



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/04931/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 4th June 2019**

**Decision & Reasons Promulgated
On 24th July 2019**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

**MR MAHMOUD ATTIA SAAD HASSAN ABOUELHASAAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Georget, Counsel instructed on behalf of the Appellant.
For the Respondent: Mr Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Egypt. On 18 February 2018, he married a national of Eire, Miss F. On 20 March 2018, he applied for a residence card as the spouse of an EEA national exercising Treaty rights in the United Kingdom under Regulation 18(1) of the Immigration (EEA) Regulations 2016 (SI 2016/1052) ("hereinafter referred to as the 2016 Regulations").
2. On 5th July 2018, the Secretary of State refused that application on the basis that the appellant was a party to a "marriage of convenience" and so was not a "spouse" of an EEA national.

3. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 28 March 2018, Judge Bennett dismissed the appellant's appeal. He concluded that the appellant was indeed a party to a "marriage of convenience".
4. The appellant sought permission to appeal. Permission was granted by the First-tier Tribunal (Judge Parkes) on the 23rd April 2019.

The decision of the FtTJ:

5. At the hearing before the FtTJ the respondent was not represented. The appellant was represented by his legal representative and the appellant and his wife both gave oral evidence. Whilst there was no cross examination on behalf of the respondent, the FtTJ must have asked some questions to have reached the findings that he did, although there is no record of what questions were asked in the body of the decision. Additionally, there was a bundle of documentation filed on behalf of the appellant.
6. In his decision the FtTJ set out the relevant history of the appellant and his wife. The appellant unlawfully entered the United Kingdom in 2011. On 5 October 2015, he made a claim for asylum on the basis that he was a national of Palestine and that his name was Abuzaid, however, on 16 November 2015 that application was withdrawn. The appellant remained in the United Kingdom.
7. The parties first met on 12 March 2017 at a coffee shop. The relationship began in or about July 2017 and they decided to marry in or about November 2017.
8. The parties married in Cairo, Egypt on 18 February 2018 by way of a proxy marriage. The appellant was present in the United Kingdom, but Miss F was present at the ceremony in person. There is no issue raised that Miss F was not exercising Treaty rights and as set out at paragraph 2 (b) of the FtTJ she was in permanent employment.
9. On the 20 March 2018 he made an application for the issue of a residence card on the basis that he was the spouse of Miss F, a national of Eire. On 27 June 2018 the appellant and Miss F were interviewed by immigration officers. At paragraph 3 of the FtTJ decision, he summarises the discrepancies/credibility issues which it was stated had come to light following their respective interviews. They are split into six different areas; Miss F's recent medical problems, her education, the appellant's arrival in the United Kingdom, the proposal to marry, the wedding and Miss F's employment. The conclusion of the report was that the appellant and Miss F "clearly know each other, to some degree, and may even be living together." The judge noted that whilst both the appellant and Miss F said that there had been "issues" with Miss F's parents as a result of the relationship and that they had both been consistent about that, the other areas listed in the body of the report and summarised were thought to be significant and indicative of the relationship being one of convenience. This was the respondent's case.

10. On 5 July 2018, the respondent refused the appellant's application stating that he was of the opinion that there were "reasonable grounds to suspect" that the appellant's marriage to Miss F on the 18 February 2018 was "one of convenience; the sole purpose of enabling him to obtain an immigration advantage." The basis of that consideration was that the respondent relied upon the apparent discrepancies between what the appellant and Miss F stated in the course of the interviews and their respective answers. Those points were:
 - (i) the appellant appeared not to have known that Miss F had suffered from particular problems and that if the appellant been involved in a genuine relationship with Miss F, he would have known of those things.
 - (ii) His apparent lack of knowledge of her education cast doubt on the proposition that there was a genuine relationship between them.
 - (iii) The respondent was adversely impressed by the fact that Miss F did not know that he had entered the United Kingdom using the name Abuzaid and put forward a claim on the basis that he was a national of Palestine and that if it had been a genuine relationship, the appellant would have discussed that with her.
 - (iv) It was said that the appellant's account and that of Miss F of where they had been when he proposed marriage differed.
 - (v) It was stated that Miss F was not able to give the date on which she became Mr A's wife and the spread of dates (18, 19/23) did not accord with the date given by the appellant (17th of February 2018).
11. As the Secretary of State was of the opinion that the marriage was one of "convenience", consistent with Regulation 2 of the 2016 Regulations, the appellant should not be treated as Miss F's spouse therefore it was not accepted by the respondent that the appellant was a "family member" within Regulation 7 of the 2016 Regulations or that he qualified for the right to reside in the United Kingdom as her family member. Thus the Secretary of State did not accept that the requirements of Regulation 18 (1) of the 2016 Regulations were fulfilled.
12. The FtTJ set out the relevant law at paragraphs 11 - 15 and then went on to set out the evidence and the analysis of that evidence and his conclusion as to what constituted a "marriage of convenience" by reference to his own analysis at paragraph 14.
13. The FtTJ sets out at length the evidence and his findings at paragraphs 16 - 24. At paragraph 16 the judge summarised the appellant's witness statement and at paragraph 17, summarised the evidence of Miss F.
14. He made the following findings:
 - (i) the appellant was the father of AA born on the 2nd February 2019 (at [19]).
 - (ii) The parties were married in Egypt on 18 February 2018 (at [20]).

