Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02514/2018

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 16 July 2019	**On 16th September 2019**

Before

UPPER TRIBUNAL JUDGE PLIMMER
DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

MUHAMMED [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Laughran, Counsel, instructed by Solicitors' Inn Limited
For the Respondent: Mr Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1 This is the appellant's appeal against the decision of Judge of the First tier Tribunal Durance dated 18 December 2018, in which he dismissed the appellant's appeal against the respondent's decision of 7 March 2018 refusing him a residence card under the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regs') confirming a right of residence in the United Kingdom as a family member of an EEA national who was a qualified person.

Background

2 There is some history to the appellant's applications for residence cards. The appellant is a national of Pakistan, and originally entered the United Kingdom with a valid entry clearance as a student in or around 2009. He obtained extensions of leave to remain as a student until 12 September 2014. The appellant married Ms Eliza [O] ('EO'), a national of Poland, on 5 April 2014, and on 20 June 2014, the appellant applied for a residence card in relation to his marriage to EO.

3 Prior to the marriage on 5 April 2014, it appears that the registrar at Manchester Register Office had, on 4 March 2014, provided a report to the respondent under s.24 Immigration and Asylum act 1999 under which provision *inter alia* a Registrar, if having reasonable grounds for suspecting that a proposed marriage will be a sham marriage, must report his suspicion to the Secretary of State without delay and in such form and manner as may be prescribed by regulations. Throughout the various proceedings before the Tribunal which are set out in more detail below, the only evidence provided by the respondent as to the content of that report ('the s.24 Report') is a print out from the respondent's 'CID' (Case Information Database) system, relating to an entry apparently created on 4 August 2014, the entire content of which reads as follows:

> "Please note a section 24 report of a suspicious marriage was received on 4.3.2014 from Manchester Register Office.
>
> The reasons for suspicion given by the registrar were:
>
> One party giving the impression of knowing very little about the other person.
>
> Either party referring to notes to answer questions about the other person.
>
> One of the parties seemed unable to give the full name or address of the other party.
>
> The wedding was booked to take place on 5.4.2014 at 11.10."

4 It is apparent that notwithstanding any concerns raised by the registrar on 5 April 2014, the marriage took place on that date.

5 In considering the appellant's application for a residence card in 2014, the respondent interviewed the Appellant and EO on 11 September 2014. In a decision dated 22 September 2014, the respondent refused the appellant a residence card. The respondent also made a decision in relation to EO, which was to refuse her a registration certificate. The respondent asserted that the marriage between the appellant and EO was one of convenience.

6 Both the appellant and EO appealed against that decision, their appeals coming before First tier Tribunal Judge Mather on 23 December 2014.

7 In a decision dated 9 January 2015 dismissing the appeals, Judge Mather directed herself at in law at [5] - [6] as to the burden of proof in the appeal as follows:

> "5. The burden of proof in this case is upon the Appellants and the standard of proof is upon the balance of probability. It is on the applicant/appellant to establish any EEA right of admission or residence ...
>
> 6. I have also reminded myself of the case of Papajogji (EEA Spouse; marriage of convenience) Greece 2012 UKUT 00038."

8 The judge noted at [8] the content of the s.24 Report. She then held at [9]: "I do not accept the Appellants are credible witnesses." The judge was not satisfied about a number of matters, set out at [10]-[16]: certain evidence given by the appellant and EO regarding the website on which it was said they met ('BearShare'); when the appellant told EO about his temporary immigration status in the UK; certain evidence given by the appellant regarding his qualifications and employment; evidence given by the appellant and EO regarding the circumstances of their second date, the purchase of an engagement ring, and when they agreed to marry; and the quality of the evidence given by supporting witnesses in the appeal.

9 The judge then held:

> "17. I accept the report made by the Registrar made pursuant to Section 24. I do not accept *(the appellant's representatives)* submission that it was made in bad faith.
>
> 18. I have reminded myself of the case of Papajorgji (check). I am satisfied on the totality of the evidence before me, it is more probable than not that this is a marriage of convenience. I have taken into account Appendix A of the Judgement.
>
> 19. As such, I am satisfied that the appellant entered into it knowing that they would give the second appellant a platform to stage the application made.
>
> 20. I accept the appellants lived together for the purpose of making the applications and were able to give many correct answers in their marriage interview. That does not obviate my finding as to the reasons for their claimed marriage.
>
> 21. I find the Appellants have not discharged the burden of proof as required and I therefore find that the decisions of the respondent appealed against are in accordance with the law and the applicable Regulations."

