



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

Appeal Number: UI-2022-000506
(EA/50524/2021); IA/02727/2021

THE IMMIGRATION ACTS

**Heard at Birmingham Civil Justice
Centre
On 4 October 2022**

**Decision & Reasons Promulgated
On 20 November 2022**

Before

**UPPER TRIBUNAL JUDGE MANDALIA
and
DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR ARDIT JANKA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr S Mustafa, counsel, instructed by Briton Solicitors
For the Respondent: Mr C Williams, Home Office Presenting Officer

DECISION AND REASONS

1. For the avoidance of confusion, we shall refer to the parties in the same way as they were referred to in the First Tier Tribunal, with Mr Janka as Appellant and the Secretary of State as Respondent.

2. The Appellant is a national of Albania. On 31 December 2020, he applied for a residence card to confirm that he is the extended family member of his partner, the Sponsor, Daniela Valentina Luca, a Romanian national exercising treaty rights in the UK. The application was refused by the respondent for reasons set out in a decision dated 27 February 2021 (“the Refusal Letter”). The Appellant’s appeal against that decision was allowed by First-tier Tribunal Judge Howarth for reasons set out in a decision promulgated on 15 February 2022. The Respondent applied for permission to appeal.

Error of law

3. The Respondent was granted permission to appeal to the Upper Tribunal by First Tier Tribunal Judge Connal on 23 March 2022. The appeal was considered by Upper Tribunal Judge Rimington at a hearing at Field House on 12 May 2022, at which both parties were represented. Upper Tribunal Judge Rimington was satisfied that the judge erred in dismissing the marriage certificate, demonstrating the marriage between Appellant and Sponsor, as evidence of the couple being in a durable partnership. Her key findings were as follows:

“[28] ... It would appear that the judge’s focus was on the fact of the new matter and disregarded the actual marriage in terms of the evidence of the durable relationship and considered that the marriage certificate related to only whether they lived at the same address. The judge apparently also relied on the fact that it was open to the appellant to make an application under the EU Settlement Scheme which in my view is irrelevant.

[29] It was most unfortunate that neither the appellant nor the sponsor was called to give evidence and that did provide the judge with difficulty, but it was assumed apparently by Mr Klear that the matter of the marriage would not be classified as a new matter and therefore the provisions in relation to Sadovska [2017] UKSC 54 would apply. As it transpired that was not the case and although I find that it was open to the judge to find that it was a new matter on the authorities that were presented to him, it was not open to the judge to dismiss the marriage certificate as evidence of a durable partnership.

[31] For the above reasons I find a material error of law. I preserve the finding that the question of the marriage under regulation 7 was a ‘new matter’ but set aside the decision’s conclusion that the appeal be dismissed and particularly paragraphs [17] - [21] because of the error relating to the approach to the evidence.”

4. She directed that the matter be retained for remaking in the Upper Tribunal but transferred it to Birmingham which is where the couple live.

Remaking the decision

5. The matter was listed for a resumed hearing before us on 4 October 2022, at which both parties were represented and with the Appellant and Sponsor in attendance. There was a Romanian interpreter present to assist the Sponsor and an Albanian interpreter present to assist the Appellant. At the conclusion of the hearing, we reserved our decision. We informed the parties that our decision and reasons would follow in writing and this we now do.
6. Before we turn to the evidence before us, we note that in the Refusal Letter, the Respondent said that the Appellant had applied as the unmarried partner of a EEA national, Ms Luca, but he had not provided sufficient evidence that she was his partner or that they were in a durable relationship. The Refusal Letter said the Respondent would have expected the couple to demonstrate they had been living together in a relationship akin to marriage for a long-term period. They claimed to have lived together since August 2020, providing a council tax bill in joint names and some photos but this was not considered sufficient evidence. Post the Refusal Letter, the Appellant and Sponsor married on 23 July 2021 in the London Borough of Waltham Forest. The Appellant then sought to rely, in his appeal to the First-Tier-Tribunal, on regulation 7 of the Immigration (European Economic Area) Regulations 2016 (“the Regulations”) as a direct family member (spouse) rather than on regulation 8 as an extended family member, as per his application. As noted above, Upper Tribunal Judge Rimington held that seeking to rely on this alternative regulation was a new matter, to which the Respondent needed to consent in order for it to be considered, whereas

the fact of the marriage itself was not a new matter but a continuation of the existing factual matrix appertaining to the application. This is the background to our decision.

The evidence before us

7. We have before us the following documents:
 - a. The Appellant's bundle comprising of 54 pages sent by the Appellant's representatives in readiness for a hearing before the First-tier Tribunal on 9 February 2022.
 - b. A supplementary bundle prepared by the Appellant's representatives comprising of 57 pages.
 - c. Respondent's review dated 29 September 2021.
 - d. Appellant's undated skeleton argument relating to the hearing before Upper Tribunal Judge Rimington on 12 May 2022.
 - e. Appellant's skeleton argument from Mr Mustafa relating to the hearing before us.

