IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005592

First-tier Tribunal No: EA/51851/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 10th of December 2024

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

Secretary of State for the Home Department

Appellant

and

Eljon Jahaj
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: No attendance
For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

Heard at Cardiff Civil Justice Centre on 6 November 2024

DECISION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal (FtT) Judge Galloway (the judge) who on 24th February 2023 dismissed the appellant's appeal under the Immigration (European Economic Area) Regulations 2016 against the decision of the respondent to refuse his application for a residence card.

2. The respondent had refused the application on 2nd June 2021 under regulations 2 and 22 of the EEA Regulations 2016 on the basis that the marriage was one of convenience. There was insufficient evidence to show that he qualified for a right of residence and further that the appellant and sponsor failed to attend scheduled interviews.

The grounds for permission to appeal

3. The grounds of appeal asserted that the judge had proceeded under a mistake of fact/failed to take account of material matters. At [8] of the decision the judge addressed the evidence heard from the appellant's brother who spoke to the relationship. He had been unable to attend a previous hearing for the appellant owing to work travel. The judge at [8(i)] found

> *'I was not persuaded by the reasons he gave for not attending the previous hearing in*
> *front of Judge Handler. I find it unusual that he would have urgently had to leave the*
> *UK to inspect tyres for his business. There was no documentary evidence produced to*
> *back this up. In particular, there was no documentary evidence regarding that booking*
> *and when it was made*

4. In fact documentary evidence regarding the booking and when it was made was before the judge in the form of the flight itinerary and established a last minute booking before the appeal hearing in 2019. The judge, however, continued to say of the appellant's brother that he was not a credible witness, noted that there was evidence not before Judge Handler but the judge still placed little weight upon the evidence of the brother.

5. At the end of [8] the judge stated

> *'looking at all the evidence in the round, this evidence cannot outweigh the evidence in*
> *favour of the relationship being a marriage of convenience, particularly in light of the*
> *material problems with the evidence from August 2017-2018 and the adverse*
> *credibility findings in respect of the Appellant, the Sponsor and the Appellant's brother. '*

6. It was asserted that the unchallenged evidence of the brother was one of the key strands of new evidence that the appellant was able to produce that was not available to the Tribunal before and the judge rejected the evidence on an erroneous basis going on to stated that the brother's evidence was not credible, in other words, he was lying about his travel abroad. Evidence was produced to support his account. Thus it was clear the judge's conclusions were incorrect.

7. As noted in the grant of permission to appeal the issue was whether the appellant had entered into a marriage of convenience and that the appellant's brother's evidence supported the appellant's appeal as the appellant and sponsor had apparently lived with his brother from 2017 until they moved in August 2018. There was evidence before the judge that his brother had to travel abroad urgently on business and this was in the form of an airline booking. The judge found that there was no good reason for the brother not to have attended the previous hearing but no reference was made to the flight itinerary. As such it was arguable that by failing to take into account material evidence, the judge had erred as this could have had a bearing on the on the assessment by the judge.

The hearing.

8. The appellant failed to attend a hearing on 23rd August 2024. The appellant sent an email the day before to the Upper Tribunal indicating that the sponsor could not attend. The matter was thus adjourned in fairness and the interests of justice to 16th October 2024 to permit the appellant who was a litigant in person and his sponsor to attend. In the event this hearing was postponed by the Upper Tribunal and the matter relisted for 6th November 2024.

9. The day before the hearing and on 5th November 2024 the appellant sent a copy of a 'Med3' to the Upper Tribunal stating that for health and financial reasons he could not attend and asked, 'Could you please let me know if this hearing can go ahead without a representation or should I withdraw my case?'

10. I issued the following direction in response on 5th November 2024 which was sent to all parties

'*The application for an adjournment is refused for the following reasons. The appellant has applied for an adjournment only the day before the hearing set for 6th November 2024. When this appeal was previously adjourned from a hearing date on 23rd August 2024 because of the appellant's non-attendance and in order to accommodate the appellant's witness, it was specifically identified that 'In the event that the appellant fails to attend the hearing listed for 16th October 2024, it is unlikely that the hearing will be further adjourned.'*

The appellant has produced medical evidence with a Med3 (unfit for work) dated 31st October 2024 (nearly a week ago) but this only identifies anxiety linked to ongoing immigration issues and does not state that he is unfit to attend court.

