Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2021-001545
EA/04841/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 April 2022	**On 27 July 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS DORA NKETIA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T. Melvin, Senior Home Office Presenting Officer
For the Respondent: In person, assisted by Thomas Yawson (the sponsor)

DECISION AND REASONS

1. This case concerns the approach to be taken under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") to a marriage of convenience which later evolves into a genuine relationship. This judgment is structured as follows. First, I summarise the procedural and factual background, including the decision of the First-tier Tribunal. Secondly, I will summarise the grounds of appeal and the submissions. Thirdly, I will outline the essential legal framework. Fourthly, I will discuss the grounds of appeal in light of the submissions and the law. As will be seen, I conclude that the decision of the judge did involve the making of an error of law. In the final part of my decision, therefore, I remake the appeal of the First-tier Tribunal by dismissing the appeal.

2. The Secretary of State appeals against the decision of First-tier Tribunal Judge Brannan ("the judge") promulgated 28 September 2021 allowing an appeal

by the appellant, a citizen of Ghana born on 27 August 1974, against a decision of the Secretary of State dated 29 August 2019 to refuse her application for a residence card as the family member of an EU citizen, Thomas Yawson, a citizen of Belgium. For ease of reference, I will use the term "the appellant" to refer to the appellant before the First-tier Tribunal, and I shall describe the respondent before the First-tier Tribunal simply as the "Secretary of State". I will refer to Mr Yawson as "the sponsor".

3. Although the UK has now left the EU and the implementation period came to an end at 11PM on 31 December 2020, this appeal was commenced before then. Pursuant to paragraph 5(1)(b) of Schedule 3 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020, the 2016 Regulations continue to apply to these proceedings. For the purposes of the coherence of this decision, where relevant I will proceed as though the United Kingdom were still a Member State of the EU, as was the functional position during the implementation period under the Withdrawal Agreement (*Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community,* October 2019) at the time of the Secretary of State's decision and the institution of this appeal.

The hearing in the Upper Tribunal

4. The appellant appeared before me as a litigant in person, supported by the sponsor, who addressed the tribunal in English. The appellant's first language is not English, but both she and the sponsor assured me that they were content for the hearing to continue without an adjournment to appoint a Twi interpreter. They said they could no longer afford legal representation. I offered to adjourn the proceedings to obtain an interpreter, but the appellant and the sponsor asked me not to. I concluded that the sponsor would, with my assistance with the formulation of the issues, be able fully to participate in the hearing, and that it would be fair for the hearing to proceed. The appellant did not want an adjournment, and through the sponsor was able to participate fully in the proceedings. I therefore declined to adjourn the proceedings of my own motion to arrange for a Twi interpreter for the appellant. I was satisfied that with the assistance of the sponsor the appellant was able to participate fully in the proceedings and that an adjournment would not be necessary or in the interests of justice. An adjournment would have led to the injection of delay into the proceedings, for no discernible gain, given there was no basis to conclude that the appellant would be able to secure legal representation on a future occasion, nor that a court-appointed interpreter would be able to facilitate the appellant's participation to a greater extent than the sponsor.

5. The appellant and sponsor had not been able to secure childcare, so their child, J, was in attendance also.

Factual background

6. On 29 April 2019, the appellant applied for a residence card as the family member of an EEA national in respect of her marriage to the sponsor. She claimed that they were married by proxy in Ghana on 4 August 2018 and that they began cohabiting in September 2018. In response to the application, the Secretary of State invited both the appellant and the sponsor to separate

marriage interviews, which they attended. The Secretary of State refused the appellant's application on the basis that she had reasonable grounds to suspect that her marriage to the sponsor was one of convenience. The appellant's appeal was heard by the judge on 30 June 2021 (not 2020, as stated on the first page of judge's decision) and 13 September 2021. In a decision promulgated on 28 September 2021, the judge allowed the appeal. The Secretary of State appeals to this tribunal with the permission of First-tier Tribunal Judge Cox on grounds to which I shall return.

7. The appellant has a poor immigration history. Only a brief summary is necessary here. She entered the United Kingdom with entry clearance as a visitor on 6 April 2011 valid for six months, falsely (on the basis of her own admission before the judge) claiming to be married to someone to whom she was not married, in order, again on her own case, to secure a visa. In 2017, she was encountered working illegally and was detained. She made a human rights claim on the basis of her relationship with a British citizen, a relationship that she accepted in evidence before the judge was simply cover for her sexuality. The claim was refused and certified as clearly unfounded. On 26 January 2016, she claimed asylum, claiming to be a lesbian in a relationship with a woman called Irene. Her claim was refused, and she appealed. By a decision dated 3 October 2018, First-tier Tribunal Judge Lawrence dismissed her appeal, finding at [36]:

> "… on the evidence before me I find the appellant is a person without a jot of credit."

8. Both the appellant and the sponsor gave evidence before the judge at the hearing on 30 June, although only the appellant attended the resumed hearing before the First-tier Tribunal on 13 September.

The decision of the First-tier Tribunal

9. The judge began by setting out the extensive procedural background to the decision, including the Secretary of State's unsuccessful adjournment application before him on 30 June 2021. It turns out that the judge had to resume the hearing on another day in any event, having sat until 18.30. Further matters occurred to the judge after that hearing, so he reconvened to hear further evidence, on 13 September 2021.

