Sadovska and another (Appellants) v Secretary of State for the Home Department (Respondent) (Scotland) [2017] UKSC 54: An Inconvenience for The Home Office

Introduction

Historically, this case is of interest as it was one of a number of cases heard during the first ever sitting of the UK Supreme Court in Edinburgh in June 2017. The subject matter concerned how immigration tribunals should proceed when attempting to remove a lawfully resident European Economic Area national for an alleged abuse of the right to reside in the UK. This case involved an alleged attempt by the appellants to enter into a 'marriage of convenience' in Scotland, justifying removal of one of the appellants under article 35 of Directive 2004/38/EC ('the Directive') and a decision on where the burden of proof lies in establishing a 'marriage of convenience'. A secondary point of interest, given that it is a UK court dealing with a Scottish case, is the presence of the terms 'marriage of convenience' and 'sham marriage' within the judgment. They have divergent meanings in different judicial contexts and there is the potential for a disconnect.

Facts

The appellants were Sadovska, a Lithuanian citizen, and Malik (from Pakistan). Sadovska had acquired rights under Directive 2004/38/EC ('the Directive').[1] Specifically, she had acquired a right of permanent residence and had lived and worked in Edinburgh since 2007. Malik had no such rights; he had entered the UK legally on a Tier 4 student visa in 2011. However he had overstayed that visa when it expired in 2013 and worked in Edinburgh until April 2014.[2]

The appellants alleged that they met in October 2012, began a regular relationship in February 2013 and decided to marry in January 2014. They then submitted their notice of intention to marry on 25 March 2014, setting a wedding date of 17 April 2014. On 11 April 2014, their solicitors notified the Home Office that Malik was an over-stayer, and lodged evidence of their relationship and intention to establish a family life together. They also indicated that Malik intended to apply for recognition of his 'treaty rights as a family member of an EEA national'. A signed statement (dated 28 March 2014), indicating that the appellants had (at that time) not made any concrete plans for living together and marrying, was also submitted to the Home Office. The appellants subsequently signed a lease together in April 2014 and also bought wedding rings.[3]

On the wedding date (17 April 2014), immigration officers attended at the Registrar's office and requested to interview the appellants (to which they agreed). They were cautioned and interviewed, separately, in English, without their solicitors present. Both appellants were detained after the interview so the wedding did not take place. They were also both issued

[1] Directive 2004/38/EC, art 35.
[2] S*adovska and another (Appellants) v SoSS for the Home Department (Respondent) (Scotland)* [2017] UKSC 54, [2].
[3] S*adovska*, [3]-[7].

with a notice that day that they were liable to be removed from the UK.[4] The reasoning respectively was: Malik was an over-stayer and had thus committed an offence;[5] Sadovska had allegedly abused her rights acquired under the Directive by 'attempting to enter into a marriage of convenience'.[6] Additionally, these notices were issued alongside notices of a decision to remove both by the Secretary of State.[7]

Procedure

The appellants challenged the Secretary of State's decision to remove them from the UK. Before the First-tier Tribunal in August 2014, their appeal was refused on the grounds they could not demonstrate interference with their rights under the European Convention on Human Rights ('the ECHR').[8] Before the Upper Tribunal (February 2015), their appeal was refused as the First-tier Tribunal had given appropriate consideration to the totality of evidence.[9] On appeal to the First Division of the Inner House, they submitted that the First-tier Tribunal had mischaracterised the burden of proof but this was dismissed in June 2016.[10] On further appeal to the Supreme Court, the appellants relied on three specific grounds.

Issues

First, the First-tier Tribunal had misdirected itself on law by erroneously assigning the appellants the burden of demonstrating the integrity of the marriage under the Directive; and that the Tribunal had failed to assess the proportionality of the Secretary of State's decision to remove Sadovska for an alleged abuse of European Union (EU) law rights.[11] Second, the appellants submitted the actions of the Home Office had interfered with their right to private and family life as well as their right to marry and found a family under Articles 8 and 12 of the ECHR respectively.[12] Third, the appellants submitted their interviews by the Home Office were 'unfair, oppressive and repugnant to public law standards' and this had been afforded insufficient weight in the Tribunal's determination.[13]

The Supreme Court focused primarily on the first ground of appeal, namely the mischaracterisation of the burden of proof at first instance. This had not been raised at the Upper Tribunal but had been dismissed by the Inner House.[14]

In relation to Sadovska, the Supreme Court found:

> 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

[4] *Sadovska*, [8]-[10].
[5] Immigration Act (1971), s24(1)(b)(i), for breach of the Immigration and Asylum Act (1999), s10(1)(a).
[6] Immigration (European Economic Area) Regulations (2006), regulation 19(3)(c); see also regulation 24(2), which characterises this conduct as a violation of the Immigration and Asylum Act (1999), s10(1)(a).
[7] S*adovska*, [11].
[8] Ibid, [12], [14].
[9] Ibid, [12], [15].
[10] Ibid, [12], [17].
[11] Ibid, [31].
[12] Ibid, [27].
[13] Ibid, [19].
[14] Ibid, [17].

