



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/01561/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House *via Skype for Business*  
On 18 January 2021

Decision & Reasons Promulgated  
On 02 February 2021

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

QERIM BOKCIU  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr. P Collins, Solicitor, Zoi Bilderberg Law Practice

For the Respondent: Mr. C Bates, Senior Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. This is an appeal against a decision of Judge of the First-tier Tribunal Khosla ('the Judge') sent to the parties on 11 September 2019 by which the appellant's appeal against a decision of the Secretary of State refusing to issue him with an EEA residence card was dismissed.
2. UTJ Keith granted permission to appeal on one ground alone, ground 9, by a decision dated 14 May 2020.

3. The appellant continues to enjoy a right of appeal against the Secretary of State's decision following the United Kingdom's exit from the European Union consequent to Schedule 3, paragraph 5 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020.

### **Remote hearing**

4. The hearing before me was a Skype for Business video conference hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.
5. Mr. Collins provided an explanation as to why the appellant was unable to attend the hearing remotely. The appellant's wife was able to attend the hearing remotely.

### **Anonymity**

6. The First-tier Tribunal did not issue an anonymity order and neither party sought one before me.

### **Background**

7. The appellant is a national of Albania. He asserts by means of his application for an EEA residence card that he entered the United Kingdom clandestinely in September 2014 though he previously informed the Secretary of State that he arrived in 2012.
8. He was encountered on 8 February 2018 at a café in north London and detained. He was subsequently served removal papers as an illegal entrant.
9. Two applications for an EEA residence card made on behalf of the appellant were refused by the Secretary of State in February and March 2018 due to a failure to provide sufficient evidence as to his relationship with his EEA sponsor.
10. Two further applications were refused in June and September 2018 as the Secretary of State was not satisfied that the appellant was in a durable relationship akin to marriage with his EEA sponsor.
11. The appellant married his wife, a Romanian national, in London on 8 September 2018.
12. A further application for an EEA residence card was made on 28 November 2018. Following interviews with the appellant and his sponsor held on 26 February 2019, the Secretary of State refused the application by a decision dated 22 March 2019.

Reliance was placed upon several inconsistencies in the answers given by the couple at interview. The Secretary of State concluded that the marriage was one of convenience, undertaken for the sole purpose of the appellant securing an immigration advantage.

### **Hearing before the First-tier Tribunal**

13. The hearing was held at Hendon Magistrates' Court on 23 August 2019. Both the appellant and his wife gave evidence. An uncle of the appellant also attended and gave evidence on his behalf.
14. The Judge lawfully applied the relevant burden and standard of proof. He made several adverse credibility findings, including:
  - As to the couple's inconsistency in interview as to what they had done the previous day, later said to be consequent to confusion arising from the questions asked, the Judge concluded, *'I find that there could be no confusion whatsoever about this. Clearly, the Appellant's wife was not confused. I find that the reason why the Appellant's answer was inconsistent with his wife is because one or other of them was lying. There cannot be any other reasonable explanation for this'*, at [61] of the decision.
  - The appellant had a lack of knowledge about when his wife started working at a café despite his evidence that he went there every other day and had been a regular there long before she started working: *'... his lack of knowledge about when she started working there, which he put down to his lack of curiosity, can only be explained by the fact that he knew little about his wife because they were not in a genuine relationship'*, at [62].
  - One or either of the couple were lying as to the appellant's friendship with the owner of the café: *'The Appellant's wife was unequivocal that they knew each other well and were friends whereas the Appellant's evidence was to the effect that they were mere acquaintances. Again, there was no reasonable explanation for this inconsistency'*, at [63].
  - *'I find the Appellant's explanation as to why he did not know the surname of his son to be bordering on the ridiculous. I do not find it credible that the Appellant who claims to treat the child like his own child, would not know his stepson's surname bearing in mind that he had been in the relationship with the child's mother from well before the child's birth, that they had been living together since late 2016, he had been looking after the child while his wife was at work, and that from January of this year he had been taking the child to nursery'*, at [64].
  - *'I find that the Appellant's answer about when he and his wife started dating is completely at odds with his wife's'*, at [65].
  - *'It simply beggars belief that the Appellant would not be at all curious about the whereabouts of the child's biological father or whether or not the child saw his father*

*... Any responsible father would want to know if their child (or the child that they treated like their own child) was having contact with a known convict, and plainly the offences must have been serious since they attracted a custodial sentence', at [67].*

15. At [68] the Judge confirmed that such findings alone were sufficient for him to find that the appellant and his wife were lying as to their relationship. However, he adopted a belt and braces approach and considered further evidence presented on behalf of the appellant, giving reasons as to why he did not find such evidence reliable.

16. The Judge decided at [71]:

'I find the appellant and his wife to be wholly untruthful witnesses'

17. The Judge considered the evidence of the appellant's uncle and found, at [72], that it did not take the appellant's case any further. He was not considered to be an independent witness, and in any event his evidence:

'... did not go to the significant and numerous inconsistencies between the Appellant's interview and his wife's interview'.

18. As to photographs relied upon by the appellant, the Judge observed, at [58] and [76]:

'58. The Appellant also relies on the documentary evidence adduced at his appeal including his photographs of their marriage, and other photographs, but it was not suggested that the documentary evidence goes to the inconsistencies given in the interview.'

...

'76. I note that there are photographs of the Appellant with his wife but just as I find that they rehearsed their account, I find that the photographs have been staged.'

19. The Judge concluded, at [77]-[79]:

'77. I accept that as an irregular migrant the Appellant may have had difficulty obtaining documentation showing that he and his wife were living at the same address. However, even if the Appellant was able to produce more documentation this would not, in my view, have overcome the inconsistencies in their interviews. In my view, the only explanation for those inconsistencies when one weighs their evidence in the round is that one or other of them (or indeed both) were lying.

78. I find that the Appellant and his wife had no compunction in lying both to the Respondent and to this Tribunal.

79. Given my above findings, it follows that I find that the Appellant's and his wife's marriage is a marriage of convenience as defined in the 2016

Regulation. Therefore, the Appellant does not meet the definition of ‘family member’ in Regulation 7 of the 2016 Regulations.’

### **Grounds of Appeal**

20. The appellant filed unsigned grounds of appeal running to 14 pages. Nine separate grounds of appeal were identified.
21. By means of a careful consideration of the application for permission to appeal, UTJ Keith addressed all nine grounds and granted permission on ground 9 alone. It is appropriate that his decision is detailed in full:
  - 1) The appellant seeks permission to appeal, in time, the decision of First-tier Tribunal Judge Khosla, (‘the FtT’), who, in a decision promulgated on 11 September 2019 (‘the Decision’), dismissed his appeal against the respondent’s decision to refuse his application for an EEA residence card on the basis of his marriage to an EEA (Romanian) national, Ms Roman. The respondent had refused the application on the basis that the couple’s marriage was one of convenience, and the FtT upheld this decision, regarding the couple’s evidence as untruthful, including inconsistencies identified by the respondent during marriage interviews.
  - 2) The appellant appeals on 9 grounds, with which I deal in turn below. Grounds (1) and (2) assert that the FtT applied the wrong burden and standard of proof. Contrary to the grounds, the FtT referred himself correctly at [14] to *Rosa v. Secretary of State for the Home Department* [2016] EWCA Civ 14 and the correct standard of proof at [13]. The FtT’s findings were in that context and the grounds disclose no arguable error of law.
  - 3) Ground (3) asserts that by referring to parts of a large bundle of evidence is irrelevant, the FtT had failed to consider material evidence and focused inappropriately on the contents of the marriage interviews. However, contrary to the grounds, the FtT considered the wider evidence, in particular, but not limited to, the detailed additional evidence and submissions on the context and explanation for supposed inconsistencies in the marriage interviews, the evidence of an uncle, and photographs. The reference to the bundle being large and containing irrelevant material discloses no arguable error of law.
  - 4) Grounds (4) and (5) assert that the FtT failed to consider the appellant’s explanations that there were no inconsistencies in the marriage interviews, as alleged, and instead focused on inaccurate summaries stated in the respondent’s refusal letter, without an analysis of the actual answers provided. However, contrary to the grounds, the FtT considered in extensive detail those explanations ([25 a to y]) and the FtT’s analysis discloses no arguable error of law.
  - 5) Ground (6) asserts that the FtT erred in imposing a requirement that an uncle be an ‘independent’ witness for his evidence to be assessed as credible. However, as the FtT make clear at [72], he attached limited weight to that evidence because it was of limited assistance in resolving the inconsistencies

in the evidence of the appellant and Ms. Roman. the ground discloses no arguable error of law.

- 6) Ground (7) asserts that the FtT had erred in focusing on the issue of the appellant wanting to have a cigarette break during the interview, when there was a reference to the appellant needing a break in interview notes, which might have a bearing on inconsistencies in the appellant's answers. However, as pointed out by the FtT, this issue was raised by the uncle ([72]); and the reference cited in the grounds to the interview notes indicates that the appellant was provided the break. The ground discloses no arguable error of law.
- 7) Ground (8) asserts that the FtT erred in assessing the appellant's and Ms. Roman's interview answers as rehearsed, when this had not been asserted in the respondent's refusal. However, the FtT was entitled to consider, and assess the possibility, in the context of the claim of a marriage of convenience, that some consistency in answers might be explained by prior rehearsal, when key elements of the answers contain inconsistencies that could not satisfactorily be explained. The ground discloses no arguable error of law.
- 8) Ground (9) asserts that the FtT erred in disregarding photographic evidence of the couple's relationship, on the basis that the photographs were 'staged' (FtT). While the FtT was entitled to scrutinise the material, the FtT arguably erred in explaining the basis for that finding or providing the parties the opportunity to give evidence on that possibility. Bearing in mind that the FtT's conclusion that the couple's marriage was one of convenience is necessarily fact sensitive, the issue is arguably material to that conclusion. Permission is granted on that solid ground.'

