IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002475
First-tier Tribunal No: EA/51870/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 11 March 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

Ahmed Mohamed Biyodon
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr M Afzal, Global Migration Solicitors UK
For the Respondent: Mr P Lawson, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 21 September 2023

DECISION AND REASONS

1. The appellant is a national of Somalia. In May 2021 he made an application for an EEA Family Permit to join his sponsor, Ms Shadiya Hasan, a Dutch national, in the UK. The appellant claims to be the spouse of Ms Shadiya Hasan and in support of the application he provided a marriage certificate dated 22 June 2018, WhatsApp communications and a series of photographs purporting to have been taken on the wedding day.

2. The application was refused by the respondent for reasons set out in a decision made by an Entry Clearance Officer and dated 17 May 2021. The Entry Clearance Officer was concerned that the photographs may have been tampered with, and there was an absence of evidence to establish that the appellant had lived with his partner following the wedding. The respondent noted that the appellant had provided evidence that the

sponsor had travelled during 2017, 2018, 2019 and 2020, but noted that there was no evidence that her Visa was extended beyond 19 June 2018, three days before the wedding. The respondent referred to the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016") and was not satisfied that the appellant is a family member of an EEA national in accordance with Regulation 7. The respondent concluded the marriage is one of convenience.

3. The appellant's appeal against that decision was dismissed by First-tier Tribunal ("FtT") Judge Parkes ("the judge") for reasons set out in a decision dated 13 March 2022. The appellant claims the judge failed to decide the appeal on the appropriate standard of proof, namely the balance of probabilities. It is said the judge failed to consider the evidence before the Tribunal from the appellant's partner Ms Shadiya Hasan that they communicate regularly and the WhatsApp messages before the Tribunal of regular communication notwithstanding the absence of translations. The appellant claims the judge accepted the photographs of the appellant's marriage are genuine and the criticism made about those in the photographs is insufficient to justify a conclusion that the marriage is not genuine or subsisting. It is said the judge failed to have proper regard to the evidence before the Tribunal regarding the appellant's partners travel to visit the appellant.

4. Permission to appeal was granted by FtT Judge Hatton on 19 May 2022.

The hearing of the appeal before me

5. Mr Afzal submits the judge was required to consider whether the appellant has established, on the balance probabilities, that his marriage is a genuine one and that he is a family member for the purposes of the EEA Regulations 2016. Mr Afzal submits there was a wealth of evidence before the Tribunal that the judge simply fails to refer to, and had the judge considered that evidence in the round, there is clear evidence of a genuine of marriage. Mr Afzal submits the fact that the judge uses the words "genuine or subsisting' in paragraph [13], indicate that the judge was applying the wrong test. The judge concluded the evidence is very limited. However the judge failed to engage with the evidence before the Tribunal including the evidence of the appellant's partner that they had provided a copy of her expired and current passport and travel tickets as evidence that she met and visited her husband on several occasions between December 2017 and February 2020.

6. In reply, Mr Lawson submits it was open to the judge to conclude that even if the marriage is legally valid, the appellant has not established the marriage is genuine. If the marriage is not 'genuine and subsisting' it is not a genuine marriage. He submits the judge was right to note the evidence before the Tribunal was limited. The WhatsApp messages that were relied upon, as the judge noted, were largely untranslated. Mr Lawson submits the respondent's decision to refuse the application raised a number of concerns regarding the marriage, including the lack of evidence that the appellant and his partner lived together following their wedding. There was an absence of evidence that the appellant's partner

has visited the appellant and there was an absence of evidence to demonstrate regular communication between them.

Decision

7. At paragraph [1] of his decision the judge recorded that the decision under appeal is a decision to refuse the application for a residence card as the family member of an EEA national in the UK exercising treaty rights. At paragraph [2] the judge records the burden rests with the appellant to establish, on a balance of probabilities, that the requirements set out in the EEA Regulations 2016 are met. The respondent's reasons for refusing the application are summarised in paragraph [3]. The judge records at paragraph [4] the evidence that was before the Tribunal and confirms the appellant's partner attended the hearing and gave evidence with the assistance of an interpreter. Her evidence is set out in paragraphs [5] to [7] of the decision.

8. The evidence of the appellant's partner was that they married on 22 June 2018 when she was in Nairobi. Her family did not attend. They are in the Netherlands and do not know she is married. She said the appellant's uncle did attend the ceremony and the appellant told her that others present were members of his family although she could not recall who they were. The judge's findings and conclusions are set out at paragraphs [8] to [13] of his decision. He noted, at [8], that the issue in the appeal is whether the marriage is genuine or a marriage of convenience.

