Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/01788/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 September 2017	**On 4 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MRS KHALIDA BOUCHENEB
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Briddock, Counsel, instructed by JD Spicer Zeb Solicitors
For the Respondent: Mr P Armstrong, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge P-J White (the judge), promulgated on 23 December 2016, in which he dismissed the Appellant's appeal against the Respondent's decision of 30 September 2015. That decision had been a refusal of an application for a residence card under the Immigration (European Economic Area) Regulations 2006.

2. The Respondent alleged that the Appellant's marriage to a Latvian national was one of convenience only. In so concluding, the Respondent had relied upon a previous decision of the First-tier Tribunal made by First-tier Tribunal Judge Beg in a decision promulgated on 22 July 2014 (IA/44305/2013). Judge Beg had made a number of

significant adverse credibility findings and had concluded that the marriage was one of convenience.

The judge's decision

3. At paragraph 4 of his decision the judge states in clear terms that the burden of proving that the marriage was one of convenience rested with the Respondent. At paragraph 10 the judge states, "a marriage of convenience is one entered into for immigration advantage, and the issue is to be determined at the date the marriage is contracted."

4. He goes on to make reference to the well-known Devaseelan principles and the evidence before him, including evidence that was before the previous judge and certain materials that post-dated her decision. Overall he concludes that there was nothing before him to displace the findings of Judge Beg.

5. At paragraph 24 he comments that the appeal before him was, "essentially an attempt to re-litigate the decided issues by calling much of the same evidence, with some degree of updating."

6. In paragraph 25 the judge says the following:

> "I should be and am in no doubt that the visit in September 2013 [relating to a home visit by the Respondent, evidence of which had been considered by the previous judge] coupled with the evidence put before Judge Beg is sufficient to discharge the initial evidential burden of showing grounds to believe that this may be a marriage of convenience, and I am not satisfied that the evidence adduced by the Appellant rebuts that concern. Accordingly I find, in line with the previous decision and on consideration of all the matters put before me, that this was at the outset and therefore unchangeably is a marriage of convenience, and not therefore a marriage giving rise to free movement rights."

The grounds of appeal and grant of permission

7. Ground 1 asserts that the judge misdirected himself in law: obtaining an immigration advantage is not the test; such an advantage must be the "sole purpose" behind the marriage.

8. Ground 2 asserts that the judge has reversed the burden of proof, particularly in what he has said in paragraph 25 (quoted above). There was no legal burden upon the Appellant. The judge failed to expressly state that the Respondent had in fact discharged the legal burden.

9. I will not describe Ground 3, as Mr Briddock has stated that he no longer wishes to rely upon it.

10. Permission to appeal was granted by First-tier Tribunal Judge Lambert on 10 July 2017.

The hearing before me

11. Mr Briddock submitted that the misdirection in paragraph 10 was clear and material. In essence he submitted that if the direction was wrong in law everything else that followed must also be wrong. He submitted that if the correct test had in fact been applied the outcome would not necessarily have been the same. The judge had failed to correct the initial error later on in the decision.

12. In respect of the burden of proof issue, Mr Briddock submitted that the judge had failed to expressly state that the Respondent had proved that the marriage was one of convenience only. In respect of both grounds I was referred to the recent Supreme Court judgment in Sadovska [2017] UKSC 54, at paragraphs 24, 29, and 28.

13. Mr Armstrong referred me back to Judge Beg's decision. He submitted that even if the judge had correctly expressed himself in paragraph 10, the outcome of the appeal would have been the same in light of the evidence as a whole. Judge Beg's decision had been the starting point, and the judge had found that no new evidence altered that position.

14. In reply Mr Briddock submitted that there had been evidence of an ongoing marriage between the Appellant and her husband. He emphasised the omission of the word "predominant" in paragraph 10 and the failure of the judge to expressly state where the legal burden of proof rested on the core issue in the appeal.

Decision on error of law

15. I reserved my decision on whether there were material errors of law in this case.

16. I have concluded that there are no such errors and I now give my reasons.

17. As expressed in paragraph 10 of the decision, the judge's direction as to what constitutes a marriage of convenience is arguably wrong, or at least incomplete. Simply obtaining an immigration advantage is not the test. In light of the Supreme Court's judgment in Sadovska, the question is whether the "predominant purpose" of entering into the marriage was to obtain immigration advantage. On the face of it, the omission of the term "predominant" from the judge's self-direction would seem to be significant. However, the judge was not necessarily wrong in stating that "immigration advantage" constitutes the underlying basis for what constitutes a marriage of convenience. The questions in this case are really whether, as a matter of substance and having regard to the decision as a whole, that the judge actually applied the correct test, or whether the outcome of the appeal would have been the same if the correct test had in fact been applied.

