

**Upper Tribunal
(Immigration and Asylum
EA/05252/2018**



Chamber) Appeal Number:

THE IMMIGRATION ACTS

**Heard at Manchester Civil Justice Centre
On 12 August 2019** **Decision & Reasons Promulgated
On 20 August 2019**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

JOSEPHINE [O]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Semega-Janneh

For the Respondent: Mrs Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant has appealed against a decision made by Designated First-tier Tribunal Judge McClure dated 30 April 2019, in which he dismissed her appeal on EEA grounds. The sole issue before the First-tier Tribunal ('FTT') was whether the appellant's marriage to her EEA citizen spouse ('the sponsor') was a marriage of convenience. The FTT concluded that the marriage was not genuine and was a marriage of convenience.

Grounds of appeal / Hearing

2. The appellant appealed against the FTT's decision relying upon 22 grounds of appeal, drafted by AJO solicitors. Permission was refused in comprehensive terms by Designated FTT Judge Shaerf on 31 May 2019. He observed that the FTT identified significant discrepancies in the evidence which remained unchallenged by the grounds of appeal, and these are sufficient to support the conclusion reached by the FTT that the marriage was one of convenience. Shorter but unenumerated renewal grounds of appeal were submitted to the Upper Tribunal ('UT').
3. In a decision dated 4 July 2019 Deputy UT Judge Mailer granted permission to appeal observing it arguable that there may have been errors in the FTT's findings as set out in the renewal grounds.
4. The SSHD submitted a Rule 24 notice dated 17 July 2019 inviting the UT to uphold the FTT's decision.
5. At the beginning of the hearing Mr Semega-Janneh indicated that he relied upon all the grounds of appeal: the 22 initial grounds and the renewal grounds. As many of the grounds were repetitive and overlapping, I invited Mr Semega-Janneh to focus upon his stronger grounds and to place these in a consolidated document. Mr Semega-Janneh relied upon 13 reformulated written grounds of appeal and amplified these in submissions. I then heard from Mrs Pettersen before reserving my decision.

Legal framework

6. A spouse does not include a party to a marriage of convenience - see Regulation 2 of the Immigration (EEA) Regulations 2016 ('the 2016 Regulations'). The 2016 Regulations do not define a marriage of convenience. That, however, is set out within the overarching Article 1 of EC Council Resolution 97/C382/01 of 4 December 1997. That Article defines a marriage of convenience as follows:

"A marriage concluded between a national of a member state or third country national legally resident in a member state and a third country national with the sole aim of circumventing the Rules on entry and residence of third country nationals and obtaining for the third country national a residence permit or authority to reside in the member state".
7. It is well-known that the burden of proof of establishing that a marriage is one of convenience rests on the Secretary of State, see Rosa v SSHD [2016] EWCA Civ 14 and Sadovska v SSHD [2017] UKSC 54. Once the Secretary of State displaces the legal burden, the evidential burden then rests on the person who is alleging that the marriage is not one of convenience.

Error of law discussion

8. I begin by making general observations regarding the FTT's decision.
 - (i) The FTT focussed its attention upon the circumstances relevant as at the date of the parties marriage on 21 April 2018, but placed this into context and in coming to its decision took into account all the evidence - see [49] and [61] of the decision.
 - (ii) The FTT was fully aware of the background history relevant to the relationship between the appellant and sponsor and set this out in detail. This included the summary of a visit by immigration officers to the home address on 24 April 2018 and a summary of the discrepancies identified at a marriage interview that took place on 12 July 2018 - see [14] to [18].
 - (iii) The FTT heard detailed evidence from the appellant, the sponsor and their friend Mr [AE] and carefully summarised their evidence in his decision at [19] to [31]. This included, inter alia, the following two significant claims: if the marriage was not genuine: (a) the parties would not have taken steps to have a child together as evidenced by documentary evidence from Hewitt Fertility Centre; (b) the sponsor would not have travelled to Nigeria (the appellant's country of origin) on 17 February 2018, in order to undertake the traditional marriage traditions there.
 - (iv) The FTT correctly directed itself to the applicable burden of proof at [40] and [41].
 - (v) The FTT made findings of fact relevant to the discrepancies that emerged following the immigration visit and the marriage interview for the reasons provided at [50] to [60].
9. The majority of the grounds of appeal do no more than disagree with the FTT's findings regarding the discrepancies that emerged following the immigration visit and the marriage interview. Having heard evidence from the parties, these findings were open to the FTT. Grounds 2, 3, 4, 6, 7, 11, 12 and 13 do no more than re-argue the case on behalf of the appellant. Having directed itself to the evidence addressing the issues raised in response to the identified discrepancies, there was no requirement on the part of the FTT to identify and refer to every single aspect of the evidence when reaching its conclusions on the discrepancies.
10. However, grounds 5 and 8 raise discrete issues, unrelated to the FTT's conclusions on the discrepancies in the evidence. These submit that the FTT failed to make any clear findings on two significant claims in support of the claim that the marriage was not one of convenience. These relate to (a) the parties attempts to conceive a child by IVF, and; (b) the traditional marriage in Nigeria on 17 February 2018.
11. The FTT expressly referred to documentary evidence from the Hewitt Fertility Centre at [32] and [33] when summarising the evidence available to it and prior to making findings on the evidence. At [33] the FTT said this (my emphasis):

“In some senses important in that respect is page 34 part of the document from the Hewitt fertility Centre where the person stated to be providing a semen sample is stated to be [MC] ...”

12. [MC] is the sponsor. The FTT does not refer to this evidence again. There is therefore no clarification as to why the FTT regarded this evidence important and no explanation as to why it was not “added to the mix” when considering the parties intentions when they got married. The marriage in the UK took place in Liverpool on 21 April 2018. The ‘instructions for the production of semen samples’ letter is dated shortly after this – 1 May 2018 – and addressed to the sponsor.
13. The parties claimed in their statements and oral evidence (see [20] of the decision) that the traditional marriage in Nigeria was clearly evidenced and it would have been unnecessary to undertake this, as the marriage at the Liverpool registry office sufficed for the marriage to be lawful.
14. The evidence relevant to the parties beginning IVF and the sponsor taking part in traditional marriage customs in Nigeria is potentially important evidence supporting the parties’ claimed genuine intentions in marrying each other, yet the FTT has not addressed this evidence when giving its reasons. The FTT may well have considered this evidence as forming part of a deliberate ruse to assist in making the marriage appear genuine. However, it made no finding in this regard.
15. It follows that when reaching its ultimate conclusion that the marriage is one of convenience the FTT omitted to take into account two matters capable of supporting the appellant’s case. I have already noted that the FTT expressly stated on two occasions that it took all the evidence into account. If, in the alternative, these two matters were taken into account, the FTT failed to give adequate reasons why this evidence was incapable of supporting the appellant’s case.
16. Although the FTT provided many other reasons in support of its conclusion, it cannot be said that these two matters would have made no difference. The errors of law I have identified regarding these two matters therefore constitute material errors of law.

Disposal

17. I have had regard to para 7.2 of the relevant *Senior President’s Practice Statement* and the nature and extent of the factual findings required in remaking the decision, and I have decided that this is an appropriate case to remit to the FTT. It is difficult to separate the FTT’s approach to the discrepancies from the two matters that it failed to take into account. If these matters were considered and found to support the appellant’s claim, a different view might have been taken on the explanations provided by her in response to the discrepancies. It follows that there are no preserved findings. Fresh

findings of fact are necessary and this will involve detailed oral evidence and cross-examination on wide-ranging matters.

Decision

18. The decision of the FTT involved the making of a material error of law. Its decision cannot stand and is set aside.
19. The appeal shall be remitted to the FTT, where the decision will be remade on a de novo basis by any judge other than Judge McClure.

Signed

Date

UTJ Plimmer
Upper Tribunal Judge Plimmer

14 August 2019