



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/00515/2017**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 29th October 2018**

**Decision and Reasons Promulgated
On 7th November 2018**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

**MS LEILA HAMADOU YEYA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N C Kenneth instructed by SLA Solicitors
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

DECISION AND REASONS

- 1.** The appellant is a national of Niger born on 28th July 1986 and she was granted permission to appeal against a decision of First-tier Tribunal Judge Lucas, promulgated on 15th June 2018, dismissing the appeal against the decision of the Secretary of State dated 29th December 2016. The Secretary of State refused a residence card under the Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations') under Regulations 7 and 6 with reference to regulation 2 of the EEA Regulations.
- 2.** The judge recorded that the refusal decision took place on 29th November 2018 (although it would appear that the decision was in fact made in December) and identified the contents of the decision letter. The full decision no longer appears to be on file. Nonetheless the application was clearly made as a spouse and the issues were whether the marriage was

one of convenience and alleged deception in the application form by the appellant.

3. The judge stated at paragraph 26

'The burden of proof is upon the Appellant and the standard of proof is of the balance of probabilities'.

Application for Permission to Appeal

4. The application for permission asserted

(i) the grounds of appeal to the First-tier Tribunal challenged the record of the visit to the sponsor and the record thereof but no attempt was made by the judge to direct himself in accordance with **Miah (interviewer's comments: disclosure: fairness)** [2014] UKUT 00515 (IAC).

(ii) the judge failed to follow **Sadovska v SSHD** [2017] UKSC 54. It was for the Secretary of State to prove, at the outset, that the marriage was one of convenience.

(iii) there was a mistake of fact. The witness statement of the sponsor did not assert that the sponsor was mistaken but that the Secretary of State was mistaken.

(iv) the judge failed to give adequate reasons for his findings at [38] and [30].

(v) the judge had not considered the Immigration Officer's report of 22nd October 2016 within the context of all of the evidence. The sponsor had on three other occasions supported the appellant's applications.

The Hearing

5. At the hearing, Mr Deller conceded that there was an error of law in the decision which was fundamental. That related to the burden of proof.

Conclusions

6. The legal direction on the burden of proof was a fundamental error and thus the judge failed to approach the evidence correctly. The approach set out at [26] of the decision and which appears to be applied throughout the decision contradicts that held by the Supreme Court in **Sadovska** at paragraph 28:

'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'.

7. Nor did the judge engage with the challenge to the contents of the interview report of IO Gill and, in view of the nature of the challenge, failed to address his/her mind to the question of **Miah**.
8. In view of my decision on grounds (i) and (ii) I see no need to address the further grounds of challenge.
9. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Signed Helen Rimington
October 2018

Date 29th

Upper Tribunal Judge Rimington