> that the relationship was a genuine and lasting one. It was for the respondent to establish that it was indeed a marriage of convenience.[15]

It further observed that:

> It was quite simply incorrect to deploy the statement that "in immigration appeals the burden of proof is on the appellant"… She had established rights and it was for the respondent to prove that the quite narrow grounds existed for taking them away.[16]

In relation to Malik, the Supreme Court confirmed that he was in a different position, as he had no established rights. To benefit from the Directive he would have to show that he had a 'durable relationship' with Ms Sadovska. However, under article 3.2 of the Directive, if he could produce evidence of a durable relationship, it would be for the respondent to show that it was not or that there were other good reasons to deny him entry.[17] The Supreme Court therefore allowed the appeal for both Sadovska and Malik, remitting it for a full rehearing by the First-tier Tribunal.

The two other grounds of appeal were not considered as the appellants succeeded in their first ground. It was therefore 'unnecessary to consider submissions regarding their rights under the ECHR'.[18] Lady Hale did however indicate that she would not accept their argument (that because of the Home Office's actions, the case should be approached as if they were married, thereby strengthening Malik's position). She stipulated that States must be allowed to act to prevent sham marriages but that they must also show that said marriage would be a sham.[19]

The third ground of appeal was based on the appellant's contentions that the interviews were **'**unfair, oppressive and repugnant to public law standards'.[20] The Supreme Court did not recognise or treat that as a valid ground of appeal. They discussed the interviews briefly, commenting on the 'considerable body of evidence which supports their claim to have been in a genuine relationship'.[21] Although the First-tier Tribunal, on re-examination of this case, is under no obligation to follow the obiter comments, they can be viewed as significant.

Analysis

Whilst this case clearly places the burden of proving an allegation of a 'marriage of convenience' against EU or EEA nationals (with established rights) on the Home Office, other matters are perhaps not so clear. 'Marriage of convenience'[22] and 'sham marriage'[23] are both mentioned by Lady Hale, with 'marriage of convenience' in particular, being referred to as 'a term of art'.[24] (A 'term of art' has been defined as 'a word or phrase that has a precise

[15] *Sadovska*, [28].
[16] Ibid, [31].
[17] Ibid, [32].
[18] Ibid, [35].
[19] Ibid, [35].
[20]Ibid, [19].
[21] Ibid, [34].
[22] Ibid, [1], [10], [14], [16], [17], [22], [24], [25], [28], [29], [34].
[23] Ibid, [35].
[24] Ibid, [29].

specialised meaning within a particular field or profession').[25] On closer examination, it is far from clear that these are terms with universally consistent or imbued with settled meanings.

In EU law, 'marriage of convenience' is defined in the Directive and clarified in the Communication from the Commission to the European Parliament and the Council on guidance for the better transposition and application of Directive 2004/38/EC ('the 2009 Communication'), which stipulates that:

> 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.[26]

However, The European Commission 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 ('the European Commission Handbook') explains 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.[27]

Further, it also states 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*).[28]

This must also be the purpose of both parties to the marriage (except in cases of deceit by the non-EU national).[29]

The Immigration (EEA) Regulations 2016 (SI2016/1052) ('the EEA Regulations 2016') also define 'marriage of convenience' as including:

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[25] Oxford English Dictionary (accessed 26/03/2018) <https://en.oxforddictionaries.com/definition/term_of_art>.
[26] Communication from the Commission to the European Parliament and the Council on guidance for the better transposition and application of Directive 2004/38/EC, 2 July 2009, [4.2].
[27] 'COMMISSION STAFF WORKING DOCUMENT - Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens - Accompanying the document COMMUNICATION TO THE EUROPEAN PARLIAMENT AND TO THE COUNCIL' (26 September 2014) SWD(2014) 284 final, 9, section 2.1.
[28] Ibid.
[29] *Sadovska*, [29].

> A marriage entered into for the purpose of using these Regulations or any other right conferred by EU Treaties, as a means to circumvent (a) Immigration Rules applying to non-EEA nationals…[30]

EU law is therefore not universal in its definition but does at least make use of the term 'marriage of convenience'.

