



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

Appeal Number: IA/49255/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Determination  
Promulgated**

**On 21 August 2014**

**On 5 September 2014**

**Before**

**DESIGNATED JUDGE MURRAY**

**Between**

**MAYUR ARUNBHAI MISTRY**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Amgbah, UK Law Associates, Ilford

For the Respondent: Ms Alice Holmes, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The Appellant is a National of India born on 17 May 1986. He appealed against the decision of the Respondent of 12 November 2013 refusing to grant him a Residence Card as confirmation of a right to reside in the United Kingdom as the spouse of an EAA National, Mrs Inana Veronica Ungureanu, who is a Romanian National exercising her treaty rights in the United Kingdom. His appeal was heard by Judge of the First Tier Tribunal, P A Grant-Hutchison on 16 May 2014. He dismissed the appeal in a Determination promulgated on 6 June 2014.
2. An application for permission to appeal was lodged and permission was granted by Judge of the First Tier Tribunal McDade on 24 June 2014. The grounds of application state that the Judge may have erred in considering whether or not the parties intend to cohabit as this is not a requirement

under the Regulations. They state that the Judge may have misdirected himself by making an adverse finding on a matter on which the Regulations did not require proof.

### **The Hearing**

3. The Appellant`s representative submitted that he is relying on the permission. He submitted that the Judge made a decision, based on whether the parties intend to cohabit and this is not in the relevant EAA Regulations. He submitted that if that was the Judge`s focus and his decision is based on that point, his decision is flawed. I was referred to paragraph 17 of the Determination in which the Judge states “In all the circumstances of this case I find that they do not genuinely intend to cohabit”. The representative submitted that this is a major point and the Judge`s decision appears to depend on this. The representative submitted that he is also relying on the other grounds of application. The Judge has referred to the Appellant not informing the Secretary of State of his change of circumstances but the grounds of application state that he was not required to do this. The grounds also refer to paragraph 16 of the Determination in which the judge refers to credibility issues. They state that the Judge has used too high a standard of proof. The grounds go on to refer to the EAA National and the Appellant having a child together and state that there must therefore be a commitment to the marriage.
4. The Presenting Officer made her submissions submitting that the Judge was entitled to raise these credibility points and that the standard of proof used was not too high. She submitted that the Judge was entitled to come to the conclusion he did regarding credibility.
6. She submitted, however, that she cannot argue against the sentence in paragraph 17 of the Determination relating to the parties not genuinely intending to cohabit. She submitted that because of the credibility issues the Judge was entitled to state that the fact that the Appellant`s wife was pregnant may not show a commitment to the marriage.
7. I find that because of paragraph 17 of the Determination, when the Judge comments on whether the Appellant is going to cohabit with the Sponsor, there is an error of law as this issue seems to be what the Judge`s decision is founded on.
8. I suggested a Second Stage Hearing there and then stating that I would be preserving the findings of fact in the First Tier Judge`s Determination.
9. The Presenting Officer submitted that she has nothing to add if that is the case and that my decision should be based on what was before the First Tier Judge.
10. The Appellant`s representative submitted that he too intends relying on the facts and evidence before the First Tier Judge. He submitted that because this is an EAA Regulation case, post decision evidence is relevant

and in this case very important and that the Appellant's current circumstances have to be taken into account when I am deciding whether the marriage is one of convenience or not. He submitted that there is a clear commitment to the marriage because of the pregnancy and the marriage is not one of convenience.

### **Determination**

11. It is clear that the Regulations do not require the parties to cohabit for an application to be successful.
12. I have considered all the evidence in this case and have gone through the findings of the First Tier Judge. At the First Tier Hearing submissions were made by the Respondent about the Appellant's wife's pregnancy. The Presenting Officer submitted that this does not mean the burden of proof has been discharged, when the other circumstances of this case are considered. The submissions raise credibility issues about where the Appellant's wife has been living, how long ago she left the UK to go to Romania, the fact that her other child was born in 2002 but the Appellant stated that he thought that child was 15 or 16 years old at the date of Hearing. Credibility issues were also raised about the Appellant's landlord and whether the Appellant's wife knows his name. Contradictory evidence was given about where the Appellant and the sponsor were living and the fact that the Appellant's wife was self employed was not made clear to the Respondent. These points were answered when the Appellant's representative made his submissions and the evidence and the submissions were carefully assessed by the Judge.
13. The Judge accepts that the Appellant and his wife were married legally but he refers to the Appellant's lack of candour and although the Home Office did not require to be informed of the Appellant's change of circumstances before he made his application in April 2013 the Judge makes the important point that the Appellant's human rights application in July 2012 made no reference to him having a partner and was based on his private life only. This is significant.
14. The Judge goes on to consider the lack of credibility in the Appellant's wife's evidence. Although the Appellant signed a form to state he was living at a certain address he gave evidence that that was not the case. This must reduce his credibility.
15. In paragraph 17 the Judge states that the fact that the Appellant's wife is pregnant does not necessarily show a commitment to the marriage. He was entitled to come to this conclusion based on the credibility issues. It is in this paragraph that he refers to the Appellant and his wife not genuinely intending to cohabit. This is unfortunate, as in terms of the Regulations they do not require to cohabit but it is clear that what the Judge means is that because of the credibility issues and the apparent lack of commitment to the marriage the application cannot succeed.

16. The Judge goes on to deal with the fact that the terms of the Immigration Rules cannot be satisfied. Although he does not state why he has considered the claim outside the Rules he has done so. His findings under Article 8 are coloured by his credibility findings and the fact that he finds there is no genuine family life. With regard to the Appellant's private life he takes into consideration the Appellant's immigration history and his use of deception.
17. Not only does the Judge dismiss the claim under the Rules he also dismisses the claim on human rights grounds.
18. Based on what was before the Judge I find that there is no material error of law in the Judge's Determination. He not only found that the Appellant and his wife do not genuinely intend to cohabit, he did not believe the evidence of either the Appellant or his wife. He found that the sponsor's evidence did little to corroborate the Appellant's evidence and that because of a lack of credibility the marriage is not genuine and subsisting. He found that the fact that the Appellant's wife is pregnant does not mean a commitment to the marriage when the other circumstances of the case, in particular the credibility issues are taken into account.

### **Decision**

19. There is no material error of law in the Judge's determination.

The First Tier Judge's Determination promulgated on 6 June 2014 will stand.

The Appellant's appeal has been dismissed under the 2006 Regulations and on human rights grounds.

No Anonymity direction has been made.

Signed

Date

Designated Judge Murray  
Judge of the Upper Tribunal