



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: EA/04892/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 10 June 2019  
Extempore Decision**

**Decision & Reasons Promulgated  
On 13 June 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**GIHAN DE ZOYSA SIRIWARDANA NANEDIRI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr M Aslam, Counsel, instructed by Chancery Solicitors  
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge Lucas (“the judge”), promulgated on 15 March 2019, in which he dismissed the Appellant’s appeal against the Respondent’s decision of 11 April 2018, refusing to issue him with a residence card under the Immigration (European Economic Area) Regulations 2016.

2. The Respondent had alleged that the Appellant's marriage to the relevant EEA national was one of convenience only and the application had been refused on this basis.
3. The judge asserted that the burden of proof in the case before him rested with the Appellant and having made a number of adverse credibility findings, he went on to conclude that that burden had not been discharged. Somewhat confusingly, the judge appeared to place his findings and conclusions in the context of a case involving leave to remain in the United Kingdom in the context of the Article 8.
4. The grounds of appeal focus primarily on the assertion that the judge misdirected himself in law having placed the burden of proof on the Appellant when in fact it rested throughout with the Respondent. Challenges are made to a number of the adverse credibility findings as well. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 1 May 2019.
5. Prior to the hearing before me the Secretary of State issued what I consider to be an entirely sensible and appropriate Rule 24 response indicating that the Respondent did not oppose the Appellant's appeal to the Upper Tribunal.

### **Decision on error of law**

6. At the hearing before me Mr Kotas maintained the position stated in the Rule 24 response. In my view he was clearly right to do so. The judge appears to have laboured under the misapprehension that the appeal before him was focused on Article 8 rather than it being an EEA case involving the serious allegation that the Appellant's marriage to the EEA national was one of convenience only. It is quite clear to me that the judge has materially misdirected himself as to the location of the burden of proof. It is well-settled that that burden rests with the Respondent (see for example Rosa [2016] EWCA Civ 14 and Sadovska [2017] UKSC 54). In light of this, the entire premise from which the judge proceeded to determine the appeal was unsound.
7. On the basis of the misdirection as to the location of the burden of proof and on the agreement of the parties I set the judge's decision aside.

### **Disposal**

8. In terms of disposal, the Rule 24 response initially suggested that the matter should be retained within the Upper Tribunal. However, Mr Kotas was in agreement with Mr Aslam that in fact this was a case appropriate for remittal to the First-tier Tribunal. I agree. Having regard to paragraph 7.2 of the Practice Statement, this is a case in which the important

allegation raised by the Respondent needs to be addressed with a complete rehearing of the appeal addressing all relevant issues. This will involve an extensive evaluation of the evidence as a whole together with wide-ranging findings of fact on the relevant issues.

**Notice of Decision**

**The decision of the First-tier Tribunal involved the making of a material error of law**

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

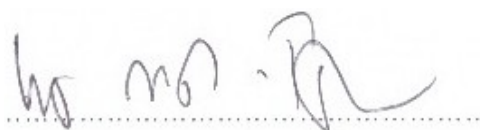
**I remit the appeal to the First-tier Tribunal**

**No anonymity direction is made**

**Directions to the First-tier Tribunal**

- 1. This appeal is remitted for a complete rehearing, with no preserved findings;**
- 2. The remitted case shall not be heard by First-tier Tribunal Judge Lucas.**

Signed



Date: 12 June 2019

Upper Tribunal Judge Norton-Taylor