



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

Appeal Number: EA/05962/2018

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

**Oral decision given following hearing
On 3 July 2019**

**Promulgated
On 1 August 2019**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

**MR ARJAN KOLA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Ali, Counsel, instructed by M & K Solicitors

For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Albania who was born in November 1993. He appealed against the decision of the respondent refusing to grant him a residence card as the husband of an EEA national exercising treaty rights in the UK. It is common ground that he entered into a ceremony of marriage with a Ms [AB] on 13 March 2018 in the UK. Ms [B] is or was a national of Albania also, but having studied in Bulgaria she acquired Bulgarian nationality in May 2016.

2. The application was refused because the respondent believed that the marriage was a marriage of convenience, or in other words a “sham” marriage and it was against this decision that the appellant appealed.
3. The appellant’s appeal was heard before First-tier Tribunal Judge French sitting at Birmingham on 2 April 2019 but in a Decision and Reasons promulgated on 10 April 2019 Judge French dismissed the appeal. The appellant now appeals against this decision, leave having been granted by First-tier Tribunal Judge E M Simpson on 31 May 2019.
4. In his decision, Judge French set out a number of reasons why he concluded that the marriage was indeed a sham marriage as claimed. They are set out within his decision. It is sufficient if I record that these reasons would certainly seem to be at least arguable and that but for what appears below could justify the decision. However, it is also necessary for the purposes of this decision to record that at the hearing evidence was adduced from six witnesses all of whom were cross-examined at the hearing. The witness statements are within the file and I will summarise the evidence given within the witness statements of the four witnesses other than the appellant and Ms [B].
5. Ms [DF], who is a Bulgarian national, claimed to be “best friends with the sponsor” having met her in Bulgaria in September 2014 when they were studying together. She claimed that they had spent almost all their free time together and that between them they had talked about everything. It is said in the statement that the sponsor had talked to her about the appellant, how they had met and how she felt about him, and that this couple had been talking together “every single day”.
6. At paragraph 7 of her statement, Ms [F] claims that the sponsor had told her that she had been thinking of moving to the UK in order to be with the appellant and work in the UK in 2016. She then records how the relationship between the couple developed, how the couple became engaged in February 2017, moving in together in May 2017 and subsequently marrying on 13 March 2018. She also states that following the marriage the sponsor and the appellant “continue to live together as husband and wife” and sets out the address that they are living at. She also claimed that she lived with them for two weeks after initially coming to the UK and during that period she saw them in “a loving and caring relationship together”. She adds that “they are one of the cutest couples that I know” and that “their love for each other is really big”.
7. She adds (at paragraph 15 of her statement) that “Those two weeks living with them I saw the way they looked at each other, talked to each other and their love and respect for one another”, then at paragraph 16 she adds that she can “confirm that the marriage of [the appellant and the sponsor] is genuine and subsisting” and that “I can honestly say that they dearly love and care for each other”.

8. She says that the couple now come to her flat all the time and they all go out together and socialise together.
9. Mrs [VM] in her statement says that she is the sponsor's sister and that she also has known about the relationship between her sister and the appellant since July 2014. She relates how she came to England in 2016 and that when she had originally come she could not rent a property because she had not got a job in the UK so she (that is the sponsor) lived with her and her family at an address in Northampton. She then says that the couple had a very close relationship and also says how they were engaged in February 2017, moved in together in May 2017 and then got married some several months later in March 2018. She took some wedding photos at the time. She also says (in identical wording) that the marriage is genuine and subsisting and that she can "honestly say that they dearly love and care for each other".
10. [MM], in his statement says that he is the brother-in-law of the sponsor (he is the previous witness's husband) and his statement is similar to that of his wife. He also sets out the same dates when it is claimed that the couple got engaged, started living together and got married.
11. Finally, Mrs [HK] is the appellant's aunt, and she in her statement says how she had first met the couple together in February 2017 after they had got engaged. She also gives the dates when they moved in together and subsequently got married. Again in more or less identical wording she says that she can "confirm" that the marriage is "genuine and subsisting" and that "I can honestly say that they dearly love and care for each other".
12. It would in the judgment of this Tribunal have been open to Judge French had he considered this to be the position to have set out his reasons why despite this evidence he did not consider that the witnesses were telling the truth. He could have referred to the answers which were given in cross-examination for example and might have stated that on balance he was not persuaded by the evidence that it was a genuine marriage. However, it is difficult to see how he could have done so without making adverse credibility findings in respect of these witnesses as well as in respect of the appellant and the sponsor. He did not do so. He dealt with the evidence of the witnesses very briefly indeed in five lines at the end of paragraph 5 of his Decision as follows:

"It was my opinion that the evidence of the supporting witnesses was circumstantial. None of them could ever know what was the genuine nature of the relationship was (sic) between the appellant and Miss [B]. All that any of them could say that was that (sic) they had observed the parties to be together and appeared to be affectionate with each other".
13. As is apparent from my summary of the evidence contained within the witness statements above, that is not all that any of them said. The evidence (which may or may not have been accepted) was that one of the

witnesses had discussed the relationship with the sponsor right from the beginning, that the couple had been together as partners in a close relationship for some several years before they married, and that they had been engaged and then subsequently moved in together some ten months or so before the marriage, all of which would if true make it very difficult for a decision maker to find that the relationship was not a genuine one. While it might have been open to the judge, provided he gave sufficient reasons for so finding, to have made adverse credibility findings with regard to these witnesses, he did not do so.

14. Although in argument Ms Cunha accepted that the description of the evidence of the supporting witnesses as “circumstantial” was problematic, and could not in itself be justified, she submitted that this error was not material because there were very strong reasons justifying the finding that the marriage was a sham marriage. I cannot accept this submission. It is incumbent on a judge to deal properly with the evidence and if and to the extent that evidence is not accepted to give reasons why not (which may have been possible in this case but was not done) and in any event to set out accurately the effect of this evidence.
15. It cannot be said that this error was not a material one, because it would have been open to the judge to make a finding that albeit there are or would otherwise be question marks as to why this couple got married when they did, if the relationship was as close as these witnesses say for the reasons they have given, it was nonetheless a genuine marriage from its inception. It follows that the decision will have to be remade.
16. Accordingly, there will have to be a rehearing and as the rehearing will have to be de novo, and findings of fact will have to be made with regard to the evidence of a number of witnesses, it is appropriate to remit this hearing back to the First-tier Tribunal for a new decision to be made.
17. It appears that at the original hearing although the respondent sought to rely on discrepancies in the interviews given by the appellant and the sponsor, the interview notes were not available. **Accordingly, I direct that the respondent must produce these interview notes for the rehearing.**
18. I accordingly make the following decision:

Decision

I set aside the decision of First-tier Tribunal Judge French as containing a material error of law and direct that this appeal be remitted for rehearing de novo in the First-tier Tribunal in Birmingham before any judge other than First-tier Tribunal Judge French.

Signed:

A handwritten signature in black ink on a light blue background. The signature reads "Ken Craig" in a cursive, slightly slanted script. The "K" is large and the "C" in "Craig" is particularly prominent.

Upper Tribunal Judge Craig

Date: 25 July 2019