



Upper Tribunal  
(Immigration and Asylum Chamber)

EA/13516/2016

THE IMMIGRATION ACTS

Heard at Glasgow  
On 6 December 2018

Determination & Reasons issued  
On 18 December 2018

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

PETER MARK

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr L Kennedy, Advocate, instructed by SLA, Solicitors, London  
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This determination is to be read with:
  - (i) The respondent's decision dated 4 November 2016, declining to issue a residence card under the Immigration (EEA) Regulations 2006.
  - (ii) The appellant's grounds of appeal to the First-tier Tribunal.
  - (iii) The decision of FtT Judge Blair, promulgated on 13 March 2018.
  - (iv) The appellant's grounds of appeal to the UT, stated in the application for permission to appeal dated 28 March 2018.
  - (v) The grant of permission by FtT Judge Scott Baker, dated 22 June 2018.
  - (vi) Counsel's skeletal argument, or outline submissions, dated 6 December 2018.

2. The appellant's position was this:

The first issue for the FtT was not whether parties had been living together as husband and wife, because cohabitation is not a requirement for persons to be considered as spouses under community law - written argument at [4].

The relevant questions were only:

- (i) whether the appellant demonstrated residence in accordance with the regulations for a continuous 5-year period;
- (ii) whether the appellant's wife was exercising treaty rights when the divorce proceedings were initiated; and
- (iii) whether the appellant was employed, self-sufficient or self-employed following dissolution of the marriage.

There had been sufficient evidence for the appellant to succeed on all those points.

The case should be remitted to the FtT for fresh decision, based on the correct approach.

- 3. Mr Govan conceded that the FtT had taken an incorrect legal approach. However, he said that the judge properly considered all the evidence and plainly found that the marriage was never genuine, which was sufficient to preserve the decision, notwithstanding the error.
- 4. I reserved my decision.
- 5. A party is not often entitled to have a decision set aside, after presenting his case on exactly the basis later said to be an error – see the decision at [4], [8] and [9]. Appeals should generally be about error made on the case put to the FtT, not about afterthoughts. The appellant had qualified representation prior to and at the FtT hearing. (The error is not of Mr Kennedy or of those instructing him. The appellant subsequently changed representatives.)
- 6. However, I also note that the error is equally due to the respondent, and if the decision turned on applying the incorrect legal approach, I consider that it would fall to be set aside.
- 7. In support of the proposition that the appellant might have succeeded on the evidence, but for the distraction of asking the wrong question, Mr Kennedy said that prior cohabitation could reasonably be inferred from the terms of the Hungarian divorce decree, a “previous adjudication of an EEA/EU specialist family court” which was “suitably authoritative”. He suggested that the judge was wrong to regard this as consistent with parties having been married in form only.

8. I was not referred directly to the terms of the decree, which is translated at pages 20 – 21 of the appellant’s bundle. I do not see anything in it which takes it above the value ascribed by the FtT.
9. The decree is based on the assertions of the appellant’s former wife in unopposed divorce proceedings. The court did not adjudicate on any dispute between the parties on whether they had cohabited or on anything else. The appellant’s argument goes too far in saying that the decree establishes there had been cohabitation, and that the wife’s specification of a UK address implied that she had been exercising treaty rights in the UK. Nor do I see that the length of the marriage, 7 ½ years, “militates against it being a marriage of convenience”. There is no logical link there.
10. The next part of the argument I find far-fetched. It is said that had this been a marriage of convenience, the wife would have founded upon “this more compelling ground”. Whether entering into a marriage of convenience is a ground for dissolution in Hungarian law is unknown, and could be established only by evidence of that law. Even if it is a good ground, it is far from obvious that the wife would have found that a more attractive route than a simple unopposed divorce. It appears rather more likely that parties would be reluctant to admit that a marriage was for convenience only. To do so would negate the appellant gaining any right of residence from the marriage.
11. The FtT reasoned its findings as follows:
  - [13] Divorce certificate consistent with having been married, “in form at least”, and with appellant’s claim that his wife returned to Hungary, where the divorce took place.
  - [14] Two letters of support, but very brief and lacking detail, authors not available for cross-examination.
  - [15] “Of real concern”, unreconciled inconsistency whether appellant established contact with his wife directly or through a friend.
  - [16] Implausible, even after passage of time, that only a water bill could be produced from the Birmingham property where the appellant, his wife and two others were said to have resided.
  - [17] Water bill for the period shortly before the claimed split up, surprising if they lived there 2011 – 2013 that no more available, and no explanation for possession even of this limited item.
  - [18] Nothing to connect appellant with woman in photographs as his wife.
  - [19] Nothing to connect signatories of supporting letters with persons in photographs.

[20] No copy lease for property in Birmingham; no evidence from landlord.

[21] Not satisfied appellant and sponsor lived together in this country for at least one year.

[22] - [23] Nothing from appellant to demonstrate how he and his wife came to know each other, what brought them together, or interests they shared; pointers to relationship of form only; marriage and relationship not genuine.

12. No error has been suggested in the judge's reasons, other than that he should have taken much more from the divorce decree in the appellant's favour than he did. I have not found that part of the argument persuasive. The adverse factual findings are strong, and not affected by error. On those findings, the appellant did not satisfy the terms of the regulations. Accordingly, it has not been shown that if the judge had been directed to the correct legal approach, there is any chance that the outcome would have been different.
13. The error into which the FtT was led was not such as to require its decision to be set aside, so it shall stand.
14. No anonymity direction has been requested or made.

A handwritten signature in black ink that reads "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

7 December 2018  
Upper Tribunal Judge Macleman