22. Consequent to directions issued by UTJ Rimington on 13 July 2020 the Secretary of State filed a response, authored by Mr. Diwnycz, Senior Presenting Officer, dated 20 August 2020 observing, *inter alia*:

'... R is prepared to state that the matter of the staging of the photographs, as found by the FTT IJ, is the only point on which she is sighted with which she can give some qualified agreement. The HOPO did not record any putting of the issue to the appellant by the judge. That acknowledges a potential for error by the FTT IJ.

R is of the opinion that the other findings of the judge stand unvitiating by the finding on the photographs. R is of the opinion that all the findings of the FTT save that on the photographs be preserved. The most apposite format for the review of the FTT decision complained of would be by way of a live hearing, during which the court may examine the photographs again and have their provenance adumbrated.'

### **Decision on Error of Law**

23. Mr. Collins represented the appellant with his usual skill, observing that the ground before me was a narrow one. He asserted that the photographs were central to the consideration as to whether the marriage was either genuine or one of convenience.

In such circumstances the Judge acted unlawfully in effectively placing the photographs into a different category of evidence to the rest relied upon by the appellant. By not asking the witnesses as to his concerns that the photographs were 'staged' the Judge had acted unfairly and failed to consider all matters in the round.

24. Mr. Collins placed particular emphasis upon the failure of the Judge to put his concerns to the appellant's uncle who had attended the wedding, the reception and the hearing.
25. I have considered the photographs relied upon by the appellant. They are located in a bundle prepared by his representatives and sent to the First-tier Tribunal under cover of a letter dated 16 August 2019. They are to be found at pages 212 to 269 of the bundle and consist of one hundred and twelve (112) photographs that solely relate to the wedding ceremony, held at a civic registry office, and the wedding reception, held at a bar/restaurant.
26. Twenty-eight (28) of the photographs were taken at the wedding ceremony. Many of the photographs appear to be taken seconds apart. The attendees are identifiable as the appellant, his wife, his stepson, and two male witnesses.
27. Several of the photographs of the reception appear to be taken seconds apart. They establish that approximately 20 people were in attendance. Mr. Collins agreed at the hearing as to such number. The appellant's wife can be seen to be wearing her wedding dress. A wedding cake is identifiable. A number of photographs were taken during the meal. There are several photographs of guests dancing.
28. No other photographs were relied upon by the appellant showing shared instances of the time the couple have spent together since the commencement of their relationship, said by the appellant in his application for a residence card to have been in January 2015.
29. The failure of the Judge to put his concerns as to the photographs to the appellant and witnesses at the hearing constitutes an error of law. The appellant should have been notified of such concerns and permitted the opportunity to address them: *Browne v. Dunn* (1893) 6 R. 67. I further find that in circumstances where it is not disputed that the wedding ceremony took place it is an error of fact, and in these circumstances an error of law, to declare that the photographs were 'staged'.
30. However, despite his efforts on behalf of the appellant, Mr. Collins comes nowhere close to undermining the reasoned observation of the Judge at [58] of his decision that the photographs were incapable of aiding the appellant in respect of the many inconsistencies provided by the couple at interview. The lack of basic knowledge as to personal history and shared events exhibited at the interview was such that photographic evidence confirming the undisputed fact as to a wedding ceremony and subsequent reception having taken place could not on any rational basis be said to cure such significant inconsistencies.

31. Consequently, whilst the Judge erred in his consideration at [76] of his decision, there is no rational basis for concluding that such error was material. The photographs are limited in their nature and the significant inconsistencies lawfully identified by the Judge were themselves sufficient to lawfully establish that the appellant's marriage is one of convenience.

32. The appeal is therefore dismissed.

**Notice of decision**

33. The decision of the First-tier Tribunal did not involve the making of a material error of law.

34. The decision of the First-tier Tribunal sent to the parties on 11 September 2020 is upheld and the appellant's appeal is dismissed.

Signed: *D O'Callaghan*  
**Upper Tribunal Judge O'Callaghan**

Date: 20 January 2021

**TO THE RESPONDENT**  
**FEE AWARD**

The appeal is dismissed and so no fee can be awarded.

Signed: *D O'Callaghan*  
**Upper Tribunal Judge O'Callaghan**

Date: 20 January 2021