



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/07528/2017

THE IMMIGRATION ACTS

Heard at Field House
Oral determination given following hearing
On 21 January 2019

Decision & Reasons Promulgated
On 08 March 2019

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MUHAMMAD JALAL KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Dr C Taroni, Counsel, instructed by Richmond Chambers
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant who was born on 10 April 1984 is a national of Pakistan. He arrived in this country with a student visa and was last issued with leave to remain as a student on 14 February 2013, which leave was valid until 20 March 2015. However, this leave was curtailed on 1 July 2014 until 26 August 2014 because the college he was studying at lost its licence.
2. It is the appellant's case that by this time he had begun a relationship with one Denise Duffy, an Irish national who (which is accepted on behalf of the respondent) was exercising treaty rights in the UK and they married on 6 August 2014, that is

after the date on which notice had been given that leave was to be curtailed but before the leave was actually curtailed.

3. As is normal in these circumstances in order to consider whether or not this was a genuine marriage, the appellant and his wife were invited to attend for interview, following which a decision was made to refuse the application. The basis of refusal was that the respondent considered largely as a result of what were said to be inconsistent answers given in interview that the marriage was a sham marriage, that is that the parties did not have a genuine relationship with each other and did not in fact intend to live permanently with each other. Reference will be made to these discrepancies below.
4. The appellant appealed against this decision and his appeal was heard before First-tier Tribunal Judge Moxon sitting at Hatton Cross on 30 March 2016 but in a decision and reasons promulgated on 12 April 2016 Judge Moxon dismissed the appellant's appeal. The appellant's applications both to the first and Upper-tier Tribunals for permission to appeal to the Upper-tier Tribunal were refused respectively on 20 September 2016 and 17 November 2016 and shortly thereafter the appellant was appeal rights exhausted.
5. Some four or five months only after being appeal rights exhausted on 28 April 2017 the appellant applied again for a residence card as confirmation of a right to reside in the United Kingdom. The basis of the application was that contrary to what had been found by Judge Moxon (to which reference will be made below) he was indeed in a genuine relationship with Ms Duffy and that it was indeed a genuine marriage and had been from its inception. An alternative argument is made that even if the marriage were found to be not a genuine one at its inception, nonetheless the relationship became a genuine one and even if for technical reasons that would not entitle him to a residence card as a family member (because in these circumstances the marriage would still be treated as a sham marriage having been not genuine at its inception), nonetheless he would be entitled to a residence permit as an extended family member because by this time he was in a durable relationship with Ms Duffy.
6. This application was refused by the respondent in a decision made on 23 August 2017 and the appellant's appeal against this decision was dismissed by First-tier Tribunal Judge McGrade in a decision and reasons promulgated on 16 July 2018 following a hearing at Taylor House on 21 June 2018. The appellant now appeals against this decision pursuant to leave granted by Deputy Upper Tribunal Judge Chapman on 22 November 2018, leave having previously been refused by the First-tier Tribunal.
7. It is instructive to refer to the reasons given in the refusal letter in which detailed reference is made to the reasons why the original application had been refused. I cite below extracts from the refusal letter in which reference is made to the earlier decision in which the respondent had considered that the relationship was not a genuine one but that the marriage was one of convenience:

"On 8 December 2014 Immigration Officers visited the address you claim to share with your sponsor, because nobody was home. An officer called you on

your mobile and you informed him that you were in Birmingham with your sponsor and would be back in two-three weeks. The officer asked if he could talk with Denise Duffy and was told that she was inside and unable to talk.

A second visit was carried out on 5/1/14, again there was no answer. The officer spoke to a neighbour who said they had never seen any females coming or going from your address. It was confirmed that you were the only person living at the address. However, you had not been seen there since 24/12/14. Several attempts were made to call your mobile but each time the line was unanswered.

In accordance with Regulation 20B this office is empowered to utilise methods from which to verify your right of residence in the United Kingdom under the Immigration (EEA) Regulations 2006 (as amended, 2014). Regulation 20B states ...

[Reference is made there to the right of the respondent to invite an appellant to attend an interview and provide various other evidence] ...'.

