



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/05777/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 20 September 2018

Decision & Reasons Promulgated  
On 24 September 2018

**Before**

**UPPER TRIBUNAL JUDGE PERKINS**

**Between**

**MOHAMED ALY AHMED ELRAW**  
(anonymity direction not made)

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr S Karim, Counsel instructed by MA Consultants, Solicitors  
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against a decision of the First-tier Tribunal dismissing the appellant's appeal against a decision of the Secretary of State to refuse him a permanent residence card in accordance with the Immigration (European Economic Area) Regulations 2016. The Secretary of State decided that the appellant was relying on a marriage of convenience and refused the application. The First-tier Tribunal dismissed the appeal.
2. There are three grounds of appeal but the clearest and strongest is that the First-tier Tribunal misdirected itself by applying the wrong burden of proof.
3. It is quite clear that the First-tier Tribunal Judge applied a shifting burden. She said at paragraph 8:

“The burden of proof is on the appellant to show that he meets the requirements of the EEA Regulations. The standard of proof is the usual civil standard of the balance of probabilities. As the respondent asserts in this case that the appellant is a party to a marriage of convenience, there is an initial evidential burden on the respondent”.

4. As long ago as 2004 in the decision **VK (Marriage of Convenience) Kenya [2004] UKIAT 00305** the Immigration Appeal Tribunal regarded it as settled law that in such cases the burden of proof was on the Secretary of State. The appeal in **VK** proceeded on that basis with the agreement of the parties and the approval of the Tribunal. However this approach was disapproved in the decision of **Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC)** which followed the decision in **IS (marriages of convenience) Serbia [2008] UKAIT 31** that there is an evidential burden on an applicant to address “evidence justifying reasonable suspicion that the marriage is entered into for the predominant purpose of securing residence rights”. It went on to explain that the:
 

“question for the judge will therefore be ‘in the light of the totality of the information before me, including the assessment of the claimant’s answers and any information provided, am I satisfied that it is more probable than not this is a marriage of convenience?’”
5. This clearly does not stand up following the decision of the Supreme Court on 26 July 2017 (almost nine months before the First-tier Tribunal’s decision in this case) in **Sadovska and Another v SSHD [2017] UKSC 54** which dealt with the point and particularly at paragraph 28 where Lady Hale said:
 

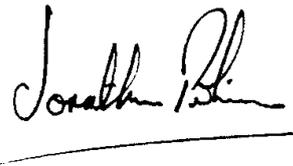
“That must mean, as held in *Papajorgji*, that the Tribunal has to form its own view of the facts from the evidence presented. The respondent is seeking to take away established rights. One of the most basic rules of litigation is that he who asserts must prove. It was not for Mrs Sadovska to establish that the relationship was a genuine and lasting one. It was for the respondent to establish that it was indeed a marriage of convenience”.
6. It follows that I am entirely satisfied that the First-tier Tribunal did misdirect itself.
7. Mr Whitwell argued that there was no material error. It is right to say that the First-tier Tribunal has given a reasoned judgment and has analysed the evidence.
8. The additional grounds of appeal are less impressive than the first. The second ground of appeal complains that there were no findings on potentially valuable items of evidence. Mr Karim was careful not to suggest that every item of evidence identified in a bundle needs a specific comment but he did point out that there was a statement from the appellant’s former wife, or said to be from her, which, if true, was wholly supportive of his case. It occurs at page 4 of the bundle. It is not clear what the judge made of this. It is considered at paragraph 21 in the sense that there is reference to the letter being provided and some acknowledgment of its contents. The judge then said that the “appellant’s former spouse did not attend the Tribunal so her evidence was not tested in cross-examination”. Regrettably, having gone so far, the judge did not indicate what weight she gave to that evidence. Mr Whitwell argued with some justification that there was a clear implication that the evidence was disbelieved but it is not expressed and it should have been.
9. This ground too must be resolved in the appellant’s favour. The judge should have made clear what weight, if any, she gave to this evidence. If that had been the only fault I might have reached a different conclusion but it is not the only fault as indicated above.

10. The third ground of appeal is that the findings are “inadequate” and the criticism is that evidence was rejected for improper reasons rather than looked at in the round. This ground adds nothing.
11. I cannot accept that the error is immaterial. When I have to make findings of fact I regard the burden of proof (and indeed the standard of proof but that is not an issue with this case) as fundamental to my analysis of the evidence. The approach is rather different in those rare cases where there is no burden. I cannot be satisfied here that the Judge’s findings might have been different if she had directed herself correctly.
12. It follows that there has not been a fair hearing here. In my judgment the appellant would have a sense of grievance that was justified if I upheld the decision or if I made the decision in the Upper Tribunal and thereby deprived him of a possible further avenue of appeal.
13. It follows that this case has to be heard again in the First-tier Tribunal and none of the findings are to be preserved.

**Notice of Decision**

The appeal is allowed to the extent that I set aside the decision of the First-tier Tribunal and direct that the appeal be heard again in the First-tier Tribunal.

Signed  
Jonathan Perkins  
Judge of the Upper Tribunal

A handwritten signature in black ink, appearing to read 'Jonathan Perkins', written over a horizontal line.

Dated 24 September 2018