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

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 20 January 2020	**On 30 January 2020**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

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, instructed by Lawmatic Solicitors
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh. His date of birth is 1 January 1988.

2. On 10 November 2016 the Appellant made an application for indefinite leave to remain on the basis of ten years long residency. This application was refused by the

Secretary of State on 17 January 2017. The Appellant appealed against that decision and his appeal was dismissed by First-tier Tribunal Judge Beg in a decision promulgated on 10 October 2019 following a hearing at Taylor House on 27 June 2019. The Appellant was granted permission to appeal by Upper Tribunal Judge Finch on 9 December 2019. Permission was granted on all grounds.

3. The matter came before me in order to determine whether the judge made an error of law.

The Appellant's Immigration History and the Respondent's Decision

4. The Appellant was granted leave to enter as a student when he entered the UK on 7 October 2006. He was subsequently granted periods of leave until 17 January 2014. He made an application for further leave to remain on 10 January 2014 and this was refused on 27 February 2014. The Appellant became appeal rights exhausted on 28 October 2014. On 17 October 2014 he made an application for an EEA residence card. This was refused by the Secretary of State on 2 March 2015. The Appellant's appeal against this decision was dismissed by FtT Judge Maxwell on 22 June 2016. There was no application to appeal. The Appellant made an application for ILR on 10 November 2016. This was refused on 17 January 2017. FtT Judge Scott dismissed his appeal against this decision. The decision of FtT was set aside by UTJ Saini. The matter was remitted to the FtT. It came before FtT Judge Beg.

5. The Respondent refused the application on the basis that the Appellant has not had at least ten years' continuance lawful residence in the United Kingdom. The Respondent relied on the reasons for the decision on 2 March 2015 to refuse to grant the Appellant an EEA residence. The decision maker took the view that the Appellant's marriage on 13 October 2014 to Diana-Elisabeta Postolache was a marriage of convenience and that the relationship was not genuine. The decision was taken following an interview with the Appellant and Ms Postolache which took place on 30 January 2015. As a result of this the Respondent decided that the Appellant did not have what would qualify for leave under the long residence rules. He did not have valid leave from 17 January 2014. Thus the application was refused under paragraph 276D with reference to paragraph 276B(i)(a) of the Immigration Rules ("the Rules").

6. The Appellant's appeal was dismissed by Judge Maxwell in 2016. The appeal was determined in the absence of the Appellant. He found that the Respondent had not discharged the burden of proof that the marriage was one of convenience; however, the Appellant had not established that the Sponsor was exercising treaty rights. The appeal was dismissed under the Immigration (European Economic Area) Regulations 2016.

7. The Appellant gave evidence before Judge Beg. The judge directed herself in relation to Devaseelan [2010] UKAIT 00702 with reference to Judge Maxwell's decision. She said that the decision of FtT Judge Maxwell was the starting point. She noted at paragraph 11 of Judge Maxwell's decision he had stated in respect of the marriage interview that none of the questions was so distinctive from one

another that looking at them individually or in the round they do not come anywhere near discharging the burden of proof upon the Respondent. The Appellant and the Sponsor did not attend the hearing before Judge Maxwell. Judge Beg said that Judge Maxwell did not make clear and specific findings with regard to whether the marriage between the Appellant and the Sponsor was a marriage of convenience. She quoted the following from Judge Maxwell's decision;

> "I find no evidence to prove that the Appellant's spouse is exercising treaty rights in the United Kingdom and accordingly I find that the Appellant has failed to prove any entitlement to a residence card as he has failed to prove any right of residence by way of his relationship to his spouse".

8. Before Judge Beg the Appellant produced evidence in order to explain why he was unable to attend the hearing before Judge Maxwell. Judge Beg made the following findings about this:

> "18. I find that the medical evidence does not make it clear why the appellant would not have been able to attend a hearing on 15 June 2015 when he had already been given pain relief from 10 June 2016 and again on 14 June 2016. Clearly on 14 June 2016, he was able to travel to Cromwell Road, SW5 to see Dr Hasan. I do not find that the medical evidence as it stands is cogent evidence that the appellant was unfit to attend the hearing before Judge Maxwell on 15 June 2015."

