Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00091/2020
UI-2021-000704

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On 24 June 2022	**On 7 September 2022**

Before

DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

HARJINDER SINGH

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M. Biggs, counsel, instructed by Vision Solicitors
For the Respondent: Ms S. Lecointe, Senior Home Office Presenting Officer

DECISION AND REASONS

A. INTRODUCTION

1. This is an appeal against the decision of First-tier Tribunal Judge Kinch promulgated on 5 July 2021. Permission to appeal was granted by Upper Tribunal Judge Plimmer on 12 January 2022.

2. No anonymity direction has been made previously in this case, there was no application made to me for one, and there is no obvious reason why anonymity would be appropriate in this case having regard to the

importance of open justice. I therefore do not make an anonymity direction in this appeal.

3. The hearing before me took place in person. I heard submissions from Mr Biggs and Ms Lecointe to both of whom I am grateful for their assistance.

B. BACKGROUND

4. The Appellant is a national of India, born in 1984, who came to the UK as a student in 2009. His student visa expired in January 2011 and he overstayed. In July 2013, he married one Dina Motichande, a Portuguese national, born in 1968.

5. As a result of their claimed marriage, the Appellant has made three applications claiming an entitlement under EU law, as implemented in the UK at the relevant times, to remain in the UK. Each application was rejected by the Respondent on the basis that the marriage was one of convenience. The Appellant appealed each refusal to the First-tier Tribunal ("FTT") and on each occasion the FTT has also concluded that the marriage was one of convenience.

6. Although this appeal is only directly concerned with the third of these appeals, under the principles explained in Devaseelan [2002] UKIAT 000702, the previous FTT decisions form the starting point for any later appeals, and, as Judge Kinch's approach to Devaseelan forms one of the central aspects of this appeal, it is necessary to set out the earlier FTT decisions in some detail.

7. Before doing so, I note that, according to the Respondent's summary of the Appellant's immigration history, there are other applications which the Appellant has made, which have not yet been determined. They are not relevant to this appeal, and in referring to "applications" below, this is reference solely to those made on the basis of an entitlement under EU law.

First application and appeal

8. The first application was made in late 2013. His appeal to the FTT was refused by First-tier Tribunal Judge Sweeney in a decision promulgated on 5 June 2015 ("the Sweeney decision"). His application for permission to the Upper Tribunal was refused by both the First-tier Tribunal and, on 24 September 2015, the Upper Tribunal.

9. Judge Sweeney provided a summary of his assessment of the Appellant's and Ms Motichande's evidence before him at paras 36-38 as follows:

> "36. I found both the appellant and Ms Motichande to be wholly unconvincing witnesses. Their account of their relationship and their marriage was, in my judgement, neither credible nor reliable. I did not accept their account.

> 37. Both parties gave not only internally inconsistent accounts of their relationship and their marriage, but also accounts that were inconsistent with each other during the course of their respective marriage interviews in March 2014. They were unable to provide a satisfactory explanation of such inconsistent accounts during the course of the hearing of the appellant's appeal. Further, the oral evidence that they gave during the course of the appeal hearing was, on occasions, inconsistent with the account that they had provided in interview.
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> 38. They were also unable to provide information on matters that they could reasonably be expected to."

10. One significant issue in determining the Appellant's and Ms Motichande's credibility was an admission which she made in interview with the Home Office in May 2013, when immigration officers prevented their first attempt at getting married. In interview Ms Motichande said that the Appellant was paying her £5,000 for marrying the Appellant. She was interviewed again in March 2014 and asked about this. Judge Sweeney, at paras 41-49, records that she gave a number of inconsistent accounts:

> "41. … Firstly, she recounted that she had been given £5,000 by her husband because she needed to go to India to deal with some problems there. She then acknowledged having admitted to immigration officers that she had accepted £5,000 to marry the appellant, but said that she had admitted doing so because she was threatened. She then denied telling immigration officers that she had accepted £5,000 to marry the appellant and said that the money was her money. She then said that she had been forced to say that she had accepted £5,000 to marry the appellant.
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> 42. Ms Motichande said that she had told the appellant that she needed money to go to India to deal with some documents there, she went to visit her parents in law and had surgery to her nose there.
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> 43. During her oral evidence, Ms Motichande said that the £5,000 was for a traditional Indian wedding. This is consistent with the appellant's account, but is entirely inconsistent with the account given by Ms Motichande during her interview. I am satisfied that she has altered her account in order to match that of the appellant.
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> 44. In his interview, the appellant that [sic] said that he and Ms Motichande were collecting £5,000 for an Indian marriage ceremony. He said that Ms Moitchande visited her parents and her in-laws in India, but did not do anything else. He made no mention of her undergoing surgery. He said that she had not undergone any operations since they had been married.
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> 45. I would have expected the appellant to know if Ms Motichande had undergone surgery. I would have expected Ms Motichande to have told her new husband this. The most likely explanation of the appellant's lack of awareness of that surgery is, in my judgement, that the same was not undergone. Ms Motichande's account of having undergone surgery was an attempt to explain payment of money to her by the appellant.
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> 46. I am satsifed that it is more likely than not that Ms Motichande's contemporaneous account on 30 May 2013 following her interview by immigration officers of having been paid £5,000 by the appellant to undergo the marriage ceremony was an accurate one.