10. The judge analysed the law from [51] to [75]. As I will return to the judge's reasoning below, a summary will be sufficient for present purposes. The judge concluded that whether a marriage of convenience which evolves into a genuine relationship should continue to be treated as a marriage of convenience was a question of proportionality under EU law. He found that the 2016 Regulations did not make provision for that question to be addressed in an assessment of a marriage of convenience, but that, given the need to read the Regulations consistently with EU law, it was nevertheless a relevant factor. The effect of that, he concluded at [69], was that it was possible for a marriage of convenience to cease to be treated as such, where it would be disproportionate to do so.

11. In the alternative, at [70] and following, the judge found that such a relationship would be a "durable partnership" under regulation 8(5) of the Regulations. Neither party supported that construction, he noted.

12. Against the background of those legal conclusions, the judge reached extensive findings of fact at [76] onwards. The judge accepted the Secretary of

State's case that the appellant and the sponsor were in a marriage of convenience at the time their marriage was contracted, but accepted that by the time they were invited to their marriage interviews, they were in a genuine relationship. Their relationship was still genuine by the time of the hearings before him. The judge accepted that J was the son of the appellant and the sponsor.

13. The judge's global conclusions begin at [135] on page 27. He listed a series of proportionality-based considerations, including the best interests of J, which led him to conclude that the appellant should be treated as the sponsor's spouse for the purposes of the Regulations, notwithstanding the circumstances in which the marriage was contracted. In the alternative, they were durable partners: [139]. The judge allowed the appeal.

Grounds of appeal

14. There are two grounds of appeal. The first is that, having concluded that the appellant and sponsor entered into a marriage of convenience, the judge erred by considering proportionality. Under the 2016 Regulations, he should have dismissed the appeal.

15. The second ground of appeal is a reasons-based challenge to the judge's findings of fact; the appellant was not a witness of truth, as found by Judge Lawrence. Having a child with the sponsor is simply a tactic to remain in the UK. The sponsor did not attend the hearing, nor give a reason for his absence. The judge failed adequately to reason his conclusions that the parties are now in a durable relationship.

16. There was no rule 24 notice.

Submissions

17. Mr Melvin submitted that the judge's introduction of the concept of proportionality to his assessment was erroneous; it features in the Immigration Rules, not in the 2016 Regulations concerning the question of whether a relationship was a marriage of convenience. The Secretary of State had not considered the question of whether the parties to the marriage were in a durable relationship; it was a factor not pursued by counsel for the appellant at the hearing below, and so should not have been considered by the judge. If the appellant applies for leave in a different capacity, for example relating to her claimed child with the sponsor, it will be given proper consideration. But the extent to which the judge took it upon himself to consider matters not before the Secretary of State, pursuant to considerations not in the 2016 Regulations, it was an error, and his decision should be set aside.

18. I explained to the appellant and the sponsor the issues they would have to address me on. I highlighted the reasons given by Judge Brannan for finding that the marriage was one of convenience and asked them to respond to them. The sponsor stressed that his marriage to the appellant was not, in his words, bogus. It had not been contracted to secure an immigration advantage. Their child is British, and has a British passport. Their marriage is genuine; they were attracted to each other because they both wanted and needed a partner. The judge had misunderstood some of the answers that he and the appellant gave during their interviews. The appellant added that the marriage had subsisted for three years now and must be genuine; it was not a marriage of convenience. The

sponsor described some of their family life together, including what he eats for breakfast each day. That had been an issue identified as inconsistent by the judge at [116] of his decision.

Legal framework

19. The appeal before the judge was brought under the 2016 Regulations, which transpose the obligations of the United Kingdom pursuant to Directive 2004/38/EC ("the Directive"). The Directive makes provision for the free movement of EU citizens and their family members in the territory of the Member States.

20. Recital (28) to the Directive provides:

> "To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures."

21. Article 28(1) of the Directive provides:

> "Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin."

22. Article 35 of the Directive provides:

> "Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31."

23. The following provisions of the 2016 Regulations are relevant. Regulation 2(1) defines these terms:

> "durable partner" does not include—
>
> (a) a party to a durable partnership of convenience; or
>
> (b) the durable partner ("D") of a person ("P") where a spouse, civil partner or durable partner of D or P is already present in the United Kingdom and where that marriage, civil partnership or durable partnership is subsisting;
>
> "durable partnership of convenience" includes a durable partnership 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 durable partnership of convenience would otherwise have to meet in order to enjoy a right to reside under these Regulations or the EU Treaties;

"EEA decision" means a decision under these Regulations that concerns—

(a) a person's entitlement to be admitted to the United Kingdom;

(b) a person's entitlement to be issued with or have renewed, or not to have revoked, an EEA family permit, a registration certificate, residence card, derivative residence card, document certifying permanent residence or permanent residence card (but does not include a decision to reject an application for the above documentation as invalid);

(c) a person's removal from the United Kingdom; or

(d) the cancellation, under regulation 25, of a person's right to reside in the United Kingdom, but does not include a decision to an application under regulation 26(4) (misuse of a right to reside: material change of circumstances), or any decisions under regulation 33 (human rights considerations and interim orders to suspend removal) or 41 (temporary admission to submit case in person);

"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;

"spouse" does not include—

(a) a party to a marriage of convenience…

24. Regulation 26 makes provision for what is termed the "misuse of rights". Paragraph (1) provides:

"(1) The misuse of a right to reside occurs where a person—

(a) observes the requirements of these Regulations in circumstances which do not achieve the purpose of these Regulations (as determined by reference to Council Directive 2004/38/EC1 and the EU Treaties); and

(b) intends to obtain an advantage from these Regulations by engaging in conduct which artificially creates the conditions required to satisfy the criteria set out in these Regulations."

