Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/09341/2017

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 6 November 2018	**On 30 November 2018**

Before

UPPER TRIBUNAL JUDGE LANE

Between

SHAHID [H]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms L Mair, instructed by Malik Legal Solicitors Ltd
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Shahid [H], was born on 5 December 1976 and is a male citizen of Pakistan. He appealed against a decision of 13 November 2017 to refuse an application for a residence card on the basis of his marriage to Ms [RD] (hereafter Ms [D]). The First-tier Tribunal, in a decision promulgated on 10 May 2018, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. The appellant entered the United Kingdom illegally in 2002. He applied in July 2010 for a residence card on the basis of his relationship with Ms [D] but was refused. He did not appeal. Following a failed application on human rights grounds in 2012, the appellant applied in June 2013 for a residence card on the basis of his relationship with Ms [D]. That application was refused, as were five subsequent residence card applications and one further human rights application. I understand that a number of those applications, if not all, did not attract a right of appeal to the First-tier Tribunal.

3. In 2014, the appellant brought an appeal before the First-tier Tribunal following his refusal of a residence card on the basis that his relationship (not at that time the marriage) to Ms [D] was one of convenience only. First-tier Tribunal Judge Lloyd-Smith dismissed the appeal. Judge Lloyd-Smith's decision refers to a "sham marriage"; in 2013, Ms [D] and the appellant had entered an Islamic marriage which was not recognised in accordance with the Marriage Act 1949. In consequence, the application had been treated as one brought on the basis of a durable relationship. The appellant appealed Judge Lloyd-Smith's decision to the Upper Tribunal but Upper Tribunal Judge Plimmer dismissed that appeal in October 2014. Subsequent to that litigation, the appellant and Ms [D] married on 31 May 2017. Thereafter, they made a further application on the basis of marriage. It is that application which is the subject of this appeal.

4. Judge Hudson considered that she was required to consider the decision in *Devaseelan* [2002] UKIAT 00702. At [14], Judge Hudson found that "the documentation that was supplied with his present application was substantially the same as that supplied in the previous applications, save for the marriage certificate and photographs". Judge Hudson went on to quote Judge Lloyd-Smith's trenchant finding that it was "abundantly apparent from the evidence that the sole purpose of [the] applicant contacting the sponsor was to get married ... in an economic arrangement to assist the appellant regularising his stay". Judge Hudson concluded that she was "bound in relation to matters determined in that case by the findings of IJ Lloyd-Smith ..."

5. Judge Hudson found that "the only change in Mr [H]'s circumstances since that determination [of IJ Lloyd-Smith] is that he has entered a legal marriage in England on 31 May 2017". Thereafter, Judge Hudson conducted a detailed examination of the evidence including tenancy agreements [20] and evidence from the school of the appellant's stepchildren and also in relation to fertility treatment received by Ms [D]. She found that the fertility treatment was "minimally invasive" and that the school evidence added little to the appellant's case. Significantly, however, the judge heard from four witnesses who attended before the First-tier Tribunal. There had been no witnesses before the Tribunal of Judge Lloyd-Smith. Judge Hudson concluded that "this partnership is one of convenience to circumvent the Immigration Rules" [30]. However, in the same paragraph she acknowledged that "on the basis of this evidence [from the schools] Mr [H] spends a significant amount of time with Ms [D]'s

children and is very fond of them this does not outweigh the concerns that I have over the purpose of the partnership".

6. After hearing the oral submissions of Ms Mair for the appellant and Mr McVeety for the Secretary of State, I reserved my decision.

7. I am satisfied that the judge has erred in law such that her decision falls to be set aside. I have reached that decision for the following reasons. First, I agree with Ms Mair's submission that an application made on the basis of a durable relationship is different from an application brought on the grounds of marriage. At the beginning of the hearing, Mr McVeety had submitted that the finding that the appellant had entered a "sham" relationship was inevitably fatal to any subsequent application, even one brought following a genuine marriage ceremony. I do not agree. Judge Hudson was concerned with an application on the basis of marriage whilst Judge Lloyd-Smith was not. That does not mean, of course, that the findings as to the credibility of the appellant and Ms [D]'s evidence should be wholly ignored. The fact that an individual claims to be genuinely married to another person must be considered in the light of previous judicial findings which had not been overturned and the effect of the earlier relationship prior to marriage had not been genuine. Equally, however, I do not believe that it can be said that a finding that a relationship between two individuals is not genuine cannot, in any circumstances, be displaced by subsequent evidence. It is possible for two individuals to enter a sham marriage and subsequently to be parties to a genuine relationship.

8. Secondly, I do not find that Judge Hudson was right to conclude that the evidence before her was "substantially the same as that supplied in previous applications". First, it is not clear what "applications" she is here referring to. In considering the tenancy documents at [20], it is clear that the judge reduced the weight which she felt should attach to that evidence because "all of this information has been considered in previous applications". Some of the evidence postdates the previous litigation before Judge Lloyd-Smith and Judge Plimmer so I assume that she is referring here to applications made subsequent to that litigation to the Secretary of State. Those were applications which did not attract a right of appeal. I am not persuaded that all the documentary evidence which the Secretary of State saw in relation to those applications was necessarily before Judge Hudson. In any event, dismissing evidence on the basis that had previously been filed in support of applications which had attracted no right of appeal following refusal is simply not enough. Moreover, I agree with Ms Mair that the evidence was not substantially the same; for example, there was live witness evidence before Judge Hudson which had not been before Judge Lloyd-Smith. The firm impression left by [14] is that the judge found that she did not have anything new before her and that she had little alternative but to follow the findings of Judge Lloyd-Smith. The correct approach should have been to consider the evidence before the previous Tribunal and the new evidence as a totality, weighing the various items of evidence in accordance with *Devaseelan*. In the light of

the fact that it postdated the previous decision, much of the "new" evidence could not by definition have been before the previous Tribunal and, whilst much of the new evidence was similar in kind to that previously adduced, that was not the case in respect of the live witness evidence.

9. Thirdly, I accept Ms Mair's submission that the judge has paid insufficient attention to the fact that there was now more evidence of cohabitation and of a relationship simply by reason of the lapse of time. Mr McVeety submitted that evidence such as utility bills and letters from the children's school did not "get better with repetition". I disagree. Judge Hudson should have taken proper account of the period of time over which this couple has been able to produce evidence of a relationship; such evidence does not, of course, show conclusively that the relationship is genuine but the lapse of time should not simply have been ignored as it has been here.

10. I stress that Ms Mair has not submitted that "new" evidence is determinative of the genuineness of the marriage. She did not go so far as to say that Judge Hudson's decision was perverse. It is, of course, possible that a couple might keep up a pretence of a relationship for a number of years. I am, however, satisfied that the judge's analysis and application of *Devaseelan* is, for the reasons which I have given, defective. I therefore set aside her decision.

11. There will need to be a fresh hearing *de novo*. I was told that the last hearing had taken a day of court's time (there were a number of witnesses who gave oral evidence). Although it may have been preferable to have kept this appeal in the Upper Tribunal, the extent of the new fact-finding which will have to be undertaken renders the appeal more suitable for remittal to the First-tier Tribunal.

Notice of Decision

12. The decision of the First-tier Tribunal which was promulgated on 10 May 2018 is set aside. None of the findings of fact shall stand. The appeal is returned to the First-tier Tribunal (not Judge A R Hudson) for that Tribunal to re-make the decision.

13. No anonymity direction is made.

Signed Date 26 November 2018

Upper Tribunal Judge Lane