- (iii) Miss F met the appellant in March 2017 when she was 17 years and four months old whilst working as a waitress. She had been studying for A-levels but dropped out because the results been poor and she wanted to have a family and that her parents had been opposed the relationship and that she would have to choose between her family and the appellant and that she married him out of genuine love and affection (at [21]).
- (iv) The judge gave five reasons why he reached the conclusion that she had married him out of genuine love and affection- there was no evidential basis for concluding that there was any other reason why she married him or that he was in a position to offer her any financial inducements or any funds. There was nothing improbable in the proposition that she would have married him out of genuine love and affection and that the photographs submitted were consistent with having a loving relationship and that the apparent discrepancies as recorded in the interview and the points raised by the respondent did not impinge significantly on her credibility or suggest any reason why she would have married the appellant for any other reason other than out of genuine love and affection.
- (v) In respect of the appellant, the judge stated that the position was “substantially different”. At paragraph 23 is set out the following matters in relation to the appellant:
- He entered the United Kingdom unlawfully and put forward a false claim for asylum and that even though the claim was withdrawn in a short space of time it was still a false claim.
 - Whilst he withdrew the claim, he did not wish to return to Egypt, and he had no right or entitlement to remain under the Immigration Rules.
 - The judge stated that it was difficult to see how he could have achieved that objective other than marrying a young woman who was an EEA national.
 - Miss F was an EEA national and when he met, she was only 17 years and four months old, she had not completed her education and wanted to start a family her own. He was nine years older than her. There was no basis for concluding that they had the interests in common.
 - He did not tell Miss F about the circumstances in which it come to the United Kingdom because he thought that that might “disturb” their relationship.
- (vi) Against those points (in favour of the appellant) the FtJ found:
- At the date that he met Miss F in March 2017 and the date of the marriage in 2018, he was of an age when he could be expected to be thinking of marriage.

- Miss F was an attractive young woman and there was nothing inherently improbable in the proposition that the appellant should wish to marry her and that he would have married out of genuine love and affection.
- The apparent discrepancies and the other matters relied on by the Secretary of State were not, in the main, of substantial weight and did not (for the most part) cast substantial doubt on the proposition that he married out of genuine love and affection. The FtTJ expressly found that the failure to mention her medical problems was not made out; he was not satisfied that there was any significance in the fact that the appellant did not know whether she been attending high school college or whether she wore uniform. He did not find that there was a discrepancy as to where the parties were when the proposal to marry was put forward nor did he accept the apparent discrepancy over the dates given by the appellant and Miss F. The judge also rejected the apparent discrepancies relating to Miss F's employment.

(vii) The only points that the FtTJ found adverse to the appellant (from the interview) was that his omission to tell Miss F of the circumstances in which he came to the United Kingdom was "in a different category and shows that he was less than frank." Furthermore, his failure to mention that she used an inhaler and was taking vitamin supplements showed a lack of interest in her condition.

15. As set out above, the judge was satisfied that the appellant and Miss F had a child born on 2 February 2019. He did not find that to be a substantial factor pointing against the marriage having been one of convenience because at the date of the marriage, the child had not been born and was not pregnant and applying the guidance in Rosa, the focus of attention must be "on the intention of the parties at the time the marriage was entered into," rather than whether, at the time of the hearing, the marriage is "subsisting".

16. The judge did take into account that evidence concerning the relationship after the date of the marriage may cast light on the intention of the parties at the time of the marriage but the FtTJ did not accept that it applied here. His reasoning is set out at paragraph 23(f) (3):

"it is difficult, in the circumstances of this appeal, to see, and I do not accept, the birth of their child, points against the appellant's "predominant purpose" having been to procure the right to remain in the United Kingdom because

- (i) it was, I am satisfied, Miss F's wish to have a child at the earliest possible date, and
- (ii) if Mr A's predominant purpose was to procure the right to remain in the United Kingdom by marrying Miss F, he could only realistically achieve his purpose, if he ensured that his relationship with her was maintained and that this required that they should have a child at the earliest possible dates."

17. Following that analysis, the judge returned to the relevant law. At paragraph 25, he stated that the decisions that he had referred to, were all decisions taken under the 2006 Regulations, which did not contain a definition of “marriage of convenience” corresponding with that in Regulation 2 of the 2016 Regulations. He further stated that it was important bearing mind that the test of “predominant purpose” which came from the guidance given in Sadovska was not the test applied in any of those decisions.
18. The judge then made reference to the decision of Rosa at paragraph 10:

“it was difficult to improve on the definition (which the SSHD accepted in that case as apposite) in article 1 of the EC Council resolution 97/C 382/01 of 4 December 1997 on measures to be adopted on the combating of marriages of convenience. That article defines a marriage of convenience as “a marriage concluded between a national of a member state or third- country national legally resident in a member state and third- country national, with the sole aim of circumventing the rules on entry and residence of third country nationals and obtaining for the third country national a residence permit or authority to reside in a member state.”
19. He then stated;

“But the Supreme Court in Sadovska preferred the statement in the Commission’s 2014 handbook that

“the notion of “sole purpose” should not be interpreted literally (as being 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.”
20. His final analysis is set out at paragraphs 26 – 27.
21. At paragraph 26 the FtTJ stated that the move from “sole purpose” to “predominant purpose” was of “substantial significance”. He then returned to his example of the “roguery” that he had set out earlier observing that when the test was that of “sole purpose”, a “marriage of convenience”, when the EEA national is entirely genuine but the conduct of the non-EEA national involved roguery. But where the question is one of “predominant purpose”, he stated that he did not accept that that was necessarily so or that genuine love and affection could not coexist with an intention to procure a right to enter or remain.
22. The FtTJ stated that he had taken into account the decision of the Supreme Court at paragraph 24 that a marriage cannot be considered as a “marriage of convenience” simply because it brings an immigration advantage, or indeed any other advantage but finally stated:

“but the crucial question is whether the obtaining of the “immigration advantage” is, in the particular case, the “predominant purpose” of the marriage – or whether the “predominant purpose” is “love and affection” and the obtaining of the immigration advantage a subsidiary or ancillary purpose. Once it is recognised that the test is of “predominant purpose” and that genuine love and affection can coexist with the desire to procure an immigration advantage, the

categorisation or description of the “marriage of convenience” is not being “genuine” should, it is suggested, be avoided as misleading. The focus of attention must simply be on what the “predominant purpose” was.

23. With that in mind, the FtTJ concluded that he was satisfied that the appellant’s “predominant purpose” in marrying Miss F was to procure the right to remain in work in the United Kingdom.
24. His reasons for reaching that can be summarised as follows:
 - (i) the adverse points raised in paragraph 23 applied. Whilst he had set out points to the contrary at paragraph 24, those points went no further than to establish that love and affection for Miss F were subsidiary and/or ancillary reasons for the appellant to marry Miss F. The crucial reason was to enable him to remain in the United Kingdom to work and to provide himself and therefore it was necessary for him to marry in EEA national.
 - (ii) The adverse points paragraph 23 justified the inference that the appellant’s predominant purpose in marrying was to procure the right to remain in to work that that was consistent with Agho to cause the “evidential burden” to shift to the appellant.
 - (iii) The appellant’s evidence and issues raised at paragraph 24 were not of “sufficient strength or weight” to undermine the above inference, taking into account he made a false asylum claim, he remained in the United Kingdom with no right to do so and did not tell Miss F of the circumstances in which she came to be in the United Kingdom. He considered that those points impaired the appellant’s credibility and that the other matters in paragraph 23 “speak for themselves”.
 - (iv) The appellant’s evidence as to his reasons for marrying F were “skeletal” and lacking in detail and came to no more than an assertion that having spoken to her on a number of occasions and that he had fallen in love with her. He gave no explanation of what it was that attracted him to her or to dispel the inference from the points made paragraph 23 namely that his reason for selecting her as a potential spouse marrying her was predominantly because she was in EEA national. The judge took into account their respective ages and that whilst at the time the marriage she was 18 years of age, the appellant gave no explanation of having chosen to pay court to a woman who was nine years younger than him.
 - (v) No friends attended the hearing
 - (vi) whilst they had been living together for 18 months, because Miss F was only just over 18 at the date when she and the appellant married and is now only just over 19, he placed “very less weight” on their cohabitation than he would have done in a case of an older and more experienced young woman. The judge stated that “over such a period, it is to be expected that, at least in the case of an older and more experienced young woman, if the position were that the predominant purpose of her husband in marrying her had been to

secure the right to remain in working United Kingdom, she would have observed signs in the husband's behaviour to indicate that that was or might be the case. But as Miss F is comparatively young, only 19 years and three months old, it cannot so readily be expected that she would have observed or recognise any such signs in the appellant or, if she'd observed and/or recognise them, have repudiated the marriage (if she had observed them after the marriage), or the relationship (if she had observed them before the marriage)."

25. The FtTJ therefore concluded that he was satisfied the appellant's predominant purpose in marrying Miss F was to procure the right to remain in working United Kingdom and therefore the marriage is properly categorised as a "marriage of convenience". He therefore dismissed the appeal.
26. The appellant sought permission to appeal. Permission was granted by the First-tier Tribunal (Judge Parkes) on the 23rd April 2019.
27. At the hearing before the Upper Tribunal, Mr Georget, who did not appear before the FtT appeared on behalf of the appellant and Mr Clarke, Senior Home Office Presenting Officer appeared on behalf of the respondent.
28. I am grateful for the submissions heard from Mr Georget and Mr Clarke on the issues that arise in the grounds advanced on behalf of the appellant. I confirm that I have considered those submissions in accordance with the skeleton argument produced and the grounds which had been filed before the Upper Tribunal. I further confirm that I have given full consideration to those submissions which I have heard, and I intend to incorporate those submissions into my analysis of the grounds relied upon by the appellant.

Decision on the error of law:

29. The principal issue before the judge was whether the appellant was a "spouse" for the purposes of the EEA Regulations 2016 and so could establish a right of residence as a family member of an EEA national exercising Treaty rights by virtue of Reg 18(1).
30. As a practical matter, that turned upon whether the respondent could establish that the appellant's marriage was a "marriage of convenience" (see Sadovska and Another v SSHD [2017] UKSC 54 at [28]).
31. Although the 2016 Regulations define a marriage of convenience this was not the position under the 2006 Regulations. The definition was, however, considered in cases such as Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 38 (IAC) (Blake J) in which the Tribunal held that "Although neither the Directive nor the Regulations define it, as a matter of ordinary parlance and the past experience of the UK's Immigration Rules and case law, a marriage of convenience in this context is a marriage contracted for the sole or decisive purpose of gaining admission to the host state. A durable marriage with children and co-habitation is quite inconsistent with such a definition".

