Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-002546
On appeal from EA/13405/2021

THE IMMIGRATION ACTS

Heard at Field House
On the 22 September 2022

Decision & Reasons Promulgated
On the 27 October 2022

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MR MUHAMMAD SHAKEEL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Coleman, Counsel, instructed by Pioneer Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant, a citizen of Pakistan born in 1988, appeals with permission against the decision of First-tier Tribunal Judge Chana (“the judge”), promulgated on 23 March 2022. By that decision the judge dismissed the

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Appellant's appeal against the Respondent's refusal to grant status under the EUSS.

2. By way of brief background, the Appellant had married a Lithuanian citizen in November 2019. He had subsequently applied for status under the EUSS (Appendix EU to the Immigration Rules) and not, as stated by the judge, Appendix EU (FP). In refusing the application by a decision dated 14 September 2021, the Respondent asserted that the marriage was one of convenience.

The decision of the First-tier Tribunal

3. At [7] of her decision, the judge stated the following self-direction: "The Appellant will qualify pursuant to the Regulations, if he can prove that he is related to someone from the EU exercising Treaty rights in the United Kingdom and that the marriage is not one of convenience."

4. Following this, the judge went on to make a number of adverse credibility findings, cumulating in a global conclusion the marriage was one of convenience "entered into as a means to circumvent the requirements for lawful entry into the United Kingdom.": [47]. The appeal was dismissed on that basis.

The grounds of appeal

5. In commendably concise grounds of appeal, it was asserted that the self-direction at [7] was plainly wrong. The judge had effectively reversed the burden of proof. It was said that although the appeal was concerned with the Immigration Rules and an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 and not the EEA Regulations 2016, the well-established proposition that it was for the Respondent to establish that a marriage was one of convenience should apply by logical analogy.

The hearing

6. For the Respondent, Mr Walker accepted at the outset that the judge had erred in law. He accepted that there was no reason as to why the burden would rest on an Appellant in an appeal such as the present.

Conclusions on error of law

7. In my judgment, the judge plainly erred in law. The case-law on the location of the burden of proof in marriage of convenience cases is clear: see Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038 (IAC) and Rosa [2016] Imm AR 402. Whilst that case-law does

of course relate to EU law and appeals under the Immigration (European Economic Area) Regulations 2016, there is no reason in principle as to why it should not apply equally in cases under the 2020 Regulations. Indeed, there are good reasons why it should. First, the issue in question in the present appeal is precisely the same as arose in cases under the 2016 Regulations where it was alleged that the marriage was one of convenience. Second, entering into a marriage of convenience may well entail the use of deception by an individual: see Saeed (Deception, knowledge, marriage of convenience) [2022] UKUT 18 (IAC). Thus, there is an analogy to be made with the position under Part 9 of the Immigration Rules, where it is clear that the burden of proving dishonesty rests with the Respondent.

8. If the judge had it in mind that the proposition set out in the case-law I have cited did not apply to cases under the 2020 Regulations, she was required to have provided cogent reasons for this. Quite plainly, no such reasons were given.

9. The error of law was fundamental and the judge’s decision must be set aside with no preserved findings of fact.

Disposal

10. Both parties were agreed that in this particular case remittal was the best course of action. I agree. There needs to be a wholesale revisiting of the assessment of the evidence and extensive fact-finding. The appropriate forum for this is the First-tier Tribunal.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I remit the case to the First-tier Tribunal.

No anonymity direction is made.

Directions to the First-tier Tribunal

(1) This appeal is remitted to the First-tier Tribunal (Hatton Cross hearing centre) for a complete re-hearing;

(2) The remitted hearing shall not be conducted by First-tier Tribunal Judge Chana.

Signed H Norton-Taylor Date: 27 September 2022

Upper Tribunal Judge Norton-Taylor