



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: HU/11464/2015

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly

On the 14<sup>th</sup> February 2018

February 2018

Decision & Reasons Promulgated

On the 26<sup>th</sup>

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MR HASSAN ABDULLAHI MOHAMUD

(Anonymity Direction not made)

Appellant

And

THE ENTRY CLEARANCE OFFICER PRETORIA

Respondent

Representation:

For the Appellant: Mr Lawson (Solicitor)

For the Respondent: Mr McVeety (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Herwald promulgated on the 9<sup>th</sup> May 2017, in which he dismissed the Appellant's appeal against the Respondent's refusal to allow the

Appellant Entry Clearance into the United Kingdom as a spouse, on Human Rights grounds under Article 8 of the ECHR.

2. Judge Herwald found that the Respondent had simply opined that “The issuing body confirmed to this office that the documents were forged and did not emanate from them”, but found that he could not rely upon that and without further information he was not prepared to find that the Appellant or Sponsor had practiced forgery in respect of the marriage certificate produced by them and further found that the parties were telling the truth about the original marriage certificate being genuine and that a subsequent copy had been obtained by Mrs Saruro Hassan Osman,. Judge Herwald found that he was driven to find that the ECO had access to the subsequent marriage certificate and found that he was satisfied that the Appellant’s wife went back to Somalia and that they went through the “rigmarole of obtaining the second certificate, in an effort to satisfy the British authorities”. Judge Herwald stated at [16(d)] that “*Had that been all, then I would have been driven to allow the appeal, and note further that the respondent was satisfied on the balance of probabilities that photographs had been taken on her visit by the Sponsor to the Appellant*”.
3. However, Judge Herwald went on to find that “*Nevertheless, during the hearing, it became apparent that there is insufficient evidence to satisfy me that this is a valid marriage.*” He found that the Sponsor had stated that she was divorced, possibly in 2007, but had said that “*I am not sure if I can get the papers, they might be in my house*”. Judge Herwald found that he was not persuaded to the relevant standard that the Sponsor, who had been married before, was indeed divorced or that she was free to marry at the relevant time claimed. Furthermore, he found that the Sponsor was asked whether or not her husband had been married before and that she had said that he had been married and that “*His wife has died and he has one daughter*”. Judge Herwald found that the Sponsor was unable to produce any evidence of the death of his first wife, which led him to the conclusion that he could not accept that there was a valid

marriage and that therefore he found that the requirements of the Immigration Rules were not met and on that basis, the appeal should not be allowed on Article 8 grounds, as there were no compelling circumstances to justify leave being granted outside the Rules.

4. Within the Grounds of Appeal it is argued that the First-tier Tribunal Judge erred by introducing matters which were not before the Court, namely whether or not the Sponsor was divorced from her previous marriage and if she was free to remarry. It is argued that additionally the Judge questioned evidence regarding the Appellant's previous marriage and that it was not for the Judge to question whether a marriage can take place in Kenya and that the relevant authorities would have ensured that both parties were free to marry and that otherwise they would not have conducted the marriage in the absence of any evidence to suggest that either party was not free to marry and that the Judge was wrong to direct himself to the conclusion he came to. It was further argued that even if the Judge took the view that he did and believed that the Sponsor or Appellant were not free to remarry, that as this was not an issue prior to the hearing and had not been raised by the Respondent the Judge should have given the Appellant an opportunity to produce such documents within a certain time period and that it was procedurally unfair for the Judge not to give the Appellant such an opportunity.
5. Permission to appeal in this case has been granted by First-tier Tribunal Judge Chamberlain who found that it was an arguable error of law of the Judge to dismiss the appeal in circumstances where the reasons why the application had been refused by the Respondent had been satisfied, as found by the Judge and when he had simply gone on to consider an issue which had not been raised by the Respondent, without giving the Appellant and the Sponsor an opportunity to provide evidence to address it.
6. At the appeal hearing before me, Mr McVeety apologised to the Upper Tribunal for the lack of a Rule 24 Reply setting out the Respondent's

response to the Grounds of Appeal. However, he freely accepted that the issue as to whether or not either the Sponsor or the Appellant were free to marry had not been a concern of the Respondent either prior to or at the appeal hearing and that that issue had not been canvassed with the parties at the appeal hearing as a potential reason for Judge Herwald wanting to dismiss the appeal. Mr McVeety stated that it appeared that Judge Herwald had simply addressed his mind to that issue after the appeal hearing. He stated that the issue before the First-tier Tribunal Judge was the bona fides of the documentation. He told me that Ms Young who had been the Home Office Presenting Officer at the original appeal hearing had not made any submissions in respect of whether or not either party was free to marry.

