IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000918
First-tier Tribunal Nos:
EA/50612/2022
EA/04898/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 06 July 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MUHAMMAD ZUBAIR
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Maqsood, Solicitor, Solicitor's Inn
For the Respondent: Mr T Melvin, Senior Presenting Officer

Heard at Field House on 13 June 2023

DECISION AND REASONS

Introduction

1. The Appellant appeals with permission against the decision of First-tier Tribunal Moffatt (the judge), promulgated on 30 December 2022 following a hearing on 1 December. The judge dismissed the Appellant's appeal against the Respondent's refusal of his application made under the EUSS. The Appellant, a citizen of Pakistan, had married a Romanian national (the Sponsor) on 29 April 2019. Both before and after that event the Appellant had made unsuccessful applications under, initially, the EEA Regulations 2016 and then the EUSS. The initial applications in fact related to a different partner.

2. Following the refusal of a previous application made in December 2021, the Appellant appealed and by a decision promulgated on 11 February

2020 First-tier Tribunal Judge Wood concluded that the Appellant's marriage to the Sponsor was one of convenience and accordingly dismissed the appeal. The latest application was refused on 25 March 2022. The Appellant appealed under the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2020.

The judge's decision

3. The judge took account of the previous decision of Judge Wood and regarded that as her starting point for the central issue in the appeal, namely whether the marriage was one of convenience. The judge noted that the Appellant had produced a relatively large amount of evidence relating to communications between him and the Sponsor. In particular, printouts of WhatsApp messages had been provided, at least in part to seek to address Judge's Wood's concern as to the absence of such evidence in the previous appeal. Medical evidence was also provided, which, it was said, indicated that the Sponsor had suffered miscarriages. The judge noted at paragraph 30 that the Respondent had not challenged the veracity of any of the documents. At paragraphs 19 and 20 the judge noted that no discrepancies had emerged from the cross-examination of the Sponsor and that additional witnesses had been consistent in their evidence.

4. When analysing the evidence, the judge raised concerns about gaps in the chronology of WhatsApp messages, in particular relating to periods of time when the Appellant was in the process of marrying the Sponsor and then when it was said that she had been pregnant prior to a miscarriage. The judge deemed it to be problematic that there were such unexplained gaps. The judge also noted that the "tone of the messages" had changed at a certain point in time.

5. In respect of the medical evidence, the judge found that it had not been attributed to the Sponsor or the Appellant by way of any, or any reliable, evidence.

6. As a result of these concerns and in light of Judge Wood's conclusions, the judge regarded the new evidence as being of little value and she concluded that there was a suggestion that the couple were not in fact permanently cohabiting: paragraphs 42 – 44.

7. At paragraph 45, the judge stated that: "The burden is upon the appellant to demonstrate that he is a family member of a relevant EEA citizen". Then at paragraph 48 she went on to state that:

> "I am satisfied that the respondent has discharged the burden to demonstrate that the marriage was one of convenience given the findings in the determination. I find that the appellant has not discharged the evidential burden on him to rebut the presumption that the marriage was

entered into for the purposes of circumventing the immigration rules for all the reasons set out above."

8. The appeal was accordingly dismissed.

The grounds of appeal

9. In summary the grounds of appeal assert that:

   (a) The judge failed to raise any of the concerns relating to the WhatsApp messages and medical evidence at the hearing, nor had any such matters been raised by the Presenting Officer;

   (b) The judge failed to consider relevant evidence going to the nature and length of the couple's claimed cohabitation since the decision of Judge Wood;

   (c) The judge had effectively reversed the burden of proof.

10. Permission was granted by the Upper Tribunal on all grounds

The hearing

11. I am grateful to the representatives for their helpful submissions, which are of course a matter of record.

12. Mr Maqsood relied on the grounds of appeal. Mr Melvin relied on his skeleton argument and submitted that grounds 1 and 2 were simply disagreements with the judge's findings. There had been material gaps in the evidence and the Appellant himself should have addressed these. It was not incumbent on the judge or the Presenting Officer to have raised the issues at the hearing. In respect of the final ground of appeal, Mr Melvin accepted that paragraph 48 was "not all that clear" but that I should consider the decision holistically and regard what was said in that passage as being a "slip".

