



Trinity Term

[2017] UKSC 54

On appeal from: [2016] CSIH 51

JUDGMENT

Sadovska and another (Appellants) v Secretary of State for the Home Department (Respondent) (Scotland)

before

Lord Neuberger, President

Lady Hale, Deputy President

Lord Kerr

Lord Clarke

Lord Reed

JUDGMENT GIVEN ON

26 July 2017

Heard on 12 June 2017

Appellant

Mungo Bovey QC

Daniel Byrne

(Instructed by Drummond
Miller LLP)

Respondent

Lord Keen of Elie QC

(Advocate General for Scotland)

Andrew G Webster

(Instructed by Office of the Solicitor to the Advocate
General for Scotland)

LADY HALE: (with whom Lord Neuberger, Lord Kerr, Lord Clarke and Lord Reed agree)

1.

The issue in this case is the proper approach of the immigration appellate authorities where the Secretary of State has decided that a national of the European Economic Area who is lawfully living in the United Kingdom should be removed on the ground of abuse of the right to reside here. The abuse in question happened to be an alleged attempt to enter into a “marriage of convenience” but the issue would arise in respect of any abuse which would justify removal under article 35 of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (“the Directive”).

The facts

2.

Ms Sadovska is a citizen of Lithuania. She came to this country lawfully in February 2007 and has since been living and working here lawfully, exercising her rights under the Directive. She lives in Edinburgh, where her sisters also live, and works as a cleaner. Mr Malik is a citizen of Pakistan who came to this country lawfully with a Tier 4 student visa in May 2011. His visa expired on 15 April 2013 and he has been here unlawfully ever since. He too lives and worked in Edinburgh until 17 April 2014.

3.

They say that they met at a disco, El Barrio in Edinburgh, in October 2012. They spent that night together and saw one another from time to time afterwards, meeting members of one another's families, but the relationship did not become a steady one until Valentine's Day 2013. Thereafter, they say, they saw one another as boyfriend and girlfriend. It is common ground (and there is photographic evidence) that in December 2013, Mr Malik attended the wedding of Ms Sadovska's sister and that they were on the streets of Edinburgh together during the celebrations at Hogmanay 2013. It is also common ground that Mr Malik booked a double room for two adults at a London hotel for four nights in January 2014 and that they were both in London at that time. They say that they were on holiday together and that was when they decided to get married.

4.

On 25 March 2014, they published notice of their intention to marry on 17 April 2014 at Leith Registry Office. On 28 March 2014, they signed a one page statement about their relationship which included the following puzzling sentence:

"We have discussed the idea of living together in depth and also have touched upon the subject of marriage, but as of yet, none of these discussions have manifested into action."

5.

That statement was enclosed in a letter dated 11 April 2014, sent by solicitors acting for Mr Malik (and, it would appear, also for Ms Sadovska) to the Home Office in Glasgow. This explained that their client was an over-stayer, but that he intended to marry an EEA national on 17 April 2014 and would be applying for recognition that he was exercising Treaty rights as a family member of an EEA national, so it was hoped that no enforcement action would be taken against him. The letter recognised that officials might wish to interview their clients but hoped that this could be done before their wedding on 17 April. It also stated that:

"We would like you to take this letter as a human rights allegation that both the applicant and the EEA national have established a family life in the United Kingdom and any decision to attempt to remove the applicant from the United Kingdom would be challenged on article 8 grounds and also on the grounds that the applicant [sci: attempt?] breaches our client's right to marry under article 12 of the ECHR."

6.

Enclosed were copies of Mr Malik's passport, of Ms Sadovska's identity card, birth certificate and most recent payslip, a receipt from the Property Management Company in respect of a flat in Edinburgh for which they had signed a lease on 6 April 2014, three statements from two people who knew them, and their statement of 28 March.

7.

Mr Malik and Ms Sadovska had indeed signed a lease for a flat in Edinburgh on 6 April 2014 and each gave this as their home address when interviewed on 17 April. (We are told that they still live together but at a different address.) On 16 April 2016 they bought wedding rings.

8.

The solicitor's letter was faxed to the Home Office on Friday 11 April. The wedding was due to take place on the afternoon of the following Thursday. Before that could happen, however, immigration officers arrived at the Registrar's Office and asked to interview them. They agreed. Each was cautioned and agreed to be interviewed in English. They were interviewed separately, Mr Malik from 14.55 to 16.20 and Ms Sadovska from 14.54 to 16.50, according to the immigration officers' records. After the interviews they were detained and thus unable to marry. Ms Sadovska was released soon afterwards, but Mr Malik was detained until 11 June. On the same day as the interviews, each was issued with a two part decision notice.