18. Looking at the judge's decision as a whole there are a number of significant factors which in my view point towards the conclusion that there is no error, or that any error is immaterial.

19. First and foremost is the previous decision of Judge Beg, which the judge has clearly had well in mind throughout his decision. Judge Beg's decision is thorough and clear. The adverse findings are damning, and it is beyond any doubt that she had found that the Respondent had discharged the burden upon her at that time. As the judge rightly says in paragraph 11 of his decision, these adverse findings constituted the starting point for his assessment. In that same paragraph he correctly directs himself to the relevant Devaseelan principles. The existence of Judge Beg's decision was always going to make the Appellant's case a significant uphill struggle.

20. Another obstacle in the Appellant's path is the fact that the issue of whether the marriage was one of convenience is one involving a fixed point in time, namely the contracting of the marriage itself. This much is recognised by the judge in paragraph 18. Any evidence indicating an on-going relationship between the Appellant and her husband would have required very real cogency in order to assist. In the event, the judge was less than impressed with it.

21. Having considered the judge's decision as a whole it is clear to me that he had full regard to all of the evidence placed before him. Some of this had already been assessed by Judge Beg, and he quite properly concluded that there was no basis whatsoever for him to go behind her findings in this regard. In respect of evidence post-dating Judge Beg's decision, he deals with it perfectly adequately at paragraphs 15, 16, 20 and 24. Therefore, he was not restricting himself solely to Judge Beg's findings, but was considering the evidence as a whole, as he was bound to do.

22. Reading the decision holistically, (and leaving aside for the moment the burden of proof issue, to which I will turn, below) it is clear enough to me that either the judge was in fact applying the correct test for what constitutes a marriage of convenience (the "predominant purpose" test), or that if he were to have applied the correct test his ultimate conclusion would have been the same, namely that this was a marriage of convenience.

23. The decision of Judge Beg coupled with his own separate findings pointed him in one direction only: the predominant purpose for contracting the marriage was for the Appellant to obtain an immigration advantage. That conclusion was open to him. Indeed, on the basis of the previous decision and the judge's own findings, it is difficult to see how he could have come to any other conclusion.

24. I turn now to ground 2. I acknowledge Mr Briddock's point in relation to paragraph 25: the judge has not expressly stated that the Respondent has discharged the legal burden of proof resting upon her and shown that the marriage was one of convenience only. Having said that, in paragraph 4 the judge has expressly set out a correct direction as to where the ultimate burden lay. It would be wrong of me to simply discount this as having no effect on what approach the judge subsequently adopted.

25. In light of the considerable obstacles faced by the Appellant emanating from Judge Beg's decision, the Devaseelan principles, and the judge's own findings in respect of the new evidence, I conclude that the judge was in effect following the correct

approach and concluding that the burden rested with the Respondent, and that she had discharged it in this case.

26. Alternatively, and based upon the actual words employed in paragraph 25, I would conclude that the judge has, again in light of all of the evidence, found that the Appellant had failed to provide a plausible rebuttal of the Respondent's initial case against her. For the judge to have reached this conclusion would have been unsurprising given the contents of Judge Beg's decision, the Devaseelan principles, and his own findings on the new evidence. If this were indeed the conclusion he reached, it would simply show that the Appellant had failed to rebut in any plausible way the Respondent's reasonable grounds of suspicion (together with the evidence adduced in support of that), and therefore the Respondent would have discharged the legal burden upon her by default, as it were. On either scenario, there is no material error of law here.

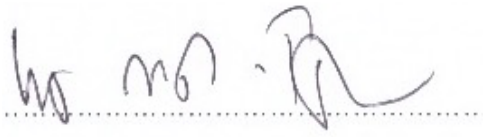
27. In light of the above, the Appellant's appeal to the Upper Tribunal fails and the decision of the First-tier Tribunal stands.

Notice of Decision

The decision of the First-tier Tribunal does not contain any material errors of law.

The Appellant's appeal to the Upper Tribunal therefore fails, and the decision of the First-tier Tribunal stands.

No anonymity direction is made.



Signed Date: 3 October 2017

Deputy Upper Tribunal Judge Norton-Taylor