9. In relation to the Appellant's credibility the judge made the following findings:-

> "20. I find that the appellant has been able to persuade the sponsor to give a witness statement which appears at page 6 of the appellant's bundle dated 13 June 2019. I do not find it credible that if she was prepared to give a witness statement as recently as 13 June 2019, that she would not have been prepared to come to the Tribunal hearing to provide evidence if her marriage to the appellant had been a genuine marriage. I attach very limited weight to the witness statement. I find that Ms Postolache, a Romanian national, intentionally failed to attend the hearing of the appeal before me and subject herself to cross-examination.
>
> 21. I take into account the marriage interview which took place on 30 January 2019. I find that there were a number of discrepancies between the answers given by the appellant and the answers given by the sponsor. At question 47 the appellant said that the sponsor did not have an engagement ring. However the sponsor in her interview at questions 279 and 280 said that the appellant gave her engagement ring and that she went with him to buy it. In further discrepancies the appellant said at question 143 that the appellant does not wish to drive but that she obtained a provisional licence as proof of address. At question 143 the appellant said that the sponsor does not wish to drive and obtained a

provisional licence as proof of address. The sponsor on the other hand said that she does with to drive at question 455.

22. In relation to employment, the sponsor said that she has not worked since she entered the United Kingdom and has not been exercising treaty rights. At question 384 she said that she came to the United Kingdom with £1000. The appellant between questions 351 and 355 said that she hopes to work in the Cooperative. The sponsor said that she had found a job and will be starting it at the end of February. The appellant said that she had found a job and was starting it on 5 February. In respect of the relationship the appellant said that the sponsor worked in a clothes shop when he first met her. At question 29 he said the clothes shop was like Primark. The sponsor said that she worked in an off-licence when she met the appellant.

23. The parties were also asked about their wedding. The sponsor said at question 302 that she married on a Tuesday. The appellant said at question 55 that they married on Monday. The sponsor said that she and the sponsor's cousin travelled with the applicant in a cab to the wedding. The appellant said that he, the sponsor and the sponsor's cousin Kazi travelled in a cab to the wedding. At question 56 the appellant stated that his friend Kazi attended the wedding. There is no explanation as to why there is no witness statement from him.

24. At question 87 the sponsor said that she did a three month English language course in the United Kingdom. I find that the appellant has finished a Masters degree in finance in 2013. I do not find that the couple are compatible in respect of their educational background. I also bear I mind that the appellant is a Muslim while the sponsor is a Christian. At question 513, the sponsor said that the appellant last visited a mosque on 24 January, as this is the date that his mother passed away. At question 521 she claimed that they discussed changing religion but decided not to.

25. The appellant on the other hand said at question 157 that he last visited the mosque two months ago. At question 155 he said that he goes to the mosque sometimes but also prays at home. At question 156 he said he usually goes to the mosque on Fridays unless he is working. At question 159 he said that they have not discussed what religion their children would be and that they can take any religion. I find that there is no evidence that the appellant and the sponsor have gone through an Islamic ceremony of marriage despite the fact that Muslim men can marry a Christian woman. Nor is there an explanation as to why a religious marriage was not considered by the appellant given that he attends a mosque.

26. I find that there were other discrepancies in the answers given in each interview. The sponsor claimed that rent was paid in cash whereas the appellant claimed that rent was paid by bank transfer from his account.

Mr Malik submitted on the appellant's behalf that the couple have evidence that they were living at the same address. I find that even if they did live at the same address, that in itself is not credible evidence that they lived together as a couple. I bear in mind that none of the sponsor's family members attended the marriage from Romania. The appellant claimed an interview at question 76 that they were planning to have a celebration in Romania. I find that there is no credible evidence before me that he has ever met any of the sponsor's family members nor are there any letters of support or witness statements from them. At question 77 the appellant claimed that she has spoken to the sponsor's brothers. I bear in mind that the sponsor had limited finances; she was not working and was helped by her cousin and his friend as well as her brother.

27. In evidence the appellant said that his marriage to Ms Postolache was a genuine marriage. In cross-examination he said that the relationship changed at the end of 2016. He then went on to state that after the marriage interview, he was unable to spend Christmas with the sponsor's family in Romania. He said both in 2014 and 2015, he was not able to travel with her and she was very unhappy with him because of that. He then accepted that the relationship changed not in 2016 but in 2015 and that that accords with paragraph 6 of his witness statement. He said that they lived together until October 2016. By the end of October 2016, they stopped living together and had separated. He said that he was no longer in a subsisting or genuine relationship with her by the summer of 2018 when he filed for divorce.