9.

Mr Malik was issued with a notice that he was a person liable to removal as an over-stayer, who had not applied for further leave to remain after his visa had expired and was thus liable to be detained pending a decision whether or not to give directions for his removal from the United Kingdom. The notice explained that he had breached section 10(1)(a) of the Immigration and Asylum Act 1999, which provides that "a person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if ... (a) having only a limited leave to enter or remain, he ... remains beyond the time limited by the leave", and had therefore committed an offence under section 24(1)(b)(i) of the Immigration Act 1971.

10.

Ms Sadovska was issued with a notice that she was a person liable to removal because her removal was justified on grounds of abuse of rights, specifically that she had attempted to enter into a marriage of convenience with Mr Malik. The notice referred to regulation 19(3)(c), without explaining that this was contained in the Immigration (European Economic Area) Regulations 2006. At the time, this provided that "... an EEA national who has entered the United Kingdom ... may be removed if ... (c) the Secretary of State has decided that the person's removal is justified on grounds of abuse of rights in accordance with regulation 21B(2)". Regulation 21B(1) provided that "The abuse of a right to reside includes ... (c) entering, attempting to enter or assisting another person to enter or attempt to enter, a marriage or civil partnership of convenience". Regulation 21B(2) provided that "The Secretary of State may take an EEA decision on the grounds of abuse of rights where there are reasonable grounds to suspect the abuse of a right to reside and it is proportionate to do so". Regulation 24(2) provided that where a decision to remove was taken under regulation 19(3)(c), the person was to be treated as someone to whom section 10(1)(a) of the 1999 Act applied.

11.

In each case, the notice was accompanied with notice of a decision to remove.

12.

Both appealed to the First-tier Tribunal which heard their appeals together on 4 August 2014 and promulgated a determination refusing them both on 19 August 2014. Their appeals to the Upper Tribunal were heard on 5 February 2015 and a determination refusing them was promulgated on 9 February 2015. Their appeals to the First Division of the Inner House of the Court of Session were refused on 17 June 2016: [2016] CSIH 51. They now appeal to this court.

13.

They make two complaints about the decisions of the tribunals and court below. The first, and most important, relates to the burden of proof in a case such as this.

14.

Under the heading “Applicable law”, the First-tier Tribunal judge said this, at para 7:

“In immigration appeals, the burden of proof is on the appellant and the standard of proof required is a balance of probabilities. In human rights appeals, it is for the appellant to show that there has been an interference with his or her human rights. If that is established, and the relevant article permits, it is then for the respondent to establish that the interference was justified. The appropriate standard of proof is whether there are ‘substantial grounds for believing the evidence.’”

It is apparent from his determination that his whole approach was to require Ms Sadovska and Mr Malik to prove that their proposed marriage was not a marriage of convenience, rather than to require the Home Office to prove that it was.

15.

Before the Upper Tribunal the appellants’ complaint was that the First-tier Tribunal judge had taken the interviews as his starting point and given too much weight to the inconsistencies between them and had not considered them in the context of the totality of the evidence, as required by the decision of the Upper Tribunal in *Papajorgji v Entry Clearance Officer, Nicosia* [2012] UKUT 38, [2012] Imm AR 3 (at para 39).

16.

Papajorgji was an extraordinary case in which an Albanian woman who had been married to and living with a Greek man for 12 years and had two children with him was refused a visa to accompany him on a visit to this country on the ground that theirs was a marriage of convenience, a belief which, as the Upper Tribunal said, was on the information supplied with the application “simply ludicrous” (para 32). There was no burden on the claimant in an application for a family permit to establish that she was not party to a marriage of convenience unless the circumstances known to the decision-maker gave reasonable ground for suspecting that that was the case. Where there was such a suspicion the matter required further investigation and the claimant should be invited to respond to by producing evidential material to dispel it (para 27). But suspicion was not enough. The claimant was only disqualified if it was established that the marriage was one of convenience (para 37). The question for the judge was “in the light of the totality of the information before me, including the assessment of the claimant’s answers and any information provided, am I satisfied that it is more probable than not this is a marriage of convenience?” (para 39)

17.

