



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005236

First-tier Tribunal Nos: EA/00805/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

26th February 2024

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

Khuram Shahzad

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms A Jones, Counsel; Farani Taylor Solicitors
For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

Heard at Field House on 31 January 2024

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan, born on 28 December 1982. He entered the UK on 1 December 2012 as a student with leave to remain valid until 28 February 2015. In October 2014 he commenced a relationship with Ms Turcu and they married on 18 December 2014. Shortly thereafter he applied for a residence card as the family member of an EEA national. This was refused and subsequently appealed. In a determination promulgated by Judge Rodger on 22 December 2016, she determined that the appellant's marriage was one of convenience. In 2020 the appellant and Ms Turcu's relationship broke down and they later divorced and a decree absolute was issued on 17 September 2021. The Appellant then applied to retain rights of residence on 30 June 2021.
2. The core of the Appellant's claim is that he: (1) married a Romania national (Alina Turcu) on 18 December 2014 and (2) following the breakdown of that relationship is entitled to remain in the UK on the basis of his retained rights of residence. On 10 January 2022, the Respondent refused the claim, essentially on

credibility grounds; she does not accept that the appellant was in a genuine relationship with Ms Turcu and relies on the 2016 decision promulgated by Judge Rodger who, at that time, refused the appellant's application for a residence card under the EEA regulations.

3. The Appellant appealed that decision to the First-tier Tribunal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 against the Respondent's decision to refuse his application under the EU Settlement Scheme.
4. A Panel composed of First-tier Tribunal Judges Feeney and Shukla (the Panel) dismissed the Appellant's appeal via a decision promulgated on 27 September 2023.
5. The Appellant sought permission to appeal on several grounds which was granted by First-tier Tribunal Judge Dempster in the following terms:

1. The in time grounds assert that the judge erred in a number of ways. In particular, it is asserted at ground 5 that the judges' treatment of the evidence of six witnesses who attended the hearing and were prepared to give oral testimony amounted to procedural unfairness. These witnesses had attended but the representative for the respondent confirmed that they did not propose to ask any questions "*as the witnesses gave broadly the same evidence*" [9] (presumably as the three witnesses who were cross examined). Consequently, their evidence at the hearing consisted only of their witness statements.

2. At [17:i] the judges considered the evidence of these witnesses. As far as I can ascertain, there were in fact five witnesses who attended but did not give evidence. The judges criticised the evidence of four of these witnesses, in particular that there was no explanation as to why they had not given evidence at an earlier hearing and in respect of some a lack of detail in their witness statements. It is arguable that if these were matters to which adverse weight to the appellant was to attach, procedural fairness required that these witnesses should have been provided with an opportunity to address any issues. There is thus an arguable error of law.

3. For the avoidance of doubt, this grant is not limited to the ground above. The other grounds may be advanced at the oral hearing.

Discussion

6. The Grounds of Appeal are self-described under the following headings:
 - (i) Ground 1: the Burden of Proof;
 - (ii) Ground 2: the evidence of Mr Cornescu
 - (iii) Ground 3: the evidence of Mr Nagra and Ms Ashiq
 - (iv) Ground 4: the treatment of the absence of Ms Turcu
 - (v) Ground 5: the R's position in respect of the other witnesses
 - (vi) Ground 6: material misdirection in respect of the burden of proof

(vii) Ground 7: the failure to make findings on materially relevant evidence postdating 22 December 2016