28. In answer to my questions, he said that he met the sponsor in Milan in 2011 when she was visiting a friend. He claimed that he was in Milan to visit a friend for two days. He said that she came to see him for the very first time in the United Kingdom in January 2014. They married on 13 October 2014 in the United Kingdom. He said that they separated at the end of October 2016 when she left the United Kingdom. He said that he believes that she went to visit her mother in June 2015 and then returned. I find that having stated that after October 2016, he did not know what happened to her, he then stated that he saw her again in July 2018 to discuss the divorce. He said they met in Stratford in a coffee shop. They met again in March 2019 because she wanted to clarify some of the divorce papers. I find that it is clear that when he met her in March 2019, it was to persuade her to provide a witness statement because her witness statement is dated 13 June 2019.

29. The appellant claimed that the sponsor during her visit to see him in January 2014 in the United Kingdom, stayed with him for a week and also saw her friend Christina who lives in this country. In answer to Mr Malik, he said that he did not ask Christina for a witness statement although she was the sponsor's friend, because he is not in contact with her, and in any event the sponsor's own witness statement clarifies everything. I find that

he was in contact with the sponsor on his own evidence in March 2019; her witness statement is dated 13 June 2019. I find that he could have asked Christina whom he claims knew about their relationship to come to the appeal hearing to give evidence. He made no such efforts to contact her or to ask the sponsor about her contact details. In taking the evidence as a whole, on a balance of probabilities I do not find the sponsor a witness of truth."

10. The judge then at paragraphs 30 and 31 gave a self-direction with reference to the cases of Rosa v Secretary of State for the Home Department [2016] EWCA Civ 14, Papajorgji [2010] UKUT 30 and the Supreme Court decision in Sadovska [2017] UKSC 54. There is no challenge to the judge's self-direction.

11. The judge made the following findings:

"32. I find that the discrepancies in the answers given in the marriage interview provides good evidence upon which the respondent has discharged the initial evidential burden of proof upon him to demonstrate that there is reasonable suspicion that the marriage between the appellant and Ms Postolache is a marriage of convenience. The appellant did not attend the hearing before Judge Maxwell. In considering the evidence in the round, I find that the appellant has not been able to provide credible evidence in rebuttal. I find that the respondent has discharged the burden of proof to the civil standard that the marriage is one of convenience.

33. I take into account the decision in **McCarthy, Rodriguez [2005] Imm AR 493** from the Court of Justice of the European Communities. I find the appellant was not entitled to an EEA residence card because he was not a spouse within the meaning of Regulation 2 of The Immigration (EEA) Regulations 2016. The sponsor was not exercising treaty rights and accordingly the appellant failed to prove that he was entitled to a residence card. Mr Malik accepted from the outset that if the issue of the marriage is not resolved in the appellant's favour, then the appellant does not meet the requirement of ten years' continuous lawful residence. He went on to state that he does not rely upon Article 8 outside the Rules and accepted that it would not be in the public interest for the appellant to be able to remain permanently in this country if he has undertaken a marriage of convenience.

34. In conclusion I find that the appellant's marriage to the sponsor was a marriage of convenience. Furthermore, I find that the sponsor was not exercising treaty rights in the United Kingdom as determined by Judge Maxwell. The appellant was not entitled to a residence card. I take into account the Home Office policy which appears at page 167 dated 3 April 2017 which confirms that when granting a long residence application in which a person has relied upon a period of leave in the United Kingdom exercising treaty rights as an EEA national or their family member any

grant of leave must be made outside the Immigration Rules. I find that the appellant does not qualify for indefinite leave to remain under the Rules."

The Law

12. In Papajorgji (EEA spouse-marriage of convenience) Greece UKUT 38 (IAC) the Upper Tribunal held 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.

(iii) The UT at [20] added:

> "This passage indicates that the AIT concluded that there was no burden on the applicant in an EU case until the Respondent raised the issue by evidence. If there was such evidence it was for the applicant to produce evidence to address the suspicions. In our judgment such an approach can be described as one of the evidential burden in the first place on the Respondent and then shifting to the claimant in the light of the relevant information rather than a formal legal burden. We agree with that approach".