Upon assessing your application and the evidence provided this office sought to invite both yourself and your EEA national sponsor to a marriage interview in order to verify the authenticity of the claimed relationship.

[Reference is then made to the attendance of both the appellant and his 'wife' to these interviews] ...

Upon assessing the interview transcripts it is highlighted that there is a litany of discrepancies between the answers which you and your sponsor have given to questions ranging between the subject of the marriage proposal, the wedding, family and other areas. It would appear appropriate to note that due to the extent and number of the discrepancies, this refusal letter will not specifically address every discrepancy, rather highlight the significant number of key discrepancies which have been deemed to fatally contradict your claim to be in a genuine and subsisting relationship with Denise Duffy.

You claim to have met your sponsor on Brighton Pier in October 2013, to have moved in with her just a month later. You married on 6 August 2014.

You both told the interviewer that when you met your sponsor was letting a room from a family at [Road]. You joined her in November 2013. You claimed to share the house with Umar, Miriam and their son Mustafa and a daughter whose name you couldn't recall. Denise Duffy who claims to have lived at the property longer than yourself, did not know the name of any of the other occupants. She claims the property was shared with a mum, dad and their two teenage sons.

You said that you lived in the front bedroom upstairs and shared that floor with the teenage girl and boy. The parents lived in the room on the right at the front of the house.

Your sponsor said your room was on the ground floor at the back looking over the back garden. She stated that she didn't know the arrangements upstairs as she had never been upstairs. The interviewing officer drew a picture of the house to avoid any confusion about the layout.

This is a clear example of an attempt to use deception. You both told the officer that you shared a property with a family at [Road] however when asked for basic details about the family and your living arrangements the story fell apart.

When asked basic questions about each other's families you answered incorrectly. You told the interviewer that you grew up with two brothers, one sister and your mother. Your wife stated that you only had one brother and didn't have any sisters.

You told the interviewer that both your wife's parents had passed away. That she had three brothers who lived together. You were only able to recall the names of two of them, Mike and Joye. Denise Duffy said her mother was alive and lived with two of her brothers, the third lives separately. She confirmed their names as Michael, Declan and Joey. It is reasonable to expect a genuine couple to have been able to answer this question.

When asked further questions about meeting each other's families again your answers did not correspond. You have a cousin in the UK named Amin you say that you introduced him to your wife when you bumped into him at a shopping centre in November 2013. Your wife claimed that she met Amin when you visited his house together in January/February 2014. When asked you said your wife had never been to Amin's place.

You say you introduced your sponsor to your brother, Behram, when he came to visit you in Brighton. Behram's wife is called Raheer and their son is A. You told the interviewer that you had visited them at their home in London with your wife twice.

Your sponsor said she had only met Behram once. This was when you visited him in London. She couldn't name his wife or child.

Consideration has been given to your individual responses. This is not a case of two people recording an event differently. Your answers do not correspond and in parts actually contradict each other.

The interviewer next asked question about memorial celebrations you have shared. You were each asked about your celebrations over the Christmas period. You told the interviewer that you had a 12 inch tree in your bedroom which you decorated with light. You had put the tree up for the two Christmases you had been together. Your sponsor said you did not own a tree.

You told the interviewer that your sponsor had travelled to Ireland from Christmas 2014. She left on the 24th and returned on either 26/27 of December.

You added that this was the only time your sponsor had left the UK since you had been a couple.

Your sponsor said that she went to Ireland from 23 to 26 December 2014. She added that she had also been for a weekend in September 2014 when it was her nephew's birthday and that she went for a few days the Christmas of 2013.

When asked if you exchanged gift for Christmas 2014 you told the officer that you did so before your wife went to Ireland. You claim to have brought your wife a green shirt and that she gave you a black jacket.

Your sponsor said that the exchange happened on her return and you gave her a watch and she gave you a black jacket.

When asked about the proposal your answers differed significantly. You say you proposed on 1 June 2014 you had been to the beach and on your way back you sat in the Royal Pavilion gardens on a bench, you proposed on bended knee. The ring was a plain gold band with no stones or detail the ring was not in any box. Afterwards you say you went to Burger King then home.

