Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02885/2017

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On Friday 1 March 2019	**On 07 March 2019**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ZOHAIB WAHEED

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Davison, Counsel instructed by Makka Solicitors Ltd
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against a decision of First-Tier Tribunal Judge Bulpitt promulgated on 5 December 2018 ("the Decision") dismissing the Appellant's appeal against the Secretary of State's decision dated 2 March 2017 refusing the Appellant a residence card as the family member (spouse) of an EEA (Polish) national, Ms [N]. This is the second appeal in relation to the Appellant's case. On 21 June 2016, his

previous appeal against a refusal of a residence card dated 25 February 2015 was dismissed by First-tier Tribunal Judge White ("the First Decision"). Mr Melvin produced a copy of the First Decision during the hearing before me and my attention was drawn to the relevant parts of it for my purposes.

2. On both occasions, the Respondent has refused to issue a residence card as he contends that the Appellant's marriage is one of convenience. Both Judge Bulpitt and Judge White found that it was. The appeals were therefore dismissed on the basis that as a party to a marriage of convenience, the Appellant does not qualify as a spouse and therefore is not to be regarded as the family member of an EEA national.

3. The Appellant contends that Judge Bulpitt was not entitled to rely on the findings of Judge White as to the existence of a marriage of convenience as Judge White's conclusions came at a time prior to the case of Sadovska and another v SSHD (Scotland) [2017] UKSC 54 ("Sadovska") since when it has been understood that what has to be established in a marriage of convenience case is whether the predominant aim of the marriage is to gain an immigration advantage. Sadovska post-dates the First Decision.

4. The Appellant accepts that Judge Bulpitt was entitled to take the First Decision as his starting point but argues that he failed to take into account that the First Decision proceeded on a misunderstanding of the issue and that Judge Bulpitt should have taken that into account. He also submits that Judge Bulpitt has failed to consider whether immigration advantage was the predominant aim of both parties and not just that of the Appellant. It is said that this is contrary to the approach in Sadovska.

5. The Appellant also takes issue with the Judge's finding that immigration advantage was the predominant aim based on the facts. He points out that he did not marry Ms [N] until a year after he was faced with removal. He says that he faced removal in September 2012, that they applied for a residence card as unmarried partners in April 2013 but did not marry until November 2013.

6. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 2 January 2019 in the following terms so far as relevant:

> "… [2]It is apparent from paragraph 31 of the decision the Judge made clear findings that the marriage between the Appellant and his EEA Sponsor was entered into for an immigration advantage. However, in accordance with the guidance in Sadovska v SSHD [2017] UKSC 54 the objective to obtain a right of entry and residence must be the predominant purpose for the marriage to be one of convenience. The Judge made no findings in this regard. Accordingly, I find there is an arguable error of law."

7. The matter comes before me to decide whether the Decision contains a material error of law and if so to either remit the appeal to the First-tier Tribunal or to re-make the decision. The Respondent has filed a Rule 24 Notice on 27 February 2019 seeking to uphold the Decision.

DISCUSSION AND CONCLUSIONS

8. Mr Davison focussed on [30] and [31] of the Decision as being the findings under challenge. Those paragraphs read as follows:

> "[30] Applying this finding to what is the issue for determination in this appeal – namely whether the marriage was entered into for the predominant purpose of gaining an immigration advantage – I must consider whether the endurance of the relationship between the appellant and Ms [N] makes it more likely that the marriage was entered into for a purpose other than an immigration advantage. On one hand the endurance of the relationship for a not insignificant period of time does suggest that there was more to the marriage than simply gaining an immigration advantage. However, it is significant that throughout the time the relationship has endured the appellant has used it as grounds for an immigration application. In this context the endurance of the relationship is equally consistent with the marriage being for the predominant purpose of gaining an immigration advantage. I find therefore the fact that there is a marriage which has endured gives me little assistance when determining what was the predominant purpose when it was commenced.
> [31] Balancing all these factors, taking as my starting point the decision reached by Judge White, who assessed this issue much closer in time to the commencement of the marriage and attaching particular weight to the clear incentive to the appellant of entering into a marriage for an immigration advantage, his apparent willingness to do so and the lies and inconsistencies over when their relationship began, I find that it is more likely than not that the appellant's relationship with Ms [N] and their subsequent marriage was for the predominant purpose of obtaining for the appellant an immigration advantage. On the definition in the regulations I therefore find on balance that this is a marriage of convenience."

9. Mr Davison accepted that in light of what is said at [31] of the Decision, he could not rely upon Judge Andrews' assertion in the grant of permission that Judge Bulpitt had made no findings of his own about the predominant purpose of the marriage. He submitted however that the wording of the Judge's findings was somewhat unfortunate in the reference to the endurance of the relationship being "equally consistent" with the predominant purpose being immigration advantage. He said that it was hard to say that this was the predominant purpose if there was an equally plausible explanation for the marriage.

