Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07856/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 8th April 2019	**On 15th April 2019**

Before

Upper Tribunal Judge Rimington

Between

Arben Gjura
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
Appellant: Mr Wilcox, instructed by J M Wilson Solicitors Ltd
Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION

The appellant, a national of Albania born on 16th May 1989 appeals against the decision of First-tier Tribunal Judge Ford promulgated on 2nd August 2018 which refused his appeal. That appeal was against the Secretary of State's refusal dated 25th July 2017 of his application for a residence card on the basis that he had engaged in a marriage of convenience contrary to the Immigration (European Economic Area) Regulations 2016.

First-tier Tribunal Judge Ford confirmed prior to her conclusions that she had considered the documents in the bundle including photographs and medical reports [34]. She acknowledged the child of the appellant and his said spouse at the outset.

In her decision the judge made the following observations and findings; -

(i) she was guided by **Papajorgji (EEA spouse – marriage of convenience) Greece** [2012] UKUT 00038 (IAC) and **Rosa v SSHD** EWCA Civ 14 as to the burden and standard of proof [9]. '*The evidential burden may shift by proof of facts which justify an inference that the marriage is not genuine, … but there must be more than suspicion'* [11].

(ii) the Secretary of State had discharged the burden of proof in showing that the marriage between the appellant and Anna Drudzova was a marriage of convenience to a high degree of probability.

(iii) the appellant had failed to adduce evidence to show that the marriage was not intended wholly or mainly for the purpose of the appellant gaining immigration advantage [34].

(iv) the couple claimed to have been married and in a relationship for 4 years and were still giving highly inconsistent answers about their respective families and the appellant wife was acting as if she were his sole carer, 'making an application for a Slovakian passport on his behalf without the appellant's knowledge and planning to take him out of the United Kingdom without the appellant's knowledge' [35].

(v) the appellant had a good knowledge of their child's medical difficulties but did not attend GP appointments because of work but the company he worked for was said to be owned by his wife [36]. (This contrasted with the wife's evidence that he did attend GP appointments)

(vi) the wife did not work in the business and knew nothing about it despite deriving some income from it. There was no evidence of any consideration passing for the transfer of the business into her name in 2015.

(vii) significant discrepancies remained unresolved from the marriage interview and the judge found '*the evidence I heard at the appeal hearing only added to the inconsistencies'*. The judge added '*I that (sic) the appellant and his wife are cohabiting as a genuine couple in an ongoing relationship. They both have relations in the United Kingdom but I heard no evidence from any of them'*.

(viii) '*the appellant has admitted to deliberately withholding information from the immigration authorities at interview in order to improve his chances of securing a residence card. I find he lied at the appeal hearing in a self-serving manner. He knew perfectly well that the car wash business was previously owned by his uncle but lied in telling me that it was 'some Kurdish guy' [39].*

(ix) *'Even allowing for the appellant's paternity of Daniel and for what must have been a stressful time of the appellant and Daniel's mother around the time of his birth and then his illness the evidence shows to a high degree of probability that this marriage was entered into for the sole or main purpose of the appellant securing a Residence card to which he was not entitled because he was never a genuine family members of the EEA national. He has married her and fathered Daniel solely to get immigration status' [40].*

The grounds of appeal advanced that

(i) the judge noted at paragraph 17 that Social Services shared the misunderstanding about the appellant's and wife's address but that on investigation this was satisfactorily addressed. However, at paragraph 25 the judge assumed the parties would have been asked by the Registrar verbally. The appellant's wife only had limited English and had recently changed address. The judge failed to consider that it was an error shared by Walsall Council Social Services.

(ii) at paragraph 18 the judge, when considering the intention of forming a genuine relationship prior to the marriage, failed to give consideration to any other factor than their difficulty in communicating with each other. She did not consider that the appellant's wife was expecting their child. This was material. The judge also failed to consider the medical notes, at 19-20 and correspondence addressed to him and his wife [21-27]. The error on the birth certificate was considered in isolation from the evidence. Further the appellant was not asked if he was aware that a passport had been applied for without his knowledge. The judge provided an explanation for not accompany his wife to the GP appointments. The judge erred in concluding that there had been no genuine transfer of the business and this was not in issue. The appellant could have provided documentary evidence on this point.

The judge's approach failed to follow the correct approach of **Papajorgji (EEA spouse – marriage of convenience) Greece** [2012] UKUT 00038 (IAC) and **Rosa v SSHD** EWCA Civ 14, including factors such as the length of their relationship, the fact that they have a child together, evidence of cohabitation, and the several applications by the appellant seeking a residence card.

The grant of permission stated that the grounds complained of (1) the approach to the evidence [17],[18] and [25], (2) a non evidence based assumption [35], (3) not considering the evidence and not giving the appellant a chance to comment on an adverse point not in the refusal letter, but that the first 3 grounds were primarily in the factual arena and '*unlikely to justify a grant of permission on their own'*.

The grant of permission concluded that Ground (4), however, rested on the proper approach to the abuse of rights involved EEA national which was considered in **Sadovska & Anor v Secretary of State** [2017] UKSC 54. The judge was stated not to have included this in her legal summary and it was not mentioned in the grounds, but it was arguable that the judge should have applied it in any event. The standard was the balance of probabilities, but the judge referred to a 'high degree of probability' in [34] and [40]. **Sadovska** held that too much weight should not be given to inconsistencies which should be in the context of all of the evidence and the circumstances of the interview. It was accepted that the couple have a child, and both are involved in the upbringing of the child. The deceit should have been the purpose of both parties.

At the hearing Mr Wilcox accepted that the legal approach was the 'hinge' to the appeal and there needed to be an error of law in relation to this aspect of the permission to found any challenge on the prior three grounds in the application for permission to appeal.