8. At the hearing before us, it became clear that Mr Mustafa was not fully aware of the current position with the appeal, and of the decision of Upper Tribunal Judge Rimington in particular. He had therefore prepared on the basis that the question of an error of law had yet to be determined, rather than for the remaking of the decision that had been set aside. Mr Williams helpfully emailed a copy of the error decision to Mr Mustafa and Mr Mustafa was permitted time during the lunchbreak to review his position accordingly. Prior to that break, we confirmed that, unless the Respondent consented to the new matter of regulation 7 being raised, we would be deciding the appeal on the basis of regulation 8, taking the fact of the marriage into account. Mr Williams confirmed that consent was not being given. We also drew Mr Mustafa's attention to Upper Tribunal Judge Rimington's comments concerning the absence of oral evidence, in case Mr Mustafa wished to review his stated position that he would not be calling either the Appellant or Sponsor to give evidence. These discussions were concurrently relayed to the Appellant and Sponsor by their respective interpreters.

9. Upon return from the break, Mr Mustafa again confirmed that he would not be calling any oral evidence, saying he had “got permission to proceed on a submission only basis”. We gave him a further opportunity to discuss this with his clients given what was at stake i.e. not only that inferences could be drawn but that no further applications under European law could be made if the appeal failed, given the deadline for making such applications had passed. Mr Mustafa left the courtroom to discuss the matter in private with his clients, after which he confirmed that the Appellant would be called to give oral evidence but the Sponsor would not. The Romanian interpreter was therefore released and we proceeded to hear oral evidence from the Appellant with the assistance of the interpreter who translated in Albanian.
10. The Appellant confirmed his full name, date of birth and current address and that the contents of his witness statement dated 8 December 2021 were true and correct to the best of his knowledge and belief, having been read to him in a language he understood. He then claimed not to know what this hearing, or the previous hearings, had been about as nobody had told him. Mr Mustafa was unable to explain this position and requested an adjournment which Mr Williams opposed. We reviewed the correspondence on the Tribunal file and noted that on 28 September 2022, a previous request for an adjournment had been made by the Appellant’s solicitors (presumably on his instructions) to the Tribunal on the basis that the Sponsor was unlikely to be able to take time off to attend today. A further email was received on 29 September 2022 asking whether the hearing was going ahead and asking for the request of an adjournment to be disregarded. It therefore appeared that the Appellant had known about the hearing in advance and arrangements had been made for the Sponsor to take time off work. Given these facts, and the fact that the Appellant had already confirmed the contents of his witness statement were accurate and he knew what they were, we refused the application for an adjournment.
11. Under examination in chief, the Appellant confirmed the Sponsor’s date of birth.

12. Under cross-examination the Appellant confirmed that he and the Sponsor were still living together at Padstow Road, Nottingham where they had been since August 2020. He confirmed they got married in July 2021. He said, aside from the council tax, they do not pay any other bills together, they are all in the Sponsor's name, they had only been asked to produce joint bills; he is not working currently as he is not allowed. He said they spend time together with the Sponsor's sister Simona and her husband Florian and some others; no one had asked them to produce evidence from these people about the relationship but there were photos of them together. He gave an unclear answer about what he understood as to why the application had been refused in February 2021, saying he was not aware it had been refused due to a lack of evidence about the relationship.

13. In answer to questions asked by us, he said he and the Sponsor communicate in English and Romanian, of which he understands a little. He said their relationship stopped being open and became committed in around August time when they started to live together; he didn't know the precise date on which they started cohabiting, it was August 2019; he was certain it was August as it was hot, it was before the covid outbreak. He said a Polish landlady owned the property, he thought her name was Lola, he said they have a tenancy agreement in the Sponsor's name but which provides for him living there too, only he and the Sponsor live there. He was taken though some of the photos and who/what they showed. He said one of the people shown was the Sponsor's brother in law, Florian, whose middle name he was not sure about as they do not use it. He said Simona, Florian and Diana, the Sponsor's friend, attended the wedding, only four people were allowed due to covid restrictions. He did not know why both his and the Sponsor's witness statements said the witnesses were Simona Luca and Diana Lucia Solomon and did not mention Florian but said Florian stayed outside due to the numbers allowed; Diana signed the certificate. He said he thought he proposed marriage at the beginning of the covid outbreak, not long after they started living together, he thought it must have been around November time.