At present this is an error of law application in relation to the decision of the First-tier Tribunal which dismissed the appellant's appeal. The appellant despite being on medication is still able to liaise lucidly with the court.

It is not a requirement that the appellant needs legal representation at court and ***the appellant can attend court in person****. That the appellant has no finances to instruct legal representation is not a matter which will be resolved in the near future. In the circumstances and bearing in mind fairness and the overriding objective in The Tribunal Procedure (Upper Tribunal) Rules 2008 in relation to the interests of justice and efficient disposal this matter will* ***not be adjourned****.*

It is a matter for the appellant as to whether he wishes to attend the hearing tomorrow but the ***hearing of 6th November 2024 will proceed****.'*

11. At the hearing on 6th November 2024 the appellant again failed to materialise and no contact was made with the court. Ms Rushforth requested that I proceed with the hearing. The appellant had been advised that the matter would proceed and given the date time and venue and in the interests of justice and fairness I declined to adjourn the matter further. The overriding objective in The Tribunal Procedure (Upper Tribunal) Rules 2008, particularly participation by the parties and the efficient use of resources was clearly relevant. I considered that the appellant had had ample opportunity to attend the hearing.

12. Ms Rushforth submitted that there was no material error of law. The appellant had another appeal pending on the same matter which was stayed in the FtT at Newport and pending determination of this appeal.

Conclusions

13. It is important to spell out the background to this appellant's litigation history. He entered the UK illegally in 2012 and claimed that he was the family member of an EEA national. That application was refused on the basis of being a marriage of convenience and his appeal dismissed by FtT Judge Flynn in March 2014.

14. It would appear that the appellant again illegally entered the UK in 2015 and this time claimed a relationship with the current sponsor (a different partner) which was also refused on 4th May 2016. FtT Judge Handler dismissed his appeal on 24th October 2019, in relation to that relationship finding, inter alia, that there was no *objective* evidence that despite the appellant claiming he had met the sponsor in the UK in 2017, (and indeed the brother's evidence was that she and the appellant lived with him in 2017-2018), and there was no evidence that the sponsor was *even in* the UK in 2017-2018. Such evidence could have been produced and was not.

15. Thus Judge Handler specifically found at [19] that there was no evidence beyond the written and oral evidence of the appellant, DP (the sponsor) and the other witnesses that DP was even in the UK before 21st August 2018 or that the appellant and DP were living together at *Park Street. At [20] Judge Handler found it specifically not credible that there would be no means of obtaining copies of documents that had been said to be destroyed. For example, DP mentioned in oral evidence that she had been to the emergency department at the hospital whilst living at *Park Street . She had since registered with a GP but she did not provide any satisfactory reason as to why she had not tried to obtain the medical records of her attendance at A & E, nor of why DP did not mention the material fact that she had been to A & E in her witness statement. Further at [21] Judge Handler found 'no reasonable explanation has been given whey there are no mobile phone records that demonstrate or given (sic) any indication as to the whereabouts of DP between August 2017 and 2018'. Nor had the mother's assertion that she paid for her daughter's travel to the UK on 17th July 2017 been substantiated by any receipt to be a reasonable explanation for the absence of documentary evidence regarding the journey to the UK.

16. Judge Handler also made reference to the previous findings of Judge Flynn when making material adverse credibility findings against the appellant who had previously been found to have entered into a marriage of convenience [25]-[26]. Not least Judge Handler found that the appellant's evidence and that of his sponsor was inconsistent and further the appellant's evidence was inconsistent with his previous evidence to Judge Flynn. Additionally there were material inconsistencies found by Judge Flynn in the appellant's evidence.

17. Judge Handler concluded that it was not in dispute that the appellant and sponsor knew each other and even living with each other in the same property but the problems with their evidence were such that it did not address the fundamental problems with the evidence for the August 2017-2018 period, [33].

18. Judge Handler specifically found that DP was not in the UK between August 2017 and August 2018 and that materially undermined the appellant's and the sponsor's credibility and there were multiple factors which had significantly undermined the credibility of the appellant and the sponsor and contributed to this conclusion. The relationship was found to be one of convenience.

