



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

Appeal Number: EA/07160/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 15 October 2018**

**Decision & Reasons  
Promulgated  
On 2 May 2019**

**Before**

**UPPER TRIBUNAL JUDGE PERKINS**

**Between**

**MUHAMMAD [M]**  
(anonymity direction not made)

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Maqsood, Counsel instructed by Expert Law Solicitors

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by a citizen of Pakistan against the decision of the respondent on 2 August 2017 refusing him an EEA residence card. The short point is that the appellant says the First-tier Tribunal Judge misdirected herself by applying the wrong burden of proof. If that is right then it is but a short step from establishing the error to showing there was a material error of law with the likely result that the appeal has to be re-determined.
2. The Judge directed herself in a way that probably was appropriate before the decision of the Supreme Court in Sadovska and another (Appellants) v

Secretary of State for the Home Department (Respondent) (Scotland) [2017] UKSC 54 but that decision was given on 26 July 2017 and the First-tier Tribunal heard this appeal on 14 June 2018. It is therefore surprising that the Tribunal seemed unaware of it. It is now clear law that the burden of proving that marriage was one of convenience rests on the Secretary of State.

3. The First-tier Tribunal erred in law.
4. The Judge not only misdirected herself at the start of the decision but she repeated the error at paragraph 44 of the Decision and Reasons where she said that the Appellant has not discharged the burden of proof on him.
5. As I indicated at the hearing, I wanted to read the decision very carefully to satisfy myself that the error was indeed material. I did not expect to take as long as I have taken and I apologise for that delay.
6. I will look very carefully at the actual decision made by the First-tier Tribunal Judge.
7. The judge began with consideration of a record of a visit by Immigration Officers on 4 December 2014. She noted, correctly, that it was the respondent's case that this note is supportive of the contention that the appellant and Ms [G] had engaged in a marriage of convenience. She noted too that there was criticism of the Secretary of State for not providing the notes that supported the Immigration Officer's conclusions but as there was no evidence that the Secretary of State had ever been asked to produce the documents she found that an unimpressive point.
8. The record is not extensive and I set it out below:

"The West London Arrest Team visited [Surbiton] today 04/12/14 in response to an EEA application made by Muhammad [M] 20/12/92 PAK male. On arrival at the address at 09:15 hours I knocked on the door to the flat and encountered an Italian female named [NA] 06/02/95. I introduced myself to her as an Immigration Officer and asked if I could speak to Muhammad [M] or [EG], I also showed her a photograph of [M]. The female stated that she did not know either person and stated that she lived there with her friend Sarah who is Polish, she added that Sarah had lived there for four years. It is clear that neither applicant or sponsor is known at the address, neither party lives there or is known by the occupants. This case should not be granted, there is clearly a problem, the address may have been used as a postal drop by one of the occupants but clearly the present female occupant [NA] does not know either person on the application."
9. It is then signed and the officer's identification number is shown.
10. The judge acknowledged evidence trying to explain away the Immigration Officer's conclusion. There was a statement from Ms [NA] saying, in effect, that she was visiting the property when the Immigration Officer arrived. Her English was poor and although she explained she did not know who lived at the flat she had tried to explain that she did not live there and so could not know who lived there. The judge noted that the witness statement was signed but the witness did not attend for cross-

examination and that reduced the weight that could be given to the statement.

