



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/05606/2017

THE IMMIGRATION ACTS

Heard at Field House
On 8 June 2018

Decision & Reasons Promulgated
On 18 June 2018

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

RUKHSAR FAYYAZ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Khan, Counsel
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Pakistan, has permission to challenge the decision of Judge Barrowclough of the First-tier Tribunal (FtT) sent on 27 February 2018 dismissing his appeal against the decision made by the respondent on 1 June 2017 refusing to issue him a residence card. The appellant had claimed that he was entitled to a residence card as he had acquired retained rights following his divorce from a Hungarian spouse on 5 December 2016. The respondent had earlier refused the appellant a residence

card when he was still a spouse, on 7 June 2013 and 15 April 2015, on both occasions because it was considered his marriage was one of convenience.

2. The written grounds of appeal raised six points. The last three are misconceived since they take issue with the judge's failure to deal properly with Article 8, whereas in an EEA appeal of this type human rights cannot be considered: see **Amirteymour and others (EEA appeals; human rights)** [2015] UKUT 466 (IAC); upheld by the Court of Appeal in **Amirteymour v SSHD** [2017] EWCA Civ 353. The appellant's first point simply alleges that the FtT decision was flawed. The second point contends that the FtT failed to ascribe appropriate weight to the evidence before the Tribunal. The third submits that the reasoning of the FtT in finding that the marriage was one of convenience was inadequate/insufficient.
3. The judge who granted permission for the above grounds to be argued also identified three other arguable errors: that the judge erred in stating he could only take into account facts in existence at the date of decision; in failing to treat the burden of proving marriage of convenience as resting on the respondent; and in treating the question of whether the appellant had shown retained rights as being "concluded in the respondent's decision".
4. Mr Khan's submissions reiterated the contention that the judge had misapplied the burden of proof and added the point that the judge had clearly misunderstood the reasoning of the Supreme Court in **Sadovska et al v SSHD** [2017] UKSC 54, in that the judge wrongly assimilated the appellant's case to that of Mr Malik (the second appellant in the **Sadovska** case) even though the latter was someone who had not married and so depended on being able to show he was in a durable relationship with an EEA national.

Analysis

5. I would readily accept there are some errors in the judge's decision. His self-direction at paragraph 2 that he could only take into account facts in existence at the date of decision is one, but this error was not material as the appellant's appeal depended crucially on historic facts relating to his marriage. A more serious error concerns the judge's treatment of the issue of the burden of proof (the focus of the appellant's third ground). It is clear from paragraphs 18-19 that the judge fully understood that in relation to proof of a marriage of convenience the burden rested on the respondent (e.g. at paragraph 18 the judge, citing **Sadovska**, states that "it is for the respondent to prove that the relationship ... is a 'marriage of convenience'"). Where the judge fell into error was in deciding that because the appellant's application for retained rights of residence had been refused, this somehow meant that he was in the same position as Mr Malik, one of the two appellants in **Sadovska** and that the issue was therefore whether the appellant could show he was in a durable relationship. That was simply incorrect. The appellant's appeal against the respondent's decision that he did not have retained rights was for the judge to determine and for retained rights to arise there had to have been a genuine marriage in the first place and hence the salient issue

was whether the appellant had entered into a marriage of convenience and in proving that the burden rested on the respondent. The judge would have been right to treat the burden as resting on the appellant if the salient issue had been whether his was a durable relationship, but that was not the issue.

6. I am unpersuaded, however, that this error on the part of the judge was material. For one thing the appellant's marriage had already been found by the respondent to be a marriage of convenience in two earlier decisions taken in June 2013 and April 2015. On the first occasion the appellant withdrew his appeal (on 12 December 2013) and on the second occasion the appellant also withdrew his appeal (in June 2016). Having chosen not to challenge the respondent's decision on two occasions the appellant could not expect the issue of whether his was a marriage of convenience to be treated as an entirely open-ended one. The issue had moved on from being one in which the respondent bore the burden of proving that the marriage was one of convenience to the appellant being required to provide something new to rebut that assessment.
7. In addition, the judge clearly gave very careful consideration to the appellant's efforts to rebut the respondent's assessment and was fully entitled to find them wanting. At paragraph 23 the judge stated:

"Is the fact that the appellant and Ms Kolompar lived in the same house for approximately three years sufficient on its own to establish the existence of a durable relationship of the type I have described between them? Not in my judgment, since I have very significant reservations about the credibility and reliability of the appellant's evidence. These arise from the fact that he and Ms Kolompar failed to attend Home Office marriage interviews, which the appellant's solicitors had confirmed that they would, on two separate occasions in 2013 and 2015, and also that the appellant has failed to produce any objective evidence to support the alleged reasons for their failure to do so. In relation to all those failings, I bear very much in mind that the appellant is an educated individual, and in fact a qualified lawyer, who has made repeated applications to remain in the UK based upon his relationship with Ms Kolompar. As such, it seems to me that the appellant must have appreciated both the reason for and the significance of those interviews, and the very great importance of his being able to provide objective confirmation of the reasons why they were unable to attend either interview, if those reasons were as he asserts. Yet no such evidence, or anything like it, has been produced. I also bear in mind what I find to be the appellant's unsatisfactory answers as to why he did not contact the Home Office and could not be contacted on the day of the second interview, and of his failure to notify the Home Office of the alleged reasons for non-attendance thereafter. I find it to be significant that the appellant's witness statement completely fails to even mention the missed interview in March 2015; that there is an important and unresolved conflict between his witness statement and what he told the Tribunal about the date when he and Ms Kolompar started living in the same house; and that there are what I find to be misleading statements about why at least one earlier appeal from the respondent's refusal to grant a residence card was

withdrawn. Whilst the immigration history is not straightforward, and I accept that there is evidence that the appellant's 2015 appeal was indeed withdrawn in June 2016, it is clear from the first refusal letter of 15 April 2015 that on 12 December 2013 the appellant withdrew his appeal against the respondent's refusal in June that year to grant him a residence card based upon his marriage. At that time, as his later application confirms, the appellant and Ms Kolompar were only recently married and living together in reasonable amity, so it is very difficult to see why the appeal would have been withdrawn, if what the appellant says is true."

8. It must also be recalled that the judge found at paragraph 22 that there was insufficient evidence in the form of photographs, phone record, e-mails or other correspondence to establish the relationship was genuine (see paragraph 22).
9. For another thing, even though the judge himself focused on whether the couple had had a durable relationship, his assessment also encompassed the question of whether their marriage had been entered into for convenience and that assessment did not depend for its efficacy on anything to do with the burden of proof. That is made clear by the judge's summary of his conclusions at paragraph 24:

"All these matters lead me to conclude that the appellant was not a truthful or reliable witness, and that the core of his account, namely that his marriage to Ms Kolompar was a genuine relationship followed by their separation and divorce due to irreconcilable differences, is a fabrication. I do not accept that the appellant has produced evidence of a 'durable relationship' with Ms Kolompar; or, to the limited extent to which he may be said to have done so by virtue of their living in the same house for three years, I find that the respondent has shown or established that it was not such a relationship. In my judgment and on the basis of the evidence I heard and read, the predominant purpose of the appellant's marriage to Ms Kolompar was to gain a right of residence in the UK; and as such it was a marriage of convenience. The appellant does not satisfy Regulations 2 or 10(5) of the 2016 Regulations and is not entitled to a permanent residence card as confirmation of a retained right to reside in the United Kingdom, and I dismiss this appeal."

10. Mr Khan sought to argue that the appellant's explanation for withdrawing his appeal - because he had already separated from his wife - was a satisfactory one, but at the relevant time the couple were only recently married and were said to have been living together harmoniously (paragraph 23).
11. I have yet to address the appellant's second ground which contends that the judge failed to ascribe appropriate weight to the evidence before the Tribunal. This ground considers that what the judge effectively did was "merely endorse" the respondent's reasons for finding the marriage one of convenience (this was much the same point noted by the judge in granting permission -that the decision appeared to disclose an

arguable error of treating the question of whether the appellant had shown retained rights as “concluded” in the respondent’s decision).

12. The reason why I find no force in this ground is the evident contrast between the respondent’s reasons for refusing the appellant’s application and the judge’s reasons for dismissing the appeal. The essential reason why the respondent refused the appellant’s application was that:

“[y]ou lodged an appeal which you have since withdrawn, the Home Office therefore concludes that you have accepted that the decision that your relationship with Edina Kolompar is one of convenience.

Resultantly you have failed to demonstrate that your ‘marriage’ lasted for at least 3 years ...”.

Whilst the judge also considered the appellant’s withdrawal of his appeal as a relevant factor he did not treat it as determinative. It is clear from paragraph 23 (cited earlier) that the appellant’s withdrawal of his appeal was only one of several factors leading the judge to conclude at paragraph 24 that:

“[a]ll these matters lead me to conclude that the appellant was not a truthful or reliable witness, and that the core of his account, namely that his marriage to Ms Kolompar was a genuine relationship followed by their separation and divorce due to irreconcilable differences, is a fabrication.”

Furthermore, the judge’s assessment also encompassed evaluation of evidence not before the respondent, in particular the evidence of his friend Mr Mustafa. Patently this evidence together with all the documentary evidence in the appellant’s bundle was the subject of an independent and far more detailed assessment and did not simply endorse the respondent’s reductionist reasoning.

Notice of Decision

13. For the above reasons, whilst the judge’s decision contains some errors of law, none had any material impact on the judge’s finding that the appellant’s marriage was one of convenience. As such it was a marriage incapable of generating any retained rights upon divorce.
14. No anonymity direction is made.

Signed:

Date: 15 June 2018



Dr H H Storey
Judge of the Upper Tribunal