Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/07209/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13th January 2022	**On 09th March 2022**

Before

UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE WILDING

Between

MR DAVINDER SINGH MANN
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Biggs, Counsel
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal brought by the appellant against a decision of First Tier Tribunal Judge Maka of 14 July 2021, who dismissed his appeal against the respondent's decision to refuse an application for leave to remain on human rights grounds. The appellant appealed against this decision on 28 July 2021. Permission to appeal was granted by First Tier Tribunal Judge Barker on 18 October 2021.

Background

2. The appellant entered the UK on 21 January 2011 as a Tier 4 student. He had leave valid until 30 May 2014, and made an application on 30 May 2014 for an extension to that leave. This was refused on 29 October 2015. He appealed against this but was not successful. His appeal rights were exhausted on 12 January 2017.

3. He married Mrs Firoza Lal in a religious ceremony on 17 February 2018. They were lawfully married on 13 October 2018 in Hounslow. Mrs Lal died on 30 March 2020.

4. He applied on 12 June 2018 for leave to remain on the basis of his relationship with Mrs Lal. This was refused on the 29 March 2019. The appeal was previously heard by Designated Judge Woodcraft and First Tier Tribunal Judge Chana, however this was set aside in a decision made on the papers by Resident Judge Appleyard on 22 March 2021.

5. The appeal came before First Tier Tribunal Judge Maka on 29 June 2021 and was heard over CVP. Judge Maka dismissed the appeal in a decision of 14 July 2021.

The FTTs decision

6. The appellant applied for leave to remain on the basis of his relationship with his wife. However, before the case could be heard before Judge Maka, his wife had passed away. The question in the appeal therefore was one exclusively on article 8 grounds, on the basis that he had a genuine and subsisting relationship with his wife, and that following her death that his removal would be disproportionate.

7. The respondent did not accept that the relationship was a genuine and subsisting one. The reason found in the refusal letter for this was that because in a marriage interview in 2018 it had been concluded that the marriage was a sham. The respondent therefore did not accept, under the immigration rules, that the relationship was genuine and subsisting.

8. Judge Maka did not accept that the appellant and his late wife were in a genuine and subsisting relationship, in particular finding that the appellant in his oral evidence was not a credible witness, and therefore the appellant's intentions were not genuine as far as the relationship was concerned.

9. In his decision the Judge made the following findings:

   (a) the appellant's intentions were not genuine in relation to his relationship with his late wife.

   (b) There was a significant discrepancy in the marriage interview as to when they saw each other on a recent occasion.

(c) The appellant was found not to be truthful in his witness statement as to being disowned by his family, given that his family and wife were on speaking terms after the religious marriage ceremony February 2018.

(d) The appellant had not been truthful as to his history of employment in the UK. In particular, he had not been truthful in his application form. There were further credibility issues and the Judge was not satisfied that he was in ad hoc employment, but was in fact engaged in regular employment in the UK. The Judge further was not satisfied with the evidence in relation to lending his friend money.

(e) Further concerns were highlighted which in the Judge's view detracted from the appellant's credibility and supported the Judge's conclusion that he was not a truthful witness, notably the exchanges he had with his wife through online messaging as to his work situation.

(f) In relation to the many letters and statements in support of the appellant and his late wife's relationship, some of the statements were drafted by the appellant's solicitors and the Judge concluded they were not heartfelt letters written by individuals of their own accord. There was nothing meaningful in them, and none gave specific dates or events.

(g) The appellant's late wife's son gave evidence. Such were the discrepancies between his evidence, the appellant's evidence, and the appellant late wife's aunt that the Judge considered he was not being told the truth.

(h) The Judge noted that none of the authors of the other letters submitted attended the hearing and therefore little weight could be placed on them. He further noted that on the death certificate, it was the brother of the appellant's late wife who reported her death and not the appellant. The Judge considered the medical records of the appellant's late wife and that they noted the lack of family support with her chronic illnesses. The Judge concluded that her children did not have her best interests at heart.

(i) The Judge was not satisfied that the evidence demonstrated that the appellant had in fact donated his kidney to his late wife. There was a donor health information form but nothing about whether there was a match or whether an actual donation to place. The Judge did not consider this was evidence going to the love and devotion that the appellant had towards his late wife, given it was in his interests to assist her, as he was claiming a right to remain based on that relationship.

