



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

**Case Nos: UI-2023-002214**  
**UI-2023-002215**  
**First-tier Tribunal Nos:**  
**EA/11712/2022**  
**EA/11715/2022**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 08 September 2023**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE LEWIS**

**Between**

**ENTRY CLEARANCE OFFICER**

Appellant

**and**

**ZAIB UN NISA**  
**MUHAMMAD ALI CHEEMA**  
**(NO ANONYMITY ORDERS MADE)**

Respondents

**Representation:**

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer

For the Respondent: Mr I Ali of Counsel instructed by Brys Immigration Consultants

**Heard at Field House on 1 September 2023**

**DECISION AND REASONS**

**Introduction and Background**

1. The Entry Clearance Officer challenges a decision of First-tier Tribunal Judge Freer promulgated on 30 March 2023 allowing appeals of Mrs Zaib Un Nisa and Mr Muhammad Ali Cheema against respective decisions dated 26 September 2022 to refuse to grant European Union Settlement Scheme Family Permits.
2. Although before me the appellant is the ECO and Mrs Nisa and Mr Cheema are the respondents, for the sake of consistency with the

proceedings before the First-tier Tribunal I shall continue to refer to Mrs Nisa and Mr Cheema as the Appellants and the ECO as the Respondent.

3. The Appellants are mother and son; they are both nationals of Pakistan. The First Appellant's date of birth is given as 1 January 1973: Mr Ali was not able to assist as to whether she was actually born on 1 January, or whether this day and month had been accorded to her in circumstances where her exact date of birth was not known although the year was thought to be 1973. (I note on the application form that the First Appellant's parents' dates of birth are given with the day and month as 1 January.) The Second Appellant's date of birth is given as 11 September 2000.
4. On 19 September 2021 the Appellants made applications for Family Permits under the European Union Settlement Scheme ('EUSS') to join Mr Ghanzanfar Ali Mian (d.o.b. 15 December 1962), a German national ('the Sponsor'). The Sponsor was said to be the husband of the First Appellant.
5. The applications were refused in similar terms for reasons set out in respective decision notices.
6. In material part the Notice of Decision in respect of the First Appellant states:

*"You have stated that the family relationship of the EEA citizen sponsor to yourself is spouse. As evidence of this you have provided a Pakistan marriage certificate, however there are inconsistencies. The marriage certificate states that your age is 47, at the time of the ceremony your age would not have been 47 years 0 months and 0 days. The marriage certificate also gives your sponsor's age as 57 years 10 months and 17 days, this is also incorrect by one day.*

*The Divorce certificate provided has a spelling mistake, Pakistan in the heading is spelt incorrectly. All these inconsistencies cast doubt upon the validity of the documents, we would not expect to see such mistakes on official documents.*

*As a result of the above, I am not satisfied that you are a family member of a relevant EEA Citizen."*
7. The Second Appellant was essentially refused 'in line' with the decision in respect of his mother.
8. The Appellants appealed to the IAC.

9. The appeals were allowed for reasons set out in the 'Decision and Reasons' of Judge Freer.
10. The Respondent applied for permission to appeal to the Upper Tribunal which was granted by First-tier Tribunal Judge Fisher on 9 June 2023. In material part the grant of permission to appeal is in these terms:
  - "2. The grounds seeking permission allege that the Judge erred in deciding that there was a burden on the Respondent when asserting that a document was unreliable. The Judge went on to describe it as a "heavy burden".*
  - 3. The burden of demonstrating that a document is reliable rests with the Appellant. If the Respondent asserts that a document is not genuine, then the burden shifts to her to demonstrate it. There was no such allegation in this case, and so the burden remained with the Appellant.*
  - 4. It is arguable that the Judge erred in law in that regard, and so I grant permission to appeal on the grounds raised, as they are clearly interlinked."*
11. The Appellants have filed a Rule 24 response dated 19 July 2023, drafted by Mr Ali, resisting the Respondent's challenge.

## **Analysis**

12. The Respondent's grounds raised two bases of challenge: the misdirection on the burden and standard of proof expressly referred to in the grant of permission to appeal (above); and the adequacy of the Judge's reasons in respect of the First Appellant's divorce and marriage documents.
13. Mr Ali, realistically and sensibly accepted that the Decision of the First-tier Tribunal included a clear misdirection in respect of burden and standard of proof; however he argued that the findings in the Decision were such that ultimately this made no material difference to the outcome, and accordingly urged that the Decision be allowed to stand.
14. Notwithstanding that in substance it is common ground between the parties that the First-tier Tribunal Judge misdirected himself in law in respect of burden and standard of proof, I set out in some detail the reasons for this below - not least because it is relevant to a further exploration of the way in which the Judge appears to have misconceived the nature of the issue in respect of the divorce and marriage documents. As regards Mr Ali's invitation to allow the decision to stand in any event, I find that I cannot possibly accept this in all the circumstances.

