Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: UI-2022-001137**
[EA/05762/2021]

THE IMMIGRATION ACTS

Heard at Field House
On the 14 October 2022

Decision & Reasons Promulgated
On the 01 December 2022

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAAD MIR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr T Metzer KC, Counsel instructed by UK Immigration Help Ltd

DECISION AND REASONS

1. Although the appellant in these proceedings is the Secretary of State, it is convenient to continue to refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of Algeria, born in 1987. He made an application on 10 December 2020 for leave to remain under the EU Settlement Scheme ("EUSS") as a person who has retained a right of residence as a result of his relationship with an EEA national.

3. That application was refused in a decision dated 16 March 2021. The appellant appealed that decision and his appeal came before First-tier Tribunal Judge Hussain ("the FtJ") at a hearing on 29 November 2021 following which the appeal was allowed.

4. The Secretary of State's appeal centres on the FtJ's consideration of the *Devaseelan* guidelines (*Devaseelan v Secretary of State for the Home Department* [2002] UKIAT 00702), in the light of an appeal by the appellant in April 214 against the refusal of a residence card as the family member of the same EEA national relied on in the present appeal.

The appeal in April 2014 – summarised

5. This appeal was before First-tier Tribunal Judge Mozolowski. The issue before her was whether the appellant's marriage to the EEA national was one of convenience. She heard evidence from a number of witnesses, eight in total including the appellant. She considered in detail evidence in relation to a marriage interview that took place in October 2013, finding inconsistencies in the accounts of the appellant and the EEA national spouse.

6. She considered two tenancy agreements which she found were designed merely to bolster the appellant's case and were "deception devices", and she considered utility and phone documentation, as well as photographic evidence. She referred to various other inconsistencies in the appellant's account. She concluded that he and his wife were not in a genuine and subsisting marriage. She did not find that any of the witnesses' evidence could be relied on in terms of the genuineness and the subsisting nature of the marriage. She also took into account the appellant's general credibility in terms of what she described as his poor immigration record, including the timing of the marriage and the application for a residence card, occurring after the appellant came to the attention of the immigration authorities and the failure of an Article 8 application.

The hearing before Judge Hussain – summarised

7. The judge summarised the evidence that he had before him, which included oral evidence from the appellant and his brother-in-law, Ibrahim, and the written statement of the appellant's former spouse, the EEA national.

8. In his findings he identified the sole issue as being whether or not the appellant's marriage to his former wife was one of convenience. He referred to the respondent relying on the decision of Judge Mozolowski. He rejected arguments based on criticism of the respondent's most recent

decision in terms of the contention that it merely relied on the decision of Judge Mozolowski, concluding that the respondent did indeed consider the fresh evidence provided with the application.

9. He referred to the decision in *Devaseelan* and quoted the first two paragraphs of the eight paragraph guidance given in that case.

10. In terms of arguments advanced in relation to Judge Mozolowski's decision, he pointed out that the proper forum to challenge that decision would have been in the Upper Tribunal, but noting that permission to appeal that decision was refused by the Upper Tribunal in September 2014.

11. At [43] he said that in terms of the evidential burden, the respondent had discharged that burden but the question he then had to consider was whether the appellant had provided sufficient evidence to persuade him, taking Judge Mozolowski's findings as the starting point, that his marriage was not one of convenience.

12. The FtJ then said as follows:

> "45. I note from Judge [Mozolowski]'s decision that in many respects, she found that some of the witnesses that gave evidence before her to be lacking in credibility. Whilst I take into account the learned judge's observations, I do not regard myself as being bound by his/her findings on credibility in relation to the evidence of the witnesses before me. In my view, it is open to me to form my own opinion as the credibility of the witnesses that gave evidence.
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> 46. I heard evidence from the appellant and his now brother-in-law Ibrahim. For obvious reasons there was no challenge to their evidence. Although the appellant's wife's testimony was presented only in written form, even if she had attended court, her testimony was not going to be cross-examined because there was no one from the respondent's office to do.
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> 47. I have considered the unchallenged testimony of the two witnesses that appeared before me, as well as the testimony of the appellant's former wife, and given the weight that I regard as being appropriate, bearing in mind that they were not cross-examined.
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> 48. I have also taken into account the documentary evidence of the appellant's cohabitation with his wife, post the hearing in April 2014 until the wife left the matrimonial home in March 2015. Having regard now to the totality of the evidence before me, I have come to the view that I am satisfied that the appellant has shown that his marriage is not one of convenience.
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> 49. Bearing in mind that the legal burden remained on the respondent, the final question that I ask myself is whether on the totality of the material before me, I am satisfied that the respondent has discharged the burden of proof. The answer to which I have come, is that she has not".