7. Mr McVeety further quite candidly conceded that it could not have been anticipated by either side that the Judge would have made the findings that he made in respect of the parties not having established that they were free to marry or that it would in fact be an issue in the case.
8. In such circumstances Mr McVeety, quite properly in accordance with his duty to the court, conceded that if Judge Herwald had considered that to be an issue in the case which might potentially lead him to dismiss the appeal, that what he should have done was to adjourn the case part heard, in order to allow the Appellant and Sponsor to obtain documentation to satisfy his concerns and that the Judge had procedurally erred by dismissing the appeal on a basis that had not been raised by the Respondent, and in respect of which he had not given the Appellant and Sponsor an opportunity to address that issue by obtaining further evidence to deal with it.
9. Mr McVeety conceded that the decision of First-tier Tribunal Judge Herwald should be set aside, and further quite properly conceded that he had now seen documentation establishing that the Sponsor had been divorced prior to her marriage to the Appellant, and that the Respondent was not taking issue with the evidence that the Appellant's previous wife

had died, prior to his marriage to the Sponsor. Mr McVeety said that as the Respondent's only concerns had been address by Judge Herwald, the decision should be remade by this court, allowing the Appellant's appeal on Human Rights grounds, the provisions of the Immigration Rules having been met, and there being no evidence of criminality on the part of the Appellant or the Sponsor.

10. In light of the concessions quite properly made by Mr McVeety in compliance with his duty to the court, I do find that the decision of Judge Herwald does contain a material error of law, in that it was procedurally unfair for him to have dismissed the appeal on the basis that had not been previously raised by the Respondent or sought to be relied upon by the Respondent at the appeal hearing, in circumstances where he had not given the Appellant an opportunity to effectively deal with what was a new issue before the court, that had never previously been raised. What he should have done, as properly stated by Mr McVeety, was to adjourn the case in order to allow any further documentation to be obtain in respect of his concerns regarding the parties' freedom to marry.
  
11. I therefore do set aside the decision of Judge Herwald, but preserve the unchallenged findings that the marriage certificate presented was genuine and that the marriage had taken place before the sponsor arrived in the UK. In light of the concession now made by Mr McVeety that the decision should be made by me, allowing the appeal on Human Rights grounds under Article 8, I do find that in light of the preserved findings from the decision of Judge Herwald that the marriage certificate presented was genuine, and that the marriage had taken place before the Sponsor arrived in the UK, that the provision of the Immigration Rules were met and that in such circumstances in the absence of any criminality being alleged on the part of the Appellant, the decision reached is a disproportionate interference with the Appellant's right to a family life with his wife in the UK, such that the decision is in breach of the Appellant's Human Rights in respect of his family life under Article 8 of the ECHR.

12. In reaching this decision I have fully taken account of the provisions of section 117 A-D of the Nationality, Immigration and Asylum Act 2002.
13. I therefore remake the decision allowing the appeal on Human Rights grounds under Article 8 of the ECHR.

Notice of Decision

The decision of First-tier Tribunal Judge Herwald was made following a procedural irregularity and therefore does contain a material error of law, and is set aside;

I remake the decision allowing the Appellant's appeal on Human Rights grounds under Article 8;

No Anonymity Order was made by Judge Herwald, and no application for an Anonymity Order was made before me. I therefore do not consider it appropriate for there to be any Anonymity Order in this case.

Signed



Deputy Upper Tribunal Judge McGinty

Dated 15<sup>th</sup> February 2018

TO THE RESPONDENT

Fee Award

The Appellant having succeeded in his appeal, any fee paid by him should be refunded to him in its entirety.

Signed

*RFMcGinty*

Deputy Upper Tribunal Judge McGinty

Dated 15<sup>th</sup> February 2018