See also paragraph (3):

"(3) The Secretary of State may take an EEA decision on the grounds of misuse of rights where there are reasonable grounds to suspect the misuse of a right to reside and it is proportionate to do so."

25. Schedule 1 to the 2016 Regulations is entitled "Considerations of public policy, public security and the fundamental interests of society etc." Paragraph 6 provides:

> "It is consistent with public policy and public security requirements in the United Kingdom that EEA decisions may be taken in order to refuse, terminate or withdraw any right otherwise conferred by these Regulations in the case of abuse of rights or fraud, including—
>
> (a) entering, attempting to enter or assisting another person to enter or to attempt to enter, a marriage, civil partnership or durable partnership of convenience; or
>
> (b) fraudulently obtaining or attempting to obtain, or assisting another to obtain or to attempt to obtain, a right to reside under these Regulations."

Discussion

Findings of fact open to the judge

26. I will address the findings of fact challenged under ground 2 first. The Secretary of State contends that the judge failed to give sufficient reasons for finding that the appellant and the sponsor are now in a "durable relationship". The grounds state:

> "It is submitted that the evidence in the previous appeal that the appellant is not a witness of truth is substantial and given her previous attempts to obtain leave via asylum, it is submitted that having a child is just another tactic used to remain in the UK. The sponsor did not attend to give evidence nor provided a reason for his absence – essentially the FTTJ has failed to adequately reason his decision and as such has erred in law."

27. Since this is a challenge to a trial judge's finding of fact, it is necessary to recall the restraint with which appellate courts and tribunals should review such findings. The principles have been summarised at length in many authorities. A recent summary of the appellate approach to first instance findings of fact may be found in *Volpi v Volpi* [2022] EWCA Civ 464 at [2] to [5], recalling, amongst others, the approach taken in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114].

28. As stated in *Volpi* at [2.ii], "It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion." In *Perry v Raleys Solicitors* [2019] UKSC 5, Lady Hale said that "the very real constraints facing an appellate court when invited to overturn a judge's findings of fact at trial" may be summarised as:

> "…requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached." (Paragraphs 49 and 52).

29. One basis for concluding that a trial judge reached a finding of fact that no reasonable judge could have reached is if insufficient reasons are given.

30. The judge engaged in a careful analysis of the appellant's evidence spanning many pages, in considerable detail. Some of his reasoning is questionable and, in isolation, may occupy the territory of findings of fact that no reasonable judge could have reached. For example, as to Judge Lawrence's finding that the appellant was a person "without a jot of credit", Judge Brannan appeared to rationalise her dishonesty before Judge Lawrence in these terms, at [33]:

> "The reason I can see why the appellant did not bring her marriage to the attention of Judge Lawrence is that it would substantially damage her claim to be a lesbian and/or the relationship was not of sufficient significance for her to seek to rely upon it as a reason to remain in the UK."

On one view, it is difficult to see how it was open to the judge to rationalise the appellant's false testimony before Judge Lawrence in that way, so as to ascribe less weight to the Secretary of State's submissions that the appellant should not be trusted. However, later in the decision the judge appeared to have reached a similar conclusion of his own motion in any event: see [118]. Having examined what he found to be inconsistencies in the answers given by the appellant and the sponsor during their marriage interviews and in their evidence before him, the judge there said:

> "The first observation I consider it important to make at this point is that I find the appellant not to be a witness of truth. Her explanations for the inconsistencies that the respondent found in the interviews add only further layers of inconsistency. This, added to her continued claim to have told the truth before Judge Lawrence despite the evidence that she has given to me detracting from this, result in me finding that the appellant is a person who is willing to lie to the respondent and to the tribunal. She is not very good at it though: her course to lies to attempt to explain past inconsistencies tends to raise more questions than it answers."

31. The judge proceeded to state at [119] that just because the appellant had lied on some matters, that did not mean that she had lied in relation to her relationship with her husband. I consider that, read as a whole, the judge's otherwise surprising reasoning (for example that at [33]) is tempered by his remaining analysis, and was therefore open to him, when taken in the round.

32. Turning to the specific contention raised in the ground of appeal concerning the sponsor's non-attendance at the hearing, the position is more nuanced than there implied. The sponsor attended the first hearing before the judge, but not the second hearing. The grounds of appeal appeared to be drafted on the premise that the sponsor did not attend at all, and they do not engage with the reasons given by the judge at [134] for stating why the sponsor's non-attendance at the resumed hearing was a matter of little consequence. This is thus a disagreement of weight.

33. In relation to the significance of the appellant and sponsor's child, I consider the Secretary of State's submission that he, the child, was simply another tactic adopted by the appellant to remain in the United Kingdom to be a further disagreement of weight. Of course, bringing a child into the world for immigration purposes is not a phenomenon unknown to this jurisdiction. But equally, it may be indicative of a genuine relationship. The judge heard live

evidence in the case, from both witnesses on the first occasion, and had the benefit of considering the whole sea of evidence. He was entitled to conclude that it was a matter attracting weight.

