



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

Appeal Number: EA/06579/2018

**THE IMMIGRATION ACTS**

**Heard at Birmingham Civil Justice  
Centre  
On 5<sup>th</sup> November 2019**

**Decision & Reasons Promulgated  
On 21<sup>st</sup> November 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE KING TD**

**Between**

**NICHOLA NATALEE CUNNINGHAM**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms A Bhachu of Counsel, instructed by Burton & Burton Solicitors

For the Respondent: Ms H Aboni, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant was born on 29<sup>th</sup> June 1980 and is a national of Jamaica. She says that she met the sponsor, a Spanish national, in 2009 and they married on 17<sup>th</sup> April 2010.
2. On 2<sup>nd</sup> May 2018 she sought a permanent residence card on the basis of being a family member of the EEA national exercising treaty rights in the United Kingdom.

3. That application was refused in a decision of 14<sup>th</sup> September 2018. It was refused on the basis that there had been insufficient evidence presented with the application to demonstrate that the marriage was not one of convenience.
4. The appellant sought to appeal against the decision, which appeal came before First-tier Tribunal Judge Butler at a hearing on 25<sup>th</sup> April 2019. It was noted that when the sponsor's address, [~] Close, Nottingham, was searched by Immigration Officers on 14<sup>th</sup> August 2018 there was no trace of the appellant being there or any of her property or possessions. The explanation provided by the appellant to the Tribunal was essentially that the sponsor was having serious drink problems and there had been in effect a separation six months prior to the hearing for him to sort himself out. She said that she was living at [~] Avenue but was unable to produce any agreement or utility bills. She indicated that she would go occasionally to No 15 to look after the sponsor. The Judge for reasons, cogently set out in the determination, found that there was a lack of credibility from both. There was no evidence that the appellant lived at No 15 and her explanation as to where she lived and her association with the sponsor was found not to be credible.
5. The Judge concluded at paragraph 23 of the determination that the appellant and sponsor had not lived together in a genuine and subsisting relationship at [~] Close. It was noted that two marriage interviews had been avoided without a reasonable excuse and therefore the conclusion was that this was a marriage of convenience. Challenge is made to the decision and permission to appeal was granted in the Upper Tribunal on the basis that material evidence may have been overlooked by the Judge in the assessment. Also that in practical terms the Judge was concentrating upon the events in the past few years without raising issue as to the genuineness of the marriage in its inception. It is not a requirement of EU law that for a marriage to subsist, the parties must live together. A marriage is, however, a marriage of convenience if indeed it was originally started for the purpose of misleading the immigration authorities as to the true nature of the relationship and continues. Criticism offered to the Judge was that that distinction was not clearly acknowledged in the determination.
6. Thus, the matter comes before me to consider the challenges that are made.
7. As Ms Bhachu submits, this is a relationship spanning some eight years from 2010 and the focus of consideration by the Judge, in practical terms seems to be on the last few years. The parties failed to attend two interviews to be conducted to determine whether or not the marriage was genuine, one in 2012 and one in 2018. The point made on behalf of the appellant was that there was a reasonable explanation for non-attendance, namely that of ill health. The respondent, however, counters that by indicating that little medical evidence was submitted and that in the interviewing years both seemed to be in good health to go on holiday.

A potential complication of course, as highlighted by Ms Bhachu, was that notwithstanding the failure to attend the interview to determine the nature of the marriage in 2012 the appellant was granted a registration document on the basis of her relationship to the sponsor. Thus, it is argued that there was at least an initial acceptance as to the genuineness of the marriage. The fact that the parties may now have separated and lived apart does not necessarily detract from the bona fides of the marriage in the early stages.

8. The case has some unusual features about it.
9. Following the marriage in 2010, there was a hearing before the First-tier Tribunal on 12<sup>th</sup> December 2012 (IA/20356/2012) to determine the issue whether or not the sponsor was a worker for the purposes of exercising treaty rights. The conclusion was that he was and thus the appeal was allowed. The appellant was a witness in that hearing and, as has been noted at paragraph 17 of that determination, she indicated that she was not living with the sponsor and could make no comment as to his work history other than what was told by him. She referred to a witness statement which is not presently before me. The only other direct evidence of residence or otherwise is that of the pastoral visit carried out at [~] Close on 14<sup>th</sup> August 2018 when only the sponsor was found in the house and no indication of any possessions or influence of the appellant.
10. A question perhaps to be considered in the light of that evidence, is whether the appellant has ever lived with the sponsor at that address and if not, why not. If not, that clearly calls into question the credibility of her explanation.
11. It would seem that the nominated address for both is the address [~] Close, Nottingham.
12. A medical report of 13<sup>th</sup> July 2011 at Annex H of the respondent's bundle of documents puts the sponsor at that address, as does a letter from JobCentre Plus of 1<sup>st</sup> March 2018 at page 191 of the appellant's bundle of documents. Clearly, the visit by immigration authorities also puts him at that address.
13. There is a paucity of evidence that supplements that to which reference has been made. The only document which is also of relevance is the marriage certificate itself, which shows that on 17<sup>th</sup> April 2010 the sponsor was living at [~] Close.
14. Thus, there would seem to be some evidence which links him over the period as living at that address.
15. The evidence which links the appellant to that address are a series of Halifax bank statements, dating from May 2017 to February 2012, which show that they are addressed to the appellant at [~] Close. As the Judge remarked in the course of the determination, the fact that the documents

are sent to that address is not evidence necessarily that she lives there. There seems to be a marked absence of utility bills or matters or documents in the bundle to show any joint residence other than potentially one from St. Patrick's Catholic Primary and Nursery School of 22<sup>nd</sup> January 2013, which seems to confirm that [R], who lives at [~] Close, was admitted to the school on 9<sup>th</sup> November 2011 and is attending Year 1 class. Both her parents, the appellant and sponsor, collect her from school, signed by the headmistress.

16. Thus, there is clearly a paucity of clear information to support the contention of any cohabitation as between the appellant and sponsor, Although cohabitation is not a requirement of a subsisting marriage for the purposes of the grant of a permanent residence card, the lack of cohabitation may be indicative of a state of mind or relationship that has always existed. It can be understood that sometimes relationships break down, leading to separation. The real issue in this case is when the marriage was entered into, was it a genuine marriage or merely a vehicle for immigration deception and the gaining of status.
17. As I have indicated, the learned First-tier Tribunal Judge perhaps did not direct the consideration to that key issue in what was otherwise a very fair determination.
18. In those circumstances and with some reluctance, I do find that there has been a material error of law in the approach that was taken such that the decision is to be set aside to be remade by a rehearing in the First tier Tribunal.
19. Any directions shall be a matter for the First-tier Tribunal but I highlight to assist a number of matters. The first is to identify, if possible, the reason why the residence card was issued to the appellant and upon what information being supplied. There was also a suggestion that the appellant has claimed child benefit as a single person on 23<sup>rd</sup> June 2017 and claimed to be single in her daughter's application for naturalisation. Documentation needs to be produced to support those concerns.
20. Clearly, it is important for the parties to adduce evidence to show cohabitation at some stage in the relationship or alternatively to indicate why that was not ever done.
21. Criticisms are also made by the lack of detail provided by the appellant as to her residence at [~] Avenue. No doubt, that should be addressed in fairness to her.

### **Notice of Decision**

The appeal is allowed to the extent that the decision is set aside to be remade in the First tier Tribunal.

No anonymity direction is made.

A handwritten signature in black ink that reads "P. Q. King". The signature is written in a cursive style with a distinct loop at the end of the last name.

Signed  
2019

Date 14 November

Deputy Upper Tribunal Judge King TD