13. Having concluded that the appellant had shown that the marriage was not one of convenience, he allowed the appeal. He dealt briefly with Article 8, concluding that in the light of his findings on the main issue, it was not necessary for him to make any findings in terms of the appellant's private life, whether within or outside the Immigration Rules. He did, however, say that if he had to make findings, he would have concluded that there were no insurmountable obstacles to the appellant's integration in Algeria on return and that the refusal to grant him leave would not result in unjustifiably harsh consequences for him or any other person.

The grounds of appeal and submissions

14. The respondent's grounds contend that the FtJ failed to apply the guidance given by the Court of Appeal in *Rosa v Secretary of State for the Home Department* [2016] EWCA Civ 14, in particular at [41]. This is in terms of whether a marriage of convenience might turn into a genuine marriage in the course of time. It is argued that the earlier finding that the appellant was a party to a marriage of convenience was a finding that should not be departed from on the basis of continued cohabitation.

15. Perhaps of more significance, the grounds contend that the FtJ erred in the application of the *Devaseelan* principles. It is argued that all of the evidence relied on before the FtJ was the same as that before Judge Mozolowski in 2014, that evidence having been found to lack credibility. That included the evidence of the appellant, his spouse and his brother-in-law, who were all witnesses at the hearing in 2014.

16. The fact that there was no Presenting Officer to challenge the evidence of those witnesses before the FtJ was not a basis for him to find that the evidence was reliable when it was found to have been lacking in credibility in the earlier appeal.

17. In submissions Ms Everett relied on the grounds. She submitted that the FtJ should have started with the finding that this was a marriage of convenience and then considered if the evidence before him was such as to enable him to depart from that conclusion.

18. It was further submitted that the FtJ put too much reliance on the fact that there was no Presenting Officer and concluding that the evidence was unchallenged. The Secretary of State's position was that this was a marriage of convenience.

19. On behalf of the appellant Mr Metzer relied on his 'rule 24' response. There it is argued that the FtJ correctly applied the guidance and principles in *Rosa*. Between [41] and [45] he directed himself correctly in relation to the decision of Judge Mozolowski and noted the need for him to consider that decision as his starting point, but that he was not bound by it.

20. The rule 24 response refers to [46]-[48] and the FtJ's reference to the evidence he heard from the appellant's brother-in-law, as well as the

written evidence from the appellant's former wife, none of which was challenged by the Secretary of State who chose not to have representation at that hearing. It was open to the respondent to provide a representative if credibility was to be in issue. He was entitled to take into account the documentary evidence of the respondent's cohabitation with his wife after the hearing in April 2014 until she left the matrimonial home in March 2015, that being new evidence. Whilst the intention of the parties at the time of the marriage was the issue to be determined, the evidence of the relationship after the marriage was a relevant factor and capable of casting light on the intention of the parties at the time of the marriage, as accepted in *Rosa*.

21. It is further argued that the respondent had misunderstood the decision in *Rosa*. In that case the question was posed in terms of the situation where a marriage of convenience had already been found and whether it could turn into a genuine marriage in the course of time.

22. It is also argued that the FtJ correctly applied the *Devaseelan* principles and the respondent's criticisms of the FtJ's decision amount to no more than a disagreement with the FtJ's assessment of the facts.

23. In his oral submissions Mr Metzer reiterated the appellant's position, namely that the FtJ did apply the *Devaseelan* principles correctly. He accepted that it would not automatically be the case that evidence has to be accepted just because it is not challenged, but it was "a bit rich" to fail to send a representative to the hearing and then argue that credibility was challenged.

24. I was referred to aspects of the FtJ's decision in terms of his consideration of the evidence and application of the *Devaseelan* principles. It was pointed out that at [48] the FtJ said that he had taken into account the documentary evidence of the appellant's cohabitation with his wife after the hearing in April 2014 until she left the matrimonial home in March 2015.