15. In respect of misdirection I note the following:

(i) It is accepted on behalf of the Appellants that the Respondent's position before the First-tier Tribunal did not involve an express allegation of forgery such that the burden of proof might have shifted to the Respondent. Rather it was understood that the concerns expressed about apparent irregularities in the documents raised issues as to their reliability as evidence of the truth of their contents.

(ii) The Respondent's position is manifest from the submissions of the Presenting Officer as set out in the First-tier Tribunal's 'Decision and Reasons' at paragraphs 22-25, in particular:

(a) *"The reliability of the documents is questioned under Tanveer Ahmed\*"* (paragraph 22);

(b) *"Taken in the round, the parties have not supplied adequate evidence of family membership..."* (paragraph 25)

(iii) The relevant guidance from **Tanveer Ahmed\* [2002] UKIAT 00439** is in these terms:

*"33. It is for the individual claimant to show that a document is reliable in the same way as any other piece of evidence which he puts forward and on which he seeks to rely.*

*34. It is sometimes argued before Adjudicators or the Tribunal that if the Home Office alleges that a document relied on by an individual claimant is a forgery and the Home Office fails to establish this on the balance of probabilities, or even to the higher criminal standard, then the individual claimant has established the validity and truth of the document and its contents. There is no legal justification for such an argument, which is manifestly incorrect, given that whether the document is a forgery is not the question at issue. In [sic.] only question is whether the document is one upon which reliance should properly be placed.*

*35. In almost all cases it would be an error to concentrate on whether a document is a forgery. In most cases where forgery is alleged it will be of no great importance whether this is or is not made out to the required higher civil standard. In all cases where there is a material document it should be assessed in the same way as any other piece of evidence. A document should not be viewed in isolation. The decision maker should look at the evidence as a whole or in the round (which is the same thing)."*

(iv) Given the foregoing, it is plain – and indeed not disputed – that the Judge fell into error in the following passage:

*“The Home Office has produced no legal expert or document verification report. This is an important gap in their case, because they have the burden of proof when asserting that there is an unreliable document, as they did by reference to Tanveer Ahmed\*. While the Appellants have the basic burden of proof in appeals, it passes to the other party when they make an assertion, because he who asserts must prove. There is a heavy burden of proof here upon the Secretary of State. No grounds for finding the marriage or prior divorce to be void or voidable have been submitted, let alone proven. The respondent has had ample opportunity to instruct an expert in the family law and customs of Pakistan. It is not enough to raise Tanveer Ahmed\* when making an assertion of this kind.”* (paragraph 36).

16. The Judge was wrong to state that the burden of proof shifted to the Respondent when the guidance in **Tanveer Ahmed** was invoked in the context of submissions on the unreliability of a document. The Judge in consequence erroneously relied upon the absence of a legal expert report or a document verification report as being determinatively adverse to the Respondent’s case.
17. This is a fundamental error that goes to the heart of the fact-finding process. It will only be in rare circumstances that such an error could be characterised as immaterial.
18. I also accept that there is substance to the criticism made in the grounds of challenge in respect of the Judge’s use of the term “*a heavy burden of proof*”, as possibly suggestive of a ‘heightened’ civil standard and being likely to obscure that the correct standard remains the ‘balance of probabilities’: e.g. see **Re B (Children) [2008] UKHL 35**. (I acknowledge that **Tanveer Ahmed** is itself vulnerable to this criticism in its use of the terms ‘higher civil standard’.) However, this is of secondary importance to the more fundamental error in placing the burden on the wrong party.
19. Further to the error in respect of burden of proof, it also seems to me manifest from the contents of paragraph 36, and other passages, that the Judge fell into error in not understanding – and therefore ultimately not addressing – the substance of the Respondent’s case in this regard.
20. The references at paragraph 36 to “*no legal expert*” and “*No grounds for finding the marriage or prior divorce to be void or voidable*”, would suggest that the Respondent’s case was based on an argument that the irregularities on the face of the documents meant that either or both the divorce and marriage are not valid in Pakistan law.

