



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

Appeal Number: EA/07454/2018

**THE IMMIGRATION ACTS**

**Heard at Manchester CJC  
On 27 September 2019**

**Decision & Reasons Promulgated  
On 10 October 2019**

**Before**

**UPPER TRIBUNAL JUDGE PICKUP**

**Between**

**SHAZIA WASEEM  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: In Person, not legally represented

For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

**DECISION AND REASONS**

This is the appellant's appeal against a decision of First-tier Tribunal Judge Moxon promulgated on 21 June 2019 dismissing her appeal against a decision of the Secretary of State dated 13 November 2018 to refuse her application made on 26 March for an EEA residence card as a family member (spouse) of an EEA national exercising treaty rights in the UK pursuant to the Immigration (EEA) Regulations 2019 (the Regulations).

First-tier Tribunal Judge Simpson granted permission to appeal on 12 August 2018, though I have to say that the reasons for granting permission are difficult to follow or understand.

### *Error of Law*

For the reasons I have summarised below, I find there was an error of law in the making of the decision of the First-tier Tribunal sufficient to require it to be set aside and to be made again by remitting this case to the First-tier Tribunal.

The application as made was refused because the marriage, alleged to have taken place in Pakistan on 8 April 2015, was deemed to be one of convenience. Three previous applications for entry clearance were refused on the same basis and in July 2017 the appeal was dismissed with the judge finding the marriage was indeed one of convenience. The appellant subsequently entered the UK illegally via Ireland, circumventing the refusal of entry clearance. The refusal of the latest application relies on the failure of the appellant to address the concerns about the genuineness of the marriage raised in previous refusals, in the application that gives rise to this appeal, and in the previous appeal decision of the First-tier Tribunal.

Relying on the previous Tribunal decision as a starting point, Judge Moxon considered the available evidence and the submissions on behalf of the unrepresented appellant, concluding that she had “failed to show upon the balance of probabilities that the marriage is genuine and subsisting”. That causes alarm bells to ring because it indicates the judge has misunderstood or misapplied the relevant burden and standard of proof. In an otherwise careful decision, it appears that Judge Moxon erred upon this fundamental issue. Without needing to recite the authorities of Papajorgji and Sadovska, it is beyond argument that the respondent bears throughout the legal burden of proof on an allegation of a marriage of convenience. There is no burden on an appellant to show the marriage is genuine and subsisting within the ambit of the Immigration Rules. Whilst, with evidence giving rise to a reasonable suspicion, the respondent may discharge and thereby shift the evidential burden to the appellant, the legal burden remains throughout with the respondent.

At paragraph 4 of the decision the judge stated:

“The appellant bears the burden of proving satisfaction of the Immigration (European Economic Area) Regulations 2016. She must therefore prove upon the balance of probabilities that her relationship with the sponsor is genuine and subsisting. It is for the respondent to prove upon the balance of probabilities that the marriage is one of convenience.”

It appears the judge lost sight of the relevant burden and standard of proof and also the issue in the appeal.

At paragraph 18 of the decision the judge said:

“I independently reach the decision that the appellant has failed to show upon the balance of probabilities that the marriage is genuine and subsisting and in fact, in light of the adverse credibility findings found above, I share Judge Dearden’s conclusions in that I am satisfied upon the balance of probabilities that the marriage is one of

convenience entered into circumvent immigration laws to secure entry and leave to remain into the United Kingdom.”

Unfortunately, the judge has failed to appreciate the relevant test under the Regulations is not whether the marriage is genuine and subsisting but whether at the time of entering the marriage it was one of convenience for the primary purpose of obtaining right to reside in the UK. The wrong approach was applied and the wrong burden and standard of proof has been applied.

In the circumstances, the decision is flawed for error of law and cannot stand.

### *Remittal*

Where a decision of the First-tier Tribunal has been set aside Section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions or it must be remade by the Upper Tribunal. The scheme of the 2007 Act does not assign the function of primary fact-finding to the Upper Tribunal. Where the facts are left unclear as a result of the error in this case, effectively there has not been a valid determination of those factual issues.

In all the circumstances, the appropriate course is to relist this appeal for a fresh hearing, with no findings preserved, in the First-tier Tribunal on the basis that it falls within the Senior President’s practice statement at paragraph 7.2.

### *Decision*

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law such that it should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the Directions below.

**Signed**



**Upper Tribunal Judge Pickup**

**Dated**

27 September 2019

### ***Consequential Directions***

The appeal is remitted to the First-tier Tribunal sitting at Bradford;

It is likely there will be four witnesses, so the appropriate length of hearing is probably two hours;

An interpreter in Pashto will be required;

The appeal may be listed before any First-tier Tribunal Judge, with the exception of Judge Moxon and Judge Simpson.

**Anonymity**

I have considered whether any parties require protection of any anonymity direction. No submissions were made on this issue. The First-tier Tribunal made no such order. In the circumstances, I make no order.

**To the Respondent  
Fee Award**

I make no fee award as the outcome of the appeal remains to be determined.

**Signed**



**Upper Tribunal Judge Pickup**

**Dated**

27 September 2019