Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/06516/2018**

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 20 August 2019	**On 10 September 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR ABDELLAH SANIBAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Shea, counsel instructed by FMB Solicitors
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Morocco born on 17 September 1973. He arrived in the UK in 2004 in possession of a visit visa and it would appear thereafter overstayed. He subsequently met a national of Poland, Ms Kataryzyna Agath Rybczyaska, born on 23 June 1980. They met in 2009, began a relationship and married on 10 January 2011 at Blackburn Registry Office, at which time they were living in London but the Appellant's mother and siblings resided in the Blackburn area.

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2. The Appellant applied for and was issued with a residence card on 27 May 2011 as the spouse of an EEA national exercising treaty rights in the UK, valid until 26 August 2016. The Appellant and his wife separated in July 2014 and their divorce was finalised on 21 July 2017.

3. On 17 April 2018, the Appellant applied for permanent residence on the basis that he was the former spouse of an EEA national exercising treaty rights in the UK for more than five years. This application was refused in a decision dated 14 September 2018, on the basis that the Respondent considered, having interviewed the Appellant, that his marriage with his former EEA national wife was one of convenience. The Appellant appealed against that decision and his appeal came before Judge of the First-tier Tribunal McAll for hearing on 30 April 2019. In a decision and reasons promulgated on 14 May 2019 the judge dismissed the appeal, finding that the Appellant had not discharged the burden on him to establish that the marriage was genuine.

4. Permission to appeal was sought, in time, on the basis that the judge had erred materially in law. In particular it was asserted that in light of the judgments in Rosa [2016] EWCA Civ 14 and Papajorgji (EEA spouse – marriage of convenience) [2012] UKUT 38, the burden was on the Respondent to make out an allegation that an Appellant's relationship was one of convenience and it was asserted the judge had not followed this approach. A number of other matters were raised, in particular the judge had assessed the Appellant's credibility unfairly and his consideration of irrelevant matters such as the failure to note that Muslims celebrate Eid three times a year – January, July and October in 2014.

5. Permission to appeal was granted by Upper Tribunal Judge Norton-Taylor in a decision dated 12 July 2019 on the basis:

"Whilst the judge made reference to Rosa [2016] 1 WLR 1206 and Sadovska [2017] 1 WLR 2926 at 12 of his decision, it is arguable that what is then said at paragraph 29 indicates an incorrect approach to the burden of proof. Permission is granted".

Hearing

6. At the hearing before the Upper Tribunal, Mr Shea on behalf of the Appellant, sought to rely on the grounds of appeal and the grant of permission to appeal. His position was that there was a material error and the appeal should be remitted back to the First-tier for a hearing *de novo*. He submitted that the Respondent's argument was based solely on the interview with the Appellant and the four points therein, which the Appellant had discharged; that there had been a lack of anxious scrutiny of the claim by the judge and that there was a material error of law.

7. In his submissions, Mr McVeety pointed out that the judge does in fact clearly refer to the correct test at [29]. Whilst it was asserted the judge did not take account of the cases in Rosa and Sadovska (op cit) it is clear that this is not the case, see [12] of the decision. Consequently, even before he starts to make his findings, the judge directed himself as to the

correct legal test. At [15] the judge was entitled to take account of the fact that there was no documentary evidence to show that the Appellant had been cohabiting with his spouse, apart from a letter from the Television Licensing Authority dated 29 February 2012. Consequently at [29] the judge accepted that the Respondent had discharged the burden upon him. The judge was aware not only of the questions the Appellant got right during his interview but also those that he got wrong and those four points go to the heart of his appeal. Mr McVeety submitted that the judge had done everything that he should have done, particularly given that there was no Presenting Officer present.

8. In reply, Mr Shea reiterated that there had been a lack of anxious scrutiny. He submitted the judge had accepted the Respondent's evidence *carte blanche* without it being properly tested in court.

