



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/36618/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 4 August 2015

Decision and Reasons Promulgated  
On 27 August 2015

Before

UPPER TRIBUNAL JUDGE GILL  
DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FARRUKH MANSURBEKOV  
(NO ANONYMITY ORDER MADE)

Respondent

**Representation:**

For the Appellant: Ms Isherwood a Home Office Presenting Officer

For the Respondent: Mr Shajko a Legal Representative

**DECISION AND REASONS**

1. This appeal is against the decision promulgated on 21 April 2015 of First-tier Tribunal Judge Povey ("the Judge") who allowed Mr. Mansurbekov's appeal against the refusal of the Secretary of State of his application of 11 April 2014 for an EEA Residence Card as confirmation of his right to reside in the United Kingdom.

2. The applicant at this hearing is the Secretary of State. For the sake of consistency with the decision in the First-tier Tribunal we shall refer to her as the respondent and to Mr Mansurbekov as the appellant.

### Background

3. The appellant, who was born on 29 August 1988, is a male citizen of Uzbekistan. He was issued with an EEA Residence Card on 24 October 2012 for 5 years as a result of his relationship with Nika Kessler (“the sponsor”), a Lithuanian national exercising EEA treaty rights. His application of 11 April 2014 was made because his new passport did not contain confirmation of his Residence Card. Following a visit on 27 August 2014 by immigration officers to where he was staying, and conversations with him and the sponsor, the application was refused on 28 August 2014 as it was concluded that their marriage was a marriage of convenience.
4. The Judge was satisfied that it was a genuine marriage and not a marriage of convenience for the following reasons despite the inconsistency in answers given to the immigration officers:
  - (1) he applied for the Residence Card 3 ½ years before he needed to,
  - (2) he disclosed she was working 200 miles away from where he lived on his application,
  - (3) the reasons for their geographical separation were work related,
  - (4) he did not rush to join her after the respondent’s decision, and
  - (5) there was credible evidence from witnesses and documents including extensive photographs of the couple spanning time and various events, occasions, and locations.
5. First-tier Tribunal Judge Reid granted permission to appeal on the basis that it was arguable that the Judge:
  - (1) did not adequately reason her findings of fact in relation to the inconsistencies that arose following a visit by the immigration officers between the various witnesses as to the nature of the appellant’s marriage to and his relationship with the sponsor, and
  - (2) did not identify the documentary evidence she placed weight upon or whether that evidence was pre or post decision.

### Discussion

6. The record of the immigration officer’s visit and refusal letter highlight the following inconsistencies within the evidence:
  - (1) the appellant’s sister-in-law said the sponsor was called Nikita, whereas the appellant said she was called Nika,

- (2) the appellant's sister-in-law when asked who lived at her house did not name the sponsor, whereas the appellant said she did live there despite the sponsor saying she had lived in Bury St Edmunds for 2 years and then said she lived with the appellant 2 days a week,
  - (3) the appellant's sister-in-law said the appellant was at work, whereas he was in bed at her home,
  - (4) the appellant's sister-in-law said the sponsor was in Cambridge, whereas the appellant said she was in London,
  - (5) the appellant did not know where in London the sponsor was seeing her family,
  - (6) the immigration officers found none of the sponsor's clothing (apart from a wedding dress in a bag), toiletries, or personal belongings at the house,
  - (7) the appellant said the sponsor was paid in cash, whereas she said her salary was paid into her bank,
  - (8) the appellant said the sponsor worked in Bournemouth, whereas she said she worked in Bury St Edmunds,
  - (9) the appellant could not describe the sponsor's job,
  - (10) the sponsor said he worked at Crockers, whereas it is Corkers,
  - (11) there is no evidence of the sponsor using their joint account,
  - (12) another male was sleeping in the appellant's room,
  - (13) he had only met the sponsor's step-father and she had only met the appellant's brother despite having been married for over 2 years,
  - (14) the sponsor was hesitant when giving the appellant's name,
  - (15) the sponsor said they were married at the John Baptiste Church in Stratford, whereas it was St Saviours Church in Forest Gate, and
  - (16) the sponsor said she had all their photographs, whereas the appellant said they were all at the Home Office.
7. The Judge noted the explanations for the discrepancies:
- (1) (paragraph 29) the appellant claimed he had just woken up, was confused, was nervous, had a friend staying with him, was not allowed to get dressed by the immigration officers, and on occasions his mind went blank,
  - (2) (paragraph 30) the appellant's sister-in-law claimed she had not been sure about the appellant being at work as he had been working some early shifts at that time to cover for holidays, and
  - (3) (paragraph 31) the sponsor accepted that she initially misled the immigration officer about her method of payment, she had been contacted by the appellant, she had a loyalty to him, and she wanted to support his answers.

