



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/01696/2017

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre  
On 11<sup>th</sup> June 2018

Determination & Reasons Promulgated  
On 12<sup>th</sup> September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR ZIAQAT HUSSAIN  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Hassan (Solicitor), Equity Law Chambers Solicitors  
For the Respondent: Ms H Aboni (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge G. R. J. Robson, promulgated on 9<sup>th</sup> November 2017, following a hearing at Bradford on 18<sup>th</sup> August 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter came before me.

The Appellant

2. The Appellant is a male, a citizen of Pakistan, who was born on 18<sup>th</sup> January 1988. He appealed against the decision of the Respondent dated 30<sup>th</sup> March 2017 refusing his application for a residence card on the basis that he had married a Latvian citizen, Mrs Ludmila Smirnova, who was working in the United Kingdom.

3. The relevant law is Regulation 17(1)(e) of the EEA Regulations 2006, which requires an applicant to prove that they are a family member of an EEA national, as well as Regulation 7, which details those who are considered to be family members of an EEA national. Regulation 2 also states that a spouse does not include a party to a marriage of convenience.

### **The Determination of IJ Robson**

4. By the time that this appeal came before Judge Robson, there had been three applications by the Appellant for a residence card. Two previous applications had been rejected on the basis of that the Appellant had entered a marriage of convenience. The first was refused on 24<sup>th</sup> October 2014, and the subsequent appeal had been dismissed by Judge Ennals in a decision promulgated on 13<sup>th</sup> April 2015. Judge Ennals had found the marriage to be one of convenience.
5. Against this background, Judge Robson, hearing the Appellant's appeal on 23<sup>rd</sup> February 2018, took as his starting point the decision of Judge Ennals, on the basis of established jurisprudence in the case of **Devaseelan**, paragraph 37 of which acknowledges that the first decision stands as an assessment of the claim the Appellant has made, and as an assessment that was before the first judge, it should simply be regarded as unquestioned, although paragraph 38 then goes on to say that the second judge must be careful to recognise that the issue before him is not the issue that was before the first judge, should that be the case.
6. Even so, Judge Robson concluded that, "the burden of proof to demonstrate that this was a marriage of convenience is, I find, on the Respondent and that burden was discharged as found by Immigration Judge Ennals (paragraph 37).
7. However, Judge Robson ended the determination by concluding that, "I record the fact that the relationship of the Appellant and the Sponsor is, and continues to be, one that is genuine and subsisting" (paragraph 40).

### **The Decision of the Upper Tribunal**

8. Upon an appeal being made by the Appellant against the decision of Judge Robson, the matter went before DUTJ Hall, who earlier recognised that the current appeal was one where he judge had found at paragraph 40 that the Appellant and the Sponsor have a genuine and subsisting relationship. He heard submissions that Judge Robson had not decided the appeal on the basis of the evidence before him, but had attached more weight to the previous Tribunal decision of Judge Ennals, which was promulgated when the Appellant and the Sponsor were newly married and did not have any children. The judge had not attached due weight to the evidence of cohabitation and intention to live together. Moreover, there were now two children of the marriage. The first was born on 17<sup>th</sup> August 2015 and the second was born on 7<sup>th</sup> October 2016 (paragraph 12).
9. DUTJ Hall went on to conclude that this was a case where sufficient time had passed since the decision of Judge Ennals was made in April 2015, and the consideration of the appeal by Judge Robson in August 2017, such that "the judge acknowledged that

the couple had a genuine and subsisting relationship, and had two children. However, the judge appears not to have attached any weight to this evidence, which was not before Judge Ennals,” and had dismissed the appeal (paragraph 20). DUTJ Hall concluded that the strictures in Devaseelan had been incorrectly applied and that Judge Robson “materially erred in law in concluding that notwithstanding different circumstances, that he was in fact bound by the previous decision” (paragraph 21).

10. DUTJ Hall gave directions that the matter should be determined substantively by the Upper Tribunal with the followings points in mind. First, that taking the decision of Judge Ennals as a starting point, whether it is the case that the Appellant and the Sponsor entered into a marriage of convenience. Second, that the question of a marriage of convenience is to be determined on the basis of the intention of the parties at the time that the marriage was entered into, with the focus on whether the aim of the marriage was to gain an immigration advantage. Third, that it would be appropriate to consider nevertheless evidence concerning the relationship between the parties after the marriage, “as this can cast light upon their intention at the time of the marriage” (paragraph 19).
11. It is in these circumstances, that the matter has returned back to the Upper Tribunal to be determined by me.

### The Hearing

12. At the hearing before me on 11<sup>th</sup> June 2018, Mr Hussain, appearing on behalf of the Appellant, drew attention to the fact that there were now two children of the marriage, which was not the case when Judge Ennals had first heard the appeal in 2015, but was indeed the case when Judge Robson determined the appeal in 2017.
13. He referred to the case of Molina [2017] EWHC, which makes a distinction between a sham marriage and a marriage of convenience, to conclude that despite the fact that there was a genuine relationship, and in the absence of any deception or fraud as to its existence, a marriage of convenience could exist.
14. Indeed, Mr Hussain submitted that Molina was argued before Judge Robson, when it was pointed out that that case focused on the intention of the parties, but the intention of the parties here was for the Appellant and for Mrs Ludmila Smirnova, to live together as man and wife, as was evident from the fact that they had two children, and there was evidence of cohabitation, such that on a balance of probabilities, “this was a marriage of substance and a marriage that was not entered into to gain an immigration advantage” (see paragraph 34 of the determination of Judge Robson).
15. Mr Hussain submitted that the couple here were still living together with their two children. Nothing could be more demonstrative of their intention. He also submitted that since the case of Molina, there had been a decision in Sadovska [2017] UKSC on 26<sup>th</sup> July 2017, which was also put before Judge Robson (see paragraph 33 of Judge Robson’s determination). In that case, submitted Mr Hussain, Lady Hale had concluded that, it was not for Ms Sadovska to establish that the relationship was a genuine and lasting one. It was for the Respondent to establish it was indeed a marriage of convenience” (paragraph 28).