25. In reply, Ms Everett argued that although the FtJ said that he was taking as his starting point the decision of Judge Mozolowski in 2014, other than referring to it he did not engage with those findings. Furthermore, a large amount of the evidence that was before the FtJ was the same as the evidence before Judge Mozolowski. Ms Everett accepted that new evidence can change the outcome of an appeal but here one could not see why the FtJ had allowed the appeal with reference to the evidence.

Assessment and Conclusions.

26. On enquiry from me, neither party was able to be definitive about what additional documentary evidence was before the FtJ that was not relied on by the appellant in the appeal in 2014. Mr Metzer was able to take instructions and from those instructions it was suggested that the additional evidence was a combination of utility bills, bank statements and

a phone bill or bills. There was some uncertainty about whether that documentary evidence was all in the name of the appellant's former spouse.

27. The guidance given in *Devaseelan* in relation to a further appeal on the same basis as previously advanced is to be found in the following paragraphs:

> "39. In our view the second Adjudicator should treat such matters in the following way.
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> (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. In principle issues such as whether the Appellant was properly represented, or whether he gave evidence, are irrelevant to this.
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> (2) **Facts happening since the first Adjudicator's determination can <u>always</u> be taken into account by the second Adjudicator.** If those facts lead the second Adjudicator to the conclusion that, at the date of his determination and on the material before him, the appellant makes his case, so be it. The previous decision, on the material before the first Adjudicator and at that date, is not inconsistent.
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> (3) **Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can <u>always</u> be taken into account by the second Adjudicator.** The first Adjudicator will not have been concerned with such facts, and his determination is not an assessment of them.
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> 40. We now pass to matters that could have been before the first Adjudicator but were not.
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> (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.** An Appellant who seeks, in a later appeal, to add to the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility. (Although considerations of credibility will not be relevant in cases where the existence of the additional fact is beyond dispute.) It must also be borne in mind that the first Adjudicator's determination was made at a time closer to the events alleged and in terms of both fact-finding and general credibility assessment would tend to have the advantage. For this reason, the adduction of such facts should *not usually* lead to any reconsideration of the conclusions reached by the first Adjudicator.
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> (5) **Evidence of other facts - for example country evidence may not suffer from the same concerns as to credibility, but should be treated with caution.** The reason is different from that in (4). Evidence dating from before the determination of the first Adjudicator might well have been

relevant if it had been tendered to him: but it was not, and he made his determination without it. The situation in the Appellant's own country at the time of that determination is very unlikely to be relevant in deciding whether the Appellant's removal at the time of the second Adjudicator's determination would breach his human rights. Those representing the Appellant would be better advised to assemble up-to-date evidence than to rely on material that is (ex hypothesi) now rather dated.

41. The final major category of case is where the Appellant claims that his removal would breach Article 3 for the same reason that he claimed to be a refugee.

(6) **If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator,** and proposes to support the claim by what is in essence the same evidence as that available to the Appellant at that time, **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. We draw attention to the phrase 'the same evidence as that *available to the Appellant*' at the time of the first determination. We have chosen this phrase not only in order to accommodate guidelines (4) and (5) above, but also because, in respect of evidence that was available to the Appellant, he must be taken to have made his choices about how it should be presented. An Appellant cannot be expected to present evidence of which he has no knowledge: but if (for example) he chooses not to give oral evidence in his first appeal, that does not mean that the issues or the available evidence in the second appeal are rendered any different by his proposal to give oral evidence (of the same facts) on this occasion.

42. We offer two further comments, which are not less important than what precedes then.

(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.** We think such reasons will be rare. There is an increasing tendency to suggest that unfavourable decisions by Adjudicators are brought about by error or incompetence on the part of representatives. New representatives blame old representatives; sometimes representatives blame themselves for prolonging the litigation by their inadequacy (without, of course, offering the public any compensation for the wrong from which they have profited by fees). Immigration practitioners come within the supervision of the Immigration Services Commissioner under part V of the 1999 Act. He has power to register, investigate and cancel the registration of any practitioner, and solicitors and counsel are, in addition, subject to their own professional bodies. An Adjudicator should be very slow to conclude that an appeal before another Adjudicator has been materially affected by a representative's error or incompetence;

> and such a finding should always be reported (through arrangements made by the Chief Adjudicator) to the Immigration Services Commissioner.
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> Having said that, we do accept that there will be occasional cases where the circumstances of the first appeal were such that it would be right for the second Adjudicator to look at the matter as if the first determination had never been made. (We think it unlikely that the second Adjudicator would, in such a case, be able to build very meaningfully on the first Adjudicator's determination; but we emphasise that, even in such a case, the first determination stands as the determination of the first appeal.)
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> (8) **We do not suggest that, in the foregoing, we have covered every possibility.** By covering the major categories into which second appeals fall, we intend 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."

