Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07293/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 February 2020	**On 5 March 2020**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MIRUSH [K]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Anyene, Counsel, instructed by MBM Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Malone ("the judge"), promulgated on 24 July 2019, by which he dismissed the Appellant's appeal against the Respondent's refusal to issue him with a residence card pursuant to the Immigration (European Economic Area) Regulations 2016 ("the Regulations"). The Respondent asserted that the Appellant's marriage to a Greek national (Ms G) was one of convenience only. The Appellant had had a previous appeal before the First-tier Tribunal in which Judge Farmer concluded that the Appellant's relationship with his now wife was in fact one of convenience.

2. The decision of Judge Farmer was relied upon before the judge. Additional evidence was called both in the form of live witnesses and various documents. It is right to say that the judge was decidedly unimpressed with much, if not all, of this evidence. Those findings were combined with Judge Farmer's, leading the judge to conclude that the Appellant's marriage was indeed one of convenience only.

3. The rather lengthy grounds of appeal are to a large extent an attempt to re-argue the matters that were before the judge. A number of points raised are in truth nothing more than simple disagreements with findings that would, all other things being equal, appear sustainable. However, the grounds also contain the assertion that the judge misdirected himself as to the burden of proof in this case. The judgment of the Supreme Court in Sadovska [2017] UKSC 54 is cited in support thereof. It was on this basis that permission was granted by First-tier Tribunal Judge Holmes on 16 December 2019.

4. Before me Mr Anyene relied on the grounds of appeal, emphasising the burden of proof point.

5. Mr Avery submitted that this case was somewhat different from the norm, in that a Devaseelan point arose as a result of Judge Farmer's previous decision and her adverse findings on the nature of the Appellant's relationship. The judge had considered new events adduced by the Appellant and had unequivocally rejected this with reference to the decision as a whole and in particular paragraphs 50 and 51. Mr Avery submitted that the conclusion reached by the judge that the marriage was one of convenience was inevitable.

6. I conclude that the judge has materially erred in law by misdirecting himself as to the burden of proof in this particular case.

7. At paragraph 15 of his decision the judge stated that:

> "If I am to allow this appeal, the Appellant must satisfy me that the Respondent's decision is not in accordance with the law or the Immigration Rules HC 395 (as amended). In particular provisions are Regulations 2 and 7 of the Regulations." This is a clear misdirection in law however it is important to read the decision as a whole and to see whether or not as a matter of substance the judge has in fact applied this error to his assessment of the evidence."

8. That was clearly an erroneous self-direction.

9. At paragraph 52 the judge stated that:

> "I therefore find that the Appellant has failed adequately to answer the evidence I have found justified reasonable suspicion that his marriage to [Ms G] was one of convenience. I find that the Respondent has discharged the burden on him of showing that the marriage was one of convenience."

10. This would on the face of it appear to be corrective of the error in paragraph 15. However, going back to paragraph 19 of the judge's decision and despite the reference to Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC) (the essential reasoning of which was approved by the Court of Appeal in Rosa [2016] EWCA Civ 14), the judge has in my view misdirected himself in law by stating that once a reasonable suspicion had been raised by the Respondent, there was then an evidential burden on the Appellant to address the evidence underpinning that reasonable suspicion and it was "then" for the Appellant to "rebut" that reasonable suspicion. A failure to do so, stated the judge, would lead to the Respondent discharging the legal burden by default as it were.

11. In marriage of convenience cases it is not a question of whether an Appellant can "rebut" evidence raising a reasonable suspicion. That term gives rise to the possibility that there is some sort of a presumption against an Appellant where reasonable suspicion is shown to exist: that would clearly be wrong. Alternatively, there is nothing by way of explanation on the judge's part to suggest what level the rebuttal had to achieve in order to prevent the legal burden being discharged by the Respondent by default, as it were.

12. Reading paragraphs 50 and 51 of the judge's decision, my concerns are not allayed. I note that at the end of paragraph 51, and having referred to various items of evidence adduced by the Appellant, the judge states that, "I find that [the evidence in question] does not tip the scales in the Appellant's favour. The stronger evidence I had militates against the success of the Appellant's claim." In my view that compounds my concern as to the misdirection in law indicating that there was something akin to a legal burden (or at least too high an evidential burden) being placed upon the Appellant in this case.

13. In light of my conclusions, the numerous adverse credibility findings are rendered unsustainable. I do not agree with Mr Avery that the outcome was inevitable on any view. Where an assessment of a marriage is undermined by a fundamental legal misdirection, the outcome of that assessment cannot be considered sound.

14. Given that the marriage of convenience was the core issue in this appeal the error was clearly material, and the judge's decision must be set aside.

15. The appropriate course in this case is to remit the appeal for a complete rehearing before the First-tier Tribunal. In so concluding, I have had particular regard to para 7.2 of the Practice Statement. Here, there needs to be extensive fact-finding in the context of the applicable legal framework.

16. No findings of the judge are to be preserved.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

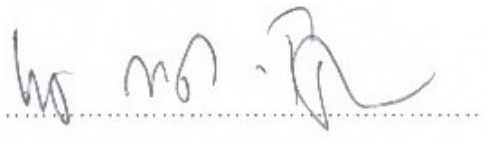
I remit the case to the First-tier Tribunal.

No anonymity direction is made.

Directions to the First-tier Tribunal

1) **This appeal is remitted to the First-tier Tribunal for a complete rehearing with no finding preserved;**

2) **The remitted hearing shall not be conducted by First-tier Tribunal Judge Malone;**

Signed  Date: 24 February 2020

Upper Tribunal Judge Norton-Taylor