Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02582/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 March 2019	**On 3 April 2019**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

MOHAMMAD MAHMOUD YOUSEF ALHANOUTI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms B Asanovic, instructed by Danielle Cohen Immigration Law Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Jordan. He appealed to a Judge of the First-tier Tribunal against the Secretary of State's decision of 27 February 2017 refusing his application for permanent residence under the Immigration (European Economic Area) Regulations 2016.

2. The judge dismissed the appeal, on the basis that the marriage was a marriage of convenience and it was not accepted that the appellant had resided in the United Kingdom with his sponsor Ms [AD] in accordance with the Regulations for a continuous period of five years.

3. The appellant sought and was granted permission to appeal to the Upper Tribunal on the basis that the judge had arguably erred with regard to the burden of proof, and other matters concerning contended inadequate findings in respect of witness evidence and errors with regard to perceived inconsistencies were also arguable.

4. The judge noted the guidance in Papajorgii [2012] UKUT 00038 (IAC), having noted at paragraph 4 of his decision that the burden of proof was initially on the respondent to show on a balance of probabilities that the marriage is one of convenience and that if the respondent discharges the burden the burden is then on the appellant to show on a balance of probabilities that the marriage is a genuine one. The judge also noted relevant provisions of the Community Regulations on marriages of convenience, and the guidance in Rosa [2016] EWCA Civ 14 and Sadovska [2017] UKSC 54.

5. The judge noted factors that had led the respondent to conclude that the marriage was one of convenience. The appellant on return to the United Kingdom on 20 February 2012 had been interviewed at Gatwick Airport and was unable to state what his wife's job was, indicating that this was because of language difficulties. He said they had no joint bills or accounts. Though he said he lived with his wife in Barnsley a provisional driving licence was found in his shoe giving a London address.

6. His wife had been contacted but was unable to give any more of his name than Mohammad. She was unable to recall when or where they were married and said that she had worked at a bakery for the last year and could not account for why the appellant did not know this.

7. The appellant was granted temporary admission and returned to Gatwick on 23 February 2012 with his wife. He knew full details of his wife and had brought the marriage certificate. He had no bills in his name in relation to the Barnsley address and indicated that he used to work in London and travelled there to work and had not bothered to change them. He said that he had not been able to answer basic questions when initially stopped because he was tired and scared of the Immigration Officer, and his wife said she had been tired and did not believe the Immigration Officer when he said they were calling from the UKBA.

8. There was a visit by the South Yorkshire LIT team to the address in Barnsley where the occupant said that they had lived for the past year and had no knowledge of the appellant or the EEA sponsor. It was said that a further address was visited and again there was no trace of the EEA sponsor spouse.

9. The judge noted what the appellant said in his witness statement of 27 March 2018 that he had met Ms [D] in January 2011 at a club in London and their relationship began straightaway and they were married on 9 May 2011. He said that they had lived at the same address i.e. the flat in Barnsley since that date and continued to live there. He said that it was

2am when he was stopped by immigration control and he was tired and had the flu and had explained his wife worked for an agency and did different jobs. When he saw her the next day she said she believed the call had been a prank call and she had been asleep.

10. He said that approximately a year later he was again stopped at the airport and asked questions and after producing a tenancy agreement and his wife's bank statements and pay slips, his passport was returned and he was allowed to proceed. He said that he worked in London and would stay in London where he rented a room and was there three or four days a week and then returned to Barnsley.

11. The judge thereafter set out in detail the evidence provided by the appellant and Ms [D] about such matters as when and where they started to live together and issues to do with their religion and work and private life together. The judge found inconsistencies in their evidence as to when they had met, when their relationship became physical, when they actually moved in together, when Ms [D] last went to Latvia and what presents were given at their recent birthdays. He also considered that different answers were given in connection with religious matters. The judge noted the evidence of witnesses who were provided to support the claimed relationship. A Mr Alamaira said he had known the appellant for about ten years and had met Ms [D] in 2011 and had met her twice since they were married though he saw the appellant recently. A Mr Al Adas said that they had both stayed at his property in the past and then he had been away for seven months and when he got back he had been told that the couple had been living in London. He said the couple had stayed at his home on occasions after they had been married. A Mr Albkadle confirmed that he had known them since 2009, they had been a couple and had gone out with him and his partner in the past. Other witness statements were also provided.