19. What is also relevant is that at [8] Judge Handler addressed the issue of an adjournment owing to the brother's absence. It was said that the brother was not able to attend in October 2019 because he had 'gone on holiday the day before the hearing'. When Judge Handler made direct enquiries of the appellant himself it was recorded that 'He said that he had contacted his brother on Saturday to check that he was still able to come to the hearing and only at that time did his brother tell him that he was going on holiday the next day. The appellant did not give a satisfactory reason as to why he only checked that his brother was able to attend on the Saturday before a hearing on Monday'.

20. Critically there was no indication that the travel itinerary or flight ticket of the brother was produced to the Judge Handler.

21. At [5] of Judge Galloway's decision under challenge here, he specifically adopted the principles in accordance with Devaseelan v The Secretary of State for the Home Department [2002] UTIAC 00702. The judge noted the contents of that decision and was evidently aware of the litigation background and that Judge Handler's decision (and indeed with reference to that of Judge Flynn) beforehand was the starting point.

22. The approach to further evidence is as identified in the following passages of Devaseelan

> '40. We now pass to matters that could have been before the first Adjudicator but were not.
> 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.
> (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.
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> 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….'

23. The judge noted at [8] that Judge Handler identified that no evidence was produced, beyond the written and oral evidence of the appellant and his witnesses themselves, that the sponsor was in the UK before 21st August 2018 or that the appellant was living with the sponsor. There was no documentary/objective evidence to show the parties were living together at any time before August 2018. In relation to the brother the judge found 'I was not persuaded by the reasons he [the brother] gave for not attending the previous hearing in front of Judge Handler. I find it unusual that he would have urgently had to leave the UK to inspect tyres for his business.' The judge then stated that there was 'no documentary evidence produced to back this up'. As pointed out by Ms Rushworth this relates to the activity of travelling for business of inspecting tyres. There was no evidence on this point and indeed it contrasted with the explanation given to Judge Handler.

24. It is quite evident that the flight itinerary which dates from 18th October 2019 could have been before Judge Handler and was not.

25. Secondly the explanation given for the brother's absence to Judge Handler that the brother was going on holiday was wholly inconsistent with the explanation to Judge Galloway which was that the brother had to go on business to check tyres.

26. The brother's witness statement and evidence was simply

'In August 2017 my brother met his wife, Bianca.

6. They fell in love really quickly and I allowed her to move in with us as I could see how happy they made each other.
7. I enjoyed their company and it was lovely having my brother and Bianca in the house.
8. While they were living with me I could see that they were really in love and really
cared for each other.
9. They stayed with me until they were able to get settled properly and find a secure home for themselves. It was difficult for them when they first arrived and it took some time for them to get set up properly here in the UK.'

27. Albeit the judge stated that 'there was no documentary evidence produced to back this up' and had omitted direct reference to the flight itinerary which is the essence of the grounds, bearing in mind the judge had identified the lack of documentary/independent evidence (quite evidently independent of the appellant) in the appeal in relation to the living arrangement between 2017-2018, and which was reasonable to expect, I find the previous findings of Judge Handler and the inconsistency in the explanation of the brother's absence, the error in relation to the travel document was not material.

28. The judge also noted that the medical evidence referred to at paragraph 20 of Judge Handler's judgment had still not been produced and it remained the case that there were still no mobile phone records. In effect the appellant and sponsor had been put on notice of this deficiency since 2019. It was open to the judge on the basis of the lack of documentary evidence and the lack of any further witnesses to come forward to support their statements, to put no weight on the brother's evidence and to refuse to depart from the findings of Judge Handler. Overall the evidence of the appellant and sponsor was found to be seriously undermined. As the judge stated 'The material inconsistencies set out in her judgment from Paragraph 29 onwards are not altered by any of the evidence submitted before me in the present appeal.'

29. The delay in production of the flight note and the overall inconsistencies in the reason for the brother's absence and the lack of independent documentary evidence, as remarked upon by the judge could do nothing to outweigh the inevitable conclusion, bearing in mind the findings of two previous immigration judges following judicial scrutiny that the appellant had engaged in a marriages of convenience to two different women.

30. **Volpi v Volpi** [2022] EWCA Civ 464 confirms at 2(i) that '*An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong*'.

31. The judge's overall findings at [8] which supported his conclusion that the marriage was one of convenience are soundly made and there is no material error of law in the decision.

Notice of Decision

I find no material error of law in the decision of the First-tier Tribunal and the appellant's appeal remains dismissed.

Helen Rimington

Judge of the Upper Tribunal
Immigration and Asylum Chamber

5th December 2024