Your sponsor said you had been walking around, went for a drink and window shopping. It was a hot day so you went to the gardens and were lying on the grass when you asked her. She says you presented her with a gold ring which had a red stone surrounded with white diamond like stones, like a flower. It was in a white box with red velvet and a clear lid. She said you did not go down on one knee. She recalls that you went straight home, didn't stop for anything to eat and she drank lots of whisky at home.

You both said that the witnesses at your wedding were Amin, your cousin and Umar, the father of the family you shared that house with.

You claim that your brother, his wife and son also attended with the Miriam and Mustafa from [Road]. Your wife says Miriam and Mustafa were the only other guests.

You say your sponsor did not work on her last birthday. You gave her a watch and a card when she woke up about 10 a.m. You had tea, coffee and pancakes.

Your sponsor claims that she did work on her birthday when she came home you gave her a black and gold necklace. She thought you had gone to the pub for drinks later.

You both claim to have exchanged gifts on New Year's Eve. She got another gold and black necklace and you a pair of jeans. You say you stayed home and were both asleep for midnight. You say you went to Brighton Marina for a curry and drinks. Afterwards you went home and were in bed aware (sic) at midnight.

It is reasonable to expect a genuine couple to be able to recall the events of recently occurring major celebrations in their lives.

You have told us that your sponsor is exercising her treaty rights as a self-employed cleaner working in private houses. Your sponsor says she takes taxis to work. You claim that she either walks or gets on the bus with her equipment which includes cleaning products, a small vacuum cleaner and a mop and bucket.

You claim that your sponsor works Monday to Friday and last worked on Thursday. Your sponsor says she works Monday to Saturday and last worked on Friday.

You told the interviewer that your sponsor didn't keep receipt for the business. You say she visits her accountant ... once a month and that she last saw them two weeks ago.

Your wife said that she keeps all her receipts for her accountant, Accountax whom she sometimes speaks with on the phone.

Denise Duffy is an educated woman who has studied economics and business at university. She informed the interviewer that she also works for Universal Study and that last Monday she was tutoring students at her office in Brighton.

You claimed that last Monday your sponsor was studying online for a job as a support worker that she is due to start in April.

Lastly you were asked about driving. You told the interviewer that you passed your driving test on 13 August 2013. Denise Duffy said she didn't think you could drive or had any licence. You say that your sponsor can't drive and doesn't even have a provisional licence. She claims that she is able to drive and does have a provisional licence.

In summary, it is abundantly clear from the details outlined above that you have fatally and irreparably damaged the credibility of your claim to be in a genuine relationship with Denise Duffy".

8. The appellant had appealed against this decision but this appeal as already noted above had been dismissed by Judge Moxon and permission to appeal was refused both by the First and Upper-tier Tribunals.
9. In addition to repeating the claim which had been refused earlier (the appeal against which decision had been dismissed) the appellant provided some further evidence in particular a joint tenancy agreement which predated the decision of Judge Moxon dated 9 June 2014 and also some bank statements in his own name which showed that he lived at []. He also submitted separate bank statements in Ms Duffy's name for the same address as the Virgin Media bill.
10. In the decision letter the respondent set out the basis upon which this subsequent application was refused, noting as follows:

"It is this department's belief that if you were attempting to show that you were in a genuine relationship after being deemed to be in one of convenience then

you would ensure you provided copious [evidence] of joint cohabitation covering 2014 to date”.

11. The respondent did not consider that the subsequent evidence submitted was sufficient to alter the view originally taken which was that the appellant and Ms Duffy were not in a genuine relationship. It has not been disputed that they reside in the same address.
12. The appeal against this decision was dismissed by Judge McGrade and as already noted it is this decision which is now the subject of this appeal.
13. The basis of the appeal can be summarised succinctly. The first ground is that the judge misstated the burden of proof when at paragraph 2 he stated that “the burden of proof is on the appellant and the standard of proof required is the balance of probabilities”. It is of course well understood that although the burden of proof in a case is generally on the appellant, where parties have as a matter of fact undergone a ceremony of marriage and the respondent seeks to assert that that is a marriage of convenience, the burden is on the respondent to establish on the balance of probabilities that that is so. However, it was accepted by both parties (as referred to at paragraph 6 of Judge McGrade’s decision) that in accordance with usual *Devaseelan* principles “the starting point for my determination should be the earlier determination”. That decision is then set out and as Judge McGrade notes at paragraph 7 and is apparent from the large extracts from the refusal letter set out above