Findings and Reasons

9. I find no material errors of law in the decision of First-tier Tribunal Judge McAll. It is apparent from the judge's self-direction at [12] that he had clearly in mind the decisions in Rosa [2016] EWCA Civ 14 and Sadovska [2017] 1 WLR 2926, where he held:

> *"The legal burden is on the Secretary of State to prove that an otherwise valid marriage is 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 the genuineness of the marriage lay on the Secretary of State, however, if he adduces evidence capable of pointing to the conclusion that the marriage is one of convenience, the evidential burden then shifts to the applicant"*.

10. The judge then reached findings of fact on the evidence before him and I find was entitled to take properly into consideration that the Appellant had produced no documentary evidence from the period of time where he was residing with his wife in Greenford, London, apart from the aforementioned letter from the Television Licensing Authority, and at [16] to find that this seriously damages his credibility and his claim. I further find the judge was entitled at [17] to take into consideration as impacting negatively on the Appellant's credibility, the absence of any photographic evidence attesting to the relationship between the Appellant and his former wife after the issue of the residence card in 2011. The judge recorded the evidence of the Appellant's brother attesting as to the relationship but at [22] found and was entitled to find the witness vague as to the events he was citing and that he appeared to be making up his evidence rather than recalling actual events.

11. The judge considered the issue of the immigration interview at [23] onwards of the decision and at [25] accepted submissions on behalf of the Appellant in relation to two of those points, i.e. the spelling of the Sponsor's family name and the fact the Appellant could not recall the day of the week that he married. However, I find that the judge was entitled to take account as he did at [26] of the fact that the address and the

Appellant's vague responses as to where he lived following the wedding were relevant given the lack of documentary or other supporting evidence to show that he was in a relationship with the Sponsor during the period he claims and:

> *"I would also have expected the Appellant to recall the witnesses names at the wedding if he claims he had been in a relationship with the Sponsor for five years. There is therefore sufficient evidence before me to raise suspicions as to the genuineness of the marriage"*.

12. The judge then noted at [27] that it would have been possible for the Appellant to locate the Sponsor to assist in providing supporting evidence given his evidence that the relationship ended on good terms, and at [28] in relation to his employment during the duration of the marriage, that he could have contacted HMRC in order to obtain his tax and national insurance record to show his income and that he was living and working in London at that time or his former landlord to confirm his residency at the same address as his wife. That is the context of the judge's finding at [29] which is *inter alia* as follows:

> *"I am satisfied the lack of evidence in regard to his cohabitation with the Sponsor is a sufficient ground for the Respondent to discharge the burden on him and to challenge the genuineness of the marriage. I find the Appellant has not discharged the burden on him to establish the marriage was genuine"*.

The judge concludes as follows at [30]:

> *"For the reasons I have set out above I am not satisfied that the Appellant and Sponsor have cohabited together as a married couple or in a relationship akin to marriage from 2009 until 2014 as the Appellant claims. I find the Appellant and the Sponsor did enter into a marriage of convenience the sole purpose being to gain an immigration advantage. I find the Respondent's refusal to issue a residence card is lawful and in accordance with the 2016 Regulations"*.

13. I find that there is no error in the judge's approach in light of the jurisprudence *viz* Rosa and Sadovska (*op cit*). The judge provided reasons which are sound for finding that the Respondent had discharged the initial burden on him and it is clear from the case law that once the legal burden has been discharged this the burden shifts to the Appellant in respect of the evidential burden. In the absence of any documentary evidence at all and somewhat vague evidence by the Appellant and in particular his brother who was his witness, the judge was entitled to find that the burden had not been discharged.

14. Therefore, for those reasons the appeal to the Upper Tribunal is dismissed with the effect that the decision of the First-tier Tribunal Judge is upheld.

No anonymity direction is made.

I have dismissed the appeal and therefore there can be no fee award.

Signed Rebecca Chapman Date 8 September 2019

Deputy Upper Tribunal Judge Chapman