Conclusions

13. I appreciate that I should exercise appropriate restraint before interfering with the judge's decision. I must, and have, read her decision sensibly and holistically.

14. With the above in mind, I nonetheless conclude that the judge materially erred in law.

15. In respect of the large number of WhatsApp messages covering a significant period of time, as a matter of fact there were clearly numerous gaps. Mr Melvin submitted that these should have been recognised and then addressed by the Appellant on a proactive basis. In the

circumstances of this case, I disagree. The Appellant had put forward the evidence and the Respondent had had the opportunity to challenge it by way of cross-examination and/or submissions. It appears as though no such challenges were specifically put at the hearing in relation to the messages. I am satisfied that the judge did not herself raise any concerns in relation to the gaps.

16. I appreciate that there can sometimes be a fine line between the need for an individual producing evidence to pre-empt any possible concerns or omissions relating to the evidence and the other party and/or judge needing to raise matters themselves. In the present case, it was not reasonable for the Appellant to have appreciated a need to meet any concerns about gaps. The gaps were not, in my judgment, of such a nature as to shout out for pre-emptive explanation, as it were. The Respondent had not challenged the veracity of the documents (which presumably included the printouts of the WhatsApp messages). There may have been a number of reasons for the short (but relatively numerous) gaps in the chain of messages, but the Appellant was not given a fair opportunity to address these.

17. I conclude that in the absence of any concerns being raised by the Presenting Officer, the judge should herself have given the Appellant and/or his representative an opportunity to meet the concerns. The failure to do so constituted an error of law and it is clear that the issue of the gaps materially featured in the judge's assessment of the case.

18. In respect of the medical evidence, it would appear as though the documents were not, on their face, attributable to the Appellant and the Sponsor. It seems to me that there was a stronger case for the Appellant and the Sponsor to have provided a pre-emptive explanation for this rather than there being any fault on the judge's part for not raising the concern at the hearing. Having said that, there was evidence from both of them connecting the scans to the Sponsor's claimed pregnancy and it looks as through the judge failed to grapple with that evidence. This issue plays no part in my overall conclusions.

19. The second material error of law relates to the burden of proof issue. It is well-established that in marriage of convenience cases the legal burden rests with the Respondent: see Sadovska v SSHD [2017] UKSC 54; [2017] 1 WLR 2926 . In the present case, the first sentence of paragraph 45 of the judge's decision, whilst correct in the normal run of cases, was inapt here, given the allegation made by the Respondent as to the status of the marriage at the time it was conducted.

20. That error could potentially have been cured subsequently. Yet paragraph 48 is problematic, as recognised by Mr Melvin. The first sentence of that paragraph would appear to be correct; the judge stated that she was satisfied that the Respondent had discharged the burden to show that the marriage was indeed one of convenience. The difficulty

lies in what follows. The next sentence states that the Appellant had failed to discharge an evidential burden to "rebut the presumption" that the marriage was one of convenience. Firstly, it is not a question of the Appellant having to discharge an evidential burden: there was a need to put forward an explanation in response to the allegation raised, but that is all. Secondly, and in any event, there is no "presumption" that the marriage was one of convenience. These points undermine what might have been a correct approach indicated in the first sentence in that paragraph. Instead they tend to point towards that first sentence being tied to the discharging of an initial evidential burden on the Respondent's part.

21. Even taking the judge's decision as a whole, the reader is left with significant concerns as to the correctness of the judge's approach to the central issue in the appeal. In my judgement, the concerns are sufficient to constitute an error.

22. In all the circumstances, the judge's decision must be set aside. In doing so, I appreciate the conscientious effort which clearly went into her decision.

23. In terms of disposal, both parties were agreed that if an error of law was found the case would have to be remitted to the First-tier Tribunal. I agree. There will be no findings of fact preserved.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors of law. That decision is set aside.

This appeal is remitted to the First-tier Tribunal (Hatton Cross hearing centre), to be heard afresh by a judge other than First-tier Tribunal Judge Moffatt.

H Norton-Taylor

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 19 June 2023