32. I have considered the submission made in the written grounds at paragraphs 8 and 9 and relied upon in the oral submissions made that the FtTJ erred in its application of the burden of proof to the evidence.
33. Mr Georget submits that the FtTJ did set out the applicable law but on the evidence before the Tribunal and the findings made, he could not have found that the evidential burden was met for a case to be answered on behalf of the appellant. This was because nearly all of the criticisms relied upon by the Secretary of State were rejected by the judge. At paragraph 24 (a) and (b) the judge recorded that at the date he met Miss F and at the date that they had married, the appellant was an age when he reasonably could be expected of thinking of marriage and that there was nothing “inherently improbable in the proposition that the appellant would have wished to marry her and that he should have married her out of genuine love and affection.” It is submitted that the judge had to apply the burden of proof and had to see whether the evidential burden had been discharged by the Secretary of State based on the respondent’s case. This required a consideration of the appellant’s answers and explanation (and that of his partner) as part of the balance of probabilities. He submitted that whilst the Supreme Court did not breakdown the burden of proof in this way, it was consistent with the decision in *Agho* and it is consistent with fraud type cases. However, the judge did not apply this in the light of the findings made. At paragraph 23, the judge relied upon his previous immigration history. However paragraph 23 (c) was not based on any evidence. At paragraph 24, the judge went through the discrepancies relied upon by the respondent but rejected them for the reasons given at paragraph 24 (c) (1-5). Consequently the respondent had not discharged the “reasonable inference” as required.
34. Mr Clarke submits that the FtTJ correctly directed himself in law at paragraph 12 where he set out the relevant decisions in *Papajorgi*, *Agho* and *Rosa*. He reminded himself that the burden was on the Secretary of State to establish on the balance of probabilities that “an otherwise valid marriage is a marriage of convenience”. He further submitted that the judge also recognised that the Secretary of State could not discharge the burden by demonstrating only a “reasonable suspicion”. Therefore, it could not be established that he misapplied or misstated the legal test. He further submitted that in light of the findings of fact, he was entitled to reach the conclusion that the evidential burden had been established.
35. It is in this context that it is submitted that as the judge rejected the respondent’s criticisms of the marriage interview, and as there was no other evidence relied upon to demonstrate that this was a “marriage of convenience” it was not open to the FtTJ to find that the “evidential burden” on the respondent had been met, if that is the correct approach to the burden of proof.
36. I have considered the parties respective submissions in the light of the relevant case law. In relation to the burden standard of proof, in *Rosa* it was held that the legal burden was on the Secretary of State for the Home Department to prove that an otherwise valid marriage was a marriage of

convenience so as to justify the refusal of a residence card under the EEA Regulations. The legal burden of proof in relation to marriage lay on the Secretary of State, but if she adduced evidence capable of pointing to the conclusion that the marriage was one of convenience, the evidential burden shifted to the applicant (paras 24 - 27).

37. In *Agho v Secretary of State for the Home Department* [2015] EWCA Civ 1198 it was held that where an applicant sought an EEA residence card on the basis that he was married to an EEA national, he simply had to produce his marriage certificate and his spouse's passport. As a matter of principle, a spouse established a prima facie case that he was the family member of an EEA national by providing the marriage certificate and his sponsor's passport. The legal burden was on the Secretary of State to show that any marriage thus proved was a marriage of convenience and that burden was not discharged merely by showing 'reasonable suspicion'. The evidential burden might shift to the applicant by proof of facts that justified the inference that the marriage was not genuine. The facts giving rise to the inference included a failure to answer a request for documentary proof of the genuineness of the marriage where grounds for suspicion had been raised: *Papajorgji* (EEA spouse - marriage of convenience) [2012] UKUT 38 (IAC) considered (para 13).
38. That the burden of proof is on the respondent is now put beyond doubt by *Sadovska v SSHD* [2017] UKSC 54 .
39. I would accept that the FtTJ did direct himself to the appropriate case law and as Mr Georget submitted, he did not mis- state the law. However, the issue arises as to whether the evidence relied upon by the respondent and the assessment of that evidence then shifted the burden to the applicant in the light of the assessment made of the parties' respective interviews.
40. The respondent applied the wrong test in the decision letter of 5 July 2018 stating that there were "reasonable grounds to suspect "for the sole purpose of enabling the appellant to obtain an immigration advantage. The judge appropriately recognised that in his footnote at page 6. However, the content of the decision letter in support of this claim relied upon the discrepancies between what the appellant and Miss F said in the course of their respective interviews. They were summarised by the FtTJ as relating to Miss F's recent medical problems, her education, his arrival in the UK, his proposal to marry, the wedding, and her employment.
41. It is plain from considering the findings of fact made by the FtTJ and set out at paragraph 24 (c) that the apparent discrepancies and other matters relied upon by the Secretary of State were not found to be of substantial weight and did not (for the most part) cast substantial doubt on the proposition that he married her out of genuine love and affection. The judge set out his reasoning at paragraph 24 (c) (1-5) and made reference to her medical problems, her the issue relating to the significance of his knowledge of her education, the discrepancy of where they were when they propose to marry and the dates upon which the marriage took place. The judge also did not accept the asserted discrepancies relating to her

employment (see subparagraph five). The judge also made a similar finding in relation to Miss F at paragraph 22 (d) in which he stated “the apparent discrepancies between what Mr A and Miss F recorded as having stated at interview and the points which the Secretary of State raised in relation to those matters do not impinge significantly on Miss F’s credibility or suggest any reason why she should have married Mr A for any reason other than out of genuine love and affection. “