“The determination records a number of unexplained consistencies, which First-tier Tribunal Judge Moxon found to be material [which] include the fact that the appellant suggested he grew up with two brothers and one sister, while his sponsor stated he had one brother and no sisters [and that] the sponsor stated her mother lives in Ireland and the appellant has met her [whereas] the appellant indicated the sponsor’s mother was dead”.

14. The judge also notes that

“The parties gave conflicting accounts of what happened after their first date, the location of the room they occupied at [Road], which members of the appellant’s family the sponsor had met, the Christmas and birthday presents they had exchanged, details of the sponsor’s employment, where they had gone on New Year’s Eve and whether the appellant had passed his driving test”.

15. In light of what on any view were substantial discrepancies which were contained within the separate interviews given by the appellant and his wife, when they were asked the same questions, as a matter of evidence it is clear that certainly at the time of the earlier decision of Judge Moxon which was as recently as 2016 which was only a few months before this fresh application, it was held that the respondent had satisfied the burden which was upon the respondent to establish that the marriage was not a genuine one but was indeed a sham marriage as the respondent was required to establish. As already noted, the appellant is now appeal rights exhausted for challenging this decision.

16. Judge McGrade in his decision refers to various evidence which was put before him, including the one witness statement from Mr Umar, who as already noted above was said to be the neighbour with whom they had originally lived. The judge refers to Mr Umar's statement and correctly states at paragraph 10 that it is "relatively short". He accepts that Mr Umar was present at the wedding but goes on to say as follows:

"However, the statement of Muhammad Umar provides virtually no detail on the parties' current relationship and states 'I used to meet with them quite often', suggesting that his contact with [them] now is more limited".

17. Appearing on behalf of the appellant, Dr Taroni submits that this suggests that the judge was considering whether or not the marriage was now a genuine one, whereas for the purpose of considering whether it was a sham marriage, he ought to have had in his mind whether or not the marriage was genuine at its inception. This is a factor to which this Tribunal will need to have further regard when considering the alternative submission which is also made.
18. Dr Taroni also suggests that the judge made a factual error when recording at paragraph 13 that the appellant had when asked why no one had attended the appeal indicated "that they had not asked anyone". No contrary indication was given in any of the witness statements, but Dr Taroni (who represented the appellant before Judge McGrade as well as before this Tribunal), said that it was her instructions that the appellant had told the Tribunal that his brothers could not give evidence for him because at the time they had been in Pakistan because there was a religious festival. I note first of all that Judge McGrade's misgivings about the lack of any evidence was not restricted to the failure to call any witness, because at paragraph 13 he stated his concern as follows:

"Given both parties [that is the appellant and his wife] claim that their friends attended the wedding, I find very surprising that they should not ask those same friends to attend the hearing in order to speak to the genuineness of the relationship. I also find it very surprising that the parties have been unable to identify anyone that either of them has met in the four years since they were married, who could provide a letter of support or attend as a witness to speak to the genuineness of their relationship".

19. In other words, it is not just the failure to call any witness which concerned the judge but also the failure to provide even a letter of support from anyone other than Mr Umar.
20. There is one added difficulty in this assertion which is that it is not supported by any statement from Dr Taroni herself, which one would usually expect. If indeed the appellant's evidence had been as is now asserted, at the very least one would expect Dr Taroni to have provided a witness statement to this effect, which might well of course have resulted in the need for separate representation to be obtained for this appeal, but it would at the very least have afforded the judge an opportunity to respond to this assertion, because he would have been asked for his comments.

