Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/12408/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 14th January 2019	**On 28th January 2019**

Before

UPPER TRIBUNAL JUDGE COKER

Between

MUHAMMAD SHAHID NAZIR
(anonymity direction not made)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Appiah, instructed by Vine Court Chambers
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a Pakistani citizen born on 1 April 1979, arrived in the UK on 28 July 2012 as a Tier 4 student. The appellant has made a number of applications for residence card as the spouse of a EU National exercising treaty rights. Each application has been refused because the respondent considers that the appellant's marriage to be one of convenience. An application made on 25 October 2014 was refused on the 2 February 2015 and his appeal was heard by the First-tier Tribunal on 25 August 2015. The appeal against the refusal of a residence card it was dismissed for reasons set out in a decision, by First-tier Tribunal Judge Robison, promulgated on 17 September 2015.

2. First-tier Tribunal judge Robison found that the inconsistencies identified in the extracts from the marriage interview set out in the reasons for refusal letter were of such number and nature that he was satisfied the respondent had raised a reasonable suspicion on the evidence that on the balance of probabilities it was a marriage of convenience [25]. The First-tier Tribunal judge identified evidence relied on by the appellant that pointed to the marriage being a genuine marriage, accepted that out of the 200 or so questions there were a large number of consistencies as well as the inconsistencies highlighted in the refusal letter but also identified discrepancies in the oral evidence, hesitancy in their answers and a lack of clarity in the explanations given by the appellant and sponsor in respect of some issues [28]. The First-tier Tribunal judge found the evidence relating to the transfer of large deposits into the sponsor's bank account of particular significance [30]. The First-tier Tribunal judge concluded that taking account of all the evidence before him he was satisfied it was more probable than not that it was a marriage of convenience.

3. The appellant applied again on 5th April 2016 for a residence card on the basis of his marriage. That application was again refused by the respondent on 3rd October 2016 because the Secretary of State took the view that the marriage was a marriage of convenience. The appeal against that decision was dismissed by a First-tier Tribunal judge Nash for the reasons set out in a decision promulgated on 17 April 2018.

4. The appellant sought permission to appeal on the grounds that the First-tier Tribunal judge had failed to place adequate weight on his spouse's pregnancy and secondly that the First-tier Tribunal judge had not had a sight of the marriage interview upon which the 2015 decision was reached and this was procedurally unfair.

5. Permission to appeal was initially refused by Upper Tribunal judge Martin in the First-tier Tribunal but granted by deputy Upper Tribunal judge Chapman in the Upper Tribunal.

6. Mr Appiah confirmed before me that he relied upon these two grounds which he submitted identified an error of law such that the decision of the First-tier Tribunal should be set aside to be remade. He accepted that the starting point for First-tier Tribunal judge Nash was the findings made by First-tier Tribunal judge Robison, as per *Devaseelan* [2003] Imm AR 1.

Interview record

7. The interview record has not been produced and was not produced before the First-tier Tribunal in 2015 or the First-tier Tribunal in 2018. It seems that the appellant sought disclosure of the interview record prior to the August 2015 hearing but at the hearing, when a further request was made, it was apparent that it could not be produced for a few weeks. His legal representative at that time did not seek an adjournment; she confirmed to the First-tier Tribunal judge that she was "happy to go ahead without the transcript" [3].

8. Mr Shah, who represented the appellant before First-tier Tribunal judge Nash (the 2018 decision), did not seek an adjournment to enable the interview record

to be produced. There is no record that he made submissions to the effect that the extract of the interview record as it appeared in the decision letter that was the subject of the appeal in 2015 was inaccurate; nor was there a submission that the evidence of the appellant and his spouse to First-tier Tribunal judge Robison did not deal with the inconsistencies that were raised by the respondent in that refusal letter. Although Mr Shah is recorded as relying on *Miah (interviewer comments disclosure fairness)* [2014] UKUT 00515, it is not recorded what the basis of those submissions were. The skeleton argument that was relied upon in the 2018 First-tier Tribunal hearing does not take issue with the extracts in the refusal letter that were before the First-tier Tribunal in the 2015 decision. The skeleton says little more than that the Home Office had failed to show which questions and answers had led the Home Office to reach the conclusion it did.

9. Mr Appiah submitted that there was an underlying unfairness because the Secretary of State had failed to produce the interview record even though at the first hearing in 2015 the appellant's representative had said she was content to proceed in its absence; and in the 2018 hearing no application was made for an order for disclosure or for an adjournment to obtain disclosure. Whilst in general it is correct that underlying fairness usually requires disclosure of interview records, in this case two representatives at two separate hearings have neither sought an adjournment or expressed an objection to proceeding in the absence of the interview record. Furthermore, the findings in the 2015 decision were considered by First-tier Tribunal judge Nash in accordance with the principles of *Devaseelan*. First-tier Tribunal judge Nash considered the evidence both oral and documentary as it applied at the time of the appellant's and his spouse's marriage. No objection has been raised to his treatment of that evidence - save the evidence of pregnancy as to which see below. The evidence with regard to the interview record was considered by First-tier Tribunal judge Robertson in 2015 and the findings have not been overturned. The appellant has not put forward any new evidence that could begin to undermine the findings with regard to the interview record. In any event an attempt to raise a procedural fairness point some 3 ½ years after a hearing has taken place when the representative at that hearing specifically did not object and at a hearing in 2018 when there was again no objection, is of no merit.

10. There is no error of law by First-tier Tribunal judge Nash failing to have regard to a document which was not before him, for which no application for it to be before him had been made, for which no application for an adjournment to enable it to be before him had been made and where the appellant's representative had said at hearing where the interview was in question, that she was happy to proceed in its absence.

Pregnancy

11. First-tier Tribunal judge Nash took account of the appellant's spouse's pregnancy and miscarriage. He notes the doctor's report that the appellant is supportive and that he is concerned about his spouse's health. The judge found that the evidence as to pregnancy and the GP letter work insufficient for him to revisit the decision of First-tier Tribunal judge Robison.

12. It is important to remember that the issue before First-tier Tribunal judge Nash is not whether there is a genuine and subsisting relationship/marriage but whether or not it was a marriage of convenience at the date on which it was entered into. A marriage may be entered into as a matter of convenience and subsequently become a close, loving, supportive and subsisting marriage but that does not mean that it was not a marriage of convenience at its instigation. The fact of a later pregnancy may affect that assessment but not necessarily so. Although it may be that paragraphs 62 and 63 of First-tier Tribunal judge Nash's decision identify issues which can be read as undermining the evidence of pregnancy, the conclusion of Judge Nash that the evidence overall that was before him was inadequate to render the decision of the respondent to refuse a residence card on the basis that the marriage was the marriage of convenience was infected by error of law.

13. There is no error of law in the decision by First-tier Tribunal judge Nash such as to set aside his decision.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision; the decision of the First-tier Tribunal stands.

Upper Tribunal Judge Coker

Date 14th January 2019