8. The Judge found (paragraph 38) that despite the inconsistencies in aspects of the evidence and the events of 27 August 2014, when the findings referred to in paragraph 4 above were factored in and the evidence viewed in the round, the appellant had answered the reasonable suspicion regarding the marriage and, further, that he had discharged the burden of proof upon him to show that the marriage was not a marriage of convenience.
9. Mr Shajko submitted that there was no material error of law as any discrepancies were minor. Focussing on these deviated from the main picture. The discrepancies arose due to the 7am visit by the immigration officers to the appellant's bedroom. The Judge could take into account new evidence and look at the whole picture. They could not fabricate 5 live witnesses and 200 photographs taken on different dates and in different settings.
10. Ms Isherwood submitted that it was not just the appellant who was inconsistent. All the witnesses were. Whilst it was conceded by the appellant that errors were made in the evidence, no reasons were given for the inconsistencies. The sponsor accepted she had misled the immigration officers over her method of payment. The Judge simply failed to deal with the concerns expressed by the respondent and resolve the issues. This amounts to a material error of law.

### Our findings

11. The inconsistencies relied upon by the respondent, which we have set out at [6] above, include some which are important and go to the core of the issue as to whether the marriage between the appellant and the sponsor is a marriage of convenience. In particular, we refer to the following:
  - (i) that the appellant said that the sponsor worked in Bournemouth whereas she said she worked in Bury St Edmunds;
  - (ii) that the appellant could not describe the sponsor's job other than to say that it was agency work in Bournemouth and he did not know the name of the agency;
  - (iii) that the appellant did not know where in London the sponsor was seeing her family;
  - (iv) that the appellant had only met the sponsor's stepfather and the sponsor had only met his brother; this notwithstanding the fact that the appellant lived with his brother, sister-in-law and their children, the appellant and the sponsor having been married for over two years and the sponsor saying that she stayed with the appellant at the address visited by the immigration officers two days a week;
  - (v) that, whilst the sponsor said she stayed at the address visited by the immigration officers two days a week from which it followed that she stayed elsewhere the remainder of the time, the appellant did not mention

that she lived anywhere else, only saying that she had gone to visit family in London three days before the visit by the immigration officers; and