7. At the hearing before us, we heard arguments from both representatives. The Respondent did not provide a Rule 24 Response. At the close of the hearing, we reserved our decision which we now give. We find that the grounds of appeal do not demonstrate material errors of law for the following reasons.
8. In respect of Ground 1, it was highlighted that the Appellant argued before the Panel that the decision of Judge Rodger was predicated upon a fundamental material error of law, namely that the judge proceeded on the basis that the burden was upon the Appellant and his former wife to prove that they were in a genuine relationship. It was argued that the Panel “materially erred in downplaying this important legal issue by stating that Judge Rodger made her assessment on the “applicable legal framework at the time” which is directly contrary to Sadovska which has retrospective effect.
9. As was the case before the Panel, both parties had failed to provide us with a copy of the decision of Judge Rodger in advance of the hearing. This was rectified by Ms Jones who appeared for the Appellant. Having considered that decision, which was and remains the starting point for the Panel, or any further judge pursuant to Devaseelan Starred [2002] UKIAT 00702, we begin by noting the contents of Judge Rodger’s decision in relevant part. First, at §12 of her decision, the judge correctly states at §12 that “Whilst a spouse is a family member, Regulation 2(1) of the EEA Regs states that 'spouse' does not include a party to a marriage of convenience. At §14, she then takes notes of the then recent Court of Appeal judgment of Rosa v SSHD [2016] EWCA Civ 14, in which the Court of Appeal “confirmed that the legal burden lies on the Secretary of State to prove that an otherwise valid marriage is a marriage of convenience so as to justify the refusal of an application for a residence card under the EEA Regulations but that the evidential burden can shift as explained in Papajorgji (sic)”. In her own assessment, Judge Rodger then finds at §27 that “The need for an appellant to prove that their marriage is not one of convenience arises only where there are factors that support suspicions for believing that the marriage is one of convenience”. This statement is consistent with Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC) which was considered and approved by the Supreme Court in giving judgment in Sadovska at [28]:

“...Furthermore, although the Regulations permit the respondent to take steps on the basis of reasonable grounds to suspect that that is the case, Ms Sadovska is entitled to an appeal where the facts and circumstances must be fully investigated. That must mean, as held in Papajorgji, that the tribunal has to form its own view of the facts from the evidence presented. The respondent is seeking to take away established rights. One of the most basic rules of litigation is that he who asserts must prove. It was not for Ms Sadovska to establish that the relationship was a genuine and lasting one. It was for the respondent to establish that it was indeed a marriage of convenience.”
10. In her own analysis, Judge Rodger finds at §27 as follows: “Having considered all of the evidence before me, including their oral evidence, I am not satisfied that the evidence of either the sponsor or the appellant was credible or honest or that theirs was a genuine marriage and not a marriage of convenience.” This assessment is echoed in the conclusive paragraph of the Judge’s findings at §40

of the decision which further states as follows: "I am not able to accept the appellant's evidence or that of Ms Turca regarding their alleged relationship and I am satisfied that the appellant has entered into a sham marriage in an attempt to gain status in the UK. I find that this marriage is nothing more than an attempt to deceive the UK immigration authorities and to allow the appellant to apply for an EEA resident permit". Thus, it is clear that the Judge performed a holistic assessment which looked to whether or not the marriage was a sham which is consistent with Papajorgji and Sadovska.

11. We are fortified in our view as, unbeknown to the Panel, the Appellant attempted to appeal Judge Rodger's decision on the same basis that was argued before the Panel, namely that the decision is incorrect (and therefore forms an incorrect starting point for the Panel) pursuant to Sadovska. Upon our request, we were provided with a copy of a decision of Deputy Upper Tribunal Judge Appleyard promulgated on 22 November 2017, which revealed that the Appellant had previously appealed with permission on the basis that "(f)ollowing Sadovska v SSHD [2017] UKSC 54 it is arguable that First-tier Tribunal Judge S Rodger misdirected herself as to the applicable law". At §§8-10 of the Upper Tribunal's 2017 decision, the following findings were made, which we set out in relevant part given the importance of this issue and as it became increasingly less clear to us why this decision was not presented to the First-tier Tribunal Panel so that it had the complete history of the Appellant's reliance on Sadovska which the Panel were ignorant of:

"8. I find that there is here no material error of law. When looking at the decision as a whole it is clear that the judge has applied the correct burden and standard of proof as shown in Sadovska v SSHD [2017] UKSC 54 and the earlier case of Papajorgji (EEA spouse-marriage of convenience) Greece [2012] UKUT 38 (IAC) as referred to in the appellant's first ground of appeal. At paragraphs 13 and 14 of her decision the judge sets out the law...

