



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/06553/2016**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Centre City Tower, Decision & Reasons
Birmingham Promulgated
On 23 February 2018 On 11 April 2018**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**HAMMAD HANIF
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms Aboni, Senior Presenting Officer
For the Respondent: Mr B Malik, instructed by City Law Practice Solicitors

DECISION AND REASONS

Introduction

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department. I shall refer herein to Mr Hanif as the 'claimant'.
2. The claimant is a citizen of Pakistan, born 2 August 1985. On 10 November 2015 he applied for an EEA residence card as confirmation of his right to reside in the United as the spouse of a Hungarian national (Ms Escedi).
3. This application was refused by the Secretary of State in a decision of 10 June 2016, it being concluded that the marriage was one of convenience

and therefore not a marriage for the purposes of the Immigration (EEA) Regulations 2006 (see regulation 2 thereof).

4. The appeal came before First-tier Tribunal Judge E Smith on 4 January 2017 and was allowed in a decision promulgated on 9 January. Permission to appeal to the Upper Tribunal was thereafter granted by First-tier Tribunal Judge Parker on 25 August 2017, and thus the matter comes before me.

Decision and Discussion

5. Ms Aboni initially framed the Secretary of State's challenge as one of inadequacy of reasoning in the First-tier Tribunal's decision. In this regard she observed as follows:

- (i) At paragraph 23 of its decision the First-tier Tribunal accepted that there had been a change of interpreter during the claimant's immigration interview, but inaccurately observed that this had not been recorded in the transcript of the interview. This led the Tribunal to erroneously conclude that the failure to record the change of interpreter "*undermines the accuracy of the [interview] transcript*";

- (ii) In paragraph 24 of its decision the First-tier Tribunal accepted that discrepancies existed as between the evidence given by the claimant and that given by the EEA sponsor during their respective interviews, and that such discrepancies had not been explained. It further found the claimant to be "*an unhelpful and unreliable witness*". The First-tier Tribunal erred in failing to adequately explain why the nature and extent of such discrepancies did not lead it to find the marriage to have been one of convenience.

6. After taking stock of Mr Malik's oral submissions Ms Aboni accepted that as the consequence of the combination of the reasoning found in paragraph 29 of the Supreme Court's judgment in Sadovska v SSHD [2017] UKSC 54 and certain of the findings of fact made by that the First-tier Tribunal, the claimant's appeal would inevitably have to be allowed even if the First-tier Tribunal decision were set aside.

7. In Sadovska the Supreme Court said as follows:

"For this purpose 'marriage of convenience' is a term of art. Although it is defined in the Directive and the 2009 Communication as a marriage the sole purpose of which is to gain rights of entry to and residence in the European Union, the 2014 Handbook suggests a more flexible approach, in which this must be the predominant purpose. It is not enough that the marriage may bring incidental immigration and other benefits if this is not its predominant purpose. Furthermore, except in cases of deceit by the non-EU national, this must be the purpose of them *both*. Clearly a non-EU national may be guilty of abuse when the EU national is not because she believes that it is a genuine relationship."

8. Ms Aboni accepted that the instant case is not one in which the sponsor's intentions in marrying the claimant were said to be for the purpose of

allowing the claimant to gain rights of entry to and residence in the European Union.

9. Consequently, it was accepted that even if the SSHD establishes that the First-tier Tribunal had erred in law as claimed, such errors were not material to the decision of the First-tier Tribunal to allow the appeal.
10. In any event, even absent Ms Aboni's concessions I would have concluded, for the reasons that follow, that the First-tier Tribunal's decision should remain standing.
11. The core of the Tribunal's reasoning is as follows:

"25. In Babar ...the Tribunal said that the burden of proving that there has been a valid marriage will usually fall on the parties claiming it has taken place, but if the parties can produce a reliable marriage certificate, the party disputing the marriage must prove to a high degree of probability that the marriage is not valid. Inevitably this decision depends upon the reliability of the marriage certificate. The certificate produced in this case is not disputed. It is anything other than a genuinely issued certificate. This decision was followed through in the case of Agho v SSHD [2015] EWCA Civ 1198 where it was held that where an applicant sought an EEA residence card on the basis that he was married to an EEA national, he simply had to produce his marriage certificate and his spouse's passport. As a matter of principle, a spouse established a prima facie case that he was the family member of an EEA national by providing the marriage certificate and his sponsor's passport. The legal burden was on the Secretary of State to show that any marriage thus proved was a marriage of convenience and that burden was not discharged merely by showing reasonable suspicion. The evidential burden might shift to the applicant by proof of facts that justify the inference that the marriage was not genuine. The facts giving rise to the inference included a failure to answer a request for documentary proof of the genuineness of the marriage where grounds for suspicion have been raised. Again, in Rosa [2016] EWCA Civ it was held that the legal burden was on the SSHD to prove that an otherwise valid marriage was a marriage of convenience so as to justify the refusal of a residence card under the EEA Regulations. The legal burden of proof in relation to marriage lay on the Secretary of State, but if she had used evidence capable of pointing to the conclusion that the marriage was one of convenience, the evidential burden shifted to the applicant (paras 24-27).

26. I found the appellant to be an unhelpful witness but appreciating where the burden of proof lies I cannot find the discrepancies in the interviews are significant or that they go beyond reasonable suspicion and, therefore, I am satisfied the respondent has not discharged the burden of proof and that the burden has not, on the evidence before me shifted to the appellant."

12. Taking the two grounds raised by Ms Aboni in her initial submissions in turn, although it is clear that the First-tier Tribunal erred in paragraph 23 of its decision in stating that the change of interpreter was not recorded in the transcript of the claimant's interview and that this undermined the

accuracy of the transcript, it is equally plain that this error had no material bearing on the First-tier Tribunal's conclusions. The Tribunal accepted both the existence of discrepancies as between the evidence given by claimant and his wife during their respective interviews, and that these discrepancies had not been satisfactorily explained. It was to the existence of these discrepancies, and the explanation thereof, that the issue of the recording of the change of interpreter went. Both issues were resolved in the SSHD's favour.

13. As to the second ground, it is to be recalled that the SSHD has made no attempt to visit the property in which the claimant and his wife purport to reside. The only evidence relied upon in support of the contention that the claimant engaged in a marriage of convenience are the discrepancies in evidence given by the claimant and his wife in their respective interviews. However, these discrepancies must be viewed in the context of the interview records read as a whole. Both claimant and his wife were asked in the region of 200 questions each during their interviews. Much of the evidence given was entirely consistent. The First-tier Tribunal looked at the interview records in the round, identified the existence of the discrepancies and evaluated the explanation for those discrepancies. In my view it was plainly entitled to conclude on the basis of all of the evidence before it that the SSHD had not demonstrated to the required standard that the claimant had engaged in a marriage of convenience. Although I accept that the First-tier Tribunal could have expressed its conclusions and reasons in more detail, its decision discloses the process the First-tier Tribunal undertook to reach its conclusions. It was required to no more in my view.
14. For all these reasons I conclude that the First-tier Tribunal's decision does not contain an error of law capable of affecting the outcome of the appeal, and it is to remain standing.

Notice of Decision

The decision of the First-tier Tribunal is to remain standing.

Signed



Upper Tribunal Judge O'Connor

Date