the incompetent handling of the file has led to the predicament that this appeal has reached and the unnecessary time and expense to which the parties and the Tribunal has been put.

8. It was also stated by Mr Malik in his Grounds of Appeal that the Appellant had apparently also confirmed that there was no earlier appeal determination where the marriage of convenience issue was determined. Mr Malik's written explanation for the Appellant's ignorance of the determination of the marriage of convenience issue is that – as Judge Maxwell recorded in his decision of 22nd June 2016 at paragraph 2 – "neither the Appellant nor his spouse attended the hearing of the appeal. Neither had made statements nor had any documents been served in accordance with directions". Consequently Mr Malik submitted that the Appellant was ignorant of the marriage of convenience findings.

9. This submission was passionately refuted by Mr Kotas who argued that the Appellant must have known about the decision of Judge Maxwell given that Judge Maxwell's decision was challenged by way of appeal to the First-tier Tribunal and also on renewal to the Upper Tribunal. Whilst there is inherent sense and force in that submission, on the other hand, Mr Kotas could not point to the precise basis upon which the Appellant had appealed against Judge Maxwell's decision as he did not have any of that paperwork to hand.

10. Clearly, the Appellant may very well have appealed against Judge Maxwell's decision on the premise that an adjournment was not granted (as sought by the representative from Universal Solicitors who attended on

that occasion), but equally the appeal may have been challenged in terms of the findings on the marriage of convenience issue. Either way, there is no evidence before me that would point to either conclusion and given the lack of any evidence at present, I give the Appellant the benefit of the doubt in the absence of evidence pointing either way. Naturally, if the Respondent obtains the previous appeal file and discovers matters which reveal the Appellant's knowledge of the previous determination and contradict his evidence that he was unaware of it, the Respondent is entitled to file and serve the same at a further hearing.

11. Returning to the materiality of the error identified, Mr Malik sought to argue that by way of example, the witness statement in the First-tier Tribunal bundle which was before Judge Scott was not, and could not have been, before Judge Maxwell as indicated by paragraph 2 of Judge Maxwell's decision, and given that no other documents were served in accordance with directions there would have been in essence no documentation going to show the marriage was not one of convenience put by the Appellant. Thus Mr Malik prayed in aid reliance upon [40(4)] of *Devaseelan* and submitted that the Tribunal *was* entitled to treat with "the greatest circumspection" the evidence regarding facts personal to the Appellant which were *not* brought before the attention of Judge Maxwell.

12. However, as I pointed out to the parties the matter did not end there, as the Appellant would still need to show "a very good reason" why he had failed to adduce relevant evidence before Judge Maxwell and why that failure should not be held against him (see [42(7)] of *Devaseelan*). In terms of whether there was a very good reason or not Mr Malik argued that no very good reason had been put forward yet because neither the Appellant nor he were alive to the need to address the principles under *Devaseelan*. Mr Malik submitted that if the matter is remitted, the First-tier Tribunal would be provided with a very good reason for the failure to adduce relevant evidence that was available to the Appellant at the time of the hearing before Judge Maxwell. I accept that the Appellant has not had such an opportunity to put forward a "very good reason" (owing to his alleged ignorance of the previous determination of Judge Maxwell).

13. Mr Kotas further sought to argue that even if Judge Scott had found that the marriage of convenience issue was to be decided in favour of the Appellant the facts underlying this appeal showed that there was no evidence that the EEA Sponsor exercising treaty rights other than a previous letter of employment and that there was no evidence of exercise of those treaty rights since the date of the Appellant's and his EEA Sponsor's wedding, and in any event the EEA Sponsor had left the United Kingdom in 2015 for an indeterminate period and the couple had in any further event separated before the hearing in June 2016. In reply Mr Malik submitted that these matters had not been raised by the Respondent by way of a supplementary or amended refusal letter pursuant to Rule 24(2) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 which specified that the Respondent must, if he intended to change or add to the grounds or reasons relied upon in the

notice of decision, provide the Tribunal and the other parties with a written statement of whether of the opposition to the Appellant's case. In that light given that the matter was not live before the First-tier Tribunal, it is not a matter which can now be raised at an error of law hearing by the Respondent. However if the matter is to be remitted (as I find it should and will turn to shortly), the Respondent is of course at liberty to amend or supplement her refusal letter by way of a further written statement in accordance with Rule 24(2) of the 2014 Procedure Rules should he be so advised, in relation to the issues which Mr Kotas now attempted to take, in respect of (a) the Appellant's evidence *not* meeting the *Devaseelan* principles, and (b) whether the EEA Sponsor was separately exercising treaty rights at the relevant time. Thus, I accept Mr Malik's submission that these matters cannot be relied upon now by Mr Kotas as they are not raised in the refusal letter that the Respondent for the time being.

14. Mr Kotas further sought to argue that the Grounds of Appeal did not challenge the Article 8 findings made by the First-tier Tribunal. Even though I find this is so, the Article 8 assessment and the marriage of convenience issues are intrinsically connected and one cannot stand without the other being reheard. Mr Malik also pragmatically accepted that if the appeal is remitted to the First-tier Tribunal, if the marriage of convenience issue is decided in favour of the Appellant then his Article 8 private life claim may have a chance of success, however, conversely if the marriage of convenience issue still falls against the Appellant, it would *not* be possible for the Appellant to succeed in a private life claim where he has been party to a sham marriage.

15. Consequently, in light of the above findings and having considered this matter at great length, I find that the decision of Judge Scott should be set aside in its entirety for the fundamental reason that the principles in *Devaseelan* were not followed at paragraph 28 of his decision.

16. In light of the above findings, I set aside the decision of the First-tier Tribunal in its entirety.

Notice of Decision

17. The appeal to the Upper Tribunal is allowed.

18. The decision of the First-tier Tribunal is set aside in its entirety. This matter is to be remitted to be heard by a differently constituted bench.

Directions

19. The appeal is to be remitted to IAC Taylor House.

20. No interpreter is required.

21. At present, only the Appellant proposes to be called to give evidence.

22. The time estimate for this appeal is two hours.

23. No special directions have been sought, however I formally record that should the Respondent seek to amend or supplement her reasons for refusal letter, he must do so in writing in accordance with Rule 24 of the First-tier Tribunal's 2014 Procedure Rules so that the Appellant can engage with them in his evidence before the First-tier Tribunal at the further hearing.

24. I direct that the Appellant serve a new Appellant's bundle containing any and all evidence that he seeks to rely upon.

25. I further direct that that bundle be clearly subdivided into several sections including (i) a section containing any evidence before Judge Maxwell, (ii) a further section containing any contemporaneous evidence that was not before Judge Maxwell (but which was in existence at the time of Judge Maxwell's decision or could have been but was not obtained at that time), (iii) a further section including any evidence that was not before Judge Maxwell which could not have been obtained and provided before Judge Maxwell and is wholly new evidence that was unavailable at the relevant time of the hearing in June 2016 (iv) a supplementary Appellant's witness statement providing "a very good reason" why the Appellant had failed to adduce relevant evidence before Judge Maxwell and why that failure should not be held against him (pursuant to [42(7)] of *Devaseelan*).

26. I further direct that a copy of Judge Maxwell's decision be included in the Appellant's bundle.

27. No anonymity direction has been requested and none is made.

Signed Date 14 January 2019

Deputy Upper Tribunal Judge Saini