9. It is only having found that there were factors supporting suspicions for believing that the marriage is one of convenience that the judge moved on to look at the evidence in accordance with the abovementioned paragraphs 24 and 25 of her decision. She has therefore not erred as asserted in the first of the appellant's two grounds. She was entitled to find that the evidence presented by the respondent cast an evidential burden on the appellant and that it was more probable than not that the appellant's marriage was one of convenience. Her approach to finding that the evidential burden had been cast on the appellant by suspicions raised was open to be made.

10. Beyond that the judge had looked at the totality of the evidence, throughout applying the correct standard of proof, and it was open to her to conclude as she did at paragraph 37 of her decision that there was no identification evidence relating to the sponsor's mother to assist her in concluding that she attended the wedding. Indeed, there was no witness statement from this person. The judge did not have to deal with the issue of clothing found in the room as this was a case concerning the nature of the relationship between appellant and sponsor. Throughout the appeal hearing the appellant was represented and following any questions that the judge may have asked it was always open for Counsel to re-examine the witnesses and make whatever submissions he considered appropriate."

12. Thus, from the above, it is clear that the Appellant attempted to challenge the starting point of Judge Rodger's decision by relying upon Sadovska but previously failed. The decision of Deputy Upper Tribunal Judge Appleyard was not provided to the Panel by the Appellant's legal representatives. We do not know if the Appellant provided it to his solicitors or not, but he was certainly aware of it and provided instructions to pursue the appeal to the Upper Tribunal on the basis it arrives before us without disclosing this decision (which was eventually, belatedly provided by the Respondent who also failed to volunteer this document sooner).
13. In any event, regardless of the allegation of "downplaying" which was not pleaded with reference to any offending passages from the Panel's decision to illustrate the "downplaying", particularly to any material effect, the sole sentence referred to with criticism in Ground 1 is taken from §18a which contains only two sentences. The Panel's first sentence, which the Appellant relies upon in his grounds, reads as follows: "Judge Rodger's decision is our starting point but she made her assessment on the applicable legal framework at the time". That sentence is directly followed by the second, and final, sentence of §18a which reads as follows: "(i)n our assessment we remind ourselves that the burden of proof lies on the respondent".
14. Thus, it is patently clear that the Panel was aware of the correct approach to the burden of proof and did not err in taking Judge Rodger's decision as its starting point as it explicitly gave a correct statement as to where the burden of proof lies which the Appellant has omitted mention of in his grounds.
15. Notwithstanding the above, we also note that the point taken on appeal in the broadest of terms, namely that Judge Rodger's decision cannot be the starting point for assessment contrary to Devaseelan was not raised in the Appellant's Appeal Skeleton Argument which was drafted by previous counsel and which acknowledges at §8 of those pleadings that the Appellant "has to overcome the hurdle in Devaseelan"; and there also does not appear to be any indication from the Panel's recording of previous counsel's closing submissions at §15 nor from the content of its decision that there was any challenge to Judge Rodger's decision being the starting point consistent with Devaseelan.
16. Finally, as to the insinuation that the Immigration Officer's Report, which formed the basis for the burden of proof, was not before the Panel on this occasion but was when the appeal came before Judge Rodger, this is to nothing. The fact remains that Judge Rodger's decision is the starting point and her assessment has been made with the benefit of the Report and she has made findings based upon the content of that report which then formed the starting point for the Panel's decision. In short, it mattered not whether the Report had been reproduced before the Panel as the Respondent's burden had already been discharged in the previous appeal and it was for the Panel to determine whether any new evidence could cause a departure from Judge Rodger's decision that this is a marriage of convenience, as opposed to revisiting whether the burden of proof could be discharged as if that had never occurred.
17. Turning to Ground 2, concerning the evidence of Mr Cornescu, and the complaint that the Panel have wrongly criticised the witness for not attending the previous hearing when the Appellant was unaware he needed to call him to corroborate his case, are mere disagreement with the findings made by the Panel which were open to them on the evidence before them. Applying the approach in Devaseelan, the Panel were required to treat evidence that could have been produced at a previous hearing, but was not without good reason, with the