42. Mr Clarke submits that whilst it is right that the judge did not accept all of the matters referred to in the decision letter, the judge did make some adverse findings; that he had failed to tell Miss F of the circumstances in which it came to the United Kingdom and that is lack of interest in her medical condition was relied upon (see paragraph 24; page 19 of the decision).
43. I prefer the submission made by Mr Georget. Given the rejection of the respondent’s case in substance, and when seen in the light of the other evidence that the judge placed weight upon, which included the evidence of Miss F which he accepted (paragraph 21), the photographs which were consistent with her having a loving relationship with him, the duration of the parties cohabitation and the birth of their child, it could not be reasonably said that the respondent had discharged the evidential burden. The appellant had given a reason why he had failed to tell her of the circumstances which he came to the United Kingdom which was that he feared that such a disclosure would disturb their relationship (see paragraph 16 (c). Even if the appellant was “less than frank” as stated by the FtTJ, it is difficult to see how that evidence when set against the other evidence identified above, demonstrates that this gave rise to the view that this was a “marriage of convenience”.
44. I am therefore satisfied that the grounds are made out in that respect. However, if I am wrong in that analysis I have gone on consider the principal submission set out at paragraph 2 (b) of the skeleton argument produced on behalf of the appellant, which relates to the consideration of whether there had been a “deceit “on the part of the appellant, in the context of whether the legal burden was discharged to demonstrate that this was properly characterised as a “marriage of convenience.”
45. I have therefore carefully considered the competing submissions of the advocates. Mr Georget directed the Tribunal’s attention to paragraph 29 of the decision in Sadovska where it was stated that “furthermore, except in cases of deceit by a 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.” He submitted that this was the heart of the issue and that the purpose (whether sole or predominant) must be a shared intention except in cases of deceit and that this introduces an additional test. He submitted that there was no guidance or case law concerning what would constitute a deceit, but when considering the handbook at page 12 and in particular the footnote, and a “marriage by deception” this would normally involve a false representation or in the marriage context potentially to the issue of

consent or lack of it. When applied to the FtTJ's reasoning, the judge was required to establish not only that his sole (or predominant) purpose in marrying was to secure an immigration advantage but that he did not have any genuine belief that there would be such a marriage and that he would have to deceive his unknowing spouse. Here, the findings were specific that Miss F married him out of genuine love and affection and that there was no evidence of any deceit practised upon the EU national. Furthermore, on the findings made, the judge also accepted that he had genuine love and affection for Miss F.

46. In his oral submissions, Mr Georget submitted that the relevant events, including those which take place after the marriage can throw light on the predominant purpose test and that when considering whether there has been a deceit practised, those other events take on an additional importance. When applied to the factual circumstances of the appellant and Miss F, the judge accepted a lengthy period of residence of 18 months and that they had a child together in 2019. Therefore, those factors are relevant to the issue of deceit. He submitted that at paragraph 14 of the FtTJ's decision, he quoted paragraph 29 of Sadovska but failed to apply the exception in cases of deceit and that this was therefore an error in law.
47. When looking at the decision, he submitted that at paragraph 24 the FtTJ made reference to the appellant's omission to tell Miss F of the circumstances in which he came to the United Kingdom or that he put forward a false claim to asylum. However, if this was the deceit, the details of a previous asylum claim could not evidence the deceit or have any effect upon Miss F, nor had it been explained how that had operated.
48. Mr Clarke referred the Tribunal to paragraph 29 of Sadovska, and that the Supreme Court had made reference to the 2014 Handbook suggesting a more flexible approach. He further submitted that where it was said that the purpose must be the "purpose of them both" that did not apply in cases of deceit by the non-EU national. In this context he referred to "deceit" as defined as an abuse of EU rights. He submitted that the FtTJ set out a sustainable consideration of the minds of each of the parties and made findings consistent with the appellant's intent at the date of the marriage which was to obtain an immigration advantage and that this was an abuse of EU rights.
49. He made reference to paragraph 22 of the FtTJ decision where he had found that Miss F had married the appellant "out of genuine love and affection". However, the FtTJ's findings at paragraph 23 made it plain that the position in respect of the appellant was "substantially different". Mr Clarke therefore submitted that the relevant "deceit" was that referred to at the subparagraphs (a) - (c)- that he had made false asylum claim, he did not wish to return to Egypt and therefore he could only do so by otherwise marrying a younger woman who was an EEA national. Furthermore at (e) the judge set out how they had met but that the appellant did not tell her that he had made a false claim. Mr Clarke therefore submitted that this was the deceit and that the judge had found at the time they had met she was vulnerable and that the inference drawn

from those findings is that the appellant capitalised on this and hoodwinked her into marriage. Therefore his predominant purpose was to procure the right to remain and in light of the FtTJ's assessment, it could be characterised as a finding of deceit.

