



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

Appeal Number: EA/03758/2021
UI-2021-001793

THE IMMIGRATION ACTS

**Heard at Field House
On: 26 August 2022**

**Decision & Reasons Promulgated
On: 5 October 2022**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

**MR ABDINAJIB HASSAN MOHAMUD
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M A Rana, counsel instructed by Aden & Co Solicitors
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Mann, promulgated on 6 August 2021. Permission to appeal was granted by First-tier Tribunal Judge Chohan on 22 November 2021.

Anonymity

2. No direction has been made previously, and there is no reason for one now.

Background

3. On 22 December 2020, the appellant applied for a EUSS Family Permit, as the family member of an EEA national. That application was refused on 23 February 2021. The decision notice explained that it was considered that the appellant had provided doctored photographic evidence of his alleged wedding and that this cast doubt on the marriage and his other evidence. The ECO was not therefore satisfied that the marriage was genuine, rather it was a marriage of convenience and accordingly the ECO was not satisfied that the appellant was a family member of an EEA citizen.

The decision of the First-tier Tribunal

4. At the hearing before the First-tier Tribunal, the sponsor did not attend the video hearing owing to technical difficulties. Counsel for the appellant confirmed that he was instructed to proceed by way of submissions. The judge acknowledged that there was no expert evidence provided by the respondent regarding the allegations of forgery, however the judge concluded that the genuineness of the relationship was called into question for other reasons.

The grounds of appeal

5. There were three grounds of appeal. Firstly, it was argued that the judge failed to apply the correct burden of proof in relation to the allegation of forgery as well as the allegation that this was a marriage of convenience, the judge making no mention of *Sadovska* [2017] UKSC 542. Secondly, it was contended that the judge failed to give adequate reasons for doubting the authenticity of the photographs. Thirdly, the judge failed to consider *RP (Proof of forgery) Nigeria* [2006] UKAIT 00086.
6. Permission to appeal was granted on the basis sought.
7. The respondent did not file a Rule 24 response.

The hearing

8. Mr Deller confirmed that a Rule 24 response had not been prepared. He also confirmed that there was no document verification report to support the ECO's claim that the photographs had been forged. Mr Deller had no concerns of his own regarding the photographs. For his part, Mr Rana, urged me to set aside the decision of the First-tier Tribunal and remake it, allowing the appeal. Mr Rana also raised the late or non-existent service of the respondent's bundle.
9. At the end of the hearing, I announced that there was a material error of law in the decision of the First-tier Tribunal, that the decision was set aside and remade, with the appeal being allowed.

Decision on error of law

10. There was just one reason which led the respondent to conclude that the appellant had taken part in a marriage of convenience. The ECO had the following to say:

“The documents appear to be a number of head and body shots of yourself with noticeably different picture grain/clarity that have been placed next to the EEA to demonstrate that you were at your wedding.

This evidence was provided specifically to validate your relationship and to support the statements that you attended the wedding ceremony, but because of the alterations made to these documents it casts significant doubts on the marriage and other evidence provided to support the application. “

11. The allegation made above is unsupported by any expert evidence. Furthermore, the appellant provided over twenty photographs, yet there is no reference to which of these items are said to be suspect. Mr Deller was unable to draw any defects to my attention and my own consideration of the photographs revealed nothing of concern. In these circumstances, the judge erred in failing to give adequate reasons which led them to doubt the authenticity of the photographs, in the absence of expert evidence. At [22] the judge states that there are ‘clear differences in the picture quality,’ but does not identify which photographs are problematic nor indicate what those clear differences are.
12. The judge further erred in effectively shifting the burden of proof onto the appellant to prove that he had not used forged documents and that he had not undertaken a marriage of convenience. Indeed, at [18], the judge states that ‘*it is for the appellant to establish on the balance of probabilities that he meets the requirements of Appendix EU...*’ That self-direction failed to take account of where the burden lies regarding the allegations made by the respondent in this case.
13. The head note in *RP (proof of forgery) Nigeria* [2006] UKAIT 00086 firmly establishes where the burden lies, as follows:
- ‘An allegation of forgery needs to be proved by evidence and by the person making it. The procedure under s108 of the 2002 Act remains available to respondents. A bare allegation of forgery, or an assertion by an Entry Clearance Officer that he believed the document to be forged can in these circumstances carry no weight. The Tribunal treats a document as forged only on the basis of clear evidence before it. KS (Allegations by respondent: proof required?) Pakistan [2005] UKAIT 00171 should not be read as implying the contrary.’*
14. There was no reference by the judge to *RP* or to the correct burden of proof regarding a forgery allegation, which was a clear error of law.

15. Referring to the judgment in *Sadovska and another (Appellants) v Secretary of State for the Home Department (Respondent) (Scotland)* [2017] UKSC 54, Lady Hale’s analysis included the following guidance:

‘One of the most basic rules of litigation is that he who asserts must prove. It was not for Ms Sadovska to establish that the relationship was a genuine and lasting one. It was for the respondent to establish that it was indeed a marriage of convenience.’

16. Again, the judge made no reference to *Sadovska* nor the fact that the burden is on the respondent to establish that it was a marriage of convenience.

17. The respondent failed to provide any evidence to support the allegation of forgery and that was the sole reason for the conclusion that the marriage was one of convenience. Therefore, it was a material error for the judge to conclude at [25] that the judge was *‘not satisfied on the balance of probabilities that the appellant is in a genuine and subsisting marriage with the sponsor. I accept that I have been provided with a marriage certificate and verification document, however due to my findings above I do not consider this to be adequate to establish that the parties are related by a genuine marriage.’*

18. Given the material errors in the decision of the First-tier Tribunal, it follows, that the decision is set aside, with no findings preserved.

19. I now remake the appeal by allowing it. In short, the respondent made an allegation of forgery which is unsupported by any evidence. That same allegation is used to support a further allegation, that being that the marriage is one of convenience. Neither allegation has been proved. It is not for the appellant to prove that his photographs are not doctored or that his marriage is genuine.

Conclusions

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

I set aside the decision to be re-made.

I substitute a decision allowing the appeal.

No application for anonymity was made and I saw no reason to make such a direction.

Signed: T Kamara

Date: 26 August 2022

Upper Tribunal Judge Kamara

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed: T Kamara

Date: 26 August 2022

Upper Tribunal Judge Kamara

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email