greatest circumspection. In short, the Panel were following the starred decision of the Tribunal as they were bound to do, as are we. We further note that §36 of Judge Rodger's decision confirms that there was an unsigned witness statement before her, and therefore it is somewhat illogical for the Appellant now to argue that Mr Cornescu did not know his evidence was required whereas he did realise it was of importance as otherwise it is unclear why he deposed his testimony in an unsigned witness statement. In any event, Ground 2 discloses no error.

18. In respect of Ground 3, and the evidence of Mr Nagra and Ms Ashiq, the Panel rejected the Appellant's explanation for their non-attendance at the previous hearing (that he was not advised by his legal representative that this would be required), instead finding at §17d and §17e, that this is unlikely to be the case because the Appellant was represented throughout the proceedings and by counsel at the hearing itself and there is no evidence to suggest he complained about the advice he received. These findings were perfectly legitimate and open to the Panel to make, their being within the range of reasonable responses that a Tribunal Judge could reasonably make.
19. Turning to Ground 4, and the Panel's treatment of the absence of Ms Turcu, the Panel was aware of the Appellant's reason for Ms Turcu's non-attendance (see §10 which makes reference to "family commitments") and found at §18f that "there is no reasonable explanation as to why she did not attend given that they are still in contact with each other and still on good terms". Although the Grounds attempt to propose reasons for Ms Turcu's non-attendance, the fact remains that the Panel was aware of the reason as the grounds accept, and it was considered to not be a reasonable explanation for her absence. That was plainly open to the Panel to find and there is nothing perverse or impermissible in the Panel's rejection of the evidence.
20. In relation to Ground 5, and the treatment of the evidence of other witnesses, even if the Respondent elected to not cross-examine the evidence of the witnesses as they "mostly gave the same evidence", that did not represent a bar to the Panel finding that they did not put forward good reasons why their evidence was not provided at the last hearing. Pursuant to Devaseelan, it is for the Appellant to provide good reason why the evidence was not previously put forward where it could have been. The requirement to provide those reasons still applies even if the evidence given is consistent and unchallenged. This would have been apparent to the Appellant's representatives who would know of this requirement given that it arises from a starred decision of the Tribunal.
21. Turning to Ground 6, and the allegation that the Panel misplaced the burden of proof upon the Appellant at §18(l), this complaint is wholly unfounded. The context of this paragraph is the Panel addressing an allegation made by the Appellant that Judge Rodger "misinterpreted what the witnesses said". It is trite that as the Appellant asserts Judge Rodger misinterpreted what the witnesses said, he must also prove it. This does not mean that the burden of proof shifted to him for the remainder of the appeal when it plainly did not.
22. Finally, turning to Ground 7, the Appellant complains that the Panel have not made clear findings on whether the scan of the former mother-in-law's Romanian ID card shows she did in fact attend the wedding, however the Appellant ignores the fact that the Panel have considered this evidence at §18f. and have indicated that this ID evidence could have been provided during the first hearing and so was treated with the greatest circumspection. The Appellant did not challenge that finding and in any event, even if he had done, we do not find that the fact of

the mother-in-law's attendance would in and of itself prove sufficient to cause a departure from Judge Rodger's robust findings which formed the Panel's starting point.

23. In light of the above findings, we find that the decision of the First-tier Tribunal is free from material error of law.

Notice of Decision

24. The Appellant's appeal to the Upper Tribunal is dismissed.
25. The decision of the First-tier Tribunal shall stand and the Appellant's appeal remains dismissed.

P. Saini

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 February 2024