(j) The Judge was not satisfied that the appellant and his late wife had lived together continuously between June 2017 and when she died in March 2020. The documentary evidence did not demonstrate a couple living together as husband-and-wife for two years or longer as claimed. There were discrepancies as to where and when couple were living at various addresses.

(k) There were also discrepancies as to the circumstances of the appellant living with his aunt, and the Judge was surprised to find private correspondence being sent to his aunt's address if it was in fact simply a temporary one.

(l) There was evidence of documents being sent to 2 different addresses at various points. Of note, the Judge highlighted correspondence going to his late wife's old address at the same time as when they claimed they were living somewhere else. This was important because in the marriage interview his late wife had said that she had returned that house to the council. The Judge considered whether they may simply have got the address wrong, however it was not just one piece of correspondence and nor was it over a short period of time. Given that the letters were medical letters, the Judge found it significant that such letters were not being sent to the correct address, considering his late wife's serious medical condition.

(m) The Judge also noted that various other people were living with the appellant and his late wife at various addresses, and he concluded that some of the addresses were utilised for correspondence purposes and that the appellant, and his late wife were not continuously living together as claimed. None of the witnesses dealt with the issue of addresses and where they saw the couple living together.

(n) The Judge did not accept oral evidence of a friend Mr Imran Mohammed, which was evidence designed to demonstrate the couple living together. No supporting evidence was provided by the appellant as to living at a particular address that Mr Mohammed spoke of, in particular evidence such as a tenancy agreement was missing.

(o) The Judge concluded that it was for the appellant to demonstrate he been living with his wife between June 2017 and when she died in March 2020, and that he had failed to meet the evidential burden on him. The Judge did not accept the evidence showing a continuous living arrangement or that they had resided together in the same place as husband and wife.

(p) The Judge considered all the evidence together and concluded that the appellant's motive and intention was always to remain in the UK, and on the evidence before him he did not accept that the marriage was a genuine subsisting one, because the appellant's intention was never genuine.

Grounds of appeal

10. In grounds of appeal settled by Mr Biggs, the appellant made five substantive complaints:

(a) The Judge had misapplied the burden of proof over the issue of the nature of the appellant's marriage to Mrs Lal (i.e. whether the marriage is one of convenience or a sham, as alleged in the decision letter dated 29 March 2019).

(b) When considering the appellant's marriage to Mrs Lal, the Judge erred in respect of the legal test for whether a marriage is a marriage of convenience and/or as to whether the marriage was genuine and subsisting.

(c) The Judge erred in law by failing to consider and apply the principle and guidance in R v Lucas [1981] QB 720 per Lord Lane CJ at 723C (see MA (Somalia) v SSHD [2010] UKSC 49, [2011] 2 All ER 65 at [32] and Uddin v SSHD [2020] EWCA Civ 338, [2020] 1 WLR 1562 at [11]) in relation to the credibility findings.

(d) The Judge's findings at paragraphs 92 and 115 that the appellant's marriage was not genuine were unreasonable. In making this finding, the Judge failed to consider, or provide legally adequate reasons addressing, material evidence and failed to consider the evidence in the round when assessing the appellant's credibility and the question as to the genuineness of his marriage to Mrs Lal (see Mibanga v SSHD [2005] EWCA Civ 367]).

(e) The Judge's finding that section EX.1 of appendix FM of the immigration rules was not applicable was wrong in law.

The hearing

11. We heard submissions from Mr Biggs and Miss Cunha, which we summarise.

12. Mr Biggs relied on his grounds of appeal. In relation to ground 1 he submitted that in a case where the Secretary of State expressly uses the phrase, "marriage of convenience" that must be taken to be understood that the marriage is a sham. Mr Biggs relied on section 24 of the Immigration and Asylum Act 1999 ('the 1999 Act') which defines a marriage as a sham if the following components are met:

> *"(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 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."*

13. Mr Biggs submitted that in these circumstances the burden of proof lies with the respondent on the basis that applying first principles, a party making allegation has to prove it. He further submitted that because of the nature and seriousness of the allegation, it implies wrongdoing and deprives parties to a marriage of the benefit of a legally recognised relationship.

14. Even though the respondent in the refusal letter relied on the provision of the immigration rules questioning the genuine and subsisting nature of the relationship, it is because of the reasoning for that conclusion, namely that it was considered to be a marriage of convenience, that the burden shifts to the respondent.

15. After discussion with us, Mr Biggs accepted that in general terms it is for an appellant to show they are in a genuine and subsisting relationship, and that the burden only shifts to the respondent by due the applicability of the 1999 Act. Mr Biggs also accepted that his construction would only apply to marriages and civil partnerships and not to long-term unmarried partners.

16. In relation to Ground 2, Mr Biggs submitted that if his submission is correct that the issue before the Judge was whether the marriage was a sham the Judge erred by failing to apply the test found in section 24 (5) of the 1999 Act.

17. Mr Biggs submitted even if he was wrong on that, then in order to properly consider whether the relationship was genuine and subsisting there needs to be an assessment of the relationship between the two parties. Mr Biggs submitted that the Judge simply did not do this, or if he did then the reasons given are inadequate. The fact that the appellant was deemed not to be a truthful witness does not answer the question that one may not be a credible witness on some areas but in others may be.

18. Mr Biggs highlighted the finding that the appellant's intentions were not genuine, however his intentions may well not have been romantic but that does not mean that the relationship was not genuine.

19. As to Ground 3, Mr Biggs submits that the Judge's findings are in effect that the appellant in his evidence told a number of lies, these were seen at paragraphs 92 and 115, and this was considered the key reason for concluding that the appellant did not have a genuine intention when he married his late wife.

20. Mr Biggs submits that Judge Maka failed to consider and acknowledge that some of the evidence may have been deliberately false or exaggerated but that at its heart lay truthfulness. In failing to consider this the Judge erred in his approach to the evidence and fell foul of the principles seen in Lucas and (MA Somalia).

21. Ground 4 was that the Judge failed to deal with important evidence, instead focusing too much on the credibility of the oral evidence to the exclusion of the other documentary evidence. There was evidence of devotion found in the written evidence which the Judge failed to consider holistically. Mr Biggs submitted that had the Judge stood back and considered whether credible evidence had been given, then the Judge could have reached a different conclusion.

22. Mr Biggs criticised the Judge's analysis and findings as being incoherent and inconsistent with themselves. The Judge only focussed on the negative aspects of the evidence and failed to conclude, or irrationally concluded, that the documents, in particular the letters provided, were not heartfelt. This, Mr Biggs says, was not only irrational but was unreasoned. The Judge undertook a piecemeal assessment of the truthful nature of the evidence and therefore failed, applying the "Mibanga" test (see: Mibanga v SSHD [2005] EWCA Civ 367) to properly consider the documentary evidence in with the all.

23. Insofar as Ground 5 is concerned Mr Biggs accepted that it only came into play if an error was established in the consideration of the relationship. Judge Maka did not consider the question of EX.1 because he did not consider there was a genuine and subsisting relationship. Mr Biggs submitted that if the appellant could show that he was in a genuine and subsisting relationship that would be sufficient for the appeal to be allowed. When pressed on this by us, Mr Biggs reiterated his submission, but submitted in the alternative that such a finding would at least be weighty in an overall balancing exercise when considering matters at the date of the hearing.

24. In her submissions Ms Cunha relied on the rule 24 response that had been provided by the respondent. In that response the respondent disputed that there was any switching of the burden of proof. The test under the immigration rules was whether the relationship is a genuine and subsisting one, and that the burden lies on the appellant.

25. In relation to the reasons, the Judge gave sound, comprehensive reasons for finding that there had not been a genuine and subsisting relationship. Given this finding, EX.1 was not relevant.

26. Ms Cunha submitted that in relation to Ground 1, the burden is on the appellant throughout. The question before the Judge was whether it was a genuine and subsisting relationship and not whether it was a marriage of convenience.

27. The Judge properly applied the relevant case law in determining the question of the relationship, and Judge Maka was not wrong to look at the intentions of the appellant when the relationship began. That was an ingredient in the overall question as to whether something is genuine and subsisting. Whilst there could have been more care in language in the refusal letter, it was nevertheless plain what the respondent was saying in the refusal. Namely that the respondent has evidence which was of concern, which went to the question as to whether the relationship was a genuine and subsisting one, and in all circumstances the respondent concluded that it was not. Reliance on section 24 of the 1999 Act was irrelevant to the core question.

28. There is no analogy to be drawn with when the respondent alleges misconduct through part 9 of the immigration rules. The relevant question

to be met is whether the relationship is a genuine and subsisting one, and the burden lies on an appellant. There is no express or implied shifting of the burden and in all circumstances the Judge did not err in law.

29. The findings that the Judge came to were all open to him on the evidence before him. It is plain when reading the entirety of the decision from paragraphs 88 to 121 that the Judge had carefully considered all the evidence before him and came to the conclusion that he reached. The findings are not perverse or irrational. The Judge was entitled to infer from previous deception that the credibility of the evidence was undermined as a whole, especially given that the deception issues the Judge highlighted were pertinent to the themes the Judge was tasked to consider in respect of the case.

30. Ms Cunha sought to distinguish the type of situation envisaged in MA (Somalia) v SSHD [2010] UKSC 49 and the present case. She highlighted that in that case the Court was tasked with assessing a protection claim, with a lower standard of proof, and where someone had found to have been not credible in one aspect that there could be a reason for that including an exaggeration of a claim. Such as exaggeration may not negate a risk of harm arising or existing.

31. Ms Cunha submits that in the present case the situation is different. Judge Maka in his findings essentially does not accept the evidence as matching up. Judge Maka did consider all the other documentation that was submitted, but in the round and holistically concluded that the appellant's oral evidence was such that little weight placed on documentary evidence. He gave reasons for that and those reasons are not perverse. Ultimately there was not enough evidence to show that the relationship was a genuine and subsisting one.

32. In relation to Ground 5 she submitted it was not material if the relationship was not genuine and subsisting.

33. In response Mr Biggs made three short points. Ground 2 identifies the strongest argument, and it was clear that the Judge failed to apply the concept of a genuine and subsisting relationship or alternatively that his reasoning is inadequate. All the Judge says is that the appellant's intention to enter the marriage was not genuine. This reasoning does not reflect the correct test. Once the test is recognised as broader, the Judge has to demonstrate and explain how the test was applied.

34. The Judge does not consider whether the marriage was entered into for mixed reasons. There is no issue that a marriage can be entered into for immigration advantage, the question is whether it is the only reason.

35. The second point it was plain that not all the letters have been considered there is nothing within them that makes the reader think not heartfelt.

36. Finally in relation to Ground 5 insurmountable obstacles is an important consideration even if the appellant's wife was dead at the date of the hearing.

37. Following the hearing we became aware of Saeed (Deception - knowledge - marriage of convenience) [2022] UKUT 18, in the circumstances the following direction was made:

> *The case of Saeed (Deception, knowledge, marriage of convenience) [2022] UKUT 00018 was promulgated the day after the hearing (13th January 2022) of the above appeal. While we express no view on its impact, we regard it as appropriate to provide the parties the opportunity to address this Tribunal on it. The parties are not obliged to make further submissions and the Tribunal will proceed to decide the appeal, in the absence of any submissions within the stipulated time-limit, without further notice.*

38. Mr Biggs provided us with a short written submission. No further submission was received from the respondent.

39. Mr Biggs submitted that Saeed fortified his earlier submissions as to the Judge's approach of the tests, as well as to who bore the burden of proof when a marriage of convenience or sham marriage is alleged.

Findings and reasons

40. We take the grounds of appeal the order in which they were presented.

41. Mr Biggs' submission that the burden of proof was misapplied by Judge Maka is a submission that we do not accept. The appellant's argument initially appeared to be that it was for the respondent to show that a relationship is not genuine and subsisting.

42. Mr Biggs' refined position was that in a case where the respondent does not accept that a relationship is genuine and subsisting, because the respondent considers it to be one of convenience, then the burden of proof is on the respondent.

43. In Naz (subsisting marriage - standard of proof) Pakistan [2012] UKUT 40 (IAC) the Upper Tribunal said:

> *"i) It is for a claimant to establish that the requirements of the Immigration Rules are met or that an immigration decision would be an interference with established family life. In both cases, the relevant standard for establishing the facts is the balance of probabilities."*

44. This general proposition is consistent with other decisions: Goudey (subsisting marriage - evidence) Sudan [2012] UKUT 41 (IAC) and GA ("Subsisting" marriage) Ghana [2006] UKAIT 00046*.

45. We also remind ourselves of Section 24 of the Immigration Act 1999:

> "24 Duty to report suspicious marriages.

(1) Subsection (3) applies if—

(a) a superintendent registrar to whom a notice of marriage has been given under section 27 of the Marriage Act 1949,

aa)a superintendent registrar, or registrar of births, deaths and marriages, who receives information in advance of a person giving such a notice,

(b) any other person who, under section 28(2) of that Act, has attested a declaration accompanying such a notice,

…

(ca) a district registrar who receives information in advance of a person submitting such a notice or certificate,]

(da) a registrar or deputy registrar who receives information in advance of a person giving such a notice,

has reasonable grounds for suspecting that the marriage will be a sham marriage.

(2) Subsection (3) also applies if—

(a) a marriage is solemnized in the presence of a registrar of marriages or, in relation to Scotland, an authorised registrar (within the meaning of the Act of 1977); and

(b) before, during or immediately after solemnization of the marriage, the registrar has reasonable grounds for suspecting that the marriage will be, or is, a sham marriage.

(3) The person concerned must report his suspicion to the Secretary of State without delay and in such form and manner as may be prescribed by regulations. …

(5) A marriage (whether or not it is void) is a “sham marriage” if—

(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.”

46. We do not accept that Section 24(5) of the Immigration and Asylum Act 1999 is directly relevant to the question of whether a relationship is a "genuine and subsisting one" for the purposes of the immigration rules. Section 24(5) creates a statutory duty upon superintendents, registrars and other persons to report suspicious marriages, where there are reasonable grounds for suspecting that the marriage is a "sham marriage" We accept that the test of whether a marriage is a "sham" includes, at Section 24(5)(b), the requirement that there is no genuine relationship, but the test is not met solely by that requirement. The section also makes no reference to the burden of proof in respect of the immigration rules.

47. The Upper Tribunal Decision of Saeed sets out in the headnote:

> *(i) There are different tests to determine whether a marriage is a "sham" or whether a marriage is one of convenience under EU law, in this case the 2016 Regs. The former is defined in s.24 (5) of the 1999 Act (see Molina) and requires the absence of a genuine relationship. In respect of the latter, the predominant purpose test applies (see Sadovksa).*
>
> *(ii) The terms "sham marriage" and "marriage of convenience" are not mutually exclusive. The absence of a genuine relationship at the time of the marriage being entered into would render the marriage one of convenience (and a "sham"); however, if there is a genuine relationship at the time of the marriage, while it could not be categorised as a "sham" marriage, it may still amount to a marriage of convenience (depending on the predominant purpose).*
>
> *(iii) When deciding whether a marriage is one of convenience under the 2016 Regs, a Tribunal should make clear findings about whether it is accepted that there was a genuine relationship between the parties to the marriage at the material time (the time of the marriage).*
>
> *(iv) There is deception deployed by a person who knowingly enters into a marriage of convenience with another in the absence of a genuine relationship. In the absence of a genuine relationship at the relevant time, a Tribunal may be entitled to infer that deception was exercised by the Appellant or the Sponsor or both. Depending on the facts there may be deception in a marriage of convenience.*

48. In Saeed, this Tribunal was considering whether a First-tier Tribunal had erred in law in relation to a human rights appeal. An earlier FtT decision had concluded that the marriage was one of convenience under the Immigration (EEA) Regulations 2016. The later FtT relied on that finding and referred to the marriage not being "genuine." Mr Saeed argued that from his perspective, the relationship might be "genuine", even if was a marriage of convenience, in the absence of fraud or deception. As is clear from the headnotes in Saeed, the two concepts (sham marriages and marriages of convenience) are distinct, but may overlap. In Saeed, there was an absence of relevant evidence about cohabitation; joint spending; and limited evidence of communication. The later FtT was entitled to rely on those findings in concluding, for article 8 purposes, that the marriage was not genuine. There was no suggestion that the burden was upon the

respondent to prove that the relationship was not genuine and subsisting. The same analysis applies here. We find Saeed not only does not assist Mr Biggs, but at best undermines the case he advances. It supports the distinction between marriages of convenience and relationships which are not genuine and subsisting, although they may overlap and facts which may be relevant to one, may be relevant to another. It does not deal with, or support any contention about a burden of proof. The reason for why the respondent considered that the relationship was not a genuine and subsisting one, is on the basis of an interview conducted with the appellant and his late wife in April 2018, from which the the respondent concluded the marriage was one of convenience. However, this fed into the conclusion about the genuine and subsisting nature of the relationship. A Judge hearing an appeal against such case may or may not agree with that position, but the burden of proof to demonstrate the test in the immigration rules remains on an appellant to demonstrate. There is nothing in any of the authorities Mr Biggs has relied on which suggests otherwise.