16. For her part, Ms Aboni, helpfully handed up the judgments in both **Molina** and **Sadovska** (which Mr Hussain had neglected to do) and proceeded to rely upon the refusal decision. She submitted that Judge Robson's decision was entirely sustainable because, although he does state that the marriage was genuine and subsisting at the end of the determination (at paragraph 40) the question still remained as to what the true intention of the marriage was at the time of its inception.
17. Second, the marriage had previously been found to be one of convenience, on more than one occasion.
18. Third, the case of **Molina** [2017] EWHC 1730 established that, "a 'marriage of convenience' may exist despite the fact that there is a genuine relationship and the absence of any deception or fraud as to its existence. The focus is upon the intention of one or more of the parties ..." (paragraph 73). That decision, made by Judge Grubb, sitting as Deputy Judge of the High Court, was based upon what the Court of Appeal had said in **Rosa** [2016] EWCA Civ 14 where Richards LJ had stated that the true focus in determining whether a marriage is one of convenience is to look to the intention of the parties in contracting the marriage" (paragraph 66 of **Molina**). Fourth, the Appellant had a poor immigration history. He came to the UK as a visitor on 22<sup>nd</sup> December 2009. He remained illegally thereafter until apprehended on a routine traffic stop on 22<sup>nd</sup> February 2018. He then promptly claimed asylum on 28<sup>th</sup> February 2012. This was refused on 13<sup>th</sup> November 2013. On 21<sup>st</sup> July 2014 he applied for an EEA residence card on the basis of his marriage with a Latvian citizen, Mrs Ludmila Smirnova. Yet, it must not be overlooked that when the Appellant and his partner got engaged, which was on 14<sup>th</sup> February 2014, this was at the time of his asylum appeal, and while the Appellant did mention this at the appeal, the Sponsor herself did not provide supplementary evidence to support this.
19. Finally, if Judge Ennals' determination is the starting point, then it must not be forgotten that there was evidence of Mrs Ludmila Smirnova's pregnancy with her first child, before that judge, and yet the conclusion that the marriage was still one of convenience, had been found to be sustainable at the time. It remained open to the Appellant, on the basis of her finding that his relationship was genuine and subsisting, to make an Article 8 application outside the Rules.
20. In reply, Mr Hussain submitted that, in the light of the fact that two judges had found the relationship to be genuine and subsisting, the Respondent had provided no evidence to show that it was a marriage of convenience. Whilst it was accepted that the Appellant entered the UK as a visitor in the manner that he did, and did then go on to remain illegally, that in itself did not imply that the marriage was one of convenience, given the fact of cohabitation, the birth of their children, and the finding that their relationship was genuine and subsisting.

### **Remaking the Decision**

21. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the following reasons.

22. First, this is a case where there has been evidence concerning the relationship between the parties after their marriage, which I find does cast a flood of light on their intention at the time of the marriage, namely, the evidence of their cohabitation, and the birth of their two children on 17<sup>th</sup> August 2015 and 7<sup>th</sup> October 2016, together with a expressed finding that their relationship is genuine and subsisting by a previous judicial Tribunal.
23. Second, whilst it is the case that Molina in the High Court, stands for the proposition that a marriage of convenience may exist despite the fact that there is a genuine relationship and in the absence of deception or fraud, as to his existence, the more recent decision of the Court of Appeal in Sadovska, makes it clear that the burden of proof to establish that this was indeed a marriage of convenience, lies not upon the Appellant and her sponsoring partner, but upon the Respondent Secretary of State (see paragraph 28 of Sadovska). In this case, there has simply been an allegation that the marriage is one of convenience. Whereas the reason for the allegation is entirely understandable given the Appellant's discreditable immigration record, it is still nothing more than a bare assertion. That allegation has to be construed in the context of the hard facts in this case, of the Appellant and the Sponsor living together, and having children of their own, in a relationship that is genuine and subsisting.
24. Finally, it is worth emphasising that the term "marriage of convenience" is a term of art. It is defined in Directive 2004/38/EC on the right of citizens of the union and their family members to move and reside freely within the territory of the member states, as well as the 2009 communication, as a marriage the "*sole purpose of which is to gain rights of entry and residence in the European Union*". Nevertheless, the European Commission's more recent handbook on addressing the issues of alleged marriage of convenience between EU citizens and non-EU nationals, dated 26<sup>th</sup> September 2014, in the words of Lady Hale in Sadovska,

*"Suggests a more flexible approach, in which this must be the predominant purpose. It is not enough that the marriage may bring incidental immigration and other benefits if this is not its predominant purpose. Furthermore, except in cases of deceit by the non-EU national, this must be the purpose of them both."* (Paragraph 29 of Sadovska).

Plainly, the marriage of the Appellant to Mrs Smirnova has brought "incidental immigration and other benefits", but it cannot be said that this has been "its predominant purpose".

### Notice of Decision

25. This appeal is allowed.
26. No anonymity direction is made.

Signed  
Deputy Upper Tribunal Judge Juss

Date  
8<sup>th</sup> September 2018

**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have made a fee award of any fee which has been paid or may be payable.

Signed  
Deputy Upper Tribunal Judge Juss

Date  
8<sup>th</sup> September 2018