



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01779/2019**

THE IMMIGRATION ACTS

**Heard at Field House
On 26 July 2021**

**Decision & Reasons
Promulgated
On 04 August 2021**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

**FATUMA NAKANWAGI
[NO ANONYMITY ORDER]**

Appellant

and

**ENTRY CLEARANCE OFFICER
PRETORIA**

Respondent

DECISION AND REASONS

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing her appeal against the respondent's decision on 13 March 2019 to refuse her an EEA family permit to permit her to join her Swedish national husband in the United Kingdom as his spouse, with reference to Regulations 2, 7 and 12 of the Immigration (European Economic Area) Regulations 2006. The appellant's Swedish spouse is exercising Treaty rights in the United Kingdom. The appellant is a citizen of Uganda.

2. The Entry Clearance Officer's decision errs in referring to the 2006 Regulations: the applicable Regulations are the 2016 Regulations. There is no difference of substance in the relevant provisions of each set of Regulations.
3. The respondent considered that the marriage contracted between the appellant and sponsor was a marriage of convenience and that Regulations 7 and 12 of the Immigration (European Economic Area) Regulations 2006 were applicable. She refused entry clearance.

Background

4. The appellant and sponsor married on 23 August 2018 in Uganda. They have produced some photographs, a Ugandan marriage certificate, and a decree of divorce for the sponsor from his previous spouse.
5. The Entry Clearance Officer did not consider that these documents were adequate or reliable:

"Ugandan marriage certificates are readily available, difficult to verify, and on their own provide little evidential value to your application. In your supporting documents, you have not demonstrated a relationship prior to this, nor that you have been in contact since this, and I am not satisfied that a genuine wedding took place.

I am therefore satisfied on the totality of information and evidence before me that it is more probable than not that you were and are a party to a marriage of convenience for the sole purpose of gaining entry into the United Kingdom. "

6. The Entry Clearance Manager upheld the Entry Clearance Officer's decision adding that the respondent would expect to see evidence of contact before, during and after the wedding, which had not been provided.
7. The appellant exercised her out of country right of appeal.

First-tier Tribunal decision

8. The First-tier Judge heard evidence from the sponsor. The sponsor was 55, and the appellant was 34 years old at the date of the Upper Tribunal hearing. There was no witness statement from the appellant: the sponsor said he did not know he needed one.
9. The sponsor gave details of his previous relationship and of his family members in Uganda. The sponsor said that he met the appellant in Uganda when he was still married, in December 2013. He was not free then, but his marriage was already in difficulty. The appellant and sponsor stayed in contact as friends. The sponsor's marriage had ended with a decree absolute in February 2017.

10. The marriage had been a registry office affair, followed by a small celebration in a local restaurant. Wedding photographs were taken by the bride's sister: they did not invite many people as he did not believe in collecting money for weddings. They were saving for a bigger church wedding later, to take place in Uganda so that the appellant's family could attend.
11. The sponsor travelled to Uganda in December 2018 to help with the entry clearance application. Following the refusal, he stayed on for 5 months, returning to the United Kingdom in May 2019. He was planning to go back in November 2019. He showed his passport with the travel stamps. The sponsor had obtained a confirmatory letter from the Ugandan Registration Services Bureau, confirming that the marriage had taken place and that the parties were lawfully married.
12. The First-tier Judge found the evidence to be very thin. There was no evidence from the registrar, the sponsor's sister, or the other person present. The sponsor was recently divorced and nearly 20 years older than his wife. They had not known each other long. The judge was surprised that there was no evidence from the appellant herself in support of her appeal, the marriage, and her reasons for entering into it, or from family members who could corroborate the circumstances surrounding the marriage. Evidence of telephone calls and money transfers was post-application and of little assistance.
13. The First-tier Judge accepted that a valid legal marriage had been undertaken, but was satisfied that it was a marriage of convenience. He dismissed the appeal.
14. The appellant appealed to the Upper Tribunal.

