



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002076
First-tier Tribunal No:
EA/51913/2021
IA/10997/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 29 May 2023

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

ERVIS PLAKU

(no anonymity order made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Lee, Counsel instructed by M Reale Solicitors
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 18 May 2023

DECISION AND REASONS
(extempore)

1. This is an appeal by a citizen of Albania against the decision of the First-tier Tribunal dismissing his appeal against a decision of the respondent to refuse him a residence card. He had applied as the durable partner of an EEA national. It is a feature of the case that on its way through the system the appellant and his partner married. When the appeal came before the First-tier Tribunal it was argued both on the basis of a durable relationship and on the basis of marriage.
2. The First-tier Tribunal plainly misdirected itself at a material point because it plainly put the burden of proof on the appellant to show that his marriage was not a marriage of convenience. It is trite law that if it is said to be a marriage of convenience then that is something that the Secretary of State must prove. In fairness to the First-tier Tribunal Judge there are other parts of the decision that leave one wondering if the judge did follow the misdirection but there was a misdirection said and Ms Ahmed entirely sensibly conceded that she could not argue against the primary assertion that the decision was just unsafe because

the wrong burden of proof was applied. I agree with that. I set aside the decision of the First-tier Tribunal.

3. Mr Lee argued that the case should be returned to the First-tier Tribunal because there have been no sound primary findings on the matter of importance. He is entitled to take that point. It is not the appellant's fault that the case has gone the way that it has and he is, broadly, entitled to another go in the First-tier Tribunal. Ms Ahmed was slightly concerned because there is an issue of law that the Secretary of State will want to argue, namely that this is not a case where the marriage is of any relevance whatsoever because it was after the relevant date and so was not a relevant consideration except to the extent that it illuminated the nature of the durable relationship, which it might have done. I draw attention to that and it is for the First-tier Tribunal to decide how to proceed with that in mind because I have decided that the case should be remitted to the First-tier Tribunal to be heard again.
4. So for the avoidance of doubt I find that there was a material error of law. I set aside the decision and I direct the case be heard again in the First-tier Tribunal.

Notice of Decision

5. I allow the appeal to extent that I set aside the decision and direct that the appeal be heard again in the First-tier Tribunal.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 May 2023