



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003300

First-tier Tribunal No: EA/05715/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

23rd January 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

FATOU TOURAY
(NO ANONYMITY ORDER MADE)

Appellant

and

AN ENTRY CLEARANCE OFFICER
(POST REFERENCE 268922)

Respondent

Representation:

For the Appellant: Mr Toora, instructed by 1st Call Immigration Services.
For the Respondent: Mr Diwnycz, a Senior Home Office Presenting Officer.

Heard at Phoenix House (Bradford) on 19 January 2024

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Hillis ('the Judge'), promulgated on 17 November 2022, in which the Judge dismissed the appeal against the refusal of his application for a Family Permit under Appendix EU of the Immigration Rules and the EU Settlement Scheme (EUSS).
2. The appellant is a female citizen of Gambia born on 18 October 2000 who sought to join her partner in the UK, Mr Sisawo ('the Sponsor'), an EEA national exercising treaty rights.
3. The Judge sets out his findings of fact from [15] in which is recorded that the sole issue to be resolved is whether the appellant had shown, on the balance of probabilities, she was married and that marriage was registered under Gambian law as at the Specified date of 11.00pm 31 December 2020.
4. Between [17-22] the Judge writes:
 17. The document entitled Banjul, The Republic of Gambia Form A, Register of Marriages dated 23rd October 2021 numbered 0410185 states that their marriage ceremony took place on "11th-12-2020" which I infer is 11th December, 2020 (AB23).

18. The signed and sealed affidavit from ALH. MLN Bah Commissioner for Oaths/Affidavits dated 23rd June, 2021 states that the Appellant married her Sponsor on 11th December, 2020 at Latrinka Mosque in accordance with the Muhammedan Marriage and Divorce Ordinance Act 1978. This was clearly signed and dated on the same date as the registration of the marriage. It makes no reference to the marriage being in accordance with requirements of the above 1978 Act prior to 23rd June, 2021.
19. Despite the Sponsor's continued and very clear account that marriage certificates are not issued in Gambia and, in particular, on the day of the ceremony, the document at AB24 from the Subordinate Courts of the Gambia dated 17th January, 2022 states that it confirms the "Attach (sic) Marriage Certificate Form A numbered 040185" which was contracted on 11th December, 2002 and registered on 23rd June, 2021. It goes on to state that 'the Marriage Certificate with serial number 0410185 is a valid document properly issued, signed and sealed by this Court and is authentic in accordance with Muhammedan Marriage and Divorce Ordinance Act 1941.' It makes no reference to the 1978 Act, or as to whether the marriage is officially recognised under Gambian Law prior to the date of registration, namely 23rd June, 2021.
20. Section 5 of the 1941 Act above states "All Muslim marriages and all divorces from those marriages celebrated or given according to the rites and observances of the Muslim religion customary and usual among the community or sect in which the marriage or divorce takes place, shall be registered within such time by such person as may be prescribed, if such marriage or divorce takes place outside the City of Banjul or any other part of The Gambia to which this Act applies , and one of the parties thereto is at the time of such marriage or divorce domicile in the city of Banjul or any other part of The Gambia to which it applies." I note here that I have been unable to trace the 1978 Act above.
21. I, therefore, conclude that the Appellant has failed to show, on the balance of probabilities, that her marriage met the requirements of Gambian law prior to its registration on 23rd June, 2021.
22. I further conclude that the Appellant has failed to show that her marriage to her Sponsor was recognised at Gambian law and, as a result, UK law as at 31st December, 2020.
5. The appellant sought permission to appeal asserting the Judge erred in exploring the lawfulness of the Gambia marriage for himself in the absence of expert evidence.
6. Permission to appeal was refused by another judge of the First-tier Tribunal who found that the one of the grounds was speculative and that the Judge could not be criticised for making findings on the documents before him and that fresh evidence will be more properly directed to a fresh application.
7. The application was renewed the Upper Tribunal and granted by Upper Tribunal Judge Norton Taylor on 11 December 2023, the operative part of the grant been in the following terms:
 1. I, like Judge Seelhoff when refusing permission, have certain concerns about the grounds of appeal. It is not entirely clear what was raised at the hearing, and what was only discovered later. In addition, describing the judge below as going on a "frolic of his own" is unnecessary and bordering on the discourteous.
 2. However, unlike Judge Seelhoff, I do grant permission. It appears as though the appellant was not legally represented at the hearing and the respondent's refusal was narrowly drawn. It is just about arguable that the judge might have relied on matters which had not been raised previously or canvassed at the hearing.

3. The applicant needs to be aware that any new evidence will not be relevant to the error of law issue unless it is being said that the judge made an error of fact, in which case the strict legal test must be met. In addition, if there was a mistake by the Commissioner of Oaths, as claimed, this might have a bearing on the materiality of any error committed by the judge.

Discussion and analysis

8. A lot of the information that has been provided by the appellant was not available to or in existence at the date of the hearing before the Judge and is, therefore, not relevant to ascertaining whether the Judge erred in law.
9. The reference in the evidence to an Act of 1978 appears to be a mistake of fact for which the appellant is not responsible.
10. Had this been the only issue it may be that the mistake of fact was not material, but there is another serious issue that arises in this case, referred to in the grant of permission to appeal.
11. The application for leave was refused as the Entry Clearance Officer was not satisfied the signatures appearing on certain documents referred to in the refusal were the same.
12. Whilst the Judge was not helped by the lack of clarity arising from the refusal, there is merit in the assertion the Judge relied upon matters that had not been raised, and his own research in relation to the same, without advising the appellant or any representative of his concerns at the hearing, and providing an opportunity for them to respond. I find that is procedurally unfair.
13. In light of those findings being the core of the Judge's decision to dismiss the appeal, and in light of there not having not been a fair hearing, I find the Judge has materially erred in law and set the decision of the Judge aside.
14. Mr Toora submitted that in light of the new evidence, which he sought to admit pursuant to rule 15(2A) of the Upper Tribunal Procedure rules, the Tribunal should proceed to substitute a decision today.
15. I refused this request as the evidence that has been provided from The Gambia has not been seen by the ECO. It was not known whether this individual was an expert or whether anything was known about him. The ECO had also not been given the opportunity to have sight of the opinion of the author of the letter in relation to the validity of the marriage.
16. I announced it was appropriate in the circumstances, and in light of the extensive fact-finding needed, lack of a fair hearing, the guidance provided by the Tribunal in Begum, and the relevant Practice Direction, for the appeal to be remitted to the First-tier Tribunal sitting at Bradford to be heard *de novo* by a judge other than Judge Hillis.

Notice of Decision

20. The First-tier Tribunal Judge materially erred in law. That decision is set aside. The appeal shall be remitted to the First-tier Tribunal sitting at Bradford to be heard *de novo* by a judge other than Judge Hillis.
21. If, having considered the evidence the Secretary of State's representative is satisfied that the requirements of the application are met, such that the appeal should be allowed, the First-tier Tribunal must be advised forthwith.

C J Hanson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 January 2024