34. While the Secretary of State may disagree with the judge's conclusions, and not all judges would have reached the conclusions he did, overall they do not enter the territory of being findings that no reasonable judge was entitled to reach.

35. Accordingly, to the extent ground 2 challenges the judge's finding of fact that the appellant and sponsor were in a "durable relationship" at the time of the marriage interviews and hearing, there is no merit to it. However, that is a different question from whether the judge was entitled to allow the appeal on the basis the appellant and sponsor were in a durable relationship, which is a matter to which I return below.

36. I have dealt with the above aspects of ground 2 first because it establishes the factual footing upon which my remaining analysis must be based.

Ground 1 – marriage of convenience; ground 2 – impact of durable relationship

Proportionality relevant to EEA decisions taken on the grounds of abuse of rights

37. I turn now to ground 1, which was the primary basis upon which Judge Cox granted permission to appeal.

38. It is settled law that whether a marriage is one of convenience is to be ascertained solely by reference to the intention of the parties *at the time the marriage was contracted*. So much is clear from *Sadovksa v Secretary of State for the Home Department* [2017] UKSC 54 at [24], in which Lady Hale cited with three extracts from a European Commission Communication, and from its *Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens* ("the Handbook") with approval. The Court cited the Commission Communication dated 2 July 2009, paragraph 4.2, with approval:

> "Recital 28 [of the Directive] defines **marriages of convenience** for the purposes of the Directive as marriages contracted for the **sole** purpose of enjoying the right of free movement and residence under the Directive that someone would not have otherwise. A marriage cannot be considered as a marriage of convenience simply because it brings an immigration advantage, or indeed any other advantage. The quality of the relationship is immaterial to the application of Article 35."

The court then cited the following extracts from the Handbook:

> "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*)."

(Emphases supplied)

39. The judge appeared to approach the issue of whether the intention of the parties at the point of the marriage was the determinative factor as an open question, on the basis that the facts in *Sadovska* could be distinguished because the couple in those proceedings had been prevented from marrying. That is not a correct reading of *Sadovska*, which, in its endorsement of the specific extracts the Supreme Court relied upon from the European Commission Communication and the Handbook, was addressing the phenomenon of marriages of convenience more broadly. Pursuant to *Sadovska*, the existence of a marriage of convenience is determined solely by reference to the intention of the parties to the marriage at the time it was contracted. Whether the relationship later evolves into a "genuine and subsisting relationship" is nothing to the point: it is a marriage of convenience, and always will be.

40. The question had been addressed and resolved in the same way by *Rosa v Secretary of State for the Home Department* [2016] EWCA Civ 14. Again the judge, with respect incorrectly, appeared to view the judgment of the court as though it were less than clear on this issue, and as though it left scope for further discussion. He took the striking step of describing the reasoning of the Court of Appeal as "unfortunate" (see [57]), in light of what he appears to have perceived to be an inconsistency between [40] and [41] of the judgment. He then proceeded on the footing that the facts before him were uncatered for by either the authorities or the 2016 Regulations.

41. The primary issue of principle in *Rosa* concerned the application of the burden of proof in cases involving marriages of convenience, and concerned the predecessor regulations to the 2016 Regulations, the Immigration (European Economic Area Regulations) 2006 ("the 2006 Regulations"), which used, but did not did not define, the term "marriage of convenience": see regulation 2(1). The court resolved the burden of proof issue in general terms at [6] to [30]. It then proceeded to address the specific issues arising from the decisions of the tribunals below, at [31] and following. At [38] it summarised the submissions made by Mr Southey QC for Ms Rosa concerning ground 1, in relation to the burden of proof issue, and in the next paragraph analysed and rejected them. It adopted the same structure in relation to ground 2, which concerned whether the tribunal below had erred by importing analysis of whether the relationship between Ms Rosa, a citizen of Brazil, and her Portuguese sponsor, had been "genuine and subsisting" when analysing the question of whether the relationship was a marriage of convenience. Thus paragraph 40 of *Rosa* summarised submissions made by Mr Southey QC for the appellant, in which he had contended that the terminology of whether a marriage relationship was "genuine and subsisting" was unhelpful, and at [41] Richards LJ rejected those submissions. Richards LJ there said:

> "41. It may be useful to contrast a marriage of convenience with a 'genuine' marriage (indeed, Underhill LJ treated them as antonyms at paragraph 6 of his judgment in *Agho* [[2015] EWCA Civ 1198]), but

> the focus in relation to a marriage of convenience should be on the intention of the parties at the time the marriage was entered into, whereas the question whether a marriage is 'subsisting; looks to whether the marital relationship is a continuing one."

42. Against that background, Judge Brannan said, at [57]:

> "It is unfortunate that the Court of Appeal uses the term 'genuine marriage' to contrast with 'marriage of convenience' in the final sentence above, having just explained why 'genuine marriage' and 'marriage of convenience' are not antonyms."

Later in the same paragraph the judge said that the Court of Appeal had:

> "… identified that a marriage being genuine had no place in consideration of an appeal under the Regulations."

43. In fact, as set out above, *Rosa* at [40] had merely summarised Mr Southey's submissions on behalf of Ms Rosa that the language of "genuine and subsisting" had no place in an analysis of a marriage of convenience. The Court of Appeal expressly rejected those submissions, and held that it "may be useful" to contrast a marriage of convenience with a genuine marriage, albeit that the focus should be the intention of the parties at the time the marriage was entered into. Indeed, in *Agho*, Underhill LJ had treated the terms "genuine marriage" and "marriage of convenience" as antonyms.