13. The Court of Appeal approving this approach in Agho v Secretary of State for the Home Department [2015] EWCA Civ 1198 at [13], held:

> "What it comes down to is that as a matter of principle a spouse establishes a prima facie case that he or she is a family member of an EEA national by providing the marriage certificate and the spouse's passport; that the legal burden is on the Secretary of State to show that any marriage thus proved is a marriage of convenience; and the burden is not discharged merely by showing "reasonable suspicion". Of course in the usual way the evidential burden may shift to the applicant by proof of facts which justify the inference that the marriage is not genuine, and the facts giving rise to the inference may include a failure to answer a request for documentary proof of the genuineness of the marriage where grounds of suspicion have been raised. Although, as I say the point was not argued before us, that approach seems to me to be correct ..."

14. In Rosa v Secretary of State for the Home Department [2016] EWCA Civ 14the Court of Appeal at [29], held:

> "... 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."

15. The Supreme Court in Sadovska v Secretary of State for the Home Department **[**2017] UKSC 54at [28] held:

> "One of the most basic rules for litigation is that he who asserts must prove. It was not for Ms Sadovska to establish that the relationship was a genuine and lasting one. It was for the Respondent to establish that it was indeed a marriage of convenience."

The Grounds of Appeal

Ground 1

16. The FtT erred in its approach to the burden and standard of proof. The approach adopted is inconsistent with the authorities.

17. The FtT at paragraphs 18 to 29 found that Appellant not credible. It is only after rejecting his evidence that at paragraph 32 the FtT considered the Secretary of State's evidence (the interview notes) and concluded that it had demonstrated that there was a reasonable suspicion that the marriage was one of convenience and that the Appellant "has not been able to provide credible evidence in rebuttal".

18. The FtT should have approached the evidence in the reverse order. It was obliged to first consider the Secretary of State's evidence and then, afterwards, if it had discharged the evidential burden, considered the Appellant's evidence. It was an error of law on part of the FtT to first consider and reject the Appellant's evidence and then, afterwards to consider whether the Secretary of State discharged the evidential burden.

19. At paragraph 32 the judge found that the Appellant "has not been able to provide credible evidence in rebuttal". The authorities show that there is no burden on the Appellant to "provide credible evidence in rebuttal". There is merely an evidential burden on the Appellant to address evidence justifying reasonable suspicion.

20. The FtT found against the Appellant because of his failure to provide supporting evidence and proceeded on the basis that it was for the Appellant to show that the marriage was genuine which is a wrong approach.

Ground 2

21. The judge made adverse credibility findings at paragraphs 20 and 28 because of the failure of the Appellant's wife to attend the hearing. The expectation that she would attend the hearing is unrealistic and perverse. The evidence showed that the relationship between the Appellant and his wife had ended. The grounds query why an estranged wife would come to the UK in order to support the appeal of her estranged husband. It was an error of law on the part of the FtT to attach "very limited weight" to the Appellant's witness statement because of her failure to attend the hearing.

22. The FtT at paragraph 26 attached weight to the absence of evidence of "letters of support or witness statements" from family members of the Appellant's wife. This expectation is unrealistic and perverse given that they are no longer a couple. As is the expectation that Christina could have attended the hearing.

Ground 3

23. The approach of the judge at paragraphs 24 and 25 relating to incompatible educational backgrounds of the Appellant and the Sponsor and the failure to have gone through an Islamic ceremony of marriage are perverse and irrational.

Ground 4

24. At paragraph 16 the judge referred to the decision of Judge Maxwell and at paragraphs 17 to 18 considered and rejected the Appellant's evidence for not attending that hearing. This was not the issue before the FtT. The issue was whether there was new evidence before Judge Beg that permitted the FtT to depart from the earlier findings: Devaseelan v Secretary of State for the Home Department [2002] UKIAT 702. There was an abundance of new evidence in the Appellant's bundle including evidence of the Sponsor's wife's employment showing that she was exercising treaty rights in the United Kingdom at the relevant time. The FtT was obliged to consider the new evidence and decide whether to depart from Judge Maxwell's decision.

25. In any event there was no evidential basis for the FtT to go behind Dr Hasan's assessment of 14 June 2016 which was that the Appellant was unfit to attend the hearing on 15 June 2016.

26. The FtT failed to appreciate the inherent flexibility in the Devaseelan guidelines as supported in the recent Court of Appeal's decision in Secretary of State for the Home Department v BK (Afghanistan) [2019] EWCA Civ 1358.

