IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006241
First-tier Tribunal No:
EA/11835/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 30 April 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MD ASADUJJAMAN KHAN
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Malik, KC, Counsel, instructed by Chancery Solicitors
For the Respondent: M E Terrell, Senior Presenting Officer

Heard at Field House on 14 April 2023

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Hussain ("the judge"), promulgated on 13 July 2022. By that decision the judge dismissed the Appellant's appeal against the Respondent's refusal of his application under the EUSS. The Respondent's refusal had been predicated on the assertion that the Appellant's marriage to an EEA national had been one of convenience only. The evidential basis for the assertion was contained in interviews conducted with the Appellant and his wife.

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2. When the case came before the judge, the Respondent had failed to provide a transcript of the interviews despite having been directed to do so. Instead, a document containing comments by the interviewing officer had been provided. This set out a number of claimed inconsistencies in the evidence on which the Respondent relied when refusing the Appellant's application.

3. At the hearing, the Respondent had sought an adjournment in order to belatedly provide a transcript, but the judge refused that application and proceeded to hear the appeal.

4. The judge noted that a transcript of the interviews would have been "advantageous for all parties". However, he determined that weight, indeed significant weight could be accorded to the interviewing officers comments, in large part because the accuracy of what was said in that document had not specifically been challenged by the Appellant at that stage (bearing in mind of course that neither party had access to a transcript of the interviews). Ultimately, the judge concluded that the claimed inconsistencies were such that the marriage was one of convenience.

5. In terms of the judge's approach to the law, at [32] he stated that "The burden of proof is on the Appellant, and the standard of proof required is the balance of probability." At [39]-[41] he stated that:

> "39. I direct myself that whilst the legal burden of proof remains on the Respondent to show that the Appellant's marriage is one of convenience she carries and initial evidential burden also. This means that the Secretary of State has to justify suspicion that the Appellant's marriage may be one of convenience. In my view, she has done that by reference to the inconsistencies in the evidence.
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> 40. Once the Respondent has justified her suspicion the burden then shifts to the Appellant **to show that there is** an innocent

explanation for the inconsistencies identified. In my view, the Appellant has not discharged that burden.

41. Having looked at the totality of the evidence and for the reasons specifically given above, the conclusion to which I have come is that the Respondent has discharged the legal burden of proving that the Appellant's marriage is one of convenience."

[Emphasis added]

6. Two grounds of appeal were put forward and these were supplemented by a skeleton argument. In essence, it was said that the judge had misdirected himself as to the location of the burden of proof and/or had erred in his approach to this core issue in at least two other ways. Secondly, the Respondent had breached her duty of candour in failing to provide the transcript of the interviews and the judge had in turn erred by proceeding in the absence of the transcripts and then placing significant weight on the comments made by the interviewing officer.

7. Permission was granted.

8. At the hearing before me, Mr Malik, KC, and Mr Terrell both provided helpful and concise submissions on both of the grounds.

9. For the following reasons, I conclude that the judge has materially erred in law in respect of the first ground of appeal.

10. The correct approach has been well-established in the authorities over the course of time: See for example, Rosa v SSHD [2016] EWCA Civ 14 and Sadovska v SSHD [2017] UKSC 54. In short, the burden of proof always rests with the Respondent to demonstrate that a marriage was one of convenience, although over the course of time the phrase "the burden of proof boomerang" (which has been used in certain contexts) has been the subject of adverse comment in DK and RK (ETS: SSHD evidence; proof) India [20202] UKUT 00112 (IAC), it remains quite clear that the legal burden of showing that a marriage is one of convenience

rests with the Respondent and that she must also satisfy an initial evidential burden which, if satisfied, can be responded to by some evidence from an individual concerned to provide what might be described as a plausible innocent explanation.

11. In the present case, the judge clearly got it wrong at [32], stating that the burden of proof rested on the Appellant. It may be that that was simply a standard paragraph that been left in from a template. However, in a case where the only live issue related to the existence of a marriage of convenience and in light of the well-established case law, I proceed with caution before assuming that that would have had no effect on the subsequent analysis. If subsequently the judge had then clearly adopted on the face of the decision a correct approach, what was said in [32] may have been, as it were, cured. However, for the reasons set out below, this is not the case.

12. Having regard to what the judge said in [39] and [40], I am satisfied that he again erred in his approach. Whether that was in as clear a way as displayed in [32] or otherwise, the wording employed in those two paragraphs is, in my view, insufficiently clear and, in respect of [40], the reference to a burden shifting to the Appellant to show that there “is” an innocent explanation is flawed because it is indicative of the application of a burden on the Appellant to prove an explanation. Although the latter part of [41] might appear to cure what was said before, I agree with Mr Malik’s point that the judge had tied that to the reasons already provided, which must have included those set out in [39] and [40]. Thus, the position remained insufficiently clear, even when reading the judge’s decision holistically and sensibly.

13. In a case where the core issue had potentially such significant consequences for the individual concerned, one should expect a clear annunciation of the relevant law and an application thereof. In this case, on the issue of the approach to the burden of proof, the judge has

committed an error. In my view, his decision is unsafe for this reason alone and the decision must be set aside.

14. In respect of the second ground of appeal, a number of potentially interesting issues arise. However, in light of what I have said about the first ground, and not wishing unnecessarily to duck the issue (although perhaps that is a consequence of what I am about to say), I need not address these.

15. This is a case, which in my view must be remitted to the First-tier Tribunal, particularly in light of what has been said recently in AEB v SSHD [2022] EWCA Civ 1512. The transcript of the interview has now been provided and can be properly assessed by the parties prior to the remitted hearing. None of the judge's findings shall stand.

Notice of decision

16. The decision of the First-tier Tribunal involved the making of an error of law and that decision is set aside.

17. The appeal is remitted to the First-tier Tribunal (Taylor House hearing centre) for a complete re-hearing with no preserved findings of fact.

18. The remitted hearing will not be conducted by First-tier Tribunal Judge M B Hussain.

H Norton-Taylor
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 20 April 2023