21. Because I did not wish the Tribunal to take any technical point without at least giving Dr Taroni an opportunity of informing the court if in fact she did have a note to this effect, I inquired during the course of the hearing whether she did have a note which could confirm the assertion now made and having searched through her file, she informed this Tribunal that she had no record of such statement being made by the appellant during his oral evidence as is now asserted. In the circumstances there cannot be said to be any arguable error of law in the judge making the finding which he did, which is founded upon his record of the evidence which was given.
22. The second ground of appeal was that the judge had failed to take into account the new evidence which had been given and the passage of time which had elapsed. In argument the first and second grounds were effectively combined because essentially the case as advanced before this Tribunal was that the judge should have appreciated that it was for the respondent to satisfy the Tribunal that the marriage was a sham marriage based on all the evidence.
23. As noted above, the time that had elapsed between the rejection of the first application and the second application was only a few months and it was only a year or two after the first appeal had been dismissed that Judge McGrade had to consider the new application. There is effectively no new evidence going beyond that when the original decision was made other than evidence that the parties share the same address. Although a minor point is taken that Judge McGrade has referred to there being only four photographs, whereas there were also photographs of the wedding, it is clear from the decision itself at paragraph 11 that he has had in mind the wedding photographs that were produced and these only show the appellant, his wife, Mr Umar and Mr Umar's wife and sons. These photographs are not the four photographs to which the judge is referring when referring to "four photographs" because these are just of the appellant and Ms Duffy. The thirteen wedding photographs mainly show the appellant and Ms Duffy and the only other people are Mr Umar, his wife and child, so the only "new" evidence is Mr Umar's statement which is extremely sparse and which the judge considered in detail and that the appellant and Ms Duffy have continued to reside in the same house.
24. The third ground is that the judge ought to have considered separately whether or not even if the finding originally made that at its inception the marriage was a sham marriage was not set aside, the relationship had subsequently become a durable relationship in the sense that there was now a genuine relationship amounting to true cohabitation, such that the appellant was entitled to a residence card as the extended family member of Ms Duffy. It is right to say that this argument is set out, albeit very briefly, in the appellant's skeleton argument which had been prepared for the hearing before Judge McGrade, as follows:

"III. A's rights under Regulation 8 as a durable partner

58. In the alternative, even were the appellant and his sponsor's marriage found to be one of convenience *at the time* of entering the marriage, the Tribunal is invited to consider that they are and have

been in a durable relationship as partners for many years. Ample evidence has been provided of the durability of their relationship.

59. The first Adjudicator had before him documentary evidence from before the appellant's marriage to his sponsor, showing their address and photographs. The first Adjudicator as a starting point, did not question their cohabitation.

60. Therefore, the appellant should be treated at the least [as] the extended family member of his sponsor, as per **Regulation 8**".

25. There are a number of aspects of this part of the submissions which should be noted. In the first place although it is argued that the parties, that is the appellant and Ms Duffy have been in a durable relationship as partners "for many years", this was not accepted by Judge Moxon some three years or so after that was said to be the case. Also when it is said that "ample evidence has been provided of the durability of their relationship", that is precisely what was thrown into doubt by the enormous discrepancies within the interviews which they gave.
26. Further, it is not correct when it is said that "the first Adjudicator as a starting point did not question their cohabitation". "Cohabitation" for these purposes means significantly more than that the appellant and Ms Duffy shared the same address. Although it was accepted that they shared the same address, it was certainly not accepted that they "cohabited" - that is that they were in a genuine relationship akin to marriage.
27. I refer now again to Dr Taroni's submission that the judge erred when considering Mr Umar's evidence by failing to concentrate on whether the marriage had been genuine at its inception. It was said that he erred in considering instead that evidence in the context of whether it supported an argument that the relationship now was a genuine one. That is of course precisely would have to be established in order for the appellant to persuade the Tribunal that he is in a durable relationship with Ms Duffy such that he is entitled to be regarded as her extended family member.
28. Although the judge does not in terms use the words "durable relationship", in the course of argument I invited Dr Taroni to make submissions as to whether or not there was any respect in which the evidence necessary to establish that a marriage was genuine was different from that which would be required to show that the parties were in a durable relationship. Dr Taroni was unable to suggest there was any material difference between what would have to be established in either case, accepting that the ingredients were the same. Her argument amounted to no more than semantics. The judge did consider whether the marriage was now a genuine one (which is not the test for considering whether the marriage is technically a sham marriage because that relates to the date of inception) and so even if it might have been better had the judge specifically stated in terms that he did not find that the parties were in a durable relationship, such error as that might have been was not a material one, because the matters that he considered were the matters relevant to consideration of that argument. The judge dealt as fully as he needed with the