50. The 2016 Regulations (reg 2) now define a marriage of convenience: "marriage of convenience" includes a marriage entered into for the purpose of using these Regulations, or any other right conferred by the EU treaties, as a means to circumvent - (a) immigration rules applying to non-EEA nationals (such as any applicable requirement under the 1971 Act to have leave to enter or remain in the United Kingdom); or (b) any other criteria that the party to the marriage of convenience would otherwise have to meet in order to enjoy a right to reside under these Regulations or the EU treaties."
51. In [Rosa \[2016\] EWCA Civ 14](#) it was held that the focus in relation to a marriage of convenience ought to be on the intention of the parties at the time the marriage was entered into, whereas the question of whether a marriage was subsisting looked to whether the marital relationship was a continuing one. However, evidence concerning the relationship might cast light on the intention of the parties at the time of the marriage.
52. The FtTJ set out his analysis of the law at paragraphs 12 - 15 stating as follows:

"12. Consistently with the decisions (made under the 2006 Regulations) of the Upper Tribunal in *Papajorgji* (EEA spouse - marriage of convenience) *Greece* [2012] UK you 38 (IAC) and the Court of Appeal in *Agho v Secretary of State* [2015] EWCA Civ 1198 and *Rosa v Secretary of State* [2016] EWCA Civ 14, it is for the Secretary of State to establish, on the balance of probabilities, that "an otherwise valid marriage is a marriage of convenience." The secretary of state does not discharge the burden simply by demonstrating "reasonable suspicion". But the "evidential burden" may shift to an appellant (see *Agho* at paragraph 13)

"by proof of the facts [by the Secretary of State] which justify the inference that the marriage is not genuine."

The focus of attention, in relation to a marriage of convenience, should [see *Rosa* at paragraph 41] be

"on the intent of the parties at the time the marriage was entered into"

rather than whether, at the time of the hearing, the marriage is "subsisting" albeit that evidence concerning the relationship might cast light on the intention of the parties at the time of the marriage. The ultimate question is therefore (see paragraph 39 of the determination in *Papajorgji*)

"in the light of the totality of the information before me, am I satisfied that it is more probable than not this is a marriage of convenience?"

In the light of the subsequent decision of the Court of Appeal in Rosa, the word “was” shall be substituted for the word “is”, immediately before the words “a marriage of convenience.”

13. At paragraph 30 of the determination in Papajorgi, an appeal against refusal to grant a family permit (permitting entry, the Upper Tribunal wrote (paragraph 30) as follows:

“Although neither the directive nor the Regulations define it, ... A marriage of convenience and his context is a marriage contracted for the sole or decisive purpose of granting admission to the host state. Durable marriage of children and cohabitation is quite inconsistent with such a definition”.

In the light of the guidance given by the Court of Appeal in Rosa (above), namely that the focus of the attention should be on the intention of the parties at the time the marriage was entered into, the second sentence of the above guidance given in the above extract from the determination in Papajorgi must be treated with caution.”

53. In a footnote, the FtTJ added the following:

“” sole or decisive” is no longer, see below, paragraph 14, the correct test. From which it follows that the next sentence in the above extract is not, with the greatest of respect the Upper Tribunal, accurate. Nor was what was stated in the sentence necessary for the Upper Tribunal decision. It does not form part of the ratio decidendi”.

54. At paragraph 14 of the decision, the FtTJ made reference to the decision in Papajorgi but set out that the Upper Tribunal did not state whether both the parties to the marriage must have the sole or decisive purpose of either granting admission to the host state or enabling the non-EEA national spouse to remain (if the marriage is to fall within the category of “marriage of convenience”) or whether it was sufficient if that purpose is only that of the non-EEA national.

55. The FtTJ considered that the answer to that question was that the purpose is only that of the non-EEA national. In support of that conclusion, he made reference to an example of where a non-EEA national, a “rogue”, who deceives an EEA national as to his intentions towards her and thereby fraudulently induces her to marry him, his purpose being to procure entry or to enable him to remain. The example went on further to assume that the EEA national is deceived by the rogue and marries him having genuine feelings towards and having no idea of his two reasons or his “roguery”. The judge concluded that if that scenario was not treated as a marriage of convenience, because the EEA national’s intentions were genuine, it would enable a “rogue to profit from his roguery.” The FtTJ went on to state that “the rogue in the example I have given has plainly committed fraud on the EEA national.” The judgement on to state that the conclusion that he had reached was in accordance with the guidance given by the Supreme Court in Sadovska at paragraph 29. He concluded that “the crucial question, consistently with the analysis of the Supreme Court is whether obtaining the “immigration benefit” was the predominant purpose of the marriage.

And the burden of establishing that (on the balance of probabilities, is with the Secretary of State.”

56. There is no dispute on the FtJ’s analysis that he was satisfied that the appellant’s wife had married him out of genuine love and affection, notwithstanding the judge’s subsequent view of her age. However, he found that the appellant had married his wife to enable him to remain in the UK and to be able to work. We therefore found one party to be a party to a marriage of convenience but not the other. As Mr Georget submits, it is an unusual scenario in practice. In a vast number of cases it can properly be said that it is the common purpose between the two parties contracting the marriage. Furthermore, in a case of duress or exploitation both parties are still clearly aware that it is not a genuine marriage. However, as I have stated in this case the judge found the appellant’s wife married him out of genuine love and affection and conversely that there was nothing improbable about the appellant should have married her out of genuine love and affection (see paragraph 24(a) –(c)).
57. Mr Georget on behalf of the appellant accepts that it is not a strict necessity in law that both parties have a common purpose and further agrees with Mr Clarke on behalf of the respondent, that as a matter of principle, it is sufficient if that purpose is only that of the non-EEA national. I would respectfully agree with that approach and that is consistent with the decision of Sadovska.
58. However, I am satisfied that the judge misdirected himself in law and in his analysis of the issue at paragraph 14. In the context of this particular factual matrix, it is not solely a question of what the sole or predominant purpose was but whether there had been a deceit, and this is plain from paragraph 29 of the decision in **Sadovska and another (Appellants) v Secretary of State for the Home Department (Respondent) (Scotland) [2017] UKSC 54** which set out as follows:
- 29. 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."*
59. I have not been directed to any authority or case report in which the issue of what constitutes a “deceit” in the context of the above paragraph. Mr Georget has directed my attention to the handbook where reference is made to a specific category which it labels a “marriage by deception”.
60. At p.12 the handbook continues: -

Marriages of convenience

Marriages of convenience can be subdivided into several groups, depending on the mode in which they have been set up. The list below should not be considered to be exhaustive.

