



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/02903/2017

THE IMMIGRATION ACTS

**Heard at Glasgow
On 20th September 2018**

**Decision issued
On 17th October 2018**

Before

**MR C M G OCKELTON, VICE PRESIDENT
DEPUTY UPPER TRIBUNAL JUDGE DEANS**

Between

**MR RAO MUHAMMAD ASIF MAHMOOD
(No anonymity direction made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by LKW Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal is brought against a decision by Judge of the First-tier Tribunal McManus dismissing an appeal against a refusal to issue a residence card. The residence card was refused because the Secretary of State decided the appellant had entered into a marriage of convenience with an EEA national.
2. The Judge of the First-tier Tribunal found the appellant had entered into a marriage of convenience. However, when an application was made for permission to appeal, the judge considering the application noted that the Judge of the First-tier Tribunal had arguably applied the wrong burden of proof. Instead of following Sadovska [2017] UKSC 54 it was arguable that the judge had accepted a submission by the respondent that the burden of proof

was on the appellant and had applied this in making her decision. In addition the judge arguably failed to take into account that a marriage would be one of convenience only if its predominant purpose was immigration benefit and arguably failed to consider whether deception was the purpose of both parties to the marriage. The judge found that the couple lived together and the sponsor considered that the appellant had been kind to her. A further issue considered to be arguable was that the judge had purported to decide the appeal under the Immigration Rules instead of the Immigration (EEA) Regulations 2016.

3. At the hearing before us both parties were of the view that the decision of the First-tier Tribunal should be set aside for error of law and the appeal remitted to the First-tier Tribunal.
4. While it was clear that the Judge of the First-tier Tribunal had erred in law by not applying the correct burden of proof, we considered whether remittal was the proper course. The difficulty we faced was that it was not possible to see what the outcome of the appeal would have been had the burden of proof been the right way round. In addition, the judge made findings using the term “the Tribunal accepted...”, which sometimes made it difficult to ascertain whether she accepted that a piece of evidence established a particular fact or whether she was merely recording what occurred at the hearing.
5. We are satisfied that because the First-tier Tribunal did not apply the correct burden of proof the decision should be set aside. In terms of paragraph 7.2(b) of the Practice Statement the appeal will be remitted to the First-tier Tribunal to be heard before a differently constituted tribunal with no findings preserved. The correct burden of proof should be applied, in terms of Sadovska [2017] UKSC 54.

Conclusions

6. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
7. The decision is set aside.
8. The appeal is remitted to the First-tier Tribunal with no findings preserved.

Anonymity

The Judge of the First-tier Tribunal did not make an anonymity direction. We have not been asked to make such a direction and see no reason of substance for doing so.

Deputy Upper Tribunal Judge Deans
October 2018

12th