evidence with regard to whether there was now a genuine relationship. He referred to the evidence which had been given and explained why it was that that was insufficient to persuade him that the appellant's and Ms Duffy's relationship was a genuine (that is to say a durable) one. There was not even a letter of support from anyone other than Mr Umar and no live evidence. The photographs are no more detailed than were or could have been before Judge Moxon.

29. There was one other feature as well which is that when asked why the appellant had produced no records of text messaging or social media contact with his wife, he indicated not only that he did not use Facebook or WhatsApp, but also that he never used texts. This as the judge notes contradicted what he had stated in his own statement where he had said that he had first met his wife on Brighton Pier and having obtained her telephone number sent her a text which the judge notes was presumably asking her to meet with him. Although Dr Taroni says that one can legitimately distinguish between somebody who does not now text and somebody who never texted, the judge was entitled to find that this was a material inconsistency which suggested that the appellant was not giving a truthful account.
30. The evidence that the marriage was a sham marriage at its inception was on the facts of this case very strong indeed, and it would have been extremely surprising if Judge Moxon when he considered the appeal initially had reached any other conclusion but that this was indeed a sham marriage. The evidence now produced on behalf of the appellant does not go very much further. Although the appellant and Ms Duffy continued to share a house, the judge was entitled to find that it remained very much more likely than not that this was still not a genuine relationship of cohabitation and did not amount to more than that the parties shared an address.
31. As he says at paragraph 17 of his decision

“Other than the documentary evidence suggesting the parties live together at the same address, I have virtually no evidence that shows the sort of relationship one would expect of a married couple. In particular, I have no evidence the parties are communicating with one another, in the way one would expect of a married couple, that they undertake activities together, other than a reference to them going to the cinema, or most importantly, that they have established relationships with others as a married couple or are viewed by others, whether they be work colleagues of the sponsor, neighbours, friends or acquaintances, as being a married couple”.
32. The judge goes on to remark that “the only witness called was one of a very small number of people who attended the wedding and who gave virtually no detail on the parties' life together now [and that] the letter of support also provided very little detail”.
33. In light of the judge's findings he was bound to find as he did at paragraph 18 that “given the terms of the previous determination and the deficiencies in the evidence before me on behalf of the appellant and the sponsor, I am not satisfied the parties are in a genuine relationship, whether as spouses or otherwise”.

34. So far as it is asserted that the judge should have regarded the burden of proof as remaining on the respondent, in light of the evidence which had already been provided that the marriage was a sham marriage, even if the earlier decision could now be reopened, the starting point would as the parties accepted have had to be that earlier decision. Further as regards whether or not the parties are in a durable relationship, it is initially for the appellant to satisfy the Tribunal that this is so, which the appellant failed to come anywhere near doing. Further and in any event, when considering who bears the burden of proof, as the Court of Appeal noted in the decision in *Rosa* [2016] EWCA Civ 14, the question of which party bears that burden will only be relevant where the decision is a marginal one. In this case, as the Court of Appeal held was the case in *Rosa*, it is clear from Judge McGrade's decision that he did not regard this as a marginal case at all, but considered that if it was very much more likely than not given the deficiencies in the evidence and the basis of the previous decision of Judge Moxon that the parties were not in a genuine relationship, as the judge notes "whether as spouses or otherwise".
35. In these circumstances the judge's decision dismissing the appeal was inevitable and the appellant's challenge to that decision must fail.

Notice of Decision

The appellant's appeal against Judge McGrade's decision, dismissing his appeal against the respondent's decision refusing to grant him a residence card, is dismissed.

No anonymity direction is made.

Signed:

A handwritten signature in black ink that reads "Ken Craig". The signature is written in a cursive style with a long, vertical tail on the letter 'g'.

Upper Tribunal Judge Craig

Dated: 25 February 2019