> 47. I do not accept that she was coerced into making such admission. In reaching this conclusion, I take particular account of my findings as to Ms Motichande's credibility. Given that I did not find her to be a credible witness, I do not accept her account in this regard in the absence of independent, reliable, corroborative evidence, of which there is none.
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> 48. I also bear in mind that when interviewed on 10th March 2014 in Liverpool, Ms Motichande gave an account of the £5000 which was not only internally inconsistent, but was also inconsistent with the evidence of the appellant. Ms Motichande then gave a different account again concerning the £5,000 during the course of her oral evidence before me.
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> 49. If Ms Motichande's account of having been coerced into making an admission that she had received £5,000 were true, then I would have expected her account as to the true situation concerning this sum to have been consistent. In fact there were numerous inconsistencies in her account in this regard." (references to interview question numbers omitted)

11. At para 50-54, Judge Sweeney considered the fact that both the Appellant and Ms Motichande could not accurately remember the date on which they got married. This, he considered, was something that they could reasonably be expected to remember and that their "inability to remember such a date suggests that it is because the date was not important or memorable, thus indicating that the marriage was not a significant event. The most likely explanation for a marriage not being a significant event to the parties to the same is, in my judgement, that it is not genuine."

12. There were further significant inconsistencies in the evidence as to:

    (a) how long Ms Motichande had known the Appellant (paras 55-58);

    (b) which room in Ms Motichande's flat the Appellant had come to fit carpet (paras 59-74);

    (c) when the Appellant and Ms Motichande first met and whether they went out together having met (paras 75-81);

    (d) which of them had proposed to the other and whether Ms Motichande had initially refused when he proposed or not (paras 82-105);

    (e) the number of floors and bedrooms in Ms Motichande's flat and the view from her bedroom window (paras 106-108);

    (f) when they started living together and where Ms Motichande's son was living (paras 109-115).

13. In light of the Appellant's and Ms Motichande's lack of credibility, Judge Sweeney found that the marriage was a marriage of convenience and accordingly dismissed the appeal.

Second application and appeal

14. On 5 November 2015, three days after Immigration Enforcement attended his home, the Appellant made a further application for a residence card. This was refused on 13 April 2016, again on the basis that the marriage was one of convenience, and on the further basis that Ms Motichande was not exercising Treaty rights. The Appellant appealed, but, by a decision promulgated on 3 January 2018, First-tier Tribunal Judge Woolley also concluded that the marriage was one of convenience and dismissed the Appellant's second appeal to the First-tier Tribunal ("the Woolley decision").

15. After setting out the legal principles on the burden of proof in marriage of convenience cases, Judge Woolley considered the reasons relied on by the Respondent for considering the marriage to be one of convenience, namely (a) the Sweeney decision and (b) the further evidence that had been adduced since.

16. At para 27, Judge Woolley set out the relevant principles from Devaseelan. At paras 28-31, Judge Woolley then considered the question whether the Appellant and Ms Motichande were in a marriage of convenience, as follows:

> "28. It has to be said that the evidence produced by the appellant in the present appeal was very much weaker that that produced before Judge Sweeney. In particular his wife was not produced as a witness. He explained that she had left him on the 18th July 2017 and he had no idea of her present whereabouts and he had no contact with her. His wife had issued divorce proceedings in September 2017 but the decree absolute had not yet been issued. This was not therefore a case where 'retained rights of residence' had to be considered. He submitted that the two visits conducted by the Immigration Officers – on 2nd November 2015 and 16th June 2017 – showed that the marriage was genuine. On the last visit he and his wife had been found in bed together. The respondent had no record of the second visit but accepted that on the first visit they had been found in bed. The only other additional evidence produced was of a joint Sky subscription and additional bank statements of the appellant and his wife. A number of photographs were also submitted although it appears that a large number of these were of their wedding.
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> 29. I take Judge Sweeney's decision as the starting point. He found that this was a marriage of convenience. I find that the additional evidence produced, while I can take it into consideration, does not lead me to differ from Judge Sweeney's conclusion. No additional evidence has been presented to me in respect of the £5,000 which Judge Sweeney [found] had been paid by the appellant in order to facilitate the marriage. No further evidence has been produced to explain the discrepancies between the accounts of the appellant and his wife in the marriage interviews. I find for the same reasons as Judge Sweeney that these objections must still carry weight.
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> 30. The most powerful new fact put forward by the appellant – namely that he and his wife had been found in bed together or in their bedroom – does not I find assist him when the totality of all the evidence is considered… A marriage of convenience might exist despite the fact that there was a

> genuine relationship and in the absence of any deception or fraud as to its existence. The fact therefore that the appellant and his wife may have had a genuine relationship when discovered by the Immigration Officers in bed does not avail the appellant on the totality of the evidence. I have found that the conclusion of Judge Sweeney that this was a marriage of convenience has not been overtaken by the subsequent evidence."

17. Judge Woolley accordingly dismissed the appeal. The Appellant's application for permission to appeal to the Upper Tribunal was subsequently refused.

Third application and appeal

18. On 20 August 2019 the Appellant applied for a permanent residence card on the basis that, having divorced Ms Motichande on 3 December 2018, he was entitled to a retained right of residence under EU law. This was refused on 16 December 2019, again on the basis that the marriage had been one of convenience, and on the further basis that the Appellant had not shown that Ms Motichande had exercised Treaty rights either for a continuous period of 5 years or on the date of the divorce, as is required.

19. The Appellant appealed this refusal, which came before First-tier Tribunal Judge Kinch ("the Judge") on 14 June 2021. By decision promulgated on 5 July 2021 ("the Kinch decision"), she dismissed the appeal.

20. At paras 9-20 of the Kinch decision, the Judge set out the Appellant's case on this third appeal, as follows:

> "9. The appellant's claim is set out in his witness statements dated 16 October 2020 and 11 June 2021. It is supported by the evidence of the sponsor, the other witnesses who attended to give oral evidence and the other evidence adduced in the appellant's bundle.
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> 10. The appellant confirms that he arrived in the UK on 9 August 2009, on a Tier 4 student visa that was valid until 3 January 2011. The appellant met the sponsor in the winter of 2011 when he went to lay carpet at her home address. They started living together in a relationship akin to a marriage in November 2012.
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> 11. The appellant and sponsor were due to marry on 30 May 2013, however, on that day, Immigration Enforcement officers arrived and interviewed the appellant and sponsor. The appellant was detained and taken to a detention centre. The appellant at this time was represented by Malik Law Chambers, who have since been investigated and closed down by the Law Society. The sponsor and Mr Sashiltant Premji both visited the appellant while he was held in detention.
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> 12. The appellant was finally released from detention in July 2013. The appellant and sponsor still wished to marry. They were not required to give 15 days-notice, and they were married on 18 July 2013.
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> 13. The appellant applied for a Residence Card as a spouse of an EEA national on 9 October 2013. The appellant and sponsor then attended a marriage interview on 10 March 2014. The appellant states that he had requested a Punjabi interpreter for the interview, but none was available,

and so the interview was conducted in English. The appellant states that he told the interviewer that his English was not good enough for that kind of interview. It was suggested to the appellant that he had paid £5000 to the sponsor for marrying her, which the appellant repeatedly denied. The appellant notes that the sponsor was very upset after her interview, and that she has a nervous disposition and suffers from anxiety and stress. The appellant states that this can affect the sponsor's ability to communicate coherently and also affects her memory.

14. The appellant denies giving the sponsor any money to marry him, and states that he did not have the funds to do so in any event. The appellant's bank account statements confirm that there was no withdrawal of £5000 from his bank account. The appellant states that the sponsor only told the Immigration Enforcement officers on 30 May 2013 that she had agreed to marry the appellant for £5000 as a result of intimidation and coercion. The officers had informed the sponsor that she would be removed from the UK and prosecuted and put in a Portuguese prison if she did not accept that this was a marriage of convenience. As a result of this pressure, the sponsor made false assertions.

15. The appellant states that one of the reasons why there may be discrepancies between the answers he gave in interview, and the answers given by the sponsor are [sic] because he did not understand the questions properly, or the interviewer did not properly understand his answers. The appellant notes that he was very stressed and anxious about the interview, particularly because he thought he might be taken to immigration detention afterwards.

16. The appellant states that the genuine nature of their marriage is also confirmed by the fact that when an enforcement visit took place at 10 Halsend, Hayes, on 2 November 2015, the sponsor and appellant were found in bed together. The appellant states that there was a further visit from immigration officers on 16 June 2017, during which time the appellant and sponsor were also found in bed together.

17. The appellant then made a further application for a residence permit, on the basis of his marriage with the sponsor, which was refused in a decision dated 13 April 2016. The appellant's appeal against this refusal was dismissed by Judge Woolley in a decision promulgated on 3 January 2018.

18. The impact of the refusals and the subsequent appeals took a toll on the appellant's marriage, and he and the sponsor divorced on 3 December 2018. The appellant describes the divorce as amicable, and states that he and the sponsor stayed in touch. Their relationship improved again, and the appellant and sponsor moved back in together in January 2020, before moving to their current address at 35 Ebbotswood Way, in September 2020.

19. The appellant and sponsor wish to remarry again, and have applied for marriage registration at Hillingdon Council. However, the appellant needs a certified copy of his passport, which the respondent has.

20. The appellant maintains that his was never a sham marriage."

21. At para 34, Judge Kinch directed herself as to the burden of proof in marriage of convenience cases. She said,

"Where the respondent alleges that a marriage is a marriage of convenience, the legal burden is on the respondent to prove this (Papajorgji

(EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC), Agho v Secretary of State for the Home Department [2015] EWCA Civ 1198 and Sadovska v Secretary of State for the Home Department [2017] UKSC 54). If the respondent demonstrates that there is a 'reasonable suspicion' that the marriage is not genuine, the appellant will be expected to respond to it, and the evidential burden shifts to the appellant."

22. At para 36, she gave a self-direction in relation to Devaseelan as follows:

> "the starting point for my assessment of the appellant's claim are [sic] the findings of Judge Sweeney in a decision promulgated on 5 June 2015 and Judge Woolley, in a decision promulgated on 3 January 2018… I am mindful that these previous decisions are not binding on me, but nor am I hearing an appeal against them. I address my mind to the reasons put forward by the appellant in seeking to depart from the findings of Judges Sweeney and Woolley, as to why those findings should not be carried forward into my determination of this appeal. I note that I should treat with circumspection relevant facts that had not been before the judges, but am mindful that I am not restricted to material post-dating their decisions, or which was not relevant to their decisions. The basis for the guidance is not estoppel or res judicata, but fairness."

23. At paras 37-38, the Judge summarised the findings of the Sweeney decision and the approach which Judge Woolley adopted in the Woolley decision. At para 39, Judge Kinch stated that "As those previous findings form the starting point of my deliberations in this appeal, I am satisfied that respondent [sic] has established that there is a 'reasonable suspicion' that the appellant's previous marriage to the sponsor is not genuine, and the evidential burden now shifts to the appellant."

24. At paras 40-44, she considered the argument put forward by the Appellant that Judge Sweeney's analysis of the evidence was vitiated because he did not have before him a copy of the interview records taken by the Immigration Enforcement Officers who attended on 30 May 2013 when the appellant and Ms Motichande were attempting to marry. This was said to be important because in that interview Ms Motichande is recorded stated that she had *agreed to be paid* £5,000 to marry the Appellant, whereas the later interview on 10 March 2014 (and therefore the Sweeney decision) was conducted on the basis that she had said that she *had been paid* £5,000. Judge Kinch then indicated that she had given careful consideration to whether as a result of this, she should depart from Judge Sweeney's findings. However, she did not accept that the Sweeney decision was undermined by not having had the 2013 interview records to consider, as it was clear that there were multiple inconsistencies in the Appellant's and Ms Motichande's accounts, to the extent that they were both found to be incredible and not reliable. It was also clear, Judge Kinch considered, that the issue of the £5,000 payment was not integral to those findings, and the way in which this was put to Ms Motichande would have been unlikely to have made any difference to Judge Sweeney's overall assessment of the Appellant and Ms Motichande's evidence.

25. At para 45, Judge Kinch recorded Mr Biggs' submission that there were real concerns about the reliability of the answers and admissions given by Ms Motichande in the 30 May 2013 interview, such that very little weight should be given to that evidence and that, as those answers formed the basis of the questions in the 10 March 2014 interview, the inconsistencies had to be treated with caution too. At para 46, the Judge rejected this submission, noting that Judge Sweeney had considered Ms Motichande's explanation for her answers (that she was forced to say that she had been given £5,000) but that this had been rejected.

26. At para 47, Judge Kinch rejected the submission that Ms Motichande was inappropriately treated during the interview, such that she felt forced to provide false information and at para 48, she notes that whereas in oral evidence Ms Motichande said that she had been forced to say that she had been given £5,000 to marry the Appellant, in her witness statement for the appeal she said that she had not said in interview that he paid her. At para 49, Judge Kinch concluded that had Ms Motichande really felt threatened and intimidated into providing a wholly false account of being paid £5,000 (either at the time, or to be paid later), she would have stated this consistently in the marriage interview on 10 March 2014, in the previous hearings and before her. Judge Kinch also found Ms Motichande's account of the 30 May 2013 interview to be unreasonable and unreliable.

27. At para 50, Judge Kinch records the Appellant's oral evidence in relation to a planned visit to India to have a religious marriage after his visa situation had been resolved, but this was inconsistent with Ms Motichande's oral evidence.

28. At para 54, Judge Kinch accepted that there were elements of consistency between the Appellant's and Ms Motichande's accounts but held that these aspects had to be considered against the very many inconsistent aspects.

29. At para 55-57, Judge Kinch considered and rejected Mr Bigg's submission that Judge Woolley's assessment of the fact that the Appellant and Ms Motichande had been found in bed together was irrational. She considered that, properly understood, Judge Woolley had not excluded this evidence, but rather taken it into account along with all of the other evidence, when deciding whether to depart from Judge Sweeney's earlier findings. In not so departing, this was a conclusion that was reasonably available to Judge Woolley based on his assessment of the evidence as a whole.

30. At 58, Judge Kinch noted that when the Appellant was in immigration detention Ms Motichande visited him and described herself as his fiancée and living in Southall, which was consistent with the Appellant's case. She noted that this evidence was not before the Tribunal on either of the two previous occasions, but she considered that it did little to counter the many inconsistencies between the Appellant's and Ms Motichande's account of how they came to be together.

31. At 59-62, Judge Kinch records the Appellant's and Ms Motichande's oral evidence as to the circumstances of their having got back together (given that in the previous determination it was recorded that the Appellant did not know Ms Motichande's whereabouts). The Judge noted that there were inconsistencies between their respective evidence in relation to this as well as a clear disparity between the account now given and that previously given by the Appellant to Judge Woolley. These, the Judge considered, were important when considering what weight to attach to the new evidence before her.

32. At paras 64-71, the Judge set out the new evidence before her that was not before the previous Tribunals and at para 72-3 states,

> "72. I have carefully considered the whole of the additional evidence before me, that was not before Judges Sweeney and Woolley. I have considered their findings, in light of this additional evidence, giving anxious scrutiny to whether this additional evidence undermines the veracity of their findings, or causes me to depart from them. I find that it does not.
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> 73. I am not satisfied that the appellant and sponsor have provided me with an accurate account of their relationship over the years, and to date. Although I accept that there is before me some documentary evidence that supports their claim to have been cohabiting since February 2020, such evidence is limited, and is of the sort that can be easily obtained and does not necessarily show that the appellant and sponsor are once again living together in a durable relationship. Although Mr Premji and Ms Cheema also stated that the appellant and sponsor lived together in their oral evidence, they did not provide any documentary evidence to confirm that they too lived at 2 Eastholme with the appellant and sponsor as they claim. This is surprising, as I would expect such evidence to be readily available to Mr Premji and Ms Cheema, and it would have bolstered their evidence.
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> 74. I also note that no other supporting documentation, such as photos or evidence of communications between the appellant and sponsor has been adduced that would be compelling supporting evidence of their rekindled relationship. Such material would be readily available to the appellant, and it is reasonable to expect that it would be adduced in circumstances where the appellant was seeking to rely on his renewed relationship with the sponsor as a reason to depart from two previous judicial findings, and also as a new matter. I find that the evidence that has been adduced by the appellant is insufficient to satisfy me, on the balance of probabilities that the appellant and sponsor are now in a genuine, durable partnership.
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> 75. Whilst the legal burden to prove the appellant's marriage was a sham remains on the respondent throughout, in circumstances where two previous judges have found that the marriage was a sham, it would have been apparent to the appellant, who has been legally represented throughout these proceedings, that he would need to adduce sufficient evidence to satisfy the evidential burden faced by him. I find that the appellant has failed to adduce sufficient evidence in that regard.
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> 76. The evidence that has been adduced by the appellant as to the circumstances around his separation and divorce from the sponsor, and the subsequent redevelopment of their relationship has been inconsistent, both between the appellant and the sponsor, and between the appellant and the other witnesses called on his behalf. The evidence adduced by the

> appellant, when considered in its totality and in the round, does not undermine the veracity of the finding made by Judge Sweeney, and endorsed by Judge Woolley, that the appellant and sponsor had entered into a marriage of convenience for the purpose of enabling the appellant to remain in the UK. Notwithstanding the additional evidence adduced, I find that the respondent has discharged the legal burden of proving that the appellant's marriage to the sponsor was a marriage of convenience, and that he was therefore never a family member of an EEA national for the purposes of the regulations. As such, the appellant cannot be a family member who has retained the right of residence under Regulation 10(5).”

33. Judge Kinch accordingly dismissed the Appellant’s appeal.

34. It is the appeal from that decision which now comes before me.

C. ERROR OF LAW HEARING

35. The Appellant’s case on this appeal is set out in his Grounds of Appeal, drafted by Mr Biggs, who expanded upon them orally at the hearing before me. There are six grounds, which are in summary as follows:

    (a) First, that the FTT erred in law in its understanding and/or application of the guidelines in Devaseelan;

    (b) Second, the FTT erred in holding, at para 39, that the “evidential burden…shifts to the appellant” on the question of whether his marriage was one of convenience based simply on the findings made by the First-tier Tribunal in earlier appeals;

    (c) Third, the FTT erred in concluding that “reasonable suspicion” was sufficient to satisfy the Respondent’s evidential burden of raising the issue of whether the Appellant’s marriage to Ms Motichande was one of convenience;

    (d) Fourth, the FTT erred in holding that it was open to Judge Woolley to follow the Sweeney decision because evidence that the Appellant’s relationship with Ms Motichande was subsisting in November 2015 did not “avail” the appellant as this post-dated their marriage;

    (e) Fifth, the FTT erred in law in its understanding and application of the evidential and legal burdens in respect of the marriage of convenience issue. In particular, at para 75 the FTT erred in finding that the appellant had failed to satisfy the “evidential burden”. That conclusion was not open to the FTT and in any case was based on an error of law. Accordingly, the FTT erred by failing to consider whether the respondent had proven that the appellant had entered a marriage of convenience in the light of the totality of the evidence.

    (f) Sixth, the FTT reached several unreasoned and/or irrational findings in respect of the appellant’s evidence.

36. The Respondent filed a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 dated 6 April 2022. Such a response must be filed within one month of the date on which the Respondent was sent notice that permission to appeal had been granted. Permission was granted on 12 January 2022 in this case, and it was therefore almost two months late. Contrary to rule 24(4), it does not contain a request for an extension of time, nor an explanation as to why it was not provided in time. Nonetheless, I am satisfied that it is in accordance with the overriding objective to extend time for filing the rule 24 response. The Appellant has not been prejudiced by its lateness, had sufficient time to produce a rule 25 reply had he thought it appropriate, and took no objection to it.

37. The rule 24 response submits, in summary, that the Judge directed herself correctly, that the Grounds misstate the law, that certain cases relied on in the grounds are irrelevant and that the Grounds 'wholly misrepresent the findings' of the Judge, suggesting, it is said, that the Judge only considered the previous decisions and not the other evidence before her. It further notes that the Appellant does not challenge the findings at paras 66-71 of the Kinch decision. Ms Lecointe made short oral submissions in line with those contained in the rule 24 response.

38. I raised with the parties at the outset of the hearing the possibility that, even if the grounds were successfully made out, they may not be material to the decision because, on the face of it, there appeared to be no evidence before Judge Kinch to show that Ms Motichande was exercising Treaty rights either for the requisite 5-year period or on the date of divorce, and as such the appeal was bound to have failed in any event. An oddity about the Kinch decision is that although these issues were matters which she was clearly aware of (she records that it formed a reason for the Respondent's decision to refuse the application at para 6, and she refused Mr Biggs' applications for an Amos direction requiring the Respondent to obtain details of Ms Motichande's records from HMRC and for the opportunity to put in further evidence on the issue after the hearing), she made no findings on them. Mr Biggs made the point that this was a matter that, if relied upon, ought to have been in the Respondent's rule 24 response, and submitted in any event that, not having had prior notice of it, it would not be fair for the Respondent or the Tribunal to take the point now. Ms Lecointe expressly disavowed reliance on the point. In the circumstances, and given that it does not in any event arise for the reasons set out below, this question does not required to be explored further.

39. The Grounds can be conveniently grouped as follows:

    (a) Issues concerning the burden and standard of proof in marriage of convenience cases (Grounds 3 and 5);

    (b) Issues concerning the principles derived from Devaseelan (Grounds 1, 2 and 4); and

(c) Challenges to the Judge's analysis of the evidence (Ground 6).

40. I propose to address them in that order.

D. BURDEN AND STANDARD OF PROOF IN MARRIAGE OF CONVENIENCE CASES (GROUNDS 3 AND 5)

Legal framework

41. The proper approach to the burden and standard of proof in marriage of convenience cases was addressed by this Tribunal in Papajorgji (EEA spouse – marriage of convenience) [2012] UKUT 38 (IAC). The approach set out therein was summarised with approval by Underhill LJ in Agho v Secretary of State for the Home Department [2015] EWCA Civ 1198 at [13] (with whom Moore-Bick and Vos LJJ agreed), as follows:

> "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 that that 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 for suspicion have been raised."

42. The ultimate question for the FTT, Underhill LJ held at [14], is whether "in the light of the totality of the information before [the Tribunal], including the assessment of the claimant's answers and any information provided, [is it] more probable than not this is a marriage of convenience?"

43. That this is the ultimate question was confirmed by the Supreme Court in Sadovska v Secretary of State for the Home Department [2017] UKSC 54; [2017] 1 WLR 2926 at [28]. The parts of Papajorgji giving rise to the summary in Agho, quoted above, were also referred to at [16] of Sadovska without any apparent disapproval. I consider that Underhill LJ's summary at [13]-[14] of Agho accordingly accurately represents the law.

44. It is important in this appeal to understand precisely what is meant by the final sentence of the passage quoted above from [13] of Agho. That sentence, in my judgement needs to be seen in the context of the drawing of inferences and shifting evidential burdens more generally. It is therefore worth noting the following general points about the drawing of inferences:

(a) First, it is trite that facts may be proved by direct evidence, but they may also be proved by drawing an inference as to their existence or non-existence from the surrounding circumstances.

(b) Second, the nature of the evidence that the fact-finding tribunal may consider in deciding whether or not to draw an inference is almost

limitless: Fortune v Wiltshire Council [2012] EWCA Civ 334, [2013] 1 WLR 808 at [22].

(c) Third, the drawing of inferences is a matter of ordinary rationality and common sense and there is a danger in making the process and overly legalistic and technical one: Efobi v Royal Mail Group Ltd [2021] UKSC 33, [2021] 1 WLR 3863 at [41].

(d) Fourth, whether a fact may be proved by inference, and correlatively whether an evidential burden then arises on the other party to lead evidence to rebut that inference, requires an evaluative assessment of the evidence as a whole by the fact-finding tribunal, with which an appellate court will not lightly interfere: Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5 at [114].

(e) Fifth, common circumstances from which inferences may be drawn include a failure by a witness or party to provide evidence, whether by failing to attend to give evidence at trial, failing to provide disclosure of relevant documents (*a fortiori* destroying those documents), or failing to provide explanations for matters which, on their face, tell against that party or witness.

45. Accordingly, where the circumstances give rise to a suspicion about a particular matter, the absence of a witness, document or explanation (as the case may be) may be what enables a fact-finding tribunal to be satisfied on the balance of probabilities that that matter is in fact true. What the final sentence of the passage quoted above from [13] of Agho is saying is that, where a tribunal may be justified in drawing an inference that a marriage is not genuine in the absence of evidence to the contrary, it will be for the person who claims that the marriage is genuine to adduce evidence to show that that inference should not be drawn.

46. If he or she does not do so, the inference may be drawn that the marriage is, on the balance of probabilities, one of convenience. Where he or she does provide an explanation, it is then for the Tribunal to consider it and to reach a conclusion in the light of the totality of the information before it. In answering that question, the Tribunal must be satisfied that it is more probable than not that the marriage is one of convenience before finding that it is so.

Ground 3

47. The Appellant's Ground 3 impugns the final sentence of the Judge's self-direction in para 34 that, "If the respondent demonstrates that there is a 'reasonable suspicion' that the marriage is not genuine, the appellant will be expected to respond to it, and the evidential burden shifts to the appellant." The Appellant submits that before the evidential burden shifts to the Appellant, the Respondent must adduce evidence itself capable of discharging the legal burden on the Respondent of showing that the marriage is one of convenience and that the Judge accordingly erred in

holding that, if the Respondent demonstrates that there is a mere 'reasonable suspicion' that the marriage is not genuine, the Appellant will be expected to respond to it, and the evidential burden shifts to the appellant.

48. However, as Underhill LJ said in Agho, above, what is required is proof of facts which justify the inference that the marriage is one of convenience. As the examples given by Underhill LJ of the sorts of facts that may do so show, they do not have to consist of positive or direct evidence itself capable of proving that the marriage is of convenience. Rather, they may include an absence of explanation in the face of reasonable "grounds for suspicion". Those grounds for suspicion will though, in the absence of contrary evidence, be sufficient to discharge the legal burden on the Respondent, where the FTT concludes that it is appropriate to draw the inference from the facts giving rise to the suspicion together with the absence of explanation. The Judge was accordingly correct that the burden may shift where there are reasonable grounds for suspicion that the marriage is one of convenience. It then falls to the appellant to explain why the marriage is not.

49. I therefore reject Ground 3.

Ground 5

50. This ground seeks to impugn paras 75-76 of the Kinch decision on the basis that it was perverse to find that the evidence which the Appellant had adduced was insufficient to discharge the evidential burden on him.

51. The Appellant recognises in his grounds that the term 'evidential burden' may mean (at least) two things. He suggests that it can either mean a burden of putting forward sufficient evidence for the issue to be determined, or it may alternatively be said that the evidential burden might shift to a party who does not bear the legal burden of proof where the party with the legal burden on an issue introduces evidence which, if believed, can only lead to one conclusion which the law will recognise as proper, namely a finding in the proponent's favour, so that the other party is logically compelled to adduce evidence in response.

52. It is the second of these senses that is applicable here. When the Judge (and Underhill LJ in Agho) refer to the evidential burden being on the Appellant, they are referring to a situation in which the evidence which the Respondent has adduced is sufficient (whether because it is direct evidence on the issue to be determined, or because it gives rise to legitimate inferences that can be drawn on that issue) to discharge the legal burden of proof. In those circumstances, unless an appellant adduces evidence to rebut the Respondent's case, he or she will lose. In paras 75-76, in my judgement all the Judge was saying was that, given the two previous Tribunals' conclusions that the marriage was one of convenience, the Appellant had logically to adduce evidence to rebut that conclusion, which, the Judge found, he had not done.

53. The Appellant relies on comments about the modest nature of the evidential burden in SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229 at [57]. These are however comments about the evidential burden in the sense of raising an issue fit for determination (i.e. the first of Mr Biggs' two posited meanings), not in the sense used in this context.

54. Subject to the question about the status of previous determinations addressed below, I consider that the Judge was amply entitled to consider that the Appellant had not discharged the evidential burden on him in paras 75-76. She gives cogent reasons for doing so, applying the correct ultimate question.

55. I therefore reject Ground 5.

E. DEVASEELAN (GROUNDS 1, 2 AND 4)

Legal framework

56. As grounds 1, 2 and 4 all concern different aspects of the approach Tribunals must take in line with the guidance in the Devaseelan case, it is sensible first to set out what they are and how they have been considered since.

57. In Devaseelan itself, the AIT made the following general remarks:

> "37. … The first adjudicator's determination stands (unchallenged, or not successfully challenged) as an assessment of the claim the appellant was then making, at the time of that determination. It is not binding on the second adjudicator; but, on the other hand, the second adjudicator is not hearing an appeal against it. As an assessment of the matters that were before the first adjudicator it should simply be regarded as unquestioned. It may be built upon, and, as a result, the outcome of the hearing before the second adjudicator may be quite different from what might have been expected from a reading of the first determination only. But it is not the second adjudicator's role to consider arguments intended to undermine the first adjudicator's determination.
>
> 38. The second adjudicator must, however be careful to recognise that the issue before him is not the issue that was before the first adjudicator. In particular, time has passed; and the situation at the time of the second adjudicator's determination may be shown to be different from that which obtained previously. Appellants may want to ask the second adjudicator to consider arguments on issues that were not – or could not be – raised before the first adjudicator; or evidence that was not – or could not have been – presented to the first adjudicator.

58. The Tribunal then proceeded at [39]-[41] to provide more specific guidance on how second adjudicators should approach a prior determination. This was summarised by Rose LJ (as she then was) in BK (Afghanistan) v Secretary of State for the Home Department [2019] EWCA Civ 1358, [2019] 4 WLR 111 at [32] as follows:

> (1) The first adjudicator's determination should always be the starting-point. It is the authoritative assessment of the appellant's status at the time it was made…
>
> (2) Facts happening since the first adjudicator's determination can always be taken into account by the second adjudicator.
>
> (3) Facts happening before the first adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second adjudicator.
>
> (4) Facts personal to the appellant that were not brought to the attention of the first adjudicator, although they were relevant to the issues before him, should be treated by the second adjudicator with the greatest circumspection.
>
> (5) Evidence of other facts – for example country evidence – may not suffer form the same concerns as to credibility, but should be treated with caution.
>
> (6) If before the second adjudicator the appellant relies on facts that are not materially different from those put to the first adjudicator, the second adjudicator should regard the issues as settled by the first adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated.
>
> (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 adjudicator should not be, as it were, held against him. Such reasons will be rare.
>
> (8) The foregoing does not cover every possibility. By covering the major categories into which second appeals fall, the guidance is intended to indicate the principles for dealing with such appeals. It will be for the second adjudicator to decide which of them is or are appropriate in any given case."

59. While the Devaseelan principles were developed in the context of human rights appeals, they apply equally to all other categories of appeal before the FTT: Mubu (immigration appeals – res judicata) [2012] UKUT 398 (IAC) at [48].

60. The Court of Appeal approved the Devaseelan guidance in Djebbar v Secretary of State for the Home Department [2004] EWCA Civ 804, [2004] Imm AR 2-3 and BK (supra), to which the Appellant referred in his grounds. As the Appellant noted in the Grounds of Appeal, the Court of Appeal in Djebbar at [30] considered that "the most important feature of the guidance is that the fundamental obligation of every special adjudicator independently to decide each new application on its own individual merits was preserved." At [40] the Court considered that "the great value of the guidance is that it invests the decision making process in each individual fresh application with the necessary degree of sensible flexibility and desirable consistency of approach, without imposing any unacceptable restrictions on the second adjudicator's ability to make the findings which he conscientiously believes to be right."

61. In Rosa v Secretary of State for the Home Department [2016] EWCA Civ 14, [2016] 1 WLR 1206, Mrs Rosa and her husband had, in her husband's

appeal against his deportation, been found by the FTT to be in a marriage of convenience. Although the Court of Appeal considered that the FTT had erred in law in proceeding on the basis that it was for Mrs Rosa to show that the marriage was not a marriage of convenience, Richards LJ (with whom Floyd and Moore-Bick LJJ agreed) held at [39] that this was not material. This was because "the findings of the previous tribunal in her husband's appeal were sufficient to shift the evidential burden in this case onto the applicant".

Ground 1

62. In the Grounds, the Appellant submits that "the Devaseelan guidelines… operate as a gateway to the FTT's fresh consideration of an issue. If, after applying those guidelines, the FTT is satisfied that the earlier tribunal(s) [sic] decision should not be regarded as having settled an issue, its fundamental duty is to have regard to all the evidence and to form its own view of the issues." The Kinch decision was flawed, the Appellant submitted, because it required the Appellant "to 'undermine the veracity' of the findings of the earlier First-tier Tribunal judges rather than by assessing the evidence, and determining the issues, itself and without giving weight, let alone dispositive weight, to the earlier findings made by the First-tier Tribunal." In his oral submissions, Mr Biggs submitted that "What the judge has done is to treat the earlier findings not as a starting point but as presumptively dispositive."

63. Notwithstanding the eloquence with which Mr Biggs made these submissions, I cannot accept them. This ground is in my judgement based on a mischaracterisation of the Devaseelan guidelines. The submission that, if the FTT is satisfied that the earlier tribunal's decision should not be regarded as having settled an issue, the Tribunal should essentially look at the evidence before it without giving any weight to the previous determination fails to give effect to the fact that the second Judge is not hearing an appeal against the decision of the first Judge. It is not the case, as the Grounds suggest, that Devaseelan acts as a "gateway" which, if passed through, enables the Tribunal to look at everything de novo as though the first decision did not exist, which is the logical effect of Mr Biggs' submission. The first decision is always the starting point.

64. Further, the Judge was clear that she was treating the earlier decisions in this case as the starting point (see paras 36 and 39), not as presumptively dispositive. As Rosa demonstrates, the party seeking to go behind a previous decision of the First-tier Tribunal on an issue in a subsequent appeal bears an evidential burden of showing why it should not be followed. In asking whether the evidence adduced by the Appellant "undermined the veracity" of the findings of Judge Sweeney and Judge Woolley, I do not consider that the Judge was doing more than applying such an evidential burden.

65. I therefore reject Ground 1.

Ground 2

66. For the same reasons, it follows that the Appellant's submission that the Judge was wrong to hold that the earlier Tribunal's findings were sufficient to shift the evidential burden on to the Appellant, fails.

67. Mr Biggs submitted that the First-tier Tribunal's earlier findings "do not constitute evidence." In light of the fact that – regardless of their status as evidence or not – it is clear from Rosa that previous findings are capable of shifting the evidential burden, this issue does not require to be determined.

68. Mr Biggs also sought to suggest that the Judge committed the same error as in DK and RK (Parliamentary privilege; evidence) [2021] UKUT 61 (IAC), where the Tribunal held at [19] that it was impermissible for the First-tier Tribunal to determine appeals "by reference to the views of others, expressed in a non-judicial setting". However, the Sweeney decision and the Woolley decision are not "the views of others, expressed in a non-judicial setting"; they are views expressed in a judicial setting. DK is accordingly distinguishable and takes the matter no further.

69. I therefore reject Ground 2.

Ground 4

70. This Ground seeks to challenge the Judge's rejection at paras 56-58 of the Appellant's submission that Judge Woolley's finding that the Appellant and Ms Mitochande being found in bed together by Immigration Officers did not "avail" the Appellant was irrational.

71. The language used by Judge Woolley in para 30 of the Woolley decision is ambiguous as to whether he considered (a) the fact that a marriage of convenience is assessed as at the date the marriage was entered into meant that post-marriage evidence was irrelevant in principle, or (b) that, in this case, the post-marriage evidence was not sufficient in light of the other evidence to cause him to make findings different to those in the Sweeney decision.

72. The Judge considered that Judge Woolley had the totality of the evidence in mind when deciding whether or not to depart from Judge Sweeney's findings in light of the new evidence before him, i.e. that the latter of these two options above applied. Particularly given the judicial restraint that should be exercised when the reasons that a tribunal gives for its decision are being examined and the fact that it should not be assumed too readily that the tribunal misdirected itself (Jones v First-tier Tribunal [2013] UKSC 19, [2013] 2 AC 48 at [25] per Lord Hope), this is a conclusion that I consider was open to the Judge.

73. It follows that I also reject Ground 4.

F. ANALYSIS OF THE EVIDENCE (GROUND 6)

74. The Appellant challenges five other aspects of the Judge's analysis of the evidence:

    (a) First, he says that the Judge erred at para 73 in giving little or no weight to the documentary evidence of the Appellant's and Ms Motichande's cohabitation because this was "of the sort that can easily be obtained and does not necessarily show that the appellant and the sponsor are once against living together in a durable relationship."

    (b) Second, he says that the Judge failed to consider, or failed to provide reasons addressing, that this evidence supported the core of the oral evidence that the Appellant and Ms Motichande had now reconciled and that the fact that they were now living together was very hard to reconcile with the suggestion that Ms Motichande entered a sham marriage for £5,000.

    (c) Third, the Appellant submits that the Judge failed to consider, or to give reasons addressing, the fact that there was strong evidence (in the form of GCID notes) that the Appellant and Ms Motichande had been in a genuine relationship before their divorce.

    (d) Fourth, it is said that the Judge failed to recognise the consistency of the core of the oral evidence adduced on behalf of the Appellant, in particular that they divorced and then reconciled and are now living together as a couple.

    (e) Fifth, and finally, the Appellant submits that the Judge erred in failing to make findings as to the credibility of the three witnesses (other than the Appellant and Ms Motichande) who gave oral evidence.

75. It is important to remember the limited ability of the Upper Tribunal to interfere with the findings and assessment of facts by the First-tier Tribunal in an error of law appeal such as this. As the Lewison LJ (with whom Males and Snowden LJJ agreed) held in Volpi v Volpi [2022] EWCA Civ 464, [2022] 4 WLR 48 at [2]:

> "i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
>
> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgments will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

76. Addressing each of the Appellant's submissions briefly in turn:

(a) The weight to be given to the documentary evidence of the Appellant's and Ms Motichande's cohabitation is pre-eminently a matter for the Judge. The reasons she gave were adequate and rational.

(b) It is not correct that the Judge failed to consider, or failed to provide reasons addressing, that this evidence supported the core of the oral evidence. In para 73, she accepted that the documentary evidence supported their claim to have been cohabiting since February 2020. I do not accept that the Appellant's and Ms Motichande's current cohabitation was very hard to reconcile with the suggestion that Ms Motichande entered a sham marriage for £5,000. There are a number of ways in which those two facts can be reconciled.

(c) The Judge did consider the CGID notes at paras 55-56 of the Kinch decision.

(d) The Judge carefully considered the Appellant's and Ms Motichande's (as well as the other witnesses') accounts of their divorce, reconciliation and current cohabitation in detail. I do not accept that she failed to recognise that there were elements of consistency in their accounts.

(e) Quite apart from the fact that there were four additional witnesses, not three, I am satisfied that the Judge's treatment of them at paras 67-71 does not disclose any error of law. The Judge noted that Mr Premji and Ms Cheema's evidence contradicted the Appellant's account of the divorce. Mr Puri's evidence was given little weight, given the lack of detail and the fact that he tends to see the Appellant and Ms Motichande only when they pass by his shop. Mr Kumar was able to give very little detail on the Appellant's and Ms Motichande's relationship, and the Judge therefore placed little weight on his evidence. The Judge in my judgement was entitled to adopt the approach to each witness that she did.

77. In light of the above, I also reject Ground 6.

G. CONCLUSION

78. For the above reasons, I am satisfied that there is no material error of law in the Kinch Decision.

DECISION

The Decision of First-tier Tribunal Judge Kinch promulgated on 5 July 2021 does not involve the making of an error on a point of law. I therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

Signed: Paul Skinner

Deputy Upper Tribunal Judge Skinner

Dated: 21 July 2022