Submissions

27. Both parties made extensive oral submissions. They addressed me on the error of law and materiality. They agreed that if the grounds were made out and the decision set aside, I could go on and remake the decision. They made submissions accordingly. No further evidence was relied on by either party.

28. I will summarise the parties submissions. In respect of Ground 4, my attention was drawn to paragraph 9 of the decision of Judge Maxwell. He said, in so far as the marriage was concerned,

> "I find the basis upon which the respondent claims to have discharged the burden does not, in fact discharge that the burden of proof. I would add that it is made significantly more difficult to analyse the responses of the parties by the way in which respondent now chooses to record them … "

29. Mr Malik submitted that properly applying Devaseelan, the starting point is that the Secretary of State has not discharged the burden of proof. In the absence of a challenge or further evidence from the Secretary of State on this issue, there was no lawful reason to depart from this finding.

30. In respect of materiality Mr Malik said that following Judge Saini's decision it was not open to the Secretary of State to raise the issue of the Sponsor not exercising treaty rights. This was not an issue raised by the Secretary of State in the decision letter. He drew my attention to the decision of Judge Saini. The Respondent was given the opportunity to amend the decision letter and did not do so. It would be manifestly unfair to now allow the Secretary of State to raise this as an issue. It is not an issue raised in the decision letter. It was not an issue before the FtT and it is too late for the Respondent to now raise it.

31. Mr Kotas made submissions. He said that the Appellant cannot win by default in respect of whether the Sponsor was exercising treaty rights. In any event, he challenged the evidence in the Appellant's bundle relating to this issue.

32. In respect of ground 1, Judge Beg applied the correct the burden of proof. Mr Kotas said the judge properly directed herself on the law (see paragraphs 31 and 32). The judge was entitled to conclude that the discrepancies in the interview were sufficient to discharge the evidential burden. If the Appellant failed to attend his own hearing without good reason, this casts doubt on his evidence that the marriage was genuine. My attention was drawn to paragraph 13 of Judge Maxwell's decision. He did not have the benefit of hearing evidence from the Appellant. Judge Beg did. He was entitled to depart from Judge Maxwell's findings.In respect of the decision of Judge Maxwell that the Respondent had not discharged the burden of proof, there was no way of challenging this because the Secretary of State was the successful party.

33. In respect of ground 2, the findings of the judge are more nuanced than the grounds of appeal suggest. The judge acknowledged that the Appellant was able to obtain a witness statement from the EEA national and reasonably inferred from this that she could have attended the hearing. Similarly, the finding in respect of his wife's family should be considered in the wider context the finding of the judge at paragraph 26 that there was no credible evidence that the Appellant had ever met the EEA national's family members. Furthermore, in respect of Christina, there was no evidence before the judge that the Appellant had made efforts to contact her. She was in the UK. In respect of ground 3, again Mr Kotas urged me to consider the findings as a whole. The Appellant's evidence about attendance at the mosque was inconsistent. The judge drew reasonable inferences from the evidence.

Error of law

34. The issue in this case is whether the Appellant's marriage to an EEA national on 13 October 2014 was a sham marriage. If it was a genuine marriage and the Sponsor was exercising treaty rights from the time they were married up until 7 October

2016 (the Appellant came into the UK on 7 October 2006) then it is accepted that the Appellant could meet the substantive requirements of the long residence rules.

35. The legal burden of proof in relation to marriages of convenience relies on the Secretary of State. If the Secretary of State adduces evidence capable of pointing to the conclusion that the marriage is one of convenience, the evidential burden shifts to the Appellant. The Respondent's case is that the interview on 30 January 2015 was capable of discharging the burden of proof that the Appellant's marriage was one of convenience. In this regard there was no evidence before Judge Beg that was not before Judge Maxwell. It is difficult to see how, properly applying Devaseelan, Judge Beg could lawfully have departed from Judge Maxwell's findings about the interview and his conclusion that the Secretary of State had not discharged the burden of proof. There was no further evidence relied on by the Secretary of State in this regard. Judge Beg was mistaken when she said that Judge Maxwell had not made "clear and specific findings with regard to whether the marriage between the Appellant and the Sponsor was a marriage of convenience." His unchallenged finding is unequivocal. It was open to the Respondent to apply to appeal against Judge Maxwell's decision notwithstanding that the Secretary of State is the losing party (see Anwar v SSHD [2017] EWCA Civ 2134**).**

36. From what is said at paragraphs 16-19 of Judge Beg's decision, she attached significance to the Appellant's none-attendance at the hearing before Judge Maxwell. However, it is difficult to see how this could undermine the decision of Judge Maxwell in respect of the probative value of the interview and the failure of the Respondent to discharge the burden of proof. The judge did not properly apply Devaseelan.

