



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/00174/2017

THE IMMIGRATION ACTS

Heard at Field House
On 28th September 2018

Decision & Reasons Promulgated
On 10th October 2018

Before

UPPER TRIBUNAL JUDGE J McWILLIAM
DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR RASHAD MAHMOOD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Benfield, Counsel, instructed by LRP Legal Rights Partnership

For the Respondent: Mr T Lindsay, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Pakistan, has permission to challenge the decision of Judge Nixon of the First-tier Tribunal sent on 3 January 2018 dismissing his appeal against the decision made by the respondent on 15 December 2016 refusing to issue a residence card as confirmation of the appellant's right of residence in the UK under European Community law. The respondent considered that the marriage the

appellant had entered into with Ms Elena Nita was one of convenience. The judge reached the same conclusion. By the date of the marriage interviews and also before the judge, the couple had a child (born in March 2015).

2. The appellant's grounds had essentially two strands: one contending that the judge wrongly treated the legal burden of proof as resting on the appellant; the other taking issue with the judge's treatment of several aspects of the evidence.
3. We are grateful to both representatives for their well-presented submissions.
4. We are persuaded that the first ground is made out. Despite citing the Supreme Court judgment in **Sadovska and Another** [2017] UKSC 54, the judge failed to follow its guidance as regards the burden of proof. At [28] Lady Hale stated in criticism of the judge in that case that "[i]t was not for Ms Sadovska to establish that the relationship was a genuine and lasting one. It was for the respondent to establish that it was indeed a marriage of convenience" (see also [31]). Not only in her formal self-direction at paragraph 4 but also in her treatment of the issue of the burden at paragraphs 13 and 23, the judge committed very much the same error. At paragraphs 13 and 23 she stated:

"13. I will start with the crucial primary issue for me to determine: whether or not the marriage between the appellant and the EEA national is a genuine marriage of substance or one of convenience. Following the decision in **Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC)** and **Rosa v SSHD [2016] EWCA Civ 14**, I ask myself the following question: in the light of the totality of the information before me, including the assessment of the appellant's answers and any information provided, am I satisfied that it is more probable than not this is a marriage of convenience? There is an evidential burden upon the respondent to justify a reasonable suspicion that this is a marriage of convenience and then there rests a burden upon the appellant to show on the balance of probabilities that it is not a marriage of convenience. I further remind myself of the decision of **Sadovska & anor v SSHD [2017] UKSC 54**.

...

23. I find that there is indeed substantial evidence of cohabitation since the decision and of course that they do indeed have child together. However, when looking at all of the factors that I have mentioned above and my findings as to appellant's blatant disregard for the immigration laws, I do not find that they are sufficient to show that this is indeed a genuine marriage. I find that the evidence points towards the fact that the marriage took place in order that the appellant could obtain residence in the UK and not be forced to return to Pakistan. I find that the appellant has not shown that this is a genuine marriage."

5. We do not think the judge's treatment of the burden of proof can be rescued by her reference in paragraph 13 to the evidential burden being upon the respondent, (or by her reference in paragraph 14 that the respondent has "indeed justified a reasonable suspicion"), since for the judge it remained that the appellant bore the burden of showing that it was "not a marriage of convenience".

6. For similar reasons articulated by Lady Hale in Sadovska, we also consider that “it is impossible ... to conclude that, had the matter been approached in the right way, the decision relating to [the appellant] would inevitably have been the same” ([33]).
7. Had we been in doubt about the material nature of the judge’s erroneous treatment of the burden of proof, we would still have decided to set aside the judge’s decision, since there are other shortcomings in the judge’s treatment of the evidence, including a somewhat inaccurate analysis of discrepancies in the evidence given by the couple during their marriage interviews regarding their child’s age; and a failure to address the oral evidence given by the appellant and his wife with any particularity (given that in the judge’s own view t the respondent had discharged the evidential burden by reference to inconsistencies in their marriage interviews, she should have recognised that their oral evidence before her was their main opportunity to explain those inconsistencies).
8. We would emphasise, however, that our finding that the judge materially erred in law in no way suggests a view on the merits of the appellant’s case. It is the intention of the appellant at the time of the marriage that is material (see Rosa v SSHD [2016] EWCA Civ 14) and prior to the marriage the appellant (according to a report by Immigration Officers who encountered the appellant on 13 December 2013) the appellant was seen trying to get back into his car a woman who said to them he was trying to pay her £500 for her to marry him so he could stay in the UK.
9. In the nature of the judge’s errors we see no alternative to the case being remitted to the FtT to be heard afresh.
10. To conclude:

The decision of the FtT Judge is set aside for material error of law;

The case is remitted to the FtT (not before Judge Nixon).

No anonymity direction is made.

Signed:

Date: 4 October 2018



Dr H H Storey
Judge of the Upper Tribunal