11. The judge said at paragraph 26 that “I therefore do not alter my conclusion that the Immigration Officer’s note is sufficient basis to discharge the legal burden on the respondent.”
12. Even if that were the relevant test I am doubtful that it was satisfied by that evidence. It boils to a report from someone who was not called to give evidence saying that the one person he saw at the address claimed to live there and not to know the appellant or his wife. Even if it is assumed that there the evidence is an accurate record I do not see how it illuminates the reasons for the appellant’s marriage rather than the integrity of [NA]. Maybe she did live there with her friend Sarah and no-one else. Maybe she was misunderstood by the Immigration Officer. Maybe she does not trust immigration officials and was untruthful. These obvious alternative explanations have not been considered in the judge’s expressed reasoning.
13. The judge did hear evidence from Ms [S] also known as Sarah. Most of her evidence was addressed to the wedding ceremony. She said that she had attended the wedding and had helped Ms [G] by going with her to buy her wedding clothes. That there was a wedding ceremony was not in dispute but the judge could not help but note the inability of Ms [S] to give clear answers about who had attended the ceremony (only very few people were present) and gave answers that were inconsistent with the appellants. The judge found her evidence to be inconsistent and vague and that reduced the weight that can go to it.
14. She also looked at photographs in the bundle but they all appeared to relate to the wedding day and showed that they were present which was not in dispute.
15. There was a letter from the landlord but that simply confirmed there was a joint tenancy involving the appellant, Ms [G] and Ms [S]. Unsurprisingly it did not illuminate the nature of the relationship.
16. The judge looked very carefully at bank statements that were produced and noted that there were several examples of people not known to the proceedings apparently paying rent on the Wellington Court address. It was not explained satisfactorily or at all and the judge took the view that the property was being used as a home by people who were not identified and this tended to confirm the Immigration Officer’s suspicion that it was an accommodation address.
17. The judge was very aware of the potential value to the appellant of evidence that his wife had miscarried. Clearly the fact of a miscarriage is not conclusive evidence that the relationship was genuine at its inception but it is something that would need rather careful thought. However the judge noted that the report was incomplete being only pages 2 and 3 out of four and that the only part of the report that actually identified the patient as Ms [G] could have been added to the top of the page. The

judge was not saying that the document was a forgery. She merely used that to illustrate how the document was not reliable or helpful. It was incomplete and not clearly relating to the appellant's wife. She gave little weight to that.

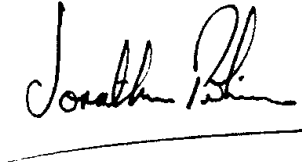
18. The judge found is that there was no satisfactory evidence of cohabitation at the stated address. She found clear evidence that an incomplete story had been told. She had no evidence before her from the appellant's wife or former wife which might have illuminated matters. She found little relevant supporting evidence. She was perfectly aware of some documents tending to show cohabitation that of its own does not illuminate the nature of the relationship.
19. The judge concluded:

"For the reasons set out above, there are numerous issues reducing the weight to be given to the appellant's evidence. I therefore find that the appellant has not discharged the burden of proof on him and I conclude that the marriage between him and Ms [G] was one of convenience."
20. That, as I have explained above, is the wrong approach.
21. Of most concern to me is that the judge did not consider expressly the appellant's evidence including his witness statement dated 14 June 2018 where he writes about the reasons for the marriage, of his attraction to his wife and his unhappiness at the time of the miscarriage. It would be particularly interesting to know if the appellant was cross-examined on the basis that he was lying when he spoke of his distress. Alternatively, if he was not cross-examined on that basis it would be interesting to know why he judge was concerned about the reliability of the medical evidence when the point was never put to the witness who might have been able to explain it.
22. The judge then looked at the documentary evidence and found further evidence that the property at Wellington Court was sublet contrary to anyone's case and this reinforced her finding that she was not being told the truth.
23. However, although the Judge might have given proper reasons for disbelieving some of the evidence it does not follow that she was necessarily and consequentially satisfied that the marriage was one of convenience and particularly not that the Respondent had proved that it was one of convenience.
24. This is a decision where the misapplication of the burden of proof was a material error and one that I cannot remedy without a fresh hearing. As the present findings are of no value the appeal needs to be heard again in the First-tier Tribunal by a different judge.

**Notice of Decision**

25. The First-tier Tribunal erred in law. I set aside its decision and direct that the case be heard again in the First-tier Tribunal at Hatton Cross by a different judge.

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 1 May 2019