Submissions

14. Mr Williams for the Respondent relied on the Refusal Letter and confirmed the burden of proof was on the Appellant to show he is in a durable partnership; the documentary evidence was essentially the same as that before the initial decision maker. He submitted there was a wealth of evidence which could have been adduced but which had not been, such as witness statements from others supporting the relationship and a tenancy agreement or statement from the landlady showing they live together. He said there was no evidence of any joint financial commitments or of the Sponsor supporting the Appellant, which she presumably is doing if he is not working. He said there are no photos of either the wedding or any celebration that followed, which is made more poignant given so few people were allowed at the ceremony due to covid restrictions. The lack of evidence has not been addressed, despite the Respondent's case having been obvious since February 2021 and being mentioned in the error of law decision. He submitted the burden of proof had not been discharged and the appeal ought to be dismissed.

15. Mr Mustafa said, under the EEA Regulations, there is no requirement of specific evidence of relationship unlike in Appendix EU of the Immigration Rules. He accepted the documentary evidence of cohabitation was limited but submitted that overall, sufficient evidence of the relationship had been adduced, in the form of the marriage certificate, the oral evidence, witness statements, photos and other documents. He said the marriage certificate in particular is significant when taken with the fact that notice of the marriage was given beforehand and the Respondent had the opportunity to refuse permission to the marriage or investigate it but chose to do neither; the application was also made before the deadline despite their not being able to marry due to covid restrictions. He accepted that there was no evidence to show the permission to marry meant the Respondent accepted the genuineness of the relationship but some weight should still be attached to the fact that the wedding was allowed to proceed. He said there is sufficient evidence of a durable relationship and the Appellant can succeed under regulation 8.

The Legal Framework

16. The Appellant's application was made before the end of the transitional period following Britain's exit from the European Union. The Refusal Letter is dated after the transitional period, which ended at 11pm on 31 December 2020. It was common ground that the transitional provisions preserved the right of appeal and the relevant parts of the Immigration (European Economic Area) Regulations 2016 ("the Regulations").
17. The Appellant's right of appeal is that referred to in regulation 36 of the Regulations, namely whether the Respondent's decision breaches his rights under the EU Treaties in respect of entry to or residence in the United Kingdom.
18. We need to consider whether the Appellant is an extended family member of a EEA National under regulation 8 of the Regulations, which stated as follows:

8.— "Extended family member"

(1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies a condition in paragraph [(1A),]1 (2), (3), (4) or (5) .

...

(5) The condition in this paragraph is that the person is the partner (other than a civil partner) of, and in a durable relationship with, an EEA national ..., and is able to prove this to the decision maker.

(6) In these Regulations, "relevant EEA national" means, in relation to an extended family member—

(a) referred to in paragraph (2), (3) or (4), the EEA national to whom the extended family member is related;

(b) referred to in paragraph (5), the EEA national who is the durable partner of the extended family member.

19. The Respondent takes no issue with the Sponsor, Ms Luca, being an EEA (Romanian) national and no challenge is made as to the fact of her marriage on 23 July 2021 to the Appellant who is an Albanian national.

20. The only question we therefore need to ask is whether the Appellant and Sponsor were in a durable relationship prior to the end of the transitional period, and still are now, such that the Appellant met/meets the requirements of regulation 8. The burden of proof is on the Appellant and the standard is the balance of probabilities.

Findings and Conclusions

21. We say at the outset that we did not find the Appellant to be a credible witness. His claim to know nothing of the position with the appeal and the reasons for the hearing was belied by the previous applications made to the Tribunal for an adjournment and the history of this matter as a whole. He has been legally represented by counsel at all of the hearings, in addition to having solicitors throughout, and has had ample opportunity to seek advice and clarify the position since the Refusal Letter was issued in February 2021, over eighteen months ago. Mr Mustafa also had the opportunity on the day of the hearing before us to discuss the matter with the Appellant and Sponsor, their having heard (via the interpreters) our discussion about the position.
22. There were several inconsistencies between the Appellant's oral and witness statement evidence as follows:
- a. He did not know the date on which he and the Sponsor began cohabiting but said it was in August 2019 prior to the covid outbreak. His witness statement clearly says at para 9 that "*We started cohabiting in August 2020*", which was several months after the initial covid lockdown in March 2020. He mentions that lockdown at para 7 of his statement.
 - b. He said he thought he proposed around the beginning of the covid outbreak (which, as above, was in March 2020) but also said he thought it was shortly after they moved in together, which he said "*must have been around November time*". His witness statement says "*In May 2020 we were at my sister in law's house, and I proposed to Daniela to marry me and start our cohabitation*". Given the significance of making a proposal to

marry, we find he could reasonably be expected to remember when he proposed with more accuracy.

