EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 41
XA104/17

Lord Menzies
Lady Clark
Lord Glennie

OPINION OF THE COURT

delivered by LORD MENZIES

in the cause

by

USMAN ASIM

Appellant

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appellant: Byrne; Drummond Miller LLP
Respondent: Webster; Office of the Advocate General

24 May 2018

[1] The appellant is a citizen of Pakistan born on 1 April 1984. He applied for residence in the United Kingdom on about 12 May 2015 under the Immigration (EEA) Regulations based on his relationship with Sylwia Gierosz, a citizen of Poland, born on 11 April 1991. The respondent refused the application for reasons set out in a letter served on 19 October 2015 on the basis that the relationship was a sham and that the subsequent marriage was one of convenience.

[2] The appellant appealed against this decision to the First-tier Tribunal and on about 9 June 2016 the First-tier Tribunal refused this appeal. The appellant appealed to the Upper Tribunal and on 15 February 2017 the Upper Tribunal refused his appeal. The Upper Tribunal later refused leave to appeal to the Court of Session but on 7 December 2017 this court granted leave to appeal.

[3] This appeal was presented on the basis that the Upper Tribunal erred in law in concluding that the First-tier Tribunal's determination was itself free from material error in law in two respects: (1) that the FTT applied the wrong onus of proof to the materials before it; and (2) that the FTT's decision was irrational. With regard to onus of proof Mr Byrne for the appellant drew our attention in particular to three passages in the determination of the FTT at paragraphs 5, 30 and 31:

> "5. In EEA immigration appeals the burden of proof is on the appellant and the standard of proof required is a balance of probabilities.
>
> …
>
> 30. On balance I consider that there are significant question marks about this being a genuine marriage and therefore the test set out at paragraph 39 of *Papajorgii* is met.
>
> 31. Taking all of these factors into account, I consider that the appellant has not discharged the burden of proof upon him."

This, it was argued, was plainly an error of law in light of the judgment of the UK Supreme Court in *Sadovska* v *Secretary of State for the Home Department* 2018 SC (UKSC) 38, particularly at paragraphs 14 and 31 to 33 of that judgment. At paragraph 14 Baroness Hale stated the following:

> "Under the heading 'Applicable law', the FTT judge said this, at para 7:
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> > '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."

[4] Baroness Hale went on at paragraphs 31 to 33 in *Sadovska* to state the following:

> "31. … 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.
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> 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."

[5] Mr Webster for the respondent drew our attention to paragraph 22 of the decision of the Upper Tribunal which states as follows:

> "Read fairly, and as a whole, the decision is not based on a misconception of legal approach. Rather its essential conclusion is that, on the whole evidence and for sensibly explained reasons, the respondent has shown that this is a marriage of convenience."

Mr Webster submitted that, when read as a whole, the decision of the FTT disclosed no material error in law. Once the evidence was out, the FTT had regard to the evidence in the round. There was enough before the FTT to entitle it to infer collusion and that internal

inconsistencies in the evidence of the appellant and the sponsor were sufficient to enable adverse inferences to be drawn. Mr Webster submitted that the FTT's approach expressly and in substance recognised that the onus was on the respondent.

[6] Looking at the decision of the FTT as a whole, we cannot reach the conclusion that the FTT recognised that the onus rested on the respondent to establish that this was a sham marriage. On the contrary, it appears to us to be clear that the FTT proceeded on the basis that the burden of proof rested on the appellant (paragraph 5 of its decision letter) and that he had not discharged that onus (paragraph 31). The FTT judge observed that there are significant question marks about this being a genuine marriage but she appears to have held these questions marks against the appellant. We consider that the FTT fell into error of law in this respect and that this error cannot be regarded as other than material. In holding otherwise the Upper Tribunal itself fell into error of law. For this reason this appeal must succeed.

[7] With regard to rationality, we are persuaded by the submissions for the appellant, particularly as set out at paragraphs 6 to 9 of the appellant's note of argument. Mr Byrne referred us to the remarks of Mr Justice Sedley, as he then was, in *R* v *Parliamentary Commissioner for Administration, ex parte Balchin and another [*1998] 1 PLR 1, starting at page 1 and in particular page 13 where he observed:

> "What the not very apposite term 'irrationality' generally means in this branch of the law is a decision which does not add up - in which, in other words, there is an error of reasoning which robs the decision of logic."

Mr Byrne submitted that the errors of reasoning by the FTT robbed its decision of logic and that it was therefore to be regarded as irrational in legal terms.

[8] In light of our decision on the first issue, we do not consider that it is appropriate for us to set out in detail the submissions and our conclusions on the issue of rationality as this

matter will require to be remitted to a differently constituted First-tier Tribunal. Suffice it to say that we are not persuaded that the FTT was entitled to draw the adverse inferences about the credibility of the appellant which it drew on the basis of the answers given by the appellant and the sponsor regarding the colour of their front door or on the sponsor's indication to the Secretary of State at interview before her marriage that she might wear jeans on her wedding day or on the positions of the appellant and the sponsor for relatives and family not being invited to the wedding on the basis of the evidence before it.

[9] In the whole circumstances the decisions of the Upper Tribunal and the First-tier Tribunal will be set aside and the matter remitted to a differently constituted First-tier Tribunal to consider the matter afresh.

[10] We shall find the appellant entitled to the expenses of this appeal to the Court of Session.