44. It was against that background that the judge highlighted the final sentence of Richard LJ's judgment at [41], which stated:

> "The wording [of the First-tier Tribunal in *Rosa*] suggests that the tribunal had in mind the possibility that a marriage of convenience might turn into a genuine marriage in the course of time, but the finding that it had always been a marriage of convenience makes it unnecessary to consider that potentially interesting issue in the present case."

Of course, *Rosa* pre-dated *Sadovska*, which settled the question of whether a marriage was one of convenience as being an analysis to be performed at the point the parties entered into the marriage.

45. The judge then said that the "potentially interesting question" concerning a post-marriage of convenience genuine marriage had not been determined, and commenced to do so for himself. His conclusion on this point was stated at [59]:

> "**Can a marriage of convenience ceased to be a marriage of convenience?**
>
> 59. In my view the answer to this question is that it is possible for a marriage of convenience to change and allow a party thereto to be treated as a family member under the regulations."

46. For the reasons set out below, I respectfully consider that the judge's reasoning on this issue was incorrect. In my judgment, whether a marriage was one of convenience is a question to be settled once and for all by reference to the intention of the parties at the time the marriage was celebrated, pursuant to *Sadovska*. The categorisation of a marriage as being one of convenience is not a dynamic concept, whereby marriage of convenience status falls away or re-

attaches with the ebb and flow of the relationship. Nor does a marriage cease to be one of convenience because its parties, having celebrated the marriage for the sole or predominant purpose of conferring on someone the right of free movement and residence under the Directive to which they would not otherwise be entitled, subsequently decide that they now have other motivations for being married or for maintaining the marriage, or consider that, were they to marry at this point in time, their motivations would no longer be to contract a marriage of convenience. Once a marriage is one of convenience, it is always a marriage of convenience.

47. However, whether a decision restricting rights conferred by the Directive should be taken in relation to a marriage of convenience is governed by the principle of proportionality. The proportionality-based task ahead of a decision maker is not to determine, on proportionality grounds, whether to continue to treat the marriage as being one of convenience: since the marriage commenced life as a marriage of convenience, it will always be a marriage of convenience. The task is to determine what the impact of the marriage being one of convenience is on whether to take a restrictive measure against it, or against one or both of the parties to it, on the grounds of abuse of rights.

48. Article 35 of the Directive requires that measures adopted to "refuse, terminate or withdraw any right conferred" by it "shall be proportionate…" The judge identified that Article 35 was a relevant provision, quoting it at [60]. Article 35 gives expression to the EU law doctrine of abuse of rights in the context of the free movement of persons. The concept of restricting EU law rights in cases of abuse is not confined to rights conferred by the Directive; it is an established doctrine, applicable in many areas of EU jurisprudence: see *Case C-110/99 Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas* [2000] ECR I-1569 at [52] to [53], and *R (oao Gureckis) v Secretary of State for the Home Department* [2017] EWHC 3298 (Admin) at [77] to [86].

49. Proportionality is also a fundamental principle of EU law; Article 35 recognises the role of the principle of proportionality in this context, stating that any measure adopted on grounds of abuse of rights or fraud "shall be proportionate". The procedural safeguards contained in Articles 30 and 31 of the Directive are expressly incorporated by Article 35; Article 31(3) additionally provides that the judicial and administrative redress procedures to which the person concerned shall have access must ensure "that the decision is not disproportionate". Proportionality lies at the heart of any consideration of restrictive measures adopted by Member States under the Directive, including decisions taken on the grounds of abuse of rights.

50. The judge correctly identified that the primary approach taken by the 2016 Regulations to the abuse of rights in the form of marriages of convenience is by means of an exclusionary definition. Pursuant to the definition of "spouse" contained in regulation 2(1), a party to a marriage of convenience is incapable of being regarded as the spouse of an EEA national. The definition of "marriage of convenience" adopts the now-settled approach of examining the intention of the parties *at the time the marriage was celebrated.* The definition does not encompass any consideration of proportionality. This is how the judge approached this issue, at [66]:

> "The Directive is clear that measures [concerning the abuse of rights] must be proportionate and subject to procedural safeguards in Articles 30 and 31. Those safeguards from Article 30 are worked into

> the Regulations. The result is the present appeal. What is not worked into the Regulations is any consideration of proportionality."

51. I have some sympathy for the judge's reasoning on this issue, as the definition of "spouse" in regulation 2(1) has the effect of automatically carving out from the scope of the Regulations any non-EEA spouse, without any express consideration of proportionality, thereby reflecting the approach that will be appropriate in the vast majority of marriage of convenience cases. Had the judge accepted the Secretary of State's version of events (rather than reaching the findings of fact that I have found he was entitled to reach), he would have proceeded on the footing that the parties were not in a genuine relationship at all, and it would have been surprising if he had been troubled by any concept of proportionality.

52. However, I respectfully consider that the judge was wrong to state at [66] that:

> "What is not worked into the Regulations is any consideration of proportionality."