28. At the hearing before me, in seeking to clarify with the parties what evidence there was before the FtJ that was not before Judge Mozolowski, I referred the parties to the decision letter dated 16 March 2021, being the decision which generated the appeal in this case. From that decision letter it appears that there was some limited additional documentation provided. It is not very well identified in the decision letter but it refers to various Barclays Bank statements and letters in the appellant's former wife's name dated 2 October 2013, September 2014, November 2014 and May 2015. It also refers to a letter from Sky in joint names dated December 2015 and January 2016.

29. In looking at the bundle of documents that was produced on behalf of the appellant before the FtJ, it can be seen that there are bank statements in the appellant's former wife's name from June 2014 and a Sky statement in joint names. Those are documents that appear to have been presented after the hearing in May 2014. The witness evidence before the FtJ consisted of three witnesses who also gave evidence before Judge Mozolowski. That is the appellant's evidence, his former wife's evidence (although before the FtJ it was only in written form), and that of the appellant's brother-in-law. As is apparent, the documentary evidence was very limited.

30. At [48] the FtJ said that he had taken into account documentary evidence post the hearing in April 2014 until the appellant's former wife left the matrimonial home in March 2015. However, he does not identify that evidence and does not explain why he found that evidence significant in the context of the comprehensive adverse credibility findings made by Judge Mozolowski.

31. At [47] he said that he had considered the "unchallenged testimony" of the two witnesses that appeared before him (the appellant and his brother-in-law), as well as the evidence of the appellant's former wife. He referred to the fact that they were not cross-examined. He does not explain why

he found their evidence credible, again in the context of the detailed findings in relation to the much more extensive evidence that was before Judge Mozolowski.

32. Whilst it is true that the witness evidence was unchallenged in the sense that there was no cross-examination by any representative from the respondent, it is evident from the decision letter that the respondent relied on the adverse credibility findings that had been made at the first hearing. It is true that the FtJ was entitled to form his own opinion as to the credibility of the witnesses that gave evidence, as he pointed out at [45]. However, as already indicated, he does not explain why he found their evidence to be credible.

33. Although the FtJ referred, in very broad terms, to the fact that Judge Mozolowski found the evidence of the witnesses before her to be lacking in credibility, it is not apparent from his decision that he engaged at all with the detail of those adverse credibility findings.

34. Similarly, although he referred to part of the guidance in *Devaseelan*, he did not quote, and did not refer to, that aspect of the guidance which refers to evidence before the second appeal judge being essentially the same as at the first hearing. Although the subheading in *Devaseelan* in this respect at [41] refers to asylum/Article 3 claims, the principle is clear.

35. It is not apparent, therefore, what reasons the FtJ had for departing from the adverse credibility findings made in the first appeal. The additional documentary evidence before him was very limited and is not identified by the FtJ. Furthermore, the bank statements and the Sky documentation were merely a continuation of similar documents from the same source that were before Judge Mozolowski. In addition, the FtJ did not explain what it was about the evidence of the witnesses called before him, which led him to conclude that they were credible when they had previously found not to be so after a very thorough consideration of their evidence.

36. In the light of the foregoing, I am satisfied that the FtJ erred in law in his application of the *Devaseelan* principles in terms of his reasons for departing from the conclusions of the first judge who found that this was a marriage of convenience. Accordingly, his decision must be set aside.

37. I canvassed with the parties their views as to the appropriate course if I decided that the FtJ's decision needed to be set aside for error of law. Both were in agreement, albeit reluctantly in Mr Metzer's case, that such would require the appeal to be remitted to the First-tier Tribunal for a hearing *de novo*.

38. Having regard to the Senior President's Practice Statement at paragraph 7.2, I am of the same view. Accordingly, the appeal will be remitted to the First-tier Tribunal.

Decision

39. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the appeal is remitted to the First-tier Tribunal for a hearing *de novo* before a judge other than First-Tribunal Judge Hussain with no findings of fact made by Judge Hussain preserved.

A. M. Kopieczek

Upper Tribunal Judge Kopieczek 18/11/2022