- c. He was unsure of his brother-in-law's middle name, despite a) being in a relationship with the Sponsor since at least March 2020, b) the brother-in-law being a witness at/attending the wedding and c) saying he and the Sponsor spend time together with the Sponsor's sister and husband, b) and c) both indicating a close family relationship which could be expected to give rise to familiarity with each other's full names.
 - d. His witness statement does not mention Diana as being a witness at, or attending, the wedding, whereas the marriage certificates states she was a witness. Conversely, the Appellant's statement said the Sponsor's brother-in-law was a witness, but he does not feature on the marriage certificate. Whilst the Appellant explained that this was because the brother-in-law remained outside during the ceremony, we find it odd that Diana is not mentioned at all in the statement and that the same error is made in the Sponsor's witness statement. The Appellant was unable to explain how their witness statements both contained this error and were also near-identical in content and format. We find this very peculiar given the two speak different languages and even if they spoke the same language, we find it unlikely they would use the exact same words. This leads us to question whose words the statements actually contain and therefore undermines their reliability.
23. The Appellant did not raise any issues with the interpreter at the hearing and there is no medical evidence of any conditions which would affect the Appellant's ability to give evidence or recall information. We therefore find these inconsistencies damage the Appellant's credibility.
24. The witness statements themselves give very little detail as to the substance of the relationship between Appellant and Sponsor. They both say there was an open relationship to start with but there is no detail given as to how this progressed to the Appellant proposing marriage within three months. The Appellant was asked about this at the hearing but his answer did not shed any further light on the matter. The

statements do not say what it was that drew them to each other, whether they have any shared interests, what they do with their time, how/whether the Appellant is financially supported by the Sponsor, what he told her about his immigration status, whether they discussed their plans for the future given the Appellant had no leave to be in the UK or why they decided to move from Sheffield to Nottingham to live together. They do not say what the Sponsor does for a living nor who pays all the household expenses. We did not hear oral evidence from the Sponsor such that her witness statement evidence could not be tested under cross examination but we refer to our comments above about its reliability on the face of it.

25. There is no evidence from family or friends in support of the application or appeal. We do not know whether the Sponsor and Appellant have each met or spoken to the other's respective families and whether those families are in the UK or elsewhere. We do not know why the witnesses to the wedding in particular have not given any evidence to confirm the nature of the relationship beyond the fact of the ceremony. Given the importance of such an event and the application under appeal, it would be reasonable to expect evidence from at least one person who knows the couple and attended or who can attest to the relationship, especially given one of them is the Sponsor's sister.
26. As Mr Mustafa accepted at the hearing, the evidence of cohabitation is limited. Whilst there are several documents addressed to the Sponsor at the address in Nottingham, the only documents bearing the Appellant's name alongside the Sponsor's (or at all) are two council tax bills, one from August 2020 and one from March 2021, the latter being after the application was made. We agree that more evidence of cohabitation could reasonably have been adduced such as statements from family/friends/landlady and bills in the Appellant's name such as mobile phone bills to at least show he was there even if they did not show joint names. We agree that the Sponsor's bank statements do not contain anything which would indicate cohabitation. As Mr Williams pointed out, there are, for example, no transfers coming out of the Sponsor's account to the Appellant. We find the photographs do not take the matter any further as it is not clear where and when these were taken.

27. Overall, we accept the Sponsor lives at Padstow Road and has done so since at least August 2020 going by the council tax bill, bank statements and payslips in her name showing that address. However, due to the lack of documentary evidence showing the Appellant's name, the doubts we have as to his credibility and the reliability of the witness statements, we do not find it proved on balance that the Appellant also lives there or has done at any point.
28. Against this background, we do not consider that the marriage certificate and the fact of the marriage is significant evidence of there being a durable relationship, either prior to 31 December 2020 or at all. We accept that the marriage took place and that the certificate is genuine but the couple have only provided the barest details about the day beyond that and even those details have been inconsistent as set out above. We appreciate the Appellant says the fact that he has married the Sponsor, and did so as soon as they could get an appointment following covid restrictions being lifted, indicates that the relationship was and is durable. We attach some weight to this, but this weight is severely limited by the doubts we have about his credibility as set out above, and by the lack of other supporting evidence of the relationship.
29. We do not accept that we should attach much weight to the fact that the Home Office did not further investigate or refuse permission to marry. By the Appellant's own evidence, covid measures were in place throughout 2020 which had an impact on the efficient functioning and procedures of public authorities. The failure to investigate could simply have been due to a lack of capacity or ability to do so; we do not know. Certainly there is no evidence that the Home Office accepted the genuineness of the relationship at any point.
30. Overall, on balance, we find the evidence adduced does not prove that the couple were in a durable relationship either as at 31 December 2020 or now, such as to meet the requirements of regulation 8. Whilst it covers the factual circumstances such as (some) dates, their address and the fact of the ceremony, there is little that goes to the substance of the relationship and we have found there is not even sufficient evidence

to find the couple live together. They themselves provide very little detail and what detail there is has not been supported by anyone else when it is reasonable to expect to see such supporting evidence.

31. It follows that in our judgement the Appellant has failed to establish that he is an extended family member for the purposes of regulation 8 of the Regulations