Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01197/2018

THE IMMIGRATION ACTS

Heard at Glasgow	**Decisions & Reasons Promulgated**
On 20 December 2019	**On 15 January 2020**

Before

MR C. M. G. OCKELTON, VICE PRESIDENT

Between

MOHAMMAD NASEEM DHENSA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Caskie, instructed by Maguire Solicitors (Glasgow).
For the Respondent: Mr Clarke, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant, a national of Pakistan, appeals, with permission, against the decision of the First-tier Tribunal (Judge McGavin) dismissing his appeal against the decision of the respondent on 19 January 2018 refusing him a residence card as confirmation of his right to reside in the United Kingdom as the spouse of a Polish national, Barbara Konarska. The reason for the refusal was that the respondent considered that his marriage was a marriage of convenience.

2. The only issue to be determined in this appeal was and is whether the appellant's marriage to Ms Konarska was, at the time, the parties entered into it, a marriage of convenience. The burden of proof is on the Secretary

of State. Those propositions both flow from the decision of the Supreme Court in Sadovska v SSHD [2017] UKSC 54. In that case the parties were not married, but at [32] the Court indicated that if the non-EU national produced evidence of the relationship, it was for the Secretary of State to show that the relationship was not genuine. At [35] the Court indicated that if the parties had been married, that would "of course, enhance [his] claims".

> "It must be permissible for the state to take steps to prevent sham marriages, although it is also incumbent on the state to show that the marriage would indeed be a sham."

3. At [29], the Court said this:

> "For this purpose, "marriage of convenience" is a term of art. Although it is defined in the Directive and the 2009 Communication as a marriage the sole purpose of which is to gain rights of entry to and residence in the European Union, the 2014 Handbook 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. 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."

4. Before Judge McGavin, there was written evidence relating to the parties' life in the United Kingdom, and there was the respondent's record of interviews of them both. In addition, the appellant and Ms Konarska gave oral evidence, as did two other witnesses including Ms Konarska's son. The judge's decision is a lengthy one. It considers, in detail, a number of the matters upon which evidence had been given, including the appellant's immigration history, the sponsor's employment history, the parties' attire at their wedding, and the appellant's contact with his children after the wedding, as well as setting out a large number of matters upon which there was no evidence, or upon which the judge considered the evidence insufficient. She concluded at paragraph 31 that the evidence of the appellant and the sponsor was "materially lacking in credibility" for the reasons she set out in the next 34 paragraphs. As a result she concluded that it was more probable than not that the marriage was one of convenience.

5. The principal burden of the grounds of appeal, drafted by Mr J W Bryce, and rearguing submissions that he had made at the hearing before the judge, is that the records of the Secretary of State's interviews of the appellant and Ms Konarska were not admissible, because they did not comply with the requirements of the Proposed Marriages and Civil Partnerships (Conduct of Investigations etc) Regulations 2015 (SI 2015/397). There is no conceivable merit in that ground. In the first place, the Regulations, made under s. 50 of the Immigration Act 2014, have no application to the present case. The Regulations, and s. 50, apply only in circumstances where the registrar has referred a proposed

marriage to the Secretary of State and the Secretary of State has decided to investigate it. This is not a case where a proposed marriage was referred to the Secretary of State.

6. In any event, it is very dubious whether the records would be inadmissible in the Tribunal, even if they had been compiled without compliance with the Regulations. The "Rules of Evidence", excluding certain evidence from consideration by a Court, have never applied in immigration proceedings. The current provision in the Rules is that in r. 14(2) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604):

> "(2) The Tribunal may admit evidence whether or not—
> (a) the evidence would be admissible in a civil trial in the United Kingdom
> …"

7. The result of this provision is that what would be in a civil trial a provision about admissibility typically becomes, in an immigration appeal, a consideration about weight.

8. That was, however, not the only ground of appeal. The grounds also submit that, given that the burden was on the respondent, there was wholly insufficient evidence to establish that the marriage was one of convenience and that the judge erred in law in the conclusions she reached on the evidence. Mr Caskie's submission before me was simply that the judge had failed to take into account the evidence as a whole, concentrating much more on discrepancy than on agreement, and that she had failed to keep properly before her the issue with which she was concerned, and had instead concentrated on matters of dubious relevance. Although he accepted, as he had to, that the question whether the sponsor was exercising treaty rights had been raised in the Secretary of State's refusal, he submitted that the judge had gone well beyond the arguments raised by the Secretary of State against the appellant. In particular, she had taken it upon herself to investigate whether the appellant was free to marry, and doubted the validity of the death certificate of his previous wife, but apparently had reached conclusions based on the misreading of it. Further, as the refusal letter indicated (and as Mr Clarke confirmed, the Presenting Officer's note confirmed), at the hearing the judge was clearly told that the negative decision was based entirely on the parties' responses at their interviews. In those circumstances, although the judge was entitled to take into account all the evidence put before her, there was an obvious risk of her making more of the case than the Secretary of State had done.

