Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01755/2018

THE IMMIGRATION ACTS

Heard at Glasgow
On 28 February 2019

Decision & Reasons Promulgated
On 04 March 2019

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

HAFIZ UDDIN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by Berlow Rahman, Solicitors, Glasgow
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals against a decision by First-tier Tribunal Judge Swaney, promulgated on 10 October 2018, dismissing his appeal against refusal of an application for a residence card.

2. The first ground of appeal is that the FtT erred by failing to apply *Sadovska v SSHD* [2017] UKSC 54, which held at [28] that it is for the respondent to establish that a marriage is one of convenience.

3. The FtT directed itself at [19] that there is "… an evidential burden on the respondent to show that there is evidence capable of pointing to [the

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conclusion that the marriage is one of convenience]. Once the respondent has discharged that burden, it is for the applicant to show that the marriage is not one of convenience." *Papajorgji* [2012] UKUT 00038 is cited.

4. Mr Govan pointed out that *Papajorgji* was referred to at [16] and [28] of *Sadovska*. He said that no different rule was laid down, and that the FtT's self-direction remained correct.

5. In *Papajorgji* at [20] the UT thought the correct approach was "an evidential burden in the first place on [the SSHD] and then shifting … in the light of the relevant information rather than a formal legal burden" – which is not as emphatic as suggested by the FtT, even if *Papajorgji* stands as an authority.

6. In *Sadovska* the Court at [31-32] saw a difference between her as an EEA national whose rights were being taken away and the co-appellant Malik, who had no established rights. The appellant here is not the EEA national. However, I do not think that the Court intended tribunals to apply two different schemes.

7. At [14], the Court found it apparent that the FtT's "whole approach" was to require proof from the appellants that the marriage proposed was not one of convenience, rather than to require the SSHD to prove that it was. The outcome was a remit to the FtT for a full rehearing for both appellants, applying the correct approach.

8. The FtT's decision in this case says at the outset of its analysis at [24] that the burden on the respondent has been satisfied. Its approach to the substance of the case, from [25] onwards, is all on basis of an onus on the appellant.

9. At the end of [28] of *Sadovska* the Court said:

> "One of the most basic rules of litigation is that he who asserts must prove. It was not for Ms Sadovska 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."

10. I do not think that the Court intended that to be limited to appeals by EEA nationals, or intended future tribunals to think in terms of shifting burdens.

11. The view I have taken of *Sadovska* is also the view taken in *MacDonald's Immigration Law and Practice*, 2nd supplement to 9th ed., 6.191 and 20.122.

12. Ground 1 is established.

13. The second ground of appeal is that the FtT should have taken the previous grant of a residence card "as a strong starting point".

14. The authority cited is *HS* [2011] UKUT 165, where it is said that previous acceptance of the exercise of treaty rights is "a material consideration".

15. At [26] the FtT said that the fact that a card had previously been issued was "relevant but not determinative".

16. The context of *HS* was different. The principle may be much the same, but the ground overstates it. There is little if anything between “a material consideration” and “relevant but not determinative”.

17. Ground 2 shows no error. At best, it feeds into ground 1; the appellant may have had a starting point which was not the same as an EEA national, but was stronger for the previous recognition of entitlement to a card.

18. Ground 3 challenges the FtT’s analysis of the evidence as “wholesale speculation”, under sub-headings (i) – (vii), all going to what the judge made of discrepancies, or alleged discrepancies, arising from the extensive interview records.

19. Mr Winter developed this ground further, with a series of further examples taken from the respondent’s refusal decision and the interview records.

20. Mr Govan accepted that some discrepancies were minor, and that there was no point so powerful that it might have been decisive on its own. However, he said that those points which survived further scrutiny were cumulatively enough to support the conclusion reached.

21. This ground was essentially an adequacy of reasons challenge. It is sufficient to say that at least some of the reasons given were shown to be debatable and others weak. The reasons which might survive are not of such strength that the outcome must have been the same, irrespective of the error on ground 1.

22. Mr Winter, correctly, did not press grounds 4 and 5. Ground 4 is only a generality and a disagreement. Nothing in ground 5, (i) – (iii), has any purchase.

23. Grounds 1 and 3 together require the decision of the FtT to be set aside. It stands only as a record of what was said at the hearing.

24. The nature of the case is such that it is appropriate under section 12 of the 2007 Act, and under Practice Statement 7.2, to remit to the FtT for an entirely fresh hearing.

25. The member(s) of the FtT chosen to consider the case are not to include Judge Swaney.

26. Although the previous hearing in the FtT was at Taylor House, future listing should be at Glasgow.

27. No anonymity direction has been requested or made.

UT Judge Macleman

28 February 2019