10 The appellant made a second and then third application for a residence card in relation to his marriage to EO. The Respondent made a further appealable decision on 16 March 2016 refusing the appellant a residence card, again asserting that the appellant's marriage to EO was one of convenience. The appellant appealed against that decision, the appeal being heard by Judge of the First tier Tribunal Hudson on 11 July 2017. The judge dismissed the appeal in a decision dated 21 July 2017. The appellant was then represented by Mr Thornhill of Thornhill Solicitors.

11 Judge Hudson noted at [13] that "Mr Thornhill accepts that the starting point is IJ Mather's determination but refers me to paragraph 40 of Devaseelan [2002] UKIAT 00702 ..." (in relation to an argument that Judge Mather may have proceeded under a mistake of fact as to the nature of the BearShare website on which the appellant and

EO were said to have met, and whether it was a dating site, or music sharing site). At [15] Judge Hudson held that:

> "I am obliged to take my starting point the determination of Immigration Judge Mather dated 9 January 2015. She concluded that (the appellant and EO) were not credible. She further considered that they had produced two false witnesses to support their claim. While I accept she did make findings in relation to the BearShare website, I do not consider them to be the finding from which all other findings flowed."

12 Judge Hudson then: set out certain discrepancies within the evidence relating to EO's employment around the time of her marriage to the appellant [16-17], and discrepancies between answers given during the marriage interviews of 11 September 2014 [18]; noted certain new evidence, but commented that most would have been available for the previous hearing but was not produced [19]; noted limitations in the evidence of contact prior to marriage [20]; noted that photographs relied upon by the appellant were limited and appeared staged [21]; deduced from certain petrol receipts that the appellant could only have spent a short time visiting EO on or around 19 May 2013 as alleged [22]; decided to pay no regard to the demeanour of the appellant and EO at the hearing before her [23]; held that certain Facebook posts and an email were impersonal and not suggestive of a genuine relationship [24]; noted that phone records relied upon by the appellant post dated the decision appealed against and were limited [24]; held that the timing of the appellant's proposal to EO was implausible, and that a Christmas card sent by the appellant to EO in December 2013 had been produced with the intent of using it as evidence [25]; and noted the limitations of, and discrepancies within, certain evidence given by supporting witnesses [26].

13 Judge Hudson then held:

> "27. In considering whether Mr [A] meets the criteria for a permanent residence card, I am mindful that the burden of proof is ordinarily upon the appellant and the standard of proof required is a balance of probabilities. However, in this case it is the respondent who makes the claim that he is in a marriage of convenience and therefore must prove it to the same standard. I am satisfied on the totality of the evidence before me, that it is more probable than not that this is a marriage of convenience (Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038) IAC)."

14 The judge then dismissed the appeal.

15 The appellant made a fourth and then fifth application for residence card, resulting in an appealable decision of 7 March 2018 (the decision which is the subject of the present proceedings). Again, the respondent refused the appellant a residence card on the basis that the appellant's marriage to EO was one of convenience. Further, at page 5 of 6 of the decision, the respondent queried certain evidence provided by the appellant as to EO's employment, and concluded that EO was not exercising treaty rights in line with regulation 6 of the 2016 Regs.

Decision of First-tier Tribunal Judge Durance

16 The appellant appealed against that decision, the appeal coming before Judge Durance on 6 December 2018. The appellant was by then no longer represented by Thornhill Solicitors, but by those now acting.

17 Judge Durance summarised the previous history of the appeals at [7-21]. The judge then said as follows at [13]:

> "I have considered the section 24 report dated 4 August 2014. The reasons given by the registrar were that both parties had notes to assist them to answer questions about each other. It was noted that one of the parties did not know the full name or address of the other party. In addition, one party seemed to know very little about the other person. That document is in the original bundle which was before Judge Mather."

18 Judge Durance observed at [23] that the appellant sought to rely upon a witness statement in the present appeal, but observed that:

> "In many respects, his witness statement reads like a rebuttal statement to a reasons for refusal letter. However, this statement is a rebuttal statement to the final decision of an Immigration Judge. This underscores a central difficulty with the appellant's case. Essentially, he is seeking to overturn a previous decision which has been finally determined and which has no onward rights of appeal. He had competent representation and he has elected not to appeal much of what he says in his witness statement has already been the subject of findings of fact. For instance, the appellant is still contesting elements relating to the interview which took place in September 2014. The appellant takes the Tribunal through various banking transactions in 2013 and 2014. The fundamental difficulty with this is that the matter has already been resolved and determined against him."