Permission to appeal

15. Permission to appeal was granted by First-tier Judge O'Brien, who said this:

"3. The judge appeared to consider the age difference between the couple as material to his or her decision, and yet there is no indication in the reasons that the sponsor was asked about it or otherwise put on notice that it might be held against the appellant. Conversely, it is unclear whether the judge took into account in his or her conclusions the arguably relevant evidence given by the sponsor of the time the couple spent together after refusal [of the application] in Uganda."

Rule 24 Reply

16. The respondent in a Rule 24 response argued that the previous marriage was relevant and the First-tier Judge was entitled to have regard to it. It was not a disputed fact. The sponsor's witness statement gave background information about his marital history. The same was true of the age difference: neither issue took the sponsor by surprise.

17. As regards the appellant's challenge to the burden of proof, the respondent relied on *Rosa v Secretary of State for the Home Department* [2016] EWCA Civ 14, which had been applied by the First-tier Judge at [14] in his decision, and the shifting evidential burden therein. The First-tier Judge had been entitled to find that the evidence in relation to the marriage was so sparse, and the sponsor's explanations so inadequate, that the evidential burden on the respondent had been discharged. There was no evidence from the appellant herself as to whether the marriage was one of convenience, that is to say, whether it was entered into for the purpose of evading immigration controls. The subsequent subsistence of any relationship was nothing to the point in that respect.

Rule 25 Reply

18. Ms Heybroek's Reply was received out of time. It was received by the Upper Tribunal at 11.26 a.m. on the morning of the Upper Tribunal hearing, which was listed for 10:30 a.m. I was not made aware of it until 12:01 when it was emailed to me. By that time, the Reply had been overtaken by the agreement at the hearing for further submissions and a rule 15(2A) application to follow the hearing.
19. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

20. At a hearing on 13 November 2020, I set aside the decision of the First-tier Judge for inadequacy of reasoning. The First-tier Judge had erred in placing the burden of proving the marriage to be genuine and subsisting on the appellant, not the respondent Entry Clearance Officer, and in conflating the 'genuine and subsisting' test with the EEA test for a marriage of convenience which is set out below.
21. The appellant wished to adduce additional evidence and it was agreed that she should be given an opportunity to make an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) if so advised, within 14 days from the sending out of the decision, to be followed by final submissions from both parties. No final submissions were received, but Ms Heybroek did file a Rule 25 Reply out of time. There was no application for an extension of time.
22. The parties agreed that no further oral hearing would be necessary and that the final remaking decision could be made on the documents which would then be before the Upper Tribunal.

Rule 15(2A): additional evidence

23. Rule 15(2A) provides that:

“(2A) In an asylum case or an immigration case—

(a) if a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party—

- (i) indicating the nature of the evidence; and
- (ii) explaining why it was not submitted to the First-tier Tribunal; and

(b) when considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence.”

24. On 1 December 2020, the applicant filed further evidence, but without making a rule 15(2A) application. There being no explanation for the delay in producing this evidence, I do consider that there has been unreasonable delay in producing it. Despite that, this is the only evidence before me from the appellant herself and I have decided to give it such weight as it will bear.
25. The new evidence does not greatly assist the appellant. The evidence produced consists of a witness statement from the appellant, one from a Ms Rebecca Nalusiba, the sponsor’s cousin, and another from Ms Jane Nanyondo, a Ugandan national living in the United Kingdom, together with copies of the sponsor’s passport confirming his travels to Uganda. There are no travels after November 2019 but given the effect of the Covid pandemic, that is unsurprising.
26. Strikingly, there is still nothing from any member of the appellant’s family and it remains unclear whether they are aware of the marriage she has contracted. No member of the appellant’s family attended the small wedding ceremony. The appellant has not explained their absence, both in person and in writing. Nor does she explain why this witness statement is the first evidence from her in these proceedings.
27. In her witness statement, the appellant says she has read the sponsor’s statement. She understands, incorrectly, that her appeal was unsuccessful because there are still doubts as to whether the marriage is legal, and whether it is ‘genuine and subsisting’. The appellant’s statement does not address whether the marriage is one of convenience. There is nothing about her personal circumstances in Uganda, nor those of the sponsor in the United Kingdom, apart from her having had a difficult previous relationship and he a difficult marriage. The appellant speaks of their mutual support, before they married.
28. She says that she has had relationships with men her own age, but those have not been satisfactory, and that the sponsor is a better husband for being older. She was distraught when entry clearance was refused and the sponsor took unpaid leave to remain with her in Uganda for nearly 6 months. He travelled there again in November 2019 for a further four weeks together. They have maintained contact during their enforced separation by WhatsApp and telephone. He has continued to support her