9. Mr Clarke's position was that the judge was amply entitled to reach the conclusion she did, for the reason she gave. Essentially, the appellant's problem was that the judge had looked at all the evidence deployed on his behalf, and had found numerous deficiencies, which she identified. If, however, I took the view that she had erred in law, Mr Clarke was content

to rely on the reasons given for the refusal of the application, and the discrepancies in the marriage interviews. Although he was not able to identify any questions about the intentions behind the marriage, or about their life together as a married couple, the interviews did show "ignorance on such a scale" that the conclusion that the marriage was a marriage of convenience should be endorsed. It was clear from the appellant's history that he would do whatever it took to remain in the United Kingdom. If remaking the decision, the Tribunal should again conclude that the marriage was a marriage of convenience.

10. Although the judge does not cite Sadovska, and so deprives herself of some of the wisdom to be found in the decision of the Supreme Court, it seems to me that she made no perceptible error in her allocation of the burden of proof or in identifying the issues to be decided. Nevertheless, I am persuaded that her decision does demonstrate both that she failed to take into account all the evidence that was before her and that she did not focus sufficiently on the matter she had to decide. The first point is, in my judgment, amply demonstrated by the fact that a reader of her judgment would probably form the view that there was really no evidence on the appellant's side to counter the Secretary of State's allegations. That is far from the case, as will appear from what follows. Mr Caskie's phrase was that the judge had gone "over the top" in accentuating the negative and ignoring the positive aspects of the evidence. There is more than a little substance in that.

11. Secondly, the judge's general conclusion is that there are substantial points upon which the evidence of both the appellant and Ms Konarska is not to be believed. Some of those conclusions, for example in relation to the death of the appellant's first wife, simply do not bear examination; but most of them are not very closely related to the matters under consideration. Of course it is right that if a person appears not to be telling the truth in general, there may be very little ground for believing that person on some particular, even if there is no specific contradiction that can be identified. On the other hand, without going so far as simply asserting that "love conquers all", it is not immediately easy to see why deficiencies in an account of employment history, or even a bad immigration history, can of themselves show that a marital relationship is not a genuine one. To cite Sadovska again, at [34]:

> "Should the Tribunal conclude that [a man] 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"."

12. For the foregoing reasons I set Judge McGavin's decision aside. I proceed to make my own decision on the evidence: there is no more evidence than that which was before her. I take into account the submissions of both parties. It is certainly true that there are discrepancies between the answers given at the interviews, but there are also very substantial points of agreement, as analysed by Mr Bryce in a note and table. This is not a

case where it could conceivably be said that the parties demonstrated complete ignorance on one another's circumstances and other relationships or history. The parties were married in September 2016 and there does not appear to me to be any good reason to suppose that they have not been living together since their marriage. Council Tax records were amended to show that, very soon after the marriage, and there has been no evidence to the contrary. It is true that the evidence about their relationship before their marriage is much less persuasive. In assessing the nature of their marriage, I regard the evidence of their relationship outside marriage as of lesser weight than of the evidence of the relationship within the marriage.

13. Given that they are married, it is, as I have indicated, for the Secretary of State to show that the relationship was entered into as a marriage of convenience. It does not appear to me that the absence of evidence on various topics, as identified by the judge, can help the Secretary of State very much. The question is whether, at the date of the marriage, there is sufficient material to persuade me that the predominant purpose of both the parties was to enable the appellant to reside in the European Union. At the date of the marriage the parties had known each other for a considerable period of time. They knew quite a lot about each other. Nothing that has happened since the marriage gives any reason to suppose that it was a marriage of convenience. It is perfectly clear, of course, that the appellant does want to remain in the EU (that is to say, in the United Kingdom): but his various attempts to do so do not, in my judgment, demonstrate in the circumstances in this case that his marriage was a marriage of convenience.

14. Looking at the matter as whole, as I do, in my judgment the Secretary of State has not discharged the burden of proof. The appellant and Ms Konarska are formally married and are entitled to be considered as husband and wife for the purposes of EU Law. It follows that the appellant is entitled to a residence card.

15. I therefore substitute a decision allowing the appellant's appeal.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 9 January 2020