19 The judge set out at [34-41] that certain further evidence was sent to the Tribunal after the hearing, without permission of the Tribunal, being copies of advice given to the appellant by Thornhill Solicitors. The appellant must have sought advice from Thornhill's immediately after receiving the decision of Judge Mather, as on 14 January 2015 a letter from Thornhill's advised the appellant that there were no grounds of appeal against that decision. Further, a letter from Thornhill's of 24 July 2017, after Judge Hudson's decision, advised that there were similarly no grounds of appeal against that decision. Judge Durance, although noting that it was discourteous for the appellant to seek to rely upon such further evidence after the close of hearing, clearly decided to admit that evidence [38].

20 Judge Durance directed himself at [42] by reference to SSHD v D (Tamil) [2002] UKAIT 00702 (Devaseelan) and at [45], [47], 48], and [63] as to the purported effect of the decision of the Supreme Court in Sadovska v SSHD [2017] UKSC 54.

21 At [19] Judge Durance made his primary findings, for which reasons are given at [47] onwards. The judge held at [46(a)] that the starting point was the findings of fact reached by Judge Mather, and at [46(g)] that Judge Hudson had later made other findings of fact. At [46 (f) and (k)] the judge held that 'no evidence has been

advanced (to the Devaseelan standard) that the legal representation was negligent' in respect of the proceedings before Judge Mather or Judge Hudson respectively.

22 At [46(l)-(q)] Judge Durance held:

> "(l) on a balance of probabilities, I concluded that the appellant had not provided evidence which meant that those findings of fact should be disturbed.
>
> (m) I find that the appellant's repeated arguments in the lodging of new evidence seek to mask the critical finding of fact which was been reached in this case. That critical finding of fact was made by Judge Mather which was that an independent registrar was so concerned about the parties that s/he had encountered that the registrar went to the trouble of completing a s.24 notice. The evidence set out in that notice was neither petty nor trivial. On the contrary this was a well-founded basis to suspect that the couple were entering the wedding contract is a marriage of convenience.
>
> (n) Judge Mather heard submission to the effect that this s.24 statement had been made in bad faith and rejected this argument.
>
> (o) That evidence and those findings of fact pose a very high threshold to surmount when Devaseelan is in play.
>
> (p) The new photos, the new witnesses, the new witness statements do not surmount that threshold.
>
> (q) The appeal is dismissed."

23 At [48], within the 'reasons' section of his decision, the judge held as follows:

> "Much of the evidence which is relied upon by the appellant and Ms O postdates the marriage contract. In my judgement, there is a difficulty with this approach. A person could enter a marriage contract with the predominant intention of obtaining a residence card and then go about building up a picture of a relationship to contradict that. The Supreme Court made it clear that contrary evidence should predate the marriage contract and act as a rebuttal to any argument raised as to the marriage being one of convenience. That correlates to the acid legal test which is the predominant purpose of the marriage. It is not an evaluation of any purported relationship which has arisen afterwards. In that respect, the evidence which has been produced by those instructing the appellant and Ms O relating to events after the wedding, including letters from councillors and letters from fertility specialists do not really assist with the critical question as to whether or not the marriage was entered into with the predominant purpose of obtaining a residence permit."

24 Further, at [49] onwards, the judge held:

> "49. The starting point is to look at the findings of fact which had been made in early appeals. Those findings of fact have not been vitiated in law by the Upper Tribunal and those findings of fact stand. I have summarised those key findings of fact above.
>
> 50. The additional evidence from Thornhill's indicates that the appellant was advised that he did not have grounds of appeal. The author of the letter indicated that there was no material error of law. In my judgement, there is no evidence of omission or negligence by the solicitors insofar as their legal advice was

> concerned in respect of either Judge Mather's decision or Judge Hudson's decision. That rather disposes of the argument which has been advanced on behalf of the appellant there has been some failing. It is certainly not the case that the appellant's present solicitors have taken steps to identify what the error of professional standards was in the instant appeal and what action has been taken to remedy this via the SRA. Given what is said by Judge Ockelton above I find that the threshold is not satisfied in this regard.
>
> 51. In many respects, that is determinative of the appeal. Absent any arguable error from a legal representative insofar as a presentation of an earlier appeal is concerned then there is little scope to go behind a prior determination. That becomes a more ominous amount of the appellant to traverse another two appeals where findings of fact of (*sic*) been made."