Before the First Division, the appellants did complain that the tribunal had adopted the wrong approach to the burden of proof and that the respondent had failed to prove to the requisite high degree that the appellants were guilty of fraud. The court dealt with the matter in this way, at para 20:

“However, as has often been said, once the evidence has been heard, questions of onus usually cease to be important (*Sanderson v McManus* 1997 SC (HL) 55, Lord Hope at 62). The view of the UT in *Papajorgji* (at para 39) that the question, in the Tribunal context, was whether it is more probable than not that the marriage is one of convenience ‘in [the] light of the totality of the information’, accords with that dictum.”

The court went on to say that the First-tier Tribunal had considered all the information and reached a decision based upon it. That decision did not depend upon onus but upon weighing the various factors in the balance. In that context, there was only one standard of proof, that being the balance of probabilities (*Scottish Ministers v Stirton* 2014 SC 218, the Lord Justice Clerk (Lord Carloway) at paras 117-119).

18.

It is perhaps worth noting that Lord Hope's observation in *Sanderson v McManus*, that questions of onus usually cease to be important once the evidence is before the court was in the context of a dispute between unmarried parents about a father's contact with his child, when, as Lord Hope observed "the matter then becomes one of overall impression, balancing one consideration against another and having regard always to the consideration which has been stated to be paramount" (that is, the welfare of the child). Even then, the court had to be able to come to the conclusion that making an order would be in the child's best interests. This demonstrates that, when considering the burden of proof, it is necessary to understand what the issues are and what has to be established.

19.

The appellants also complain that their interviews were unfair, oppressive and repugnant to public law standards. The circumstances of being approached on their wedding day by uniformed immigration officers carrying batons and handcuffs meant that they were frightened. They agreed to be interviewed in English but neither is fluent in English. They had no time to contact their solicitor for advice, to obtain an interpreter, to produce evidence and contact witnesses. They complain that both the First-tier and the Upper Tribunal had thought the interviews were of central importance, yet they gave no weight to the circumstances in which they had taken place.

The law

20.

It is of central importance in this case to consider the substantive law governing the respondent's decisions and what had therefore to be established in each case. It differs significantly as between the two appellants.

21.

Ms Sadovska is an EEA national. Her rights are therefore governed by the Directive, which the 2006 Regulations were designed to implement in UK law. To the extent, if any, that the 2006 Regulations do not accurately transpose the requirements of the Directive, we have to give effect to the Directive rather than the Regulations and so it is appropriate to focus on the provisions of the Directive.

22.

She has been living lawfully in the United Kingdom for a continuous period of more than five years. This means that, under article 16 of the Directive, she has the right of permanent residence here. None of the conditions attached to the right of residence of people who have been here for more than three months but less than five years, provided for in article 8 of the Directive, applies. Article 28.2 lays down the general rule that a host member state may not take an expulsion decision against a Union citizen who has the right of permanent residence "except on serious grounds of public policy or public security". However, Recital 28 to the Directive states that:

"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."

This is therefore provided for in article 35, which is the crucial article in this case:

“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.

Article 30 requires that the person concerned be notified in writing of the decision and informed precisely and in full of the reason for it and where and within what time that person may lodge an appeal. Article 31 requires that the person have access to judicial and, where appropriate, administrative redress procedures to appeal against or seek review of any decision taken against them. These “shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which [it] is based. They shall ensure that the decision is not disproportionate ...”

24.

A Communication from the Commission to the European Parliament and the Council on guidance for the better transposition and application of Directive 2004/38/EC, dated 2 July 2009, has this to say about marriages of convenience, at para 4.2:

“Recital 28 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 definition in the first sentence is repeated in the Commission’s more recent Handbook on addressing the issues of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens, dated 26 September 2014. However, this goes on to explain that:

“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.”

But it repeats that:

“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).”

25.

Mr Malik is in a different position from Ms Sadovska. As an over-stayer he is, as noted above, liable to be removed under section 10(1)(a) of the 1999 Act. However, had he succeeded in marrying Ms Sadovska, he would have become a “family member” within the meaning of article 2.2 of the Directive. Under article 7.2, this would bring with it the right of residence for more than three months, provided that Ms Sadovska satisfied one of the conditions in article 7.1(a), (b) or (c). As a “worker” she would satisfy condition (a). Once he had been living here lawfully for five years, he too would acquire a right of permanent residence under article 16.2. As with Ms Sadovska, of course, he would be liable to removal under article 35 if their marriage was one of convenience.

26.

As they have not succeeded in marrying, Mr Malik is not a “family member” of an EU citizen. However, article 3.2 requires Member States to “facilitate” the entry and residence of certain other persons, who include “(b) the partner with whom the Union citizen has a durable relationship, duly attested”. Article 3.2 also requires that “The host member state shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people”.

27.

Finally, of course, both Ms Sadovska and Mr Malik have rights under the European Convention on Human Rights. Article 8.1 guarantees the right to respect for private and family life, although under article 8.2 interference is justified if it is in accordance with the law and “necessary in a democratic society” to achieve a legitimate aim. Article 12 guarantees the right of “men and women of marriageable age ... to marry and to found a family, according to the national laws governing the exercise of [the] right”.

Analysis

28.

It is clear from the provisions of the Directive quoted above that Ms Sadovska has a right of permanent residence in the United Kingdom. As an EU citizen, under article 27.1, her freedom of movement can only be restricted on grounds of public policy, public security or public health. As a permanent resident, under article 28 she could only be removed if those grounds are serious. It is not suggested that she can be removed under article 28 on any of those grounds. She can therefore only be removed, under article 35, if it is established that she has entered, or attempted to enter, into a marriage of convenience. 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.

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.

30.

In the case of a person exercising EU law rights, the tribunal must also be satisfied that the removal would be a proportionate response to the abuse of rights established. So it would be one thing to find that the proposed marriage had been shown to be one of convenience, and therefore that it was right to prevent it, but quite another thing to find that expelling Ms Sadovska from the country where she

had lived and worked for so long and had other family members living was a proportionate response to that.

31.

The First-tier Tribunal did not analyse her rights in this way. It was quite simply incorrect to deploy the statement that “in immigration appeals the burden of proof is on the appellant”, correct though it is in the generality of non-EU cases, in her case. She had established rights and it was for the respondent to prove that the quite narrow grounds existed for taking them away. Nor did the determination address the issue of proportionality. It is impossible for this court to conclude that, had the matter been approached in the right way, the decision would inevitably have been the same.

32.

The position of Mr Malik is different, for he has no established rights, either in EU law or in non-EU immigration law. In order to benefit from the Directive, he would have to show that he has a “durable relationship” with Ms Sadovska. However, article 3.2 requires the respondent to justify any refusal of entry or residence in such cases. So if he can produce evidence of a “durable relationship” (a term which is not defined in the Directive), it would be for the respondent to show that it was not or that there were other good reasons to deny him entry.

33.

It is not impossible that a tribunal, properly directing itself, would reach different conclusions in the case of these two appellants. But it is impossible for this court to conclude that, had the matter been approached in the right way, the decision relating to Mr Malik would inevitably have been the same.

34.

It follows that the appeal must be allowed and the case remitted for a full re-hearing by the First-tier Tribunal. In seeking to establish its case, the respondent will no doubt concentrate on the interviews, the discrepancies between the appellants’ accounts, and the gaps in Ms Sadovska’s knowledge of Mr Malik’s family, together with the sentence in their statement of 28 March that their thoughts of living together and marriage had not yet “manifested into action” (which on 28 March was strictly true in that they were not yet living together or married but they had given notice of intention to marry). But in considering those discrepancies, the circumstances in which the interviews took place and the statement was made must be borne fully in mind. Furthermore, there were many matters on which their accounts were consistent. It turns out, for example, that Ms Sadovska’s mother does indeed live in Lithuania, as Mr Malik said in explaining why she was not there. There is also a considerable body of evidence which supports their claim to have been in a genuine relationship, dating back some time before they gave notice of intention to marry. 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. Their legal and their factual cases must be considered separately.

35.

Having reached the firm conclusion that the case must be remitted to the First-tier Tribunal to be heard afresh, because a wrong approach was taken to the requirements of EU law in this case, it is unnecessary to consider whether the appellants’ Convention rights add anything further to their claims. But for my part I would not accept their argument that, because their marriage was frustrated by the respondent’s actions, their case should be approached as if they were married, which would, of course, enhance Mr Malik’s claims. It must be permissible for the state to take steps to prevent sham

marriages, although it is also incumbent on the state to show that the marriage would indeed be a sham.