21. That was no part of the Respondent's case, which was, rather, that the documents did not appear to be reliable evidence of the truth of their contents - i.e. did not reliably establish either that the Appellant was divorced and therefore available to marry, or that the Appellant and the Sponsor became married.
22. As noted above, that the Respondent's approach to this issue was in reliance upon **Tanveer Ahmed**, and that the Presenting Officer understood that this required a global approach to the evidence, is manifest from the submissions, which included "*Taken in the round...*" (paragraph 25).
23. In contrast the Judge appears to have ultimately excluded other aspects of the evidence when evaluating the documents, and thereby failed to take a global approach to the issue of the reliability of either of the marriage certificates (i.e. the one produced with the application and the purportedly amended version produced on appeal) and the divorce certificate. In this context see:
  - (i) "*I allowed wider questioning simply because it might have assisted with context or credibility; but I find that it was at times irrelevant to the specific legal question of valid marriage, which this court is required to settle*" (paragraph 33); and
  - (ii) "*The legal issue is a technical one*" (paragraph 35).
24. It may also be noted that these passages presage the contents of paragraph 36, and reinforce the notion that the Judge considered that the issue was the extent to which any irregularities on the face of the documents invalidated the events they were supposedly evidencing. This was the 'technical', 'specific legal question' that the Judge identified, and considered not to be contingent upon credibility.
25. That this was the approach of the Judge is confirmed by the contents of paragraph 38, which contains the Judge's findings that were determinative in allowing the appeals. See in particular: "*The errors found in the official documents...*"; and "*... the drafting concerns...*".
26. In my judgement it is adequately plain that the Judge found that in the absence of a document verification report the Respondent had failed to prove that the documents were false; further, in the absence of an expert legal report the Respondent had failed to show that defects in the documents invalidated the ceremonies/procedures to which they purportedly related. Thus the Judge proceeded on the basis that the documents were duly issued by the appropriate authority, and that at worst any defects were a matter of simple drafting that did not invalidate - as "*void or voidable*" (paragraph 36) - either the First Appellant's divorce

or the marriage of the First Appellant and the Sponsor. Accordingly, the only issue the Judge had identified as 'live' - "*the specific legal question of valid marriage*" (paragraph 33) - was answered by the Judge in the Appellants' favour.

27. This process of reasoning was wholly to fail to engage with the substance of the Respondent's case. The Judge seemingly at no point gives consideration to whether the defects undermine the reliability of the documents *qua* authentic documents issued by the relevant authority, or, if issued by the appropriate authority whether the contents were reliable.
28. In such circumstances - a clear and fundamental misdirection as to burden and standard of proof, and a failure to address the substance of the case of one party - I do not accept that the error of law - acknowledged by the Appellants - is such that it could possibly be characterised as immaterial. The residual aspects of the Judge's reasoning are, in significant part, made on the premise that the First Appellant was indeed married to the Sponsor, whereas that was the very issue that required to be determined pursuant to a proper consideration of the documents (along with other aspects of the evidence).
29. For example, the Judge's observation that "*errors found in the **official documents***" (my emphasis) were "*certainly not the responsibility of the parties to the marriage*" failed to acknowledge that the issue as to reliability raised by the Respondent necessarily encompassed possible concerns in respect of provenance, as well as content.
30. In seeking to persuade me that the decision of the First-tier Tribunal should stand in any event, Mr Ali sought to emphasise other favourable findings of the Judge. But it seems to me that the difficulty with this submission is that those findings were made in the context of a failure properly to address the issue raised in respect of the reliability of the documents. The absolving of the First Appellant and the Sponsor of any responsibility for errors in the documents illustrates the point.
31. Be that as it may, the error in respect of burden of proof is so fundamental, and the Judge's consequent treatment of the issue of whether a marriage been contracted between the First Appellant and the Sponsor being at the core of the rejection of the Respondent's case, the Decision cannot be allowed to stand.
32. In the circumstances it is common ground between the parties - and I agree - that the decisions in the appeals require to be remade before the First-tier Tribunal with all issues at large.
33. In this context it is appropriate to note that there was some discussion concerning the case of **QC (verification of documents; Mibanga duty)**

**China [2021] UKUT 33 (IAC)** which featured in Mr Ali's Rule 24 response. It was acknowledged by Mr Ali that no submissions in respect of **QC** were pursued before the First-tier Tribunal: in particular it had not been argued that there was an obligation on the Respondent to take steps to verify the authenticity of any of the documents. The remaking of the decisions in the appeals will be a matter for the First-tier Tribunal Judge before whom these linked appeals are listed. In the circumstances I make no specific observation in respect of this issue: in the first instance it is a matter for the Appellants to decide whether they wish to pursue any preliminary arguments in this regard; it will then be for the presiding Judge to determine any such issue if raised.

34. Finally, for completeness: the hearing was conducted as a hybrid hearing - I was present at the Field House hearing centre as was Mr Clarke, whilst Mr Ali and the Sponsor joined the hearing on separate remote video connections. In the event it was not possible to see Mr Ali (although he reported that he could see the hearing room); whilst there were momentary problems with Mr Ali's audio connection it was ultimately adequate and no issues were raised to suggest a fair hearing had not taken place.

### **Notice of Decisions**

35. The decisions of the First-tier Tribunal in respect of both Mrs Nisa and Mr Cheema contained material error of law and are set aside.
36. The decisions in both appeals are to be remade before the First-tier Tribunal, with all issues at large, by any Judge other than First-tier Tribunal Judge Freer.
37. No anonymity orders are sought or made.

**Ian Lewis**

Deputy Judge of the Upper Tribunal  
(Immigration and Asylum Chamber)

**3 September 2023**