“Standard” marriage of convenience

Probably the most common modus operandi related to marriages of convenience is a marriage where both spouses are willing accomplices, freely consenting to enter into a relationship designed to abuse EU law. By no means is this the exclusive way in which a marriage of convenience can be contracted. The degree to which the EU citizens freely consent to enter into a marriage of convenience can significantly differ.

Marriage by deception

A marriage by deception arises when the EU spouse is deceived by the non-EU spouse to genuinely believe that the couple will lead a genuine and lasting marital life such marriage is a marriage of convenience and should be tackled accordingly, with due regard to the innocence of the EU spouse. In such marriages, the EU citizen is not a willing accomplice, but a victim guilty only of good faith, such marriages typically, but not necessarily, follow a short relationship on the Internet, or after the EU citizen has met the non-EU spouse in a foreign country on holidays. They may involve violence and threatening behaviour, particularly if the EU spouse has started to have concerns and is unwilling to participate in the immigration process.”

61. As set out above, what is described as the “standard marriage of convenience” is the type which commonly appears before the Tribunal. This case falls outside that.
62. Having considered the meaning of the word “deceit” and in the context of the handbook as set out above, in the context of a marriage the issue of such a “deceit” is relevant to the issue of consent, or lack of consent. I agree with the submission made by Mr Georget that in such a case something more is required if such a deceit is to be relied upon to demonstrate that this a “marriage of convenience”. When applied to the instant appeal, whilst the FtTJ cites paragraph 29 of Sadovska, he makes no reference to the issue of deceit and it is on that basis that I am satisfied that the analysis of the FtTJ discloses a misdirection in law.
63. Furthermore, whilst he considered that the predominant purpose was to secure an immigration advantage by the appellant and that this was sufficient to satisfy the definition of a “marriage of convenience” he did not point to any deceit upon the appellant’s wife. To put it another way, it was necessary to establish not only that the appellant’s sole (or predominant) purpose in marrying was to secure an immigration advantage (which the judge found to be a right of residence/work) but also that he did not have any genuine belief that it would be a genuine and

lasting marital life. The judge would have to have found that the appellant would have deceived his spouse into thinking that he shared her belief that they were entering into a genuine relationship when he had no such belief.

64. This was not met on the facts of this case. That is because the judge clearly found that there was an element of genuineness in his intentions towards Miss F. The judge expressly found at the date that he met Miss F in March 2017 and the date of the marriage in 2018, he was of an age when he could be expected to be thinking of marriage. He set out that “Miss F was an attractive young woman nothing inherently improbable in the proposition that the appellant should wish to marry her and that he would have married out of genuine love and affection”. As to the apparent discrepancies from their interviews and other matters relied on by the Secretary of State, the FtTJ did not find them to be in the main of any substantial weight and did not (for the most part) to cast substantial doubt on the proposition that he married Miss F out of genuine love and affection. The FtTJ expressly found that the failure to mention her medical problems was not made out; he was not satisfied that there was any significance in the fact that the appellant did not know whether she been attending high school college or whether she wore uniform. He did not find that there was a discrepancy as to where the parties were when the proposal to marry was put forward nor did he accept the apparent discrepancy over the dates given by the appellant and Miss F. The judge also rejected the apparent discrepancies relating to Miss F’s employment.
65. Whilst Mr Clarke submitted that the FtTJ made a finding that the appellant’s omission to tell Miss F of the circumstances in which he came to the United Kingdom was “in a different category and shows that he was less than frank” and that his failure to mention that she used an inhaler and was taking vitamin supplements showed a lack of interest in her condition, this does not in my judgment cancel out or undermine the earlier substantial findings in which the FtTJ accepted Miss F’s evidence and where he rejected the main evidential assertions relied upon by the respondent or the favourable points made in the appellant’s favour.
66. Looking at the decision of the FtTJ, there is no reference or any proper evidential basis to conclude that there had been any deceit practised. I cannot accept the submission made by Mr Clarke that the deceit practised was that he failed to tell her of the circumstances in which he came to the United Kingdom, that the judge had found Miss F to be vulnerable and that the inference raised is that the appellant had hoodwinked Miss F into marrying him. I can see no evidential basis for that inference and at no point can it be said that Miss F’s evidence was to that effect.
67. I also accept the submission made by Mr Georget that in considering the issue, other considerations and factors which emerge after the date of the marriage are equally relevant. At paragraph 27 (e) the judge makes reference to the length of cohabitation between the parties but that in view of her age (just over 19 years) he placed “very significantly less weight” on their cohabitation for 18 months than he would have done “in

the case of an older and more experienced young woman". His reasoning is that over such a period in the case of an older woman, if the position was that the predominant purpose of a husband in marrying her was to secure the right to remain, such an older person would have observed signs in his behaviour but as Miss F was comparatively young, it could not so readily be expected that she would have observed or recognised such signs. That seems to be the only reference made but it is in an entirely different context. In any event, it has not been demonstrated that such a conclusion or analysis was supported by any evidential foundation other than a generalisation.

68. In Sadovska v Secretary of State for the Home Department [2017] UKSC 54 it was found that the objective to obtain the right of entry and residence must be the predominant purpose for the marriage to be one of convenience and a marriage could not be considered to be a marriage of convenience simply because it brought an immigration advantage. "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".
69. That seems to me to apply equally to the present facts of this appeal.
70. As the Supreme Court acknowledged in Sadovska, that requires proof that both parties contracted the marriage with the predominant purpose to gain rights of entry to and residence in the European Union (see [29]).
71. I am also satisfied that there is a further misdirection in law as set out at paragraph 6 of the written grounds. The judge correctly directed himself to the issue relating to the "contracting" of the marriage, rather than with its continued "subsistence". The focus, therefore, in time is upon the parties' motivation when they entered into the marriage. However, evidence relating to the genuineness and subsistence of the marriage subsequently may reflect back upon their motivations when they married. But it is always the latter which is the issue when the respondent alleges that the marriage is a "marriage of convenience".
72. In reaching a finding on that issue, bearing in mind that the burden of proof is upon the respondent, a judge must take into account all relevant evidence which may include evidence concerning the genuineness and subsistence of the marriage over time.
73. Whilst the FtT made reference to paragraph 28 of Sadovska, the FtT did not attribute any weight to the evidence concerning the relationship between the appellant and his wife after the marriage itself, although that was capable of casting light on their intention at the time of marriage. That evidence included the birth of their child in February 2019 and that they had continued to reside together since their marriage in February 2018, a period of 18 months. The analysis of the judge at paragraph 27(e) where he sought to attribute little weight to her length of cohabitation on the basis of her age(just over 19 years) as compared with an older woman

who would have observed or recognised any adverse signs, has no evidential basis for the reasons I have set out earlier. There was no evidence before the FtTJ to support that finding by reference to her level of maturity or otherwise and can be properly considered to be a generalisation.

74. As to the birth of their child, the FtTJ did not find this to be a substantial factor pointing against the marriage having been one of convenience because at the date of the marriage the child had not been born. This was because the FtTJ considered that the focus of attention was on the intention of the parties at the time the marriage was entered into rather than whether, the time of the hearing, the marriage is subsisting (see paragraph 23(f) (2)). Whilst at (3) he made reference to evidence concerning the relationship after the date of the marriage may cast light on intention, it is plain that he rejected the evidence of the child's birth because he stated that Miss F wanted to have a child at the earliest possible date and if the appellant's "predominant purpose" was to procure the right to remain he could only achieve this by ensuring that the relationship was maintained and that they should have a child at the earliest possible date. I can see no evidential foundation for that latter finding either. I can see no evidence to support such a finding that it was at his insistence that they should have a child at the earliest possible date to secure his right to remain.
75. A further point was raised on behalf of the appellant which was the interpretation of the "sole purpose" test. Given my analysis of the other two points raised on behalf of the appellant, it is not necessary to reach any view on that particular ground as I am satisfied that those errors go to the heart of the decision under challenge whether it is the "sole purpose" or the predominant purpose".
76. For those reasons I am satisfied that the submissions made on behalf of the appellant are made out and that the decision demonstrates the making of an error on a point of law. I therefore set aside the decision.
77. As to the remaking of the decision, in the light of the preceding analysis, when the evidence is considered as a whole, the legal burden upon the respondent does not establish that this is a marriage of convenience. The FtTJ was satisfied that Miss F had given credible evidence had married the appellant out of genuine love and affection for the reasons that he set out at paragraphs 21 and 22 of his decision. The FtTJ also did not find that it was inherently improbable that the appellant should wish to have married her and would have married out of genuine love and affection (paragraph 24 (a) -(c)). The discrepancies in the marriage interviews, which forms the principal evidence on behalf of the respondent to demonstrate that this was a "marriage of convenience" were not found to be of "substantial weight". The judge's finding that those discrepancies did not cast "substantial doubt on the proposition that he married out of genuine love and affection" (see paragraphs 24 (a)-(c)). There is no evidential basis that any omission to tell Miss F that he had made a false asylum claim cast doubt on his reasons for marrying Miss F and it does not been established

either that that failure or lack of frankness was such to constitute any form of deceit upon Miss F. The focus must be on the intention of the parties that the time the marriages entered into, evidence concerning the relationship is capable of casting light on the intention of the parties at the time of the marriage. It is therefore important to consider the totality of the information. This would include the lengthy period of cohabitation that has accrued between the parties since the date of their marriage and the appeal both before the FtTJ and this Tribunal and that the parties have a young child together. There is no evidence to support any view that the appellant's sole purpose or predominant purpose was to procure the right to remain by ensuring that he maintained the relationship to require that they had a child at the earliest possible date. A more reasonable inference raised from the birth of their child their continued cohabitation is that this is not a marriage of convenience.

78. It is not for the appellant to establish that the relationship was a genuine and lasting one but for the respondent to establish that it was indeed a marriage of convenience. As the legal burden has not been discharged in this respect, the appellant has established on the balance of probabilities that he is Miss F's spouse, who is an EEA national and therefore his appeal succeeds.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law; the decision is set aside, and decision is remade as follows: the appellant's appeal is allowed.

No anonymity direction is made.

Signed: Upper Tribunal Judge Reeds

Date: 17/7/19

Upper Tribunal Judge Reeds