There was no clear evidence that the judge had grappled with the motive of the wife. There was carelessness in the decision and a degree of laxness, and I was referred to paragraph 38 where there appeared to be a word missing. Mr Wilcox relied on but also expanded on the written grounds of appeal. The Secretary of State's refusal had not taken issue with the wife exercising treaty rights. There was an anomalous finding at [25] in relation to the addresses particularly when compared with the finding at [35]. There was a failure to consider the wife's pregnancy notes. **Sadovska** clearly focussed on the intention of both parties. There should not be merely incidental benefit, but it must be the predominant purpose of the relationship to subvert the Immigration (European Economic Area) Regulations 2016. The evidence was not approached with the relevant legal test or considered in the round.

Mr Tufan argued that the evidence was indeed considered in the round. He accepted that there was a child and the DNA report was not challenged and that the judge did not mention **Sadovska,** but she nonetheless applied the correct ratio and legal matrix. The judge realised that the evidential burden shifted. The onus was on the Secretary of State to show that the marriage was one of convenience. The observation in relation to the wife in the business was not material. What was material was that the evidence was littered with inconsistencies. The judge heard detailed oral evidence and had the opportunity to see the way in which the appellant and witnesses respondent to the questions.

Analysis

Sadovska is clear that the burden rested with the Secretary of State and at [31] confirmed

> *'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'.*

At [28] **Sadovska** approved **Papajorgji** which is the judgement that the judge applied by stating

> *'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'*.

At paragraph [29] in relation to the purpose of both parties the Supreme Court held

> *'Furthermore, except in cases of deceit by the non-EU national, this must be the purpose of them both. Clearly, a non-EU national may be guilty of abuse when the EU national is not, because she believes that it is a genuine relationship*.

In relation to the advantage **Sadovska** noted at [24]

> "the notion of *'sole purpose'* should not be interpreted literally *(as being the unique or exclusive purpose)* but rather as meaning that the objective to obtain the right of entry and residence must be the **predominant purpose** of the abusive conduct."

and

> "On the other hand, a **marriage cannot be considered as a marriage of convenience simply because it brings an immigration advantage**, or indeed any other advantage *(for example the right to a particular surname, location-related allowances, tax advantages or entitlement to social housing for married couples)*."

A careful reading of the decision under challenge demonstrates that the judge did not depart from this approach. The judge realised the approach was that as set out in **Papajorgji** and explained that the burden of proof initially rested with the Secretary of State. Albeit she did not identify that decision specifically, I am not persuaded in her analysis of the evidence the judge departed from the guidance in **Sadovska**. The judge recorded that at [10] and again at [34].

The grant rested on the finding of an error with regard the legal approach and acknowledged that the remaining findings were weak. I shall,

nonetheless, refer to them. I have continued in my decision to demonstrate that the judge not only adopted the correct legal approach at the start of her determination but also applied it.

The judge identified numerous and significant discrepancies between the appellant's and the witness' evidence in the interview. These are recorded between paragraphs 13 and 33. There was scant evidence of them living together and at the onset of their relationship and at the time of the marriage they gave different addresses to the registrar when recording the birth of their child. They were inconsistent about how long their child had remained in hospital (the appellant said he was discharged in May 2015 and the wife 1st July 2015) [14], they could not easily communicate when they first met [18] and there were discrepancies regarding the deposit and rent on the flat [24].

Clearly the judge did not find the explanation as to why they each gave a different address to the Registrar when recording the birth for the certificate. The explanation of moving was rejected because the wife who was said to have lived at Dudley park with the appellant for two years could not even remember the number, [25]. There was also inconsistency as to when the wife last visited Slovakia – he said 2017 and she 2016. The issue in relation to the passport was that the appellant stated Daniel would not be making the trip to Slovakia whereas she stated that Daniel would, and she had applied for a passport for him. There was also variance between the appellant and his wife as to the medical appointments he attended. The judge found, because of the variance of the evidence that the appellant had lied in the appeal hearing [39].

Nevertheless, the judge acknowledged that the appellant and wife had a child but owing to the nature of the evidence and the sheer volume of contradictory statements made it was open to the judge to draw the conclusions that she did. The observation about the wife's involvement with the business (said by the wife to be owned by the appellant's uncle) was just that rather, in the face of the evidence received, than contributory to the nature of the relationship or the decision on the marriage of convenience.

Sadovska does not state that no weight should be attached to discrepancies but holds that: -

'But in considering those discrepancies, the circumstances in which the interviews took place and the statement was made must be borne fully in mind'.

It is not evident that the judge failed to take into account all of the evidence and recorded at the outset of her deliberations that the documents and medical reports had been considered. In the light of the evidence as it was when the parties were married the judge was entitled to make the findings she did. With regard the typographical

error in [38] the context of the decision makes it plain that the judge was making an adverse finding. As the judge stated in the previous sentence '*Significant discrepancies remain unresolved from the marriage interview and the evidence I heard at the appeal hearing only added to the inconsistencies*.

I am not persuaded that **Sadovska** refers to both parties being engaged int eh deceit although on the findings of the judge, she would be able to make that deduction.

In relation to the standard of proof it is correct that the judge referred to the 'high degree of probability' but because the burden of proof rested with the Secretary of State, the disadvantage was to the respondent and thus not material to the decision.

It is clear that the judge did not consider that there was mere immigration advantage after considering all the evidence but found that the 'sole' or 'main' purpose, despite the child, was for the appellant to secure a residence card [40]. The judge was entitled to make those findings and gave cogent reasons for doing so. The decision contains no material error of law and will stand.

Helen Rimington

Upper Tribunal Judge Dated 8th April 2019