9. The judge considered the photographs of the wedding that are relied upon by the appellant and concluded, at [10], that he was not prepared to draw an adverse conclusion from the state of the photographs that were relied on. He was not prepared to accept therefore that the photographs are 'false' or 'altered'. However, he went on to say:

> "…However, I am concerned by the very limited nature of the photographs. Very few people appear in the pictures that have been provided which, as noted above, appear to have been taken in a studio against a backdrop. The absence of photographs of the ceremony or of the event with the number of guests described by the Sponsor is significant.
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> 11. There are only 3 additional females and 2 additional males appearing in different pictures. There was no identification of who was who, the bride and groom apart being readily identified. Despite the concerns raised in the Refusal Notice there were no photographs of the ceremony itself or of any party or celebrations connected with a wedding. As the ECO was questioning the fact of the marriage the absence of evidence from others who attended the ceremony or celebrations would have been an obvious avenue to explore and, from what the Sponsor said in evidence, there were a number of individuals who could have assisted. The absence of such evidence does undermine the Appellant's claims about the nature of the event."

10. At paragraph [12] the judge addressed the WhatsApp messages relied upon. He said:

> "The WhatsApp messages run from page 48, 01/08/2021, to page 100, 28/11/2021. The next set run from page 150, 27/12/2020, to page 291, 24/04/2021 and then in a different format from page 292, 05/10/2018, to page 354, 03/12/2020. At various points names appear, at places there are heart emojis and some of the exchanges are in English but the bulk are not translated and accordingly attract very little weight."

11. At paragraph [13] the judge concluded:

> "As it stands the evidence is very limited. It amounts to the marriage certificate and series of posed photographs with only a few people other that the Appellant and Sponsor in attendance. The evidence relied on for contact is untranslated and does not assist. The evidence of the genesis of the relationship is similarly lacking. In the circumstances the evidence does not show that the marriage, even if legally valid, is genuine or subsisting. On that basis the Appellant has not shown that he meets the provisions of the rules."

12. I remind myself that an appellate court must not interfere in a decision of a judge below without good reason. The power of the Upper Tribunal to set aside a decision of the First-tier Tribunal only arises in law, if it is found that the Tribunal below has made a genuine error of law that is material to the outcome of the appeal.

13. There is nothing in the decision that supports the claim that the judge considered the appeal on anything other than the balance of probabilities. At paragraphs [5] to [7] of his decision the judge referred to the evidence of the appellant's partner. The evidence of the appellant's partner appears to be vague, but unfortunately, the judge does not engage with her evidence in reaching his decision. He does not make any finding as to her credibility, and if she is not credible, the reasons for that. The judge refers to the photographs and although it was open to the judge to observe that the photographs appear to have been taken in a studio against a backdrop, and there is an absence of photographs of the ceremony itself or the event with the number of guests described, the judge does not, in terms, make any finding as to whether the photographs establish that there was a wedding ceremony, as claimed by the appellant on 22 June 2018. Moreover the judge fails to engage at all with the evidence of the appellant and sponsor that they have spent time together since the marriage. There was, as Mr Afzal submits, some evidence of the appellant's partner having travelled to Kenya and Somalia at various points between December 2017 and February 2020. It may have been open to the judge to conclude that the evidence of the appellant's partner that she travelled to Somalia, without more, does not establish that she travelled to visit the appellant. The difficulty with the decision is that the judge simply fails to engage with that evidence at all.

14. In paragraph [13] of his decision, the judge states that even if the marriage is legally valid, it does not follow that it is genuine and subsisting. That is not the test. The respondent did not accept the marriage is genuine. The respondent claimed the marriage is one of

convenience. A 'marriage of convenience' is defined in Regulation 2 of the EEA Regulations 2016 as:

> "…a marriage entered into for the purposes 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;"

15. The judge's decision is brief. Whilst brevity is often to be lauded, it must not be at the expense of sufficient explanation and reasoning (see, for example, the headnote of *MK (duty to give reasons) Pakistan* [2013] UKUT 00641 (IAC), including as to the origin of the point or evidence on which findings are based so as to avoid both confusion and further dispute in any onward appeal.

16. Standing back, I am satisfied that the judge's failure to consider the evidence of the appellant's partner and reach findings regarding material aspects of the evidence is such that the appellant has established that there is a material error of law in the decision of the First-tier Tribunal such that it must be set aside.

17. As to disposal, I bear in mind the guidance provided in *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC). Whilst there is a narrow issue in this appeal, considering (i) the amount of fact finding needed as no findings can be preserved, and (ii) the loss of the two-tier decision making process if the decision is retained in the Upper Tribunal, I find the appropriate course of action is for the matter to be remitted to the First-tier Tribunal for hearing afresh.

Notice of Decision

18. The decision of FtT Judge Parkes to dismiss the appeal is set aside.

19. The appeal is remitted to the FtT for hearing afresh with no findings preserved.

20. The parties will be notified of a further hearing date before the FtT in due course.

V. L. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal