Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: EA/05863/2016
IA/24777/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 June 2017	**On 18 August 2017**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

HASEED UR RAHMAN MOHAMMED First Appellant
VINICHA LACMIDAS Second Appellant

(ANONYMITY DIRECTION NOTE MADE)

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Representation:
For the Appellants: Mr V Makoi, Counsel instructed by Maalik & Co Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are married to each other. They appeal with the permission of the First-tier Tribunal against the decision of the First-tier Tribunal dismissing their different but linked appeals against a decision of the Secretary of State that theirs was a marriage of convenience.
2. In the case of the first appellant the decision was to refuse him a residence card to which he would have been entitled if the Secretary of State was satisfied that his was a genuine marriage. In the case of the second appellant the appeal was against the decision to remove her because the Secretary of State was satisfied that the second appellant had abused her rights as an EEA national exercising treaty rights because, contrary to the requirements of 21B(c), she had assisted another person to enter a marriage of convenience.

3. The First-tier Tribunal Judge, with respect, clearly misdirected himself at paragraph 4 of the decision when he used what appears to be a standard paragraph usually appropriate in appeals before the Tribunal saying the burden of proof is on the appellant. This is clearly not the case where the Secretary of State is alleging that the marriage was a marriage of convenience. The First-tier Tribunal was clearly familiar with the case of **Papajorgji v Entry Clearance Officer, Nicosia [2012] UKUT 38** where the Tribunal ruled that the correct direction was whether "in the light of the totality of the information before me, including the assessment of the claimant's answers and any information provided, am I satisfied that it is more probable than not that this is a marriage of convenience?"

4. This direction was expressly approved by the Supreme Court in the case of **Sadovska and Another v SSHD [2017] UKSC 54**. The judgment in that appeal was given after I heard this case but I decided it was not necessary to reconvene the hearing as, with respect, the decision of the Supreme Court is clear and it emphasised rather than changed the law.

5. However as well as approving the decision in **Papajorgji** Lady Hale, who gave the leading judgment, said at paragraph 28:

> "One of the most basic rules of litigation is that he who asserts must prove. It was not for [the appellant] to establish that the relationship was a genuine and lasting one. It was for the respondent to establish that it was indeed a marriage of convenience."

6. Notwithstanding the clear error on the face of the Decision it must be acknowledged that in the case of the first appellant the First-tier Tribunal identified the necessary test from **Papajorgji** and Mr Clarke argued, persuasively, that the apparent error should be disregarded because in fact the correct test was followed. Whilst I see some inherent merit in that argument as far as the case of the first appellant is concerned it does not transfer to the second appellant. In the case of the second appellant the judge said at paragraph 31:

> "On the law quoted above I am satisfied that the Secretary of State was entitled to come to the conclusion that this appellant should be removed on the grounds of abuse of rights."

7. That does not suggest to me that the First-tier Tribunal was asking itself if the Secretary of State had proved to its satisfaction that the marriage was a marriage of convenience but that the First-tier Tribunal was, wrongly, reviewing the decision. I should not have to try and engage in intellectual gymnastics to reconcile the required and declared position. The burden of proof and the independence of the Upper Tribunal's decision are essential to the proper discharge of its duties and I am not satisfied that these duties were discharged in the case of the second appellant.

8. It has always been the position that the appeals should be determined together and this reason alone causes me to be satisfied that both decisions should be set aside.

9. I also note for the benefit of anyone who may be hearing this appeal again that the decision in the case of the second appellant required proper analysis of whether removal was proportionate once the abuse of rights had been

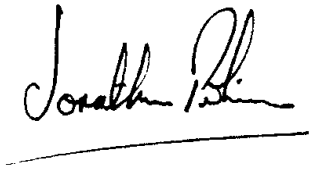
established and although this was recognised by the judge it was not explained beyond stating that the judge was satisfied that it was proportionate.

10. However there is an additional argument in the case of the first appellant and that is that the First-tier Tribunal in reaching its conclusion did not show a proper appreciation of the contrary arguments supporting the contention that theirs was a genuine marriage. After some reflection I have decided that this too is made out. There were inconsistencies in the account that were seized upon by the Secretary of State and accepted by the First-tier Tribunal Judge who found no satisfactory explanation. However it is necessary to set inconsistencies or other deficiencies in the evidence in the context of the evidence as a whole and although the First-tier Tribunal may well have paid lip service to this requirement I am just satisfied that it was really necessary to show a proper appreciation of the case and a proper analysis to have set out more clearly the matters in which people were in agreement and why, if this be the case, the judge was not satisfied on an overall assessment that the helpful answers did not outweigh the unhelpful answers.

11. I have taken heed of Mr Clarke's submissions and I do agree that I have to be concerned with what the judge did rather than what he said. If there was only one appellant here it may be that I would have reached a different conclusion but the fact is there are two appellants whose cases were heard together and I am satisfied that it is not at all clear that the correct burden of proof was applied in the case of the second appellant.

12. Putting all these things together I set aside both decisions and direct that they be heard again in the First-tier Tribunal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 18 August 2017