- (vi) there was no evidence of the sponsor's personal belongings at the address visited by the immigration officers notwithstanding that the sponsor said she lived there two days a week.
12. We do not, for a moment, suggest that the Judge was obliged to consider each and every inconsistency. However, when viewed as a whole, the matters set out at [11] above are not peripheral. On any legitimate view, they go to core of the issue as to whether the marriage was a marriage of convenience.
  13. On a proper analysis of the Judge's reasoning, we are satisfied that he did not engage with these concerns. At [34] of the determination, he referred to the fact that the sponsor works and lives in Bury St. Edmunds which he considered was consistent with the application form that had been completed by the appellant. He posed the question: "*If the marriage is a sham, why openly recorded [sic] such information in the application form?*" The reasoning in [34] simply does not address the concern of the respondent, that the appellant said that the sponsor worked in Bournemouth whereas she said she worked in Bury St. Edmunds. Indeed, the reasoning that the Judge relied upon at [34] itself raised a further issue: If the appellant completed the application form saying that the sponsor worked in Bury St. Edmunds, why did he then say she worked in Bournemouth when asked by the immigration officers during the visit?
  14. There was nothing in [35] or [36] of the determination which addresses why the appellant said that the sponsor works in Bournemouth whereas she said she works in Bury St. Edmunds.
  15. There was nothing in the Judge's reasoning which addressed (ii)-(vi) of the matters listed at [11] above.
  16. Mr Shajko repeatedly asked us to remember that the Judge heard evidence from five witnesses and had many photographs. He told us that the Judge had 200 photographs of the couple taken on different dates and in different settings. He asked us to take the photographs into account. He questioned whether the appellant could have fabricated the evidence of five live witnesses.
  17. However, when one looks at the determination, the Judge said very little about the evidence of the witnesses and the photographs. The only paragraph which dealt with this evidence is para 37. He referred to the witnesses stating that the marriage was genuine. However, if he had engaged with the issues at [11] above he might have taken a different view of their evidence. He referred to the photographs "*spanning time and various events, occasions and locations*". He did not explain how the evidence of the witnesses and/or the photographs overcame the issues set out at [11] above.

18. We repeat that we do not say that the Judge was obliged to deal with each and every inconsistency. However, as we have said, the issues set out at [11] above were not at the periphery but went to the core of the issue as to whether the marriage between the appellant and the sponsor is a marriage of convenience. It was not just one issue that the Judge failed to deal with. There were several which, collectively, go to the core of the case as to whether the marriage was a marriage of convenience.
19. Those issues need to be compared with the issues that the Judge did deal with, insofar as he dealt with credibility issues. We refer to [29]-[37] of the determination. We have already dealt with some of these paragraphs.
20. It is plain, in our view, that the issues that the Judge failed to deal with ([11] above) were of greater importance than those he dealt with, on any legitimate view.
21. For all of these reasons, we are satisfied that, in failing to deal with the issues at [11] above and even allowing for the fact that he heard live witnesses, the Judge was not reasonably entitled, on any legitimate view, to reach his finding that the appellant had discharged the burden of proof upon him to show that his marriage was a genuine marriage.
22. We are therefore satisfied that the Judge's determination involved an error on a point of law such that it be set aside. We set it aside in its entirety.

#### Re-making the decision

23. The effect of Practice Statement 7 of the Senior President's Practice Statement of 25 September 2012 is such that, in most cases where a decision of the First-tier Tribunal (FtT) is set aside, the Upper Tribunal will go on to re-make the decision, instead of remitting the case to the FtT. The position is, however, otherwise in the circumstances described in Practice Statement 7.2(a) and (b). These circumstances are where (a) the effect of the error of law has been that a party has been deprived of a fair hearing or other opportunity for that party's case to be put to and considered by the FTT; or (b), there are highly compelling reasons why the decision should not be re-made by the UT (these will be rare).
24. Having regard to para 7 of the Practice Statement and the Court of Appeal's judgment in JD (Congo) & Others [2012] EWCA Civ 327, we are of the view that in this case Practice Statement 7(2)(a) applies. This is because the outcome of the case turns on credibility and because the appellant was found credible previously.
25. We direct that the decision on the appeal be re-made by a Judge of the FtT other than Judge Povey. None of the findings of Judge Povey shall stand.

Decision:

The making of the decision of the First-tier Tribunal did involve the making of a material error on a point of law.

We set aside the decision.

We remit the appeal to the First-tier Tribunal to be heard by any Judge except Judge Povey.

The time estimate is 4 hours given the number of potential witnesses. We are told that no interpreter is required. The First-tier Tribunal will issue consequent directions regarding the filing of further evidence and the date time and venue of the hearing.

Signed:

Deputy Upper Tribunal Judge Saffer

25 August 2015