



26 July 2017

PRESS SUMMARY

Sadovska and another (Appellants) v Secretary of State for the Home Department (Respondent) (Scotland) [2017] UKSC 54
On appeal from [2016] CSIH 51

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Kerr, Lord Clarke, Lord Reed

BACKGROUND TO THE APPEAL

An EU citizen with a permanent right of residence in a host member state may have that right removed ‘in the case of abuse of rights or fraud, such as marriages of convenience’. The issue in this appeal is which party bears the burden of proof of establishing that a proposed marriage is one of convenience.

Ms Sadovska is a citizen of Lithuania. She moved to the United Kingdom in 2007 and has lived and worked here lawfully since, acquiring a right of permanent residence as an EU citizen pursuant to Directive 2004/38/EC (‘the Directive’). Mr Malik is a citizen of Pakistan who entered the UK with a student visa in May 2011 and has remained here unlawfully after his visa’s expiry in April 2013, in breach of section 10(1)(a) Immigration and Asylum Act 1999. Ms Sadovska and Mr Malik (‘the appellants’) maintain that they have been in a relationship with each other since February 2013, and decided to marry in January 2014.

On 11 April 2014, the appellants’ solicitors notified the Home Office in Glasgow that they intended to marry on 17 April 2014 at Leith Registry Office and invited officials to interview them before the wedding. Immigration officers arrived at the Registrar’s Office, interviewed the appellants separately, and then detained them before they were able to marry. Both were then served with notice that they were persons liable to removal from the UK: Mr Malik by having stayed after the expiry of his visa and Ms Sadovska by giving the Secretary of State reasonable grounds to suspect the abuse of her EU right of residence by attempting to enter into a marriage of convenience, contrary to regulation 19(3)(c) Immigration (European Economic Area) Regulations 2006.

The appellants appealed to the First-tier Tribunal. The judge held that the burden of proof was on the appellants to establish that their proposed marriage was not a marriage of convenience, and that they had failed to do this, having regard to the inconsistencies in their accounts at interview. The appellants appealed unsuccessfully to the Upper Tribunal and to the First Division of the Inner House, arguing that the tribunal had adopted the wrong approach to the burden of proof, and that the Secretary of State had failed to prove that the appellants were guilty of fraud, when the totality of the evidence relating to their relationship and the circumstances in which the interviews had taken place was taken into account.

JUDGMENT

The Supreme Court unanimously allows the appeal and remits the case for a full re-hearing by the First-tier Tribunal. Lady Hale gives the only substantive judgment.

REASONS FOR THE JUDGMENT

It was important to identify the different rights the appellants individually enjoyed, and thus what the Secretary of State needed to establish in order to remove them:

- Ms Sadovska had a right of permanent residence in the UK and could not be expelled unless she had abused her rights within the meaning of article 35 of the Directive. A Communication in 2014 from the European Commission giving guidance on the Directive explained that a ‘marriage of convenience’ was a marriage contracted with the predominant purpose of enjoying the right of free movement. It was not enough that the marriage might bring incidental immigration and other benefits, and the predominant purpose must be the purpose of both parties [21-24, 29].
- Mr Malik was liable to be removed as an over-stayer. Had he succeeded in marrying Ms Sadovska he would have acquired a right of residence in the UK under the Directive as a family member of an EU national working here. The Directive also required member states to facilitate the entry and residence of the partner of an EU citizen if it was ‘a durable relationship, duly attested’ [25-26].
- Both appellants enjoyed rights under articles 8 and 12 of the European Convention on Human Rights to a private and family life, and to marry and found a family [27].

The 2006 Regulations permitted the Secretary of State to take steps to remove Ms Sadovska on the basis of reasonable grounds to suspect that she had entered or attempted to enter a marriage of convenience, but she was entitled to an appeal where the facts and circumstances were fully investigated. The tribunal had to form its own view of the facts from the evidence presented. It was not for her to establish that her relationship with Mr Malik was a genuine and lasting one, but for the Secretary of State to establish that it fell within the definition of a marriage of convenience [28]. The tribunal had also to be satisfied that the removal of Ms Sadovska from the country where she had lived and worked for so long with other family members would be a proportionate response to the abuse of rights, rather than merely the prevention of the marriage [30]. As the tribunal had not analysed Ms Sadovska’s rights this way, it was not possible for the Supreme Court to conclude that the Secretary of State had proved that the narrow grounds for taking away her established rights existed [31].

Mr Malik had no established rights but if he could produce evidence of a durable relationship with Ms Sadovska, it would be for the Secretary of State to show that it was not, or that there were other good reasons to deny him entry. Again, the Supreme Court could not conclude that, had his case been approached in the right way, the outcome would have inevitably been the same [32-33].

Accordingly, the burden of proof of establishing that the proposed marriage is one of convenience falls on the Secretary of State. The appeal is allowed and the case remitted for a full rehearing by the First-tier Tribunal, at which the inconsistencies in the appellants’ interviews will be considered along with their evidence supportive of a genuine relationship dating back several months, and the circumstances in which the interviews took place will also be taken into account [34].

The appellants’ ECHR rights did not add anything further to their claims in the light of this conclusion. Such rights would not in any event prevent a state from taking steps to prevent sham marriages, if it could show that the marriage would indeed be a sham [35].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>