



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

Appeal Number: HU052572015

THE IMMIGRATION ACTS

**Heard at Field House
On 20th July 2017**

**Decision & Reasons
Promulgated
On 20th July 2017**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS SRIJANA THULUNG SUBBA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr L Tarlow (Senior Home Office Presenting Officer)
For the Respondent: Mr S Jaisri (instructed by Raiyad, Solicitors)

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal by the Secretary of State against the Decision of First-tier Tribunal Judge Sweet. Following a hearing at Taylor House on 16th November 2016, in a Decision and Reasons

promulgated on 2nd December 2016 Judge Sweet allowed this Human Rights appeal.

2. For the sake of continuity and clarity I shall continue to refer to the Secretary of State as the Respondent although she is in truth the Appellant before the Upper Tribunal.
3. The Appellant of the Immigration Rules. The application was refused on 1st September 2015. The reasons for the refusal were that, based on a number of inconsistencies in the marriage interview, the Secretary of State was not satisfied that the marriage was subsisting or that the couple intended to live together permanently as husband and wife.
4. The First-tier Tribunal heard evidence from the Appellant and her spouse and from the Appellant's mother-in-law.
5. The Judge stated at paragraph 21, correctly, that the burden of proof in meeting the Immigration Rules is on the Appellant on the balance of probabilities. The judge then went on to state that the burden of showing that a marriage and relationship were not genuine is on the Secretary of State, particularly if the Secretary of State alleged that the marriage is a sham marriage. In that the Judge fell into error because in this case the Secretary of State had not made an allegation that the marriage was a sham marriage. The Secretary of State was not satisfied that the requirements of Appendix FM were met, namely that the relationship was subsisting or that the couple intended to live permanently together as husband and wife. Those are requirements of the Rules and the burden falls squarely on the Appellant to satisfy that.
6. At paragraph 24 the Judge expressed himself dissatisfied with much of the evidence. He accepted that there were a number of discrepancies in the evidence given at the marriage interview, for example as to the purchase and exchange of rings. He also found that their respective oral evidence was unsatisfactory in relation to their evidence about the spouse's knowledge of the Appellant's difficulties with her first spouse. The Judge was not persuaded by the reasons given for the spouse's father not attending the wedding, the reasons varying between the fact that he had a flight arranged and/or he could not obtain time off work. The Judge also considered it significant that the marriage took place only a few days after the Appellant's leave had been curtailed. The Judge then took into account the Appellant's mother's evidence that the parties were still getting to know each other and had not spent enough quality time to get to know each other due to work commitments. The Judge noted that as they only started living together from April 2015 there was no reason why they had to get married as early as 7 April 2015. The judge also commented that their conduct together at the hearing did not indicate that they were in a genuine relationship.
7. In the next paragraph the Judge went on to say that the burden of proof on showing that this was a sham marriage and the relationship is not genuine

is on the Secretary of State. In that the Judge was wrong. As I have already indicated there was no suggestion that this was a sham marriage and the burden of proof lay squarely on the Appellant.

8. Mr Jaisri tried to argue that when the Judge went on to say that he was prepared to accept on the balance of probabilities that it was genuine relationship that rescued matters. However, that one sentence following on from incorrectly applying the burden of proof and the preceding paragraph indicating all of the problems with the evidence means that I cannot agree that that one sentence saves the decision.
9. The error of law going to the heart of the case it is clearly a material error of law meaning that the decision must be set aside in its entirety.
10. As the appeal needs to be heard de novo both parties agreed it was appropriate to remit it to the First-tier Tribunal for a full rehearing.

Notice of Decision

The Secretary of State's appeal to the Upper Tribunal is allowed to the extent that the decision of the First-tier Tribunal is set aside and the appeal is remitted to the First-tier Tribunal at Hatton Cross for a full rehearing on all issues.

There was no application for an anonymity order and I see no reason to make one.

Signed

Date 20th July 2017

Upper Tribunal Judge Martin