49. Indeed, contrary to Mr Biggs's submission that it is counter to the principle of whoever asserts must prove, there is a real mischief in the approach advanced by him. Under appendix FM at GEN 1.2 the definitions of what constitutes a partner are found:

> *"GEN.1.2. For the purposes of this Appendix "partner" means-*
>
> *(i) the applicant's spouse;*
>
> *(ii) the applicant's civil partner;*
>
> *(iii) the applicant's fiancé(e) or proposed civil partner; or*
>
> *(iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application, unless a different meaning of partner applies elsewhere in this Appendix."*

50. Once that definition is met the immigration rules set out the criteria to be met by an applicant and their partner:

> *"E-LTRP.1.2. The applicant's partner must be-*
>
> *(a) a British Citizen in the UK;*
>
> *(b) present and settled in the UK;*
>
> *(c) in the UK with refugee leave or with humanitarian protection;*
>
> *(d) in the UK with limited leave under Appendix EU, in accordance with paragraph GEN.1.3.(d); or*
>
> *(e) in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay, in accordance with paragraph GEN.1.3. (e).*

E-LTRP.1.3. The applicant must be aged 18 or over at the date of application.

E-LTRP.1.4. The partner must be aged 18 or over at the date of application.

E-LTRP.1.5. The applicant and their partner must not be within the prohibited degree of relationship.

E-LTRP.1.6. The applicant and their partner must have met in person.

E-LTRP.1.7. The relationship between the applicant and their partner must be genuine and subsisting.

E-LTRP.1.8. If the applicant and partner are married or in a civil partnership it must be a valid marriage or civil partnership, as specified.

E-LTRP.1.9. Any previous relationship of the applicant or their partner must have broken down permanently, unless it is a relationship which falls within paragraph 278(i) of these Rules.

E-LTRP.1.10. The applicant and their partner must intend to live together permanently in the UK and, in any application for further leave to remain as a partner (except where the applicant is in the UK as a fiancé(e) or proposed civil partner) and in any application for indefinite leave to remain as a partner, the applicant must provide evidence that, since entry clearance as a partner was granted under paragraph D-ECP1.1. or since the last grant of limited leave to remain as a partner, the applicant and their partner have lived together in the UK or there is good reason, consistent with a continuing intention to live together permanently in the UK, for any period in which they have not done so.

E-LTRP.1.11. If the applicant is in the UK with leave as a fiancé(e) or proposed civil partner and the marriage or civil partnership did not take place during that period of leave, there must be good reason why and evidence that it will take place within the next 6 months.

E-LTRP.1.12. The applicant's partner cannot be the applicant's fiancé(e) or proposed civil partner, unless the applicant was granted entry clearance as that person's fiancé(e) or proposed civil partner.

51. Mr Biggs accepts that if his construction is correct then the burden to show that a relationship is not genuine and subsisting would only shift to the respondent where there is a statutory underpinning of definition relied on i.e. in this case that the marriage is one of convenience or a sham. That would create a difference in approach between parties who are married or in a civil partnership and those who are simply engaged to be married or who are living in a relationship akin to marriage as defined under GEN 1.2. There is no support by way of authority or explanation of the rationale for such a distinction. Moreover, it would also render LTRP.1.8. otiose, as Mr Biggs submitted that a "sham marriage" is not a valid one. In this case the respondent did not set out concerns as to the marriage itself, but considered the nature of the relationship, which it did not accept a genuine and subsisting one.

52. The respondent's refusal to accept a relationship as proven to be genuine and subsisting is not equivalent to refusal based on Part 9 of the rules, which is a standalone part, where the burden is on the respondent to show relevant misconduct. The logic of Mr Biggs submission is that whenever the respondent refused an application, the burden would pass to her to show relevant default by the applicant. The language of the requirement found in Appendix FM is that the "applicant is in a genuine and subsisting relationship", that plainly puts the burden on an applicant, and later an appellant, to satisfy the decision maker.