financially. The appellant gives no details of her living expenses, or how much and how often the sponsor sends money.

29. Ms Nanyondo is an Ugandan national living in the United Kingdom. She was one of the two witnesses to the marriage and her name is on the marriage certificate. She says that she has no doubt that the couple are genuinely in love, having seen the relationship develop over time. They are dedicated to each other. The appellant has suffered 'great sadness, which she should not have to endure', by reason of the continued separation.
30. Ms Nalusiba is the sponsor's first cousin and she too is a Swedish citizen. she confirms that she attended the wedding and the small reception. She says their relationship is 'genuine and subsisting' but her statement really takes matters no further.

Immigration (European Economic Area) Regulations 2016

31. Regulation 2 of the 2016 Regulations defines a marriage of convenience:

““marriage of convenience” includes a marriage entered into for the purpose of using these Regulations, or any other right conferred by the EU Treaties, as a means to circumvent—

(a) immigration rules applying to non-EEA nationals (such as any applicable requirement under the 1971 Act to have leave to enter or remain in the United Kingdom); or

(b) any other criteria that the party to the marriage of convenience would otherwise have to meet in order to enjoy a right to reside under these Regulations or the EU Treaties; ...

“spouse” does not include—

(a) a party to a marriage of convenience; ...”

32. The effect of these definitions is that Regulation 7, which defines 'family member' as including a person's spouse or civil partner, excludes any spouse in a marriage of convenience. Such a person is not a spouse for the purpose of the EEA Regulations. Regulation 12 requires an Entry Clearance Officer to issue an EEA family permit to a person who is a 'family member', but again, a person who is a party to a marriage of convenience is not a 'family member' because they are not a spouse as defined in the Regulations.
33. The question whether this marriage when contracted was a marriage of convenience is therefore likely to be determinative of the appeal.

Analysis

34. The First-tier Judge's finding of fact that the marriage was one of convenience was based on the sponsor's evidence alone. There has been no explanation from the appellant as to why she gave the First-tier Judge no assistance by providing evidence of the type now advanced in her witness statement and those of her two witnesses. As already stated, the

evidence which has been advanced continues to focus on the wrong issue and gives the Tribunal little assistance in whether the marriage, when contracted, was one of convenience or not.

35. The question of the sponsor's age does not seem to me to be determinative. Marriage between a man in his 50s and a woman in her 30s is not particularly extraordinary. The very sparse nature of the ceremony, and the lack of any relative of the appellant's there, is significant. The sponsor's account that he was saving for a better wedding but did not want to invite people and collect money at the registry office wedding is internally contradictory.
36. The sponsor did spend time in Uganda after the wedding, but there is no confirmation that he spent it with the appellant. He has family there too. He seems to have been in the habit of returning for visits: he says he met the appellant on a holiday visit in 2013. There is no detail as to whether he has met her family now, or how they spent their time together.
37. The evidence continues to be particularly sparse in this appeal, even with the addition of the new witness statements. There is insufficient to rebut a reasonable suspicion that the marriage is one of convenience.

DECISION

38. For the foregoing reasons, my decision is as follows:
The making of the previous decision involved the making of an error on a point of law.
I set aside the previous decision. I remake the decision by dismissing the appeal.

Signed [Judith AJC Gleeson](#)
Upper Tribunal Judge Gleeson

Date: 26 July 2021