37. The Devaseelan argument that developed at the hearing was not on all fours with that in the grounds (ground 4). However, putting aside the Devaseelan point in respect of the sham marriage, the judge having properly directed herself on the burden of proof then failed to apply it. I conclude that the judge's findings, at paragraph 32, disclose an error of law. The first task for the judge was to consider whether the Secretary of State had adduced evidence capable of pointing to the marriage being one of convenience. She considered whether the Respondent had discharged the burden after having made findings about the Appellant's credibility. I cannot be certain that when the judge considered whether the Respondent had discharged the initial evidential burden of proof, she did not take into account the adverse credibility findings, thus placing a burden on the Appellant. Whilst the evidential burden may shift to the Appellant, there is no legal requirement on the Appellant to provide evidence in rebuttal. An evidential burden is an obligation to show if called upon to do so that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue. The use of the word "rebuttal" by the judge supports an argument that she treated the Respondent's case to be true and that there was an obligation on the Appellant to contest the Respondent's case and prove otherwise. This is supported by her having considered the Appellant's credibility before considering whether the Respondent had discharged the initial

evidential burden. Ground 1 is made out. The error is such that the decision of the FtT must be set aside. I set aside the decision of the judge to dismiss the appeal.

38. I will briefly engage with grounds 2 and 3. I am satisfied that ground 2 is made out. In my view it is irrational of the Tribunal to expect the Appellant's estranged wife to travel from Romania to the UK in order to give live evidence and to make an adverse credibility finding based on her failure to attend. I find that ground 3 is made out. The judge's findings in relation compatibility are speculative and not grounded in the evidence before her.

Re-making

39. Judge Maxwell found that the Appellant had not established that the EEA national was exercising treaty rights. There was insufficient evidence before him on the issue. There was evidence before Judge Beg. On the face of it, it was incumbent on her to consider this evidence; however, she made no mention of it and in this respect Ground 4 is made out. However, Mr Malik drew my attention to Judge Saini's set aside decision. Judge Saini observed that the issue of the EEA national exercising treaty rights was not raised in the decision letter of 17 January 2017. It was not an issue before Judge Scott. Judge Saini said that it was not a matter on which the Secretary of State was entitled to rely. He remitted the matter to the FtT indicating that the Respondent was at liberty to amend the decision. Furthermore, he made a direction that should the Respondent seek to amend or supplement the decision, he must do so in writing in accordance with Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The decision relied on by the Respondent before Judge Beg was the same as that before Judge Scott. There had been no attempt by the Respondent to amend the decision letter to indicate that whether the EEA national was exercising treaty rights was an issue relied on. I accept Mr Malik's submission that it is not an issue on which the Respondent is now entitled to rely. If it had been an issue before Judge Beg, she did not take into account the evidence in the Appellant's bundle when deciding whether to depart from Judge Maxwell's findings. I have considered this evidence and I am satisfied that it establishes on the balance of probabilities that the EEA national was exercising treaty rights at the material time. However, there was no challenge to the evidence by the Home Office Presenting Officer at the hearing before Judge Beg. Mr Kotas attempted to challenge the evidence before me. However, I accept that to allow the Respondent to raise this issue at such a stage in the proceedings would amount to a procedural irregularity in the absence of an adjournment. There was no application for an adjournment. In any event, considering the history of the proceedings and the overriding objective enshrined in the Tribunal Procedure (Upper Tribunal) Rules 2008, fairness does not demand an adjournment to allow the Respondent to amend the decision letter.

40. The only issue properly before Judge Beg was whether the marriage was one of convenience. Properly applying Devaseelan there was no reason to depart from the finding of Judge Maxwell that the Respondent has not discharged the burden of proof.

41. The only reason for the decision maker having refused the application was the assertion of a sham marriage. Thus, I conclude that in the absence of any other reason, the Appellant meets the requirements of the Immigration Rules and his appeal should therefore be allowed under Article 8.

Notice of Decision

The appeal is allowed under Article 8.

No anonymity direction is made.

Signed *Joanna McWilliam* Date 23 January 2020

Upper Tribunal Judge McWilliam