53. Indeed, this is where there is another divergence from what was discussed in Saeed, in that case the refusal was brought on part 9, and the general grounds for refusal at paragraph 322. That is not the basis upon which the decision was reached in this case.

54. In our view an applicant, and subsequently an appellant, bears the burden throughout to demonstrate that their relationship is a genuine and subsisting one. A Judge's role in such a case is to weigh up all of the evidence and come to a conclusion whether the appellant has shown, taking everything into account, that the relationship is a genuine and subsisting one.

55. Turning to Ground 2, the Judge cannot be criticised for the approach that he took in assessing the case, he was directed to take such an approach by Mr Biggs, who in his skeleton argument in the First Tier Tribunal advanced the same case as he did before us. Notwithstanding what we say about that approach and that it is not on the respondent to show a relationship is not genuine, what the Judge found, after consideration of the evidence, was that the appellant did not enter into the relationship with genuine intentions. That is a relevant consideration going to whether a relationship is genuine and subsisting. Of course it would be perfectly possible if the evidence was accepted for someone to enter into a relationship and marriage for not genuine reasons but as the relationship developed that could then become a genuine and subsisting relationship. That is not controversial.

56. Judge Maka in our view not only found that the marriage was entered into with genuine intention, but that the evidence before him did not show a genuine and subsisting relationship. The relevance of the living arrangements for example was evidence going to post-marriage circumstances, which Judge Maka found to be particularly problematic.

57. In the case before him Judge Maka found that the appellant was not a credible witness. Clear and detailed reasons are given for that spanning from paragraph 92 up to paragraph 115. We do not accept that the only two paragraphs of relevance are paragraphs 92 and 115. It is clear and obvious that in those 23 paragraphs the Judge had considerable difficulty with the evidence presented to him. The appellant ultimately does not agree with the findings that the Judge came to, but his complaints

however attractively presented by Mr Biggs, amount to little more than a disagreement with the conclusions.

58. It is plain that the Judge had before him a considerable body of evidence which he read and considered. That can be seen with specific page referencing throughout the paragraphs accompanied by reasons as to why he did not consider the documentary evidence as weighty. There is nothing irrational or perverse in those reasons.

59. The Judge considered the question in the way in which Mr Biggs presented the case namely whether the marriage was one of convenience, and whether at its initiation was a genuine relationship. The logical conclusion from Judge Maka's findings is that he was not satisfied that there was a genuine intention to enter into the relationship on the part of the appellant, and that the documentary evidence did not support either that initiation of the relationship or subsequent time spent in the alleged relationship, such that that the relationship was not a genuine and subsisting one. The short concluding sentence in paragraph 115, is just that, following an preceding assessment of the body of evidence, including the duration of couple's cohabitation; the appellant's credibility; and the text messages between the appellant and his late wife. All of that was evidence taken into account in reaching the conclusion that the relationship was not genuine and subsisting.

60. We do not consider that the Judge did anything wrong in relation to the application of the principles from Lucas and MA (Somalia). The appellant was found to be not credible. It may be another Judge could have come to a different conclusion, however the rejection of the documentary evidence makes it clear that the Judge did not consider the appellant reliable in any of his evidence before him. There is no error in law in the approach that he took to the credibility assessment.

61. Mr Biggs submits that the Judge's reasoning as to the lack of emotion, or as the Judge puts it the letters and stains are not heartfelt, is perverse. On the contrary we conclude it is a finding perfectly open to the Judge to make on the evidence before him. It is clear from the evidence found within that the Judge's description of some of the letters being typed by professional lawyers as being obvious. Consequently his conclusion as to the heartfelt nature or otherwise of the documents was one perfectly open to the Judge to draw having considered those documents. There is a lack of any detail as to the strength of the relationship between the appellant and his late wife. The letters and statements are short and brief on any detail and whilst a different Judge could have found them persuasive in light of all the evidence, the Judge did not err in taking them into account in the way he did.

62. In terms of Ground 5 given we have found there is no material error in Judges findings as to the relationship, consequently this ground falls away.

Conclusion

63. For all of the above reasons we conclude that the Judge did not err in law and we dismiss this appeal.

Notice of Decision

The appeal is dismissed

No anonymity direction is made.

T.S. Wilding

Date 28th February 2022

Deputy Upper Tribunal Judge Wilding