53. Such a consideration *is* expressly worked into the Regulations. Regulation 26(3) of the 2016 Regulations makes provision for a proportionality assessment to be conducted in all cases concerning the abuse (or as the Regulations put it, the *misuse*) of a right to reside. The criteria for a "misuse" of a right to reside in regulation 26(1) are the classic two stage test for abuse of rights, requiring an objective and subjective element. And as held in *Gureckis* at [86]:

> "The paradigm of an abuse of rights in the context of the Directive is a 'marriage of convenience', as identified in Article 35. Whilst married partners might formally comply with the relevant conditions in the Directive to benefit from rights of movement and residence, the compliance has been created in an artificial way by a sham marriage in order to obtain the rights conferred by the Directive."

54. The Secretary of State's decision adopted the language of regulation 26(3): the terminology of the decision was that "there are reasonable grounds to suspect that the marriage… is one of convenience"; regulation 26(3) uses strikingly similar language, "there are reasonable grounds to suspect the misuse of a right to reside…"

55. However, while the judge was wrong to say that there was *no* consideration of proportionality worked into the Regulations, he was correct to identify that the binary approach to the definition of "marriage of convenience" made no express provision for a proportionality-based approach to the impact of a relationship being a marriage of convenience. Since it is necessary to read the Regulations consistently with EU law, the approach the judge should have taken was not to decide whether to categorise the marriage as being one of convenience on proportionality grounds; on the judge's findings of fact, the relationship between the appellant and the sponsor would always be a marriage of convenience. Rather, the approach of the judge should have been to determine whether it was proportionate to refuse to grant a residence card to the appellant, on the grounds that she was in a marriage of convenience, albeit one that had evolved into a genuine relationship. (I pause here to note that the term "genuine relationship" requires clarification in this context; it can have a variety of meanings, in this context I take it to mean that, were the unmarried parties to

choose to marry at the time the genuine relationship was found to exist, the ensuing marriage would not be one of convenience.)

56. In some respects, the approach the judge should have taken is similar to that adopted by him in any event. The end result depends on a proportionality assessment, regardless of whether the assessment of proportionality is conducted in order to categorise an applicant for residence documentation as a "spouse" or whether it is conducted at a later stage, in relation to whether to refuse residence documentation. However, I consider the judge's approach to be wrong as a matter of construction and principle.

57. It was wrong as a matter of construction because it overlooks the express proportionality-based provision made by the Regulations in regulation 26(3). While a degree of purposive interpretation is required to ensure consistency with EU law, express provision is made to cater for proportionality in regulation 26(3).

58. It was wrong as a matter of principle because it conflates the existence of an abuse of rights with the quite separate issue of whether it is proportionate to adopt a restrictive measure in relation to the abuse of rights once identified. In *Gureckis*, Lang J said at [65], "It was common ground before me that the application of the proportionality principle only arises once a misuse of rights has been established." The approach of the judge confused two separate questions. The judge's approach was also inconsistent with the approach of the Supreme Court to the definition of a marriage of convenience, which turns on the intention of the parties at the time of the marriage, rather than being a dynamic concept, liable to change over time.

59. The question of whether it is proportionate to adopt a restrictive measure against a party to a marriage of convenience is a fact-specific analysis, which may depend on the evidence and the underlying circumstances of the person(s) concerned over time, depending on the EEA decision under consideration. It would be unduly restrictive and cumbersome to have to perform such analysis in a manner that shifted or changed depending on whether the underlying marriage continued to attract the "marriage of convenience" label. By failing correctly to categorise a marriage of convenience as such, there is a risk the proportionality assessment would fail to ascribe sufficient significance to the fact that the parties sought to engage in an abuse of rights through the misuse of the institution of marriage, thereby overlooking a significant factor in any proportionality assessment concerning a marriage of convenience, as addressed in further detail below.

60. In summary, and contrary to the findings reached by a judge, I consider that whether a marriage is one of convenience is determined once and for all by reference to the intention of the parties at the time the marriage was contracted, pursuant to the now established test expounded in *Sadovska*. The separate question of whether it is proportionate to adopt a restrictive measure against such a decision cannot be conflated with the question of whether the marriage was one of convenience.

Proportionality assessment flawed

61. Ordinarily, a first-instance judge's analysis of the proportionality of a decision is a matter for that judge. This tribunal will only intervene on established public or EU law grounds.

62. At [135], the judge summarised his proportionality analysis in these terms:

> "…looking at the factors together, including:
>
> (a) the best interests of J:
>
> (b) the appellant and her husband having lived together for over two years and having had a child together,
>
> (c) them being nationals of different countries with no obvious alternative country in which to reside,
>
> (d) them having only enjoyed their relationship in the UK,
>
> (e) and the husband's long period of lawful residence in the UK (his he has worked in the UK for ISS since November 2008) and lack of any action against him despite paragraph 6 of schedule 1 to the Regulations,
>
> I find at this time for the appellant to be excluded from being a family member of her husband because of the circumstances in which the marriage was entered to be disproportionate."

63. Proportionality is a general principle of EU law; the measures adopted by a national authority must be suitable for achieving the objectives of the measure, and must not go beyond what is necessary to attain them (see *K and A*, C-153/14, EU:C:2015:453, paragraphs 50 and 51; *X v Belgium* C-930/19 ECLI:EU:C:2021:657, paragraph 88). One objective of measures adopted in relation to abuse and rights and fraud may be found at Recital (28) to the Directive: to guard against abuse of rights. Schedule 1 to the Regulations also states that it is consistent with the public policy and public security requirements of the United Kingdom that EEA decisions may be taken on the grounds of abuse of rights or fraud: see paragraph (6).

64. It follows that any proportionality assessment taken in relation to a marriage of convenience must assess the impact of the measure in relation to the objective of adopting measures to guard against the abuse of rights or fraud, and must feature an express consideration of whether it was appropriate to confer on the parties to a marriage of convenience rights which flow from a relationship contracted for the sole or predominant purpose of the abuse of EU law rights. Such assessments must also engage with the stated public policy objectives of the United Kingdom, as set out in Schedule 1(6). In turn, in the case of a marriage of convenience that is now a "genuine" relationship (that is, a relationship that, were the parties marrying at the present time, it would not be for the sole or predominant purpose of circumventing any immigration requirements to which a party to the marriage would otherwise be subject, even if at the time the marriage was contracted, that was the purpose), it would be necessary to consider whether it was appropriate, in light of the objective, recognised at EU-level, to tackle marriages of convenience and fraud, to confer upon the parties to the marriage the relatively advantageous benefits of EU residence rights. In turn, that assessment would have to be performed against the background of the marriage partners' real world situation.

65. Without hesitation I conclude that the judge's proportionality analysis was deficient. It was wholly one sided. It addressed factors going only to the appellant's side of the equation, without considering any matters on the Secretary of State's side. The judge did not engage with the fact that, on his findings, the application for the residence card was submitted with the intention

of deceiving the Secretary of State, by a person who had been unlawfully resident for a considerable period of time. That was perhaps the consequence of the judge conflating the question of fact concerning the existence of a marriage of convenience with the quite separate proportionality assessment that was to follow: the judge simply failed to approach the question on the correct footing.

66. I also consider that some of the reasons relied upon by to the judge were not open to him. At [135(c)] the judge said that the couple had "no obvious alternative country in which to reside". That was a consideration that was based on the premise that the refusal of the residence card would not require the appellant to leave the country, which is not true. The refusal of the residence card would simply place the appellant into the same position she had been in for some time, namely as an overstayer of some vintage. Moreover, I consider that it was not rationally open to the judge to conclude that there was no obvious alternative country in which to live in any event; quite apart from Belgium being an obvious alternative country, as an EU citizen, the sponsor could reside with the appellant and their in one of the remaining 26 Member States. The judge did not consider whether the couple could relocate to Ghana, for example.

67. The judge also appeared to impose on the Secretary of State a requirement to take parallel action against the sponsor: see [135(e)]. There is no requirement for the Secretary of State to do so in the Regulations, and operational enforcement decisions are a generally matter for the Secretary of State, not judges.

68. Drawing the above analysis together, I consider that the judge's proportionality analysis failed to take into account relevant considerations, namely any factors on the Secretary of State's side, and irrationally approached the decision as though it required the appellant and sponsor to leave the country, and consequently concluded that that the appellant and sponsor would have no other country in which to live. Further, the judge erroneously ascribed significance to the Secretary of State having not taken parallel action against the sponsor, despite there being no requirement in the Regulations for her to do so. That aspect of the judge's analysis was also based on the erroneous premise that, if the Secretary of State had not decided to take action (which may have been on proportionality grounds) against an EU citizen who enjoyed the right of permanent residence, and had worked and resided here since November 2008, she could not do so against a person who had resided her unlawfully for many years and who, on her own evidence, had previously sought to deceive the Secretary of State. The judge also failed to engage with the fact if the appellant later faced removal, she would be able to make a human rights claim in the usual way. As Mr Melvin submitted at the hearing, full consideration may then be given to the impact of the appellant's British son, and all other relevant factors, on her prospective future removal, or any grant of leave to remain (if appropriate).

69. The judge was, therefore, wrong to allow the appeal on the basis that it was not proportionate to treat the appellant and the sponsor as being in a marriage of convenience. They were in a marriage of convenience. The correct approach should have been to address the proportionality of holding that fact against the appellant. When the judge purported to address proportionality, he failed to address any factors on the Secretary of State's side of the equation, and in doing so conducted a flawed proportionality assessment.

No jurisdiction to consider durable partnership in the alternative

70. The judge's alternative finding was that the parties were in a durable relationship. That was a matter that had not been considered by the Secretary of State. Indeed, an application on the basis that the parties were in a durable partnership was inconsistent with the application that the appellant submitted as the spouse of the sponsor. It involved an assessment of a wholly different character to the matters which she had considered in the context of the application under consideration. Both parties urged the judge not to proceed on this basis. They were correct to do so.

71. Putting to one side whether the appellant and the sponsor were in a "durable partnership of convenience", all that being in a durable partnership entitles the non-EEA participant to is to be categorised as an "extended family member" under regulation 8(5), and to enjoy the relatively preferential facilitation duty to which the Secretary of State is then subject. Regulation 8 is merely a definition provision. It does not confer any substantive right to reside on those falling within its terms. Such persons enjoy only the right to have their potential residence facilitated, pursuant to an extensive examination of their personal circumstances. In the context of an application for a residence card, the facilitation duty is performed by the Secretary of State under regulation 18(4). The position was described in these terms by Richards LJ in *Aladeselu v Secretary of State for the Home Department* [2013] EWCA Civ 144, in relation to the predecessor to regulation 18 in the 2016 Regulations, regulation 17 of the 2006 Regulations:

> "52. It should be emphasised that a finding that an applicant comes within regulation 8 does not confer on him any substantive right to residence in the United Kingdom. Whether to grant a residence card is a matter for decision by the Secretary of State in the exercise of a broad discretion under regulation 17(4), subject to the procedural requirements in regulation 17(5)."

72. It follows that a decision of the Secretary of State to refuse to grant discretionary residence documentation (which only has the effect of conferring a substantive right to reside, once the Secretary of State has exercised her discretion to issue the documentation) is of a very different character to the refusal of an appeal against a decision to grant residence documentation, such as a residence card, which is merely declaratory of a pre-existing, underlying right to reside.

73. Another consequence of the very different character of an appeal against a decision concerning a durable relationship lies in the Secretary of State's duties upon an appeal against a refusal under regulation 8(5) being allowed: the decision must revert back to the Secretary of State to (re-)exercise her discretion. Where a judge purports to allow an appeal against the refusal of non-discretionary, declaratory residence documentation (e.g. under regulation 18) by finding that the relationship is a durable partnership for the purposes of regulation 8(5), in circumstances where the Secretary of State had previously not considered that issue, it would result in the Secretary of State being compelled to revisit a decision which she not only had she not taken in the first place, but which she had not been invited by the applicant to take.

74. These considerations combine to lead to the conclusion that whether a marriage of convenience may be a durable partnership in the alternative to a residence card as a family member of an EEA national is a "new matter" for the purposes of section 85(5) of the 2002 Act, as applied by paragraph 1 of Schedule

2 to the 2016 Regulations. It requires the consideration of a wholly different range of matters to those originally considered pursuant to the primary application to the Secretary of State. The position is analogous to that stated in the headnote to *AK and IK (S.85 NIAA 2002 - new matters) Turkey* [2019] UKUT 67 (IAC) which held that a different category of leave under the Immigration Rules amounts to a "new matter".

75. I note that in *Sadovska* Lady Hale suggested that the relationship between Ms Sadovska and her non-EEA partner could be considered on the basis that it was a durable relationship. I doubt whether Lady Hale was addressing the jurisdictional framework of the First-tier Tribunal as then constituted, since at [26] she was addressing the position of the unmarried non-EEA partner's position under Article 3(2) the Directive. But even if she was, it is no longer open to a tribunal to consider a durable relationship in the alternative, as it would amount to a "new matter" under the statutory framework for appeals that has since come into force. The proceedings before the First-tier Tribunal in *Sadovska* were heard on 4 August 2014 (see [12] of the judgment), which was before the statutory framework for appeals under the 2006 Regulations was amended to replicate and extend the "new matter" regime now in section 85 of the 2002 Act to appeals under the 2006 Regulations: see the Immigration (European Economic Area) (Amendment) Regulations 2015, Schedule 1, paragraph 15, which came into force on 6 April 2015.

76. The effect of the above analysis is that the judge was wrong to consider the appeal on the footing that it may have been a durable relationship in the alternative. That was a new matter for which there was no jurisdiction, and the judge's purported findings on this issue were otiose.

Conclusion: setting aside the decision of the First-tier Tribunal

77. I set aside the judge's decision on account of its flawed proportionality analysis as outlined above and the findings concerning the durable partnership that were reached in excess of the tribunal's jurisdiction. I preserve all findings of fact reached by the judge, save for those reached in relation to his proportionality findings, and the issue of whether the appellant and the sponsor are in a durable relationship for the purposes of regulation 8(5).

78. I proceed to remake the decision on the basis of the preserved findings of fact. The sole issue for my consideration is whether it was proportionate for the Secretary of State to refuse to grant a residence card to the appellant on the basis that she was a party to a marriage of convenience.

79. I consider that the refusal of a residence card to the appellant on marriage of convenience grounds would be proportionate. The appellant sought to deceive the Secretary of State by relying on a marriage of convenience in order to obtain residence documentation under the 2016 Regulations to which she was not entitled. While, on the judge's findings, she is now in a genuine relationship, it is a proportionate response to refuse to issue her with the residence card to which she is only entitled on account of her participation in a marriage of convenience. The predominant purpose of the marriage was to abuse the rights ordinarily enjoyed by non-EEA family members of EEA nationals. It is entirely appropriate for the application to refused on that basis. The fact that the appellant and her sponsor have, through having created this artificial state of affairs, subsequently acquired a degree of affection for one another such that the judge found that

they are now in a "genuine" relationship does not decisively tip the proportionality balance in the appellant's favour. Simply not issuing the appellant with a residence card under the Regulations will not have the effect of compelling her to leave the United Kingdom, and it remains open to her to make a human rights claim, or to seek to regularise her stay by other lawful means open to her. The decision respects the best interests of her son, as the appellant's removal is not in scope as a direct consequence of this decision, and his position will lie at the heart of any future human rights claim that it is open to the appellant to make. Refusing the residence card on this basis merely places the appellant back in the position she was in before she made her fraudulent application.

80. It follows that the refusal of the residence card was a proportionate response to the appellant having contracted a marriage of convenience.

Notice of Decision

The decision of Judge Brannan involved the making of an error of law.

I set aside the decision and remake the appeal by dismissing it.

No anonymity direction is made.

Signed Stephen H Smith Date 6 June 2022

Upper Tribunal Judge Stephen Smith

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Stephen H Smith Date 6 June 2022

Upper Tribunal Judge Stephen Smith