25 The judge stated at [52] that he would nevertheless consider the appellant's evidence. At [54], the judge stated:

> "In my judgment, the fundamental difficulty that the appellant cannot overcome is the finding of fact which was made at the first hearing which related to the evidence from the registrar. That contemporaneous evidence was made in conjunction with the statutory obligation to report reasonable grounds for suspicion that a marriage is a sham marriage. The grounds identified by the registrar make it clear that both parties were using notes to answer questions about each other. Judge Mather focussed on the argument advanced by the appellant's solicitor that this registrar had acted in bad faith. This allegation was completely unsubstantiated. Judge Mather rejected that argument. I should add that such conclusion was one which I would endorse. The idea that a public official would go out of his or her way to falsify evidence against a complete stranger is frankly absurd. I note that at no juncture has the appellant tackled this matter head-on in any of his witness statements. I find the reason is that the appellant prefers to focus his attention on peripheral matters in the hope that it will distract the Tribunal from this core event. I find that this is powerful, compelling and entirely persuasive evidence from an independent third party who has reasonable grounds to suspect that the relationship is a sham. That evidence emanates from a person with wide experience of couples celebrating their nuptials. The evidence that the parties to the wedding had briefing notes about each other is highly persuasive and fulfils the legal criteria set out by the UKSC. Whilst the appellant has lodged numerous photos from social media which purport to show the couple together, there has been no plausible explanation for this evidence. I find that the reason that there is no plausible explanation is because there is no plausible explanation. A genuine couple who were entering into a marriage with each other would not leave notes about their partner.
>
> 55. In my judgement, the appellant's inability to tackle the contemporaneous observations of the registrar is highly problematic."

26 The judge noted at [62] that he had heard evidence from a further witness (a Mr Jamil), but held at [63]: "I found that the evidence of the witness adds very little to the appellant's case. The witness did not meet Ms O until 2016. As such his evidence with regard to the marriage of convenience is wholly immaterial. Adopting the UKSC rationale, he can add nothing to the question about the marriage contract."

27 The judge then noted at [64] that in any event there were certain inconsistencies and limitations of that witness's evidence.

28 The judge then held at [65]:

> "My own assessment of the evidence is that for the reasons already adjudicated upon, the respondent has discharged the burden of proving that the marriage was entered into as a marriage of convenience. Whilst there are elements of the interview which are consistent, there are equivalently elements of the interview which are lacking in consistency. When one adds up those inconsistencies to the evidence of the registrar above, I consider that the burden of proof has been discharged."

29 In considering at [68-69] whether the respondent's decision represented an unlawful interference with the appellant's rights under Article 8 ECHR (such consideration potentially being unnecessary, as the decision did not include any removal decision), the judge held as follows:

> "68. I do not accept that the couple are in a subsisting relationship. The appellate process indicates that the appellant seeks to obtain evidence to counter the findings of previous immigration judges. When findings are made to the effect that photos are staged, new photos are generated to attempt to determine otherwise. The collective evidence of a number of witnesses to the relationship has been rejected on the grounds that they have disclosed information which is either vague or discrepant with knowledge of Ms O. To that extent the production of new evidence has all the appearance of evidence which is being constructed to override earlier findings of fact. Those findings of fact all stem from an follow-on from the section 24 report.
>
> 69. There is evidence of fertility *(treatment)* but this is not evidence that the couple are in a relationship. It is evidence that Ms O is seeking fertility treatment and that the appellant has been involved in some consultations relating to this. However, the appellant has gone to some lengths to generate evidence which he feels will support his case for legal status in the UK. I do not find that this evidence shows anything other than the fact that Ms O is receiving fertility treatment. The semen analysis does not refer to the appellant by name [152] and as such I do not accept that the appellant has discharged the burden of proof in this regard."

30 The appeal was dismissed.

Appeal to the Upper Tribunal

31 The appellant appeals to the Upper Tribunal on grounds dated 1 January 2019. The grounds are, with respect, somewhat opaque in some of the arguments advanced, but argue, in summary, that the judge erred in law in:

(i) structuring his decision as he did, revisiting and rehearsing the reasons given by Judges Mather and Hudson, the structure of the decision being irrational or flawed (Grounds, para 5);

(ii) giving the impression that the judge has treated the decision of Judges Mather and Hudson as the endpoint for considering the core issues in the appeal, and the judge had closed his mind to the possibility that this was not a marriage of convenience (Grounds, para 5);

(iii) refusing permission for further evidence to be produced from the appellant by way of examination in chief (Grounds, para 5);