The position in Scotland differs in that 'sham marriage', not 'marriage of convenience', is the term used in both the relevant legislation (applicable to Scotland) and Scottish case law on nullity of marriage. For example, in the Immigration and Asylum Act 1999:

> A marriage (whether or not it is void) is a 'sham marriage' if:
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> (a) either, or both, of the parties to the marriage is not a relevant national,
>
> (b) there is no genuine relationship between the parties to the marriage, and
>
> (c) either, or both, of the parties to the marriage enter into the marriage for one or more of these purposes—
>
> > (i) Avoiding the effect of one or more provisions of United Kingdom immigration law or the immigration rules;
> >
> > (ii) Enabling a party to the marriage to obtain a right conferred by that law or those rules to reside in the United Kingdom.[31]

In *SH v KH*, ~~Lord Penrose~~an action concerning declarator of nullity of a marriage allegedly entered into for immigration benefit, Lord Penrose observed that '...formal compliance with the procedural requirements of regular marriage is not conclusive of the contraction of a valid marriage...'[32] He also noted that:

> ... what is material is that where parties have agreed that, notwithstanding the exchange of words of consent, the relationship that the language used would

[30] The Immigration (EEA) Regulations 2016 (SI2016/1052), s2(1).
[31] Immigration and Asylum Act 1999, s24(5).
[32] *SH v KH* 2005 SLT 1025, 1029, [33].

> normally establish will not be established between them, the proceedings are sham, and should not be recognised.[33]

The divergence of the terms ‘marriage of convenience ‘ and ‘sham marriage ‘ has not yet been addressed in Scottish courts.

The matter has been addressed in more depth in England, where it has been clearly established that a ‘sham marriage’ and a ‘marriage of convenience’ are not the same. In *R (Molina) v The Secretary of State for the Home Department*, Judge Grubb stated:

> In my judgement there is a difference in principle between a ‘sham marriage’ and a ‘marriage of convenience’. It is clear from the statutory definition that a ‘sham marriage’ can only be established if there is no genuine relationship between the parties. Of course, a ‘marriage of convenience’ may also entail a marriage, which is not genuine. Indeed, many such marriages of convenience will reflect that fact. However the hallmark of a ‘marriage of convenience’ is one that has been entered into, in the context with which we are concerned, for the purpose of gaining an immigration advantage…[34]

He then later observed a ‘marriage of convenience’ may exist despite the fact that there is a genuine relationship and in the absence of any deception or fraud as to its existence’. [35]

In considering Lady Hale’s judgment in *Sadovska*, the use of ‘marriage of convenience’ as a term of art is clearly evident, with a specific technical meaning in the context of EU law. However, she also deploys the phrase ‘sham marriages’. As already noted, this may also be a term of art in a specific context, namely in immigration. The case, while primarily about EU law, also touches upon aspects of immigration. What is not clear from the judgment is the way Lady Hale intends to deploy the phrase ‘sham marriages’.[36]

Two readings could be taken from its usage. The first possibility is that it was not used as a term of art, and has no specific and technical meaning, but was merely deployed as a colloquial phrase to describe a fake marriage. The second is that it was used as a term of art, importing the specific meaning from the legislation (The Immigration and Asylum Act 1999). Each reading has a particular consequence. In the former case, if Lady Hale intended no specific meaning, then it muddies the water unnecessarily, because ‘sham marriage’ adds ambiguity because of its potentially different meaning in other legal contexts. Lady Hale consistently referred to ‘marriage of convenience’ throughout, and one wonders why, when dealing with an already dismissed point of appeal[37], she would risk conceptual confusion. In

[33] *SH v KH* 2005 SLT 1025, 1029, [56].
[34] *R (Molina) v The Secretary of State for the Home Department* [2017] EWHC 1730 (Admin), [64].
[35] Ibid, [73].
[36] *Sadovska*, [35].
[37] Ibid,

the latter case, if it was used as a term of art, then it conflates 'marriage of convenience' and 'sham marriage' unnecessarily. Lower courts in England have explicitly separated these two concepts and sought to tease out their nuances. Scottish courts have not had to address this issue. Whilst not directly relevant in this case, because of the way the ECHR grounds of appeal were not considered (the Court did not deem it necessary),[38] in other factual circumstances, it may not be so clear and there is room for significant confusion as to how the two terms relate to each other.

Conclusion

This case was part of the historic first sitting of the UK Supreme Court in Scotland. The substantive part of the judgment followed cases decided elsewhere in the UK,[39] placing the burden of proof for establishing a 'marriage of convenience' firmly on the Home Office; a welcome point of unity across the UK's three jurisdictions. Given the significance and symbolism of this sitting, however, it is perhaps ironic that the judgment has the potential to create confusion in the law relating to marriage in Scotland. This is because 'sham marriage' and 'marriage of convenience' have different meanings in European, English and Scottish contexts, a point overlooked in Sadovska and something that ought to born in mind the next time the Supreme Court is asked to address the issue.

[38] *Sadovska*, [35].
[39] See *Rosa v Secretary of State for the Home Department* [2016] EWCA Civ 14; *Agho v The Secretary of State for the Home Department* [2015] EWCA Civ 1198.