12. The judge also noted and took into account additional evidence submitted by the appellant, in particular evidence in connection with the address including bank statements and a tenancy agreement and other documents in connection with Ms [D] which confirmed that she resided at the Barnsley address.

13. The judge then went on to say that after taking into account all of the evidence referred to by the respondent together with the inconsistencies in the oral evidence he was satisfied the respondent had discharged his burden of proof and that it was therefore for the appellant to show on a balance of probabilities that there was a reasonable explanation for those suspicions.

14. The judge referred again to the oral evidence from the appellant, his wife and the witnesses but concluded that there were a number of inconsistencies between the couple which would not be expected between a couple who were in a genuine and subsisting relationship. The judge found that the inconsistencies set out in the evidence did materially affect

the overall credibility of the appellant's claim to be in a genuine and subsisting relationship and durable relationship with Ms [D]. He accepted that the respondent had discharged the initial burden of proof and on those findings was not satisfied the appellant had shown on a balance of probabilities that this was a genuine and subsisting marriage nor that the marriage was not entered into in accordance to secure rights of residence into the United Kingdom.

15. The grounds of challenge, on which Ms Asanovic relied and which she developed in her oral submissions, argued that the judge had erred in deeming that the burden of proof was on the appellant to show the marriage was genuine and not one of convenience, as set out at paragraph 70. As had been said in Sadovska, it was not for Ms Sadovska to establish that the relationship was a genuine and lasting one, it was for the Secretary of State to establish that it was indeed a marriage of convenience.

16. In this regard Mr Melvin argued that the judge had applied the test correctly and argued that though the judge's wording might have been better when drawing his conclusions on the appeal it was argued that it was abundantly clear that the judge had followed the path set out in the case law dealing with marriages of convenience.

17. It was also argued by Ms Asanovic that the Secretary of State had in fact provided very little evidence to rebut the initial burden. The interview notes had not been provided, the redacted document at Annex G to the Secretary of State's bundle was very terse, saying no more than that the intelligence team had visited the relevant property and the occupant for the last year had no knowledge of the subject or her new partner. He went on to visit another address for her, again no trace of her. No names are contained in this report and Ms Asanovic argued that it was essentially valueless. She argued that despite the initial concerns from the first interview, there had been no attempt to cancel his residence permit and the matter had simply arisen when he had applied for permanent residence some years later. She also argued that the judge had failed to take any or any proper account of the evidence of the witnesses which showed a continuity of relationship and had not been given proper consideration. It was also argued that with regard to the inconsistency claimed concerning the couple's religious practices, there was no inconsistency as the appellant had simply been asked whether his wife practised her religion and said he had not seen her do so which was consistent with her answer that she went to church when he was not around. He was not asked whether to his knowledge she went to church or whether he prayed and there was no definition of what was meant by practising his religion. Also the inconsistencies as to precise dates when the coupled moved in together and when they met had to be seen in the context of the passage of time.

18. It is clear from paragraph 28 in Sadovska that it is not for the appellant to establish the relationship was genuine and lasting but for the Secretary of

State to establish that it was indeed a marriage of convenience. This contrasts with the judge's paragraph 70 where having said what he did about the initial burden of proof being discharged by the respondent he was not satisfied that the appellant had shown on a balance of probabilities that this was a genuine and subsisting marriage. That inconsistency with the guidance in the Supreme Court decision is such in my view that as in Sadovska itself it cannot be said with any confidence that the judge would have decided the case in the same way had the burden of proof been properly applied.

19. I am also concerned that inadequate attention was given to the evidence of the witnesses. The judge said no more in his conclusions that he had heard evidence from them and there were additional witness statements and that he took account of all the evidence before him. I consider he needed to say why he did not attach any more weight than he appears to have done to the evidence of the three witnesses and the other witness statements. The evidence from the respondent's side was fairly slender and also rather elderly, and the evidence from the appellant was more recent and in greater detail. I also see some force in the points made about the discrepancies or at least some of them as set out in the grounds.

20. In conclusion therefore I consider that the judge did err in law in the manner contended for in the grounds. In light of the fact that the whole matter will have to be reconsidered I conclude that it is more appropriate for it to be reheard in full in the First-tier Tribunal and that rehearing will be at Taylor House.

21. No anonymity direction is made.

Signed Date 19 March 2019

Upper Tribunal Judge Allen