(iv) treating the starting point of his decision as being the findings in the decisions of judges Mather and Hudson, as, *prima facie*, both decisions appeared to contain an error of law such as that at paragraph 5 of the decision of Judge Mather which stated "the burden of proof, in this case, is upon the appellant", which represents a misdirection in law in cases involving allegations of a marriage of convenience; it was stated that this argument had been advanced before the judge; thus, it was argued that Devaseelan did not apply in the present proceedings (Grounds, para 6);

(v) failing to acknowledge the application made by the appellant to adduce further evidence post hearing, and failing to acknowledge that the respondent did, contrary to the suggestion by the judge, have an opportunity to respond to the application (Grounds, para 8-9);

(vi) erring in the consideration of the existence of a durable relationship between the appellant and EO, and in his consideration of fresh evidence; in particular proceeding under a mistake of fact at [69] that the evidence of fertility treatment showed only that EO was receiving fertility treatment, and that the semen analysis did not refer to the appellant by name, whereas the evidence before the judge did identify the appellant as the semen donor.

32 Permission to appeal was granted by Judge of the First-tier Tribunal Gibb in a decision dated 28 February 2019. Although summarising the appellant's grounds somewhat differently to the way we have done above, and suggesting that the appellant's argument that the judge had erred in his consideration of further documents provided after the hearing had little force, Judge Gibb found the remainder of the grounds arguable.

Submissions

33 On behalf of the appellant, Ms Laughran argued that para 30 of LD (Algeria) v Secretary Of State For Home Department [2004] EWCA Civ 804 established that 'perhaps the most important feature of the guidance (in Devaseelan) is the fundamental obligation of every special adjudicator independently to decide each new application on its own individual merits was preserved', but that the judge had, by characterising the appellant's desire to overcome the findings of the previous judges as a 'central difficulty' in his appeal, failed to perform that task. The judge had, at his para [12], noted that Judge Mather had stated that the appellant had not discharged the burden of proof, but had failed to recognise that such a finding by Judge Mather, contained at both paragraphs [5] and [21] of her decision, had represented a misdirection in law, notwithstanding that she had also referred at [6]

and [18] to the authority of Papajorgji. Judge Durance had erred in at least not considering whether it was appropriate, in those circumstances, to not treat Judge Mather's decision as the relevant starting point. Further, Judge Husdon had similarly erred in her decision when finding at her paragraph [15] that she was *obliged* to treat judge Mather's decision as her starting point in making the decision in the appeal before her. A misapprehension by the First tier Tribunal as to where the burden of proof lay was the very error, set out at [14] of Sadovska, which resulted in the Supreme Court deciding to remit the appeal in that case to the First tier Tribunal.

34 Further, in relation to the evidence which Judge Durance thought relevant to the issues in the appeal, Judge Durance misdirected himself in law as to the guidance given in Sadovska, which does not, contrary to Judge Durance's findings at [47]-[48], limit the evidence relevant to the existence of a marriage of convenience to the evidence of circumstances at the time of the marriage. The judge had, in appearing to find that there was no evidence that the semen sample used in EO's fertility treatment was the appellant's, failed to take into account evidence in the respondent's bundle at page E7/121, and the appellant's bundle at page [35].

35 Mr Tan argued that there was no material error in the judge's decision. Judge Durance had been correct to treat the decisions of Judges Mather and Hudson as the starting point his decision. He was entitled to have identified inconsistencies in the evidence provided by the appellant and EO. Mr Tan appreciated that Judge Mather *may* have recited the burden of proof incorrectly in her decision, but this did not and would not affect her findings; she had also made findings on the quality of the witnesses' evidence, and on the s.24 report. Judge Hudson had correctly directed herself in law as to the burden of proof. Further, Judge Durance did not misdirect himself in law as to the ratio of Sadovska; it was right to focus on the circumstances at the time of the marriage to determine whether it was one of convenience, not whether a relationship might have blossomed thereafter. Any mistake of fact or failure to take into account relevant evidence regarding the identity of the person giving the semen sample was not material to the outcome of the appeal, because that evidence did not relate to the circumstances at the time that the marriage of convenience was entered into.

36 In reply, Ms Laughran referred to para 39 of Rosa v Secretary of State for the Home Department [2016] EWCA Civ 14, where the Court of Appeal had found that a misdirection in law as to where the burden of proof lay did not, in that case result in a material error, on the basis that "this was not one of those rare cases that turns on where the legal burden of proof lies. The answer to the question whether the appellant marriage was a marriage of convenience was clear-cut." The issue is not clear-cut in the present case, she argued.

Relevant law

37 The headnote of Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 38 (IAC) provides:

> "i) There is no burden at the outset of an application on a claimant to demonstrate that a marriage to an EEA national is not one of convenience.
>
> ii) *IS (marriages of convenience) Serbia* [2008] UKAIT 31 establishes only that there is an evidential burden on the claimant to address evidence justifying reasonable suspicion that the marriage is entered into for the predominant purpose of securing residence rights.
>
> iii) The guidance of the EU Commission is noted and appended."

38 In Rosa v Secretary of State for the home Department [2016] EWCA Civ 14, the Court of Appeal held, *inter alia*

> "24. In my judgment, the legal burden lies on the Secretary of State to prove that an otherwise valid marriage is a marriage of convenience so as to justify the refusal of an application for a residence card under the EEA Regulations. The reasoning to that effect in Papajorgji, as endorsed in Agho, is compelling."

and

> "39. I have already held that the legal burden of proof on the issue of marriage of convenience lies throughout on the Secretary of State. It follows that the First-tier Tribunal was indeed in error in proceeding on the basis that it was for the appellant to show on the balance of probabilities that the marriage was not a marriage of convenience. In my judgment, however, the error was not material. This was not one of those rare cases that turns on where the legal burden of proof lies. The answer to the question whether the appellant's marriage was a marriage of convenience was clear-cut. The findings of the previous tribunal in her husband's appeal were sufficient to shift the evidential burden in this case onto the appellant, as was effectively recognised in her counsel's concession that the issues raised by the previous determination had to be dealt with. The appellant produced a body of evidence in an attempt to deal with them. But the tribunal found that the inconsistencies in the evidence of the appellant and her husband supported the conclusion of the previous tribunal that the marriage was one of convenience and that there was no satisfactory evidence that it had ever been the appellant's intention to live with her husband as husband and wife. The emphatic finding in paragraph 26 that "I am entirely satisfied that it is a marriage of convenience and always has been" is a fair reflection of the tribunal's overall reasoning and is the clearest of indications that the outcome did not turn on the tribunal's direction as to the burden of proof. It is fanciful to suggest that the finding might have been different if the tribunal had approached the matter on the basis that the legal burden of proof lay throughout on the Secretary of State."

and

> "41. ... The tribunal was correct to look at the evidence concerning the relationship between the appellant and her husband after the marriage itself (both before, during and after the husband's period of imprisonment), since that was capable of casting light on the intention of the parties at the time of the marriage. ..."

39 In Sadovska, where the appeal before the Supreme Court included an appeal against a decision to remove Ms Sadovska, an EEA national, for 'abuse of rights' on the

ground that she had attempted to enter into a marriage of convenience with a Mr Malik, the Court held:

> "14. Under the heading "Applicable law", the First-tier Tribunal judge said this, at para 7:
>
> > "In immigration appeals, the burden of proof is on the appellant and the standard of proof required is a balance of probabilities. In human rights appeals, it is for the appellant to show that there has been an interference with his or her human rights. If that is established, and the relevant article permits, it is then for the respondent to establish that the interference was justified. The appropriate standard of proof is whether there are 'substantial grounds for believing the evidence.'"
>
> It is apparent from his determination that his whole approach was to require Ms Sadovska and Mr Malik to prove that their proposed marriage was not a marriage of convenience, rather than to require the Home Office to prove that it was."

and

> "28. ... Furthermore, although the Regulations permit the respondent to take steps on the basis of reasonable grounds to suspect that that is the case, Ms Sadovska is entitled to an appeal where the facts and circumstances must be fully investigated. That must mean, as held in Papajorgji, that the tribunal has to form its own view of the facts from the evidence presented. The respondent is seeking to take away established rights. 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."

and

> "31. The First-tier Tribunal did not analyse her rights in this way. It was quite simply incorrect to deploy the statement that "in immigration appeals the burden of proof is on the appellant", correct though it is in the generality of non-EU cases, in her case. She had established rights and it was for the respondent to prove that the quite narrow grounds existed for taking them away. Nor did the determination address the issue of proportionality. It is impossible for this court to conclude that, had the matter been approached in the right way, the decision would inevitably have been the same.
>
> 32. The position of Mr Malik is different, for he has no established rights, either in EU law or in non-EU immigration law. In order to benefit from the Directive, he would have to show that he has a "durable relationship" with Ms Sadovska. However, article 3.2 requires the respondent to justify any refusal of entry or residence in such cases. So if he can produce evidence of a "durable relationship" (a term which is not defined in the Directive), it would be for the respondent to show that it was not or that there were other good reasons to deny him entry.
>
> 33. It is not impossible that a tribunal, properly directing itself, would reach different conclusions in the case of these two appellants. But it is impossible for this court to conclude that, had the matter been approached in the right way, the decision relating to Mr Malik would inevitably have been the same.

40 Finally, on the issue of the evidence that may be taken into account by the First-tier Tribunal upon little by the Supreme Court, the court commented as follows:

> "34. It follows that the appeal must be allowed and the case remitted for a full re-hearing by the First-tier Tribunal. In seeking to establish its case, the respondent will no doubt concentrate on the interviews, the discrepancies between the appellants' accounts, and the gaps in Ms Sadovska's knowledge of Mr Malik's family, together with the sentence in their statement of 28 March that their thoughts of living together and marriage had not yet "manifested into action" (which on 28 March was strictly true in that they were not yet living together or married but they had given notice of intention to marry). But in considering those discrepancies, the circumstances in which the interviews took place and the statement was made must be borne fully in mind. Furthermore, there were many matters on which their accounts were consistent. It turns out, for example, that Ms Sadovska's mother does indeed live in Lithuania, as Mr Malik said in explaining why she was not there. There is also a considerable body of evidence which supports their claim to have been in a genuine relationship, dating back some time before they gave notice of intention to marry. Should the tribunal conclude that Mr Malik was delighted to find an EU national with whom he could form a relationship and who was willing to marry him, that does not necessarily mean that their marriage was a "marriage of convenience", still less that Ms Sadovska was abusing her rights in entering into it. Their legal and their factual cases must be considered separately."

Discussion

41 Having set out above in detail the history of the appeal, and the reasons given for the decisions of Judges Mather, Hudson and Durance, we are able to state our own conclusions in rather shorter terms. There is nothing in grounds (i), (iii) and (v) as we have summarised them above. There is no error of law established by reason of the overall structure of the judge's decision; there is no reason advanced why it was necessary for further oral evidence by way of examination in chief, and no procedural unfairness appears to have resulted; and the judge did not err in relation to the post hearing evidence, which he clearly admitted.

42 However, we find that Judge Durance did err in law in finding that the starting point to his own deliberations were the findings of fact made by Judge Mather. We find that, as is now made clear beyond peradventure by the Supreme Court judgement in Sadovska, Judge Mather erred in law in directing herself as she did by directing herself that the burden of proof in the appeal before her lay on the appellant. We find that such error is not ameliorated by any reference by Judge Mather to the case of Papajorgji.

43 Although Judge Durance observed correctly that no appeal was brought by the appellant to the Upper Tribunal in relation to the decision of Judge Mather (or indeed against the decision of Judge Hudson), we find that Judge Durance erred in law in appearing to treat the lack of any appeal against those decisions as determinative against the appellant, in relation to the findings made in those decisions, notwithstanding a clear misdirection in law contained within Judge

Mather's decision. As per para 30 of LD Algeria, the guidance given in Devaseelan is just that, guidance, and issues determined in previous appeals are not to be treated as res judicata. We are of the view that Judge Durance, in the language he used in his paragraphs [23] ('central difficulty', and 'fundamental difficulty'), [46(m)] ('critical finding of fact'), [51] ('In many respects, that is determinative of the appeal'), and [54] ('core event'), has erroneously restricted his consideration of the appeal, particularly in light of the misdirection in law contained within Judge Mather's decision. Even if Judge Durance was right to be concerned that no appeal had been brought against the decisions of Judges Mather and Hudson at the time that they were made, he was wrong in law to treat the absence of any such appeal as a significant factor, given in particular that the Supreme Court in Sadovska, post dating the decisions of Judges Mather and Hudson, gives guidance which is even clearer than that provided in Papajorgji and Rosa, that in a case involving an allegation of marriage of convenience, the burden lies on the respondent.

44 Further, we find that as a result of the misdirection in law in Judge Mather's decision, Judge Hudson ought not to have treated herself as 'obliged' to treat Judge Mather's decision as the starting point in her own decision. Although Judge Hudson clearly had many of her own concerns regarding the appellant's evidence in the appeal before her, we cannot be sure that she would inevitably have come to the same conclusion in the appeal had she not misdirected herself in law by treating Judge Mather's decision as the starting point.

45 We are of also of the view that Judge Durance misdirected himself in law in appearing to find that it is part of the ratio of Sadovska that evidence relating to the question of whether a marriage is one of convenience should predate the marriage (Judge's decision, at [48] and [63]). We find that that it simply not part of the ratio of the Supreme Court's decision. The Court merely observed in the latter part of [34] that the evidence which was available to be taken into account by the First-tier Tribunal at the remitted hearing included a considerable body of evidence which supported the appellant's claim to have been in a genuine relationship, dating back some time before they gave notice of intention to marry. This does not represent, in our view, a ruling that evidence relating to the intentions of parties at the date of marriage must predate the marriage. Such a ruling would be contrary to the guidance at para [41] of the Court of Appeal decision of Rosa (above). If the Supreme Court intended to overrule that guidance, it would have done so in clear terms.

46 The practical effect of Judge Durance's misdirection as to the ratio of Sadovska is that he has erroneously left out of account in his assessment of whether the appellant's marriage was one of convenience, the evidence before him of the fertility treatment being received by EO. Although this post dates the marriage by some time, it is not entirely irrelevant. Further, Judge Durance erred in law by failing to take into account evidence which did in fact identify the appellant as the donor of the semen sample. Although the letter from Ascroft Medical dated 26 January 2018 at [152] in the appellant's bundle, regarding EO's fertility treatment, and referred to by the judge at [69], refers to EO's 'partner' and does not actually name the appellant, the letter makes reference to the results obtained from a semen sample given by the

'partner' in November 2017. Numerical results are given for three different factors that were assayed in tests. The separate document at E7/121 in the respondent's bundle is a semen analysis dated 14 November 2017, naming the appellant, and contains the same figures for the three factors mentioned in the letter of 26 January 2018. There is also another letter from Ascroft Medical dated 14 November 2017 at F15/148 of the respondent's bundle, relating to EO and stating that her partner was at that time waiting for his semen analysis result. The dates of, and the test results contained within these letters do tend to support the proposition that it was indeed the appellant who had given the semen sample under discussion in the Ascroft Medical letters. We find that the documents should be read together, and that the judge therefore left out of account relevant evidence in purporting to find that the appellant's evidence showed only that EO was receiving fertility treatment.

47 We find that, notwithstanding that the appellant may well have very many hurdles to overcome in his appeal, which we intend to remit to the First-tier Tribunal, we are unable to say that it is inevitable that the First-tier Tribunal would find that the appellant's marriage to EO was one of convenience. The matter is not 'clear-cut', and we find it is not fanciful (Rosa, para [39]) to suggest that the finding on that issue might be different if the First-tier Tribunal re-hearing the appeal properly directs itself.

48 For example, we are of the view that the content and meaning of the section 24 report requires closer examination than has been given to it hitherto. The report does not, contrary to the suggestion of Judge Durance, necessarily represent a contemporaneous observation by the registrar that both the appellant and EO used briefing notes about each other during discussions with the registrar. All that is known about the opinion of the registrar is that which is recorded in the respondent's CID note, set out above. A full copy of the Registrar's report is not given, and the three 'reasons' said to have been given by the Registrar for making the report, appear to us to be drafted in the form of standard criteria that have been selected. Even if it is correct that the registrar selected those standard criteria, the language (eg 'either party') used does not state unequivocally that both parties referred to notes to answer questions about the other. Although there was no ground of appeal before us regarding the wording of the report, and the wording of the report has not formed part of our reason for setting aside Judge Durance's decision, we are concerned that Judge Durance was not entitled to give the report the significance he did at [46(m)], [54], [55], [65], and [68]. When the decision is re-made it would be helpful for the parties to address this issue in more detail.

49 We further direct that, in the particular circumstances of this appeal, Devaseelan has no relevance to the rehearing of the appeal, and the findings of fact of Judges Mather and Hudson shall not form the starting point of the decision of the First-tier Tribunal rehearing this appeal for the reasons set out above.

50 We also note that in relation to the doubts that have previously been expressed regarding EO's economic activity, we were informed by Ms Loughran that EO has now been granted a certificate confirming a right of permanent residence in United

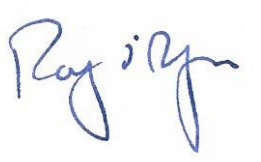
Kingdom. Whilst EO having been granted such a certificate has formed no part of our decision this appeal, it may be relevant in the determination of the issues before the First-tier Tribunal.

Decision

The decision of the First-tier Tribunal involved the making of a material error of law and is set aside.

Due to the extent of the findings of fact which will need to be made in the appeal, the appeal is remitted to the First-tier Tribunal.

Signed: Date: 13.9.19



Deputy Upper Tribunal Judge O'Ryan