10. I do not accept that submission. To begin with, Mr Melvin submits and I accept that the finding that the relationship is "enduring" is not

the same as saying that the marriage is genuine and subsisting. Mr Davison accepted that, even if it were, the Judge could still find the marriage to be one of convenience (as the Judge notes at [9] of the Decision). Particularly in light of what is said at [18] to [29] of the Decision concerning inconsistencies in the evidence about the relationship before both Judge Bulpitt and Judge White, I do not accept that the Judge was saying any more than, as he finds at [28] of the Decision, that "there is an enduring relationship between the two from their marriage until the hearing, which has involved them both living at the address in Grove Road".

11. The Judge clearly understood that the burden of proof lies on the Respondent ([8] of the Decision) and from what is there said and as directed at [30] of the Decision that the standard is the balance of probabilities. All that the Judge is saying at [30] of the Decision is that he does not accept that the endurance of the relationship means that it was not a marriage of convenience at the outset.

12. Turning then to the main ground on which permission was granted, Mr Davison submitted that there is now a "different gloss" in relation to the distinction between a genuine relationship and a marriage of convenience and that Judge Bulpitt erred in adopting the negative finding from the First Decision without recognising the different test. If Judge Bulpitt found that the relationship was genuine and enduring now, he needed to consider how that should sit with a finding that the marriage was initially one of convenience. He also said that the finding needed to be considered in the context of such factors as the attitude of the parties to marriage generally. If they believed in the institution of marriage, then the fact that they were committed to each other would lead them to marry for that reason. This was something which the Judge failed to consider.

13. He drew my attention in particular to the distinction between what is said by Judge White at [31] of the First Decision and what is said at [28] of the Decision which he said reflected the difference in the situation between 2016 and now and the difference in the evidence on which the findings are based. Paragraph [31] of the First Decision reads as follows:

> "I am in no doubt that the answers given in interview were sufficiently discrepant and otherwise concerning to raise a real doubt over the genuineness of this relationship, and thus to discharge the initial evidential burden on the respondent of raising a case to answer that this is or may be a marriage of convenience."

Paragraph [28] of the Decision reads as follows:

> "It is now five years since the appellant and Ms [N] were married in November 2013. The vast majority of the evidence adduced before me is about what has happened in those five years. Both the appellant and Ms

> [N] attended the marriage interviews in February 2015, both attended the hearing before Judge White in April 2016 and both attended this hearing. The evidence of Ms Rochnowska and Mr [N] that the appellant and Ms [N] have lived at the same address in Grove Rd, Hounslow throughout this time was largely unchallenged. Both the appellant and Ms [N] were found at the Grove Road address by Immigration Officer Muir when he attended without appointment at 07:12 hours of 27 January 2017. In the context of his unfavourable report I consider it significant that Immigration Officer Muir does not mention seeing anything within that address which undermines the claim by the appellant and Ms [N] that they live at that address. There is overwhelming evidence that from May 2014 until the date of hearing Ms [N] has worked at the same care home and that her employers, HMRC, her bank and various doctors and hospital have all corresponded with her at the same address in Grove Rd, Hounslow throughout that time. On the basis of this evidence I find that there is an enduring relationship between the two from their marriage until the hearing, which has involved them both living at the address in Grove Road."

14. Those two paragraphs need to be read in context. First, Judge White was considering at [31] of the First Decision only the evidence relied upon as establishing the evidential burden by the Respondent. Although there were discrepancies in the documentary evidence as to residence at the Grove Road address, Judge White accepted at [32] of the First Decision that they lived at that address but concluded that the "significance to be attached to them sharing an address is minimal" because Grove Road is a house in multiple occupation (see [15] of the First Decision).

15. Second, as I have already observed, there is a distinction to be drawn between finding an enduring relationship and a genuine and subsisting marriage. I do not accept, based on the Judge's record of the evidence and the inconsistencies which he identifies throughout the Decision (which includes consideration also of the evidence on which Judge White relied), that Judge Bulpitt was doing more than recording in the Appellant's favour that he still lives with Ms Niemic and, as he says at [30] of the Decision, that this might be indicative of immigration advantage not being the predominant aim of the marriage.

16. Judge Bulpitt has taken as his starting point the findings in the First Decision and what Judge White there says about the evidence. The law at that time was based on the Court of Appeal's decision in Rosa v SSHD [2016] EWCA Civ 14 and the Upper Tribunal's decision in Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 38 (IAC). The burden and standard of proof were therefore the same. Further, as Judge White records at [9] of the First Decision:

> "A marriage of convenience is an abuse of free movement rights. It is a marriage entered into for the purpose of immigration advantage. On the authorities the question whether a marriage is one of convenience is to be determined at the time of the marriage. The relationship between the

> parties might later change but the marriage cannot either become a marriage of convenience if it was not at the outset or cease to be one if it was. I note that in Rosa a comment was made about the "interesting possibility" of a marriage changing its nature, but that was *obiter* since the issue did not arise on the facts. Nor does it in this case."

Whilst Judge White observed that the issue was yet to be the subject of binding authority, he concluded that the issue did not arise on the facts of the Appellant's case. I can therefore see no need to consider whether there is any difference in "gloss" between the legal position then and at the time of the Decision. Judge White made a finding of fact that the issue regarding whether a genuine relationship could still have been a marriage of convenience did not arise at that time.

17. Nor do I understand there to be any other legal distinction between the position at the time of the First Decision and the time of the Decision or at least not one which could make any material difference. At the time of the First Decision, the prevailing case law was that of Papajorgji. The test was stated to be whether there is a marriage of convenience based on the purpose of the marriage being to gain an immigration advantage (as Judge White identifies in the extract cited above). Insofar as Sadovska modifies that test to whether the immigration advantage is the predominant purpose and not the sole one, that cannot assist the Appellant because the burden of proof is on the Respondent and, if anything, what he has to prove is less.

18. Further and in any event, as I have already noted, Mr Davison conceded that Judge Bulpitt did make findings of his own. That is clearly the case based on what is said at [31] of the Decision. He takes Judge White's finding that the marriage is one of convenience as the starting point ([17] and [31]) but does so only because, as he notes, the Judge was considering the issue nearer to the time of the marriage. He also has regard to the evidence before Judge White and particularly the inconsistencies with that evidence and the evidence now. That he was clearly entitled to do. The Judge has considered all the evidence before him and made findings which are reasoned.

19. The Appellant raises a factual issue concerning the Judge's understanding of the timing of the relationship and says that the Judge failed to understand that the Appellant was not relying on immigration advantage because he did not marry Ms [N] until November 2013 when he was made subject to removal in September 2012. That point though is readily explained by what the Judge says at [19] and [20] of the Decision as follows:

> "[19] It is equally evident that the appellant was well aware of the immigration advantage to be obtained through a relationship with an EEA national because when he was interviewed by immigration officers on September 2012 he claimed to have been in a relationship for year with Karolina Halina from Poland. In his evidence before me the appellant

> conceded that this was a lie, which he told because he had two friends who had married EEA nationals and they had told him if he did the same he would be able to come out of the detention centre. He accepted that he had never been in a relationship with Karolina Halina. I find therefore that by the time he was detained for the purpose of being removed from the United Kingdom on 28 September 2012 the appellant had the incentive to commence a relationship with an EEA national for the predominant purpose of securing an immigration advantage and also that he had demonstrated a willingness to do so.
> [20] It was both the evidence of both the appellant and Ms [N]'s before Judge White however, that they had met in June 2012 and moved in together before his detention in September 2012. Significantly evidence of the Immigration Officer's interview with the appellant on 28 September 2012 was not placed before Judge White. Despite this Judge White still did not accept their evidence about when the relationship began because of the inconsistencies in their evidence, in particular concerning Ms [N]'s travel to the United Kingdom in June and September 2012, inconsistencies which led Judge White to reject their assertion that the relationship had begun by September 2012. That finding by Judge White is only strengthened by the discovery of the appellant's lie in his immigration interview. There would have been no logic to the appellant inventing a relationship with a Polish national in that interview if he was in fact already in a relationship with a real Polish national."

20. In other words, on the facts, the Judge rejected the claim that the Appellant had been in a relationship with Ms [N] at the time that he was detained for removal and found that he only formed the relationship thereafter. He found at [27] of the Decision that the Appellant had only formed the relationship after he was released from detention "when the appellant was looking for an EEA national on which he could found an application for an EEA residence card." That is a finding on which the Judge placed "particular weight" as he was entitled to do.

21. That also deals with the point made about the intention of both parties. It is evident from reading [18] to [29] of the Decision that the Judge did not accept the evidence of Ms [N] as to the relationship either. This is not one of those cases where one party to the marriage believes it to be genuine and the other does not. Further, as I pointed out to Mr Davison the need to assess the intentions of both parties arises from what is said in Sadovska. In that case, both the EEA national and non-EEA national spouse had brought appeals against their removal. Ms [N] is not a party to this appeal. The Respondent has not taken any action against her.

22. Having regard to the totality of the Judge's findings on the evidence at [17] to [32] of the Decision, I am satisfied that the Judge reached a conclusion open to him on the evidence for the reasons there given. It follows that I am satisfied that the Decision does not contain an error of law. Accordingly, I uphold the Decision.

DECISION

I am satisfied that the Decision does not contain a material error of law. I uphold the decision of First-tier Tribunal Judge Bulpitt promulgated on 5 December 2018 with the consequence that the Appellant's appeal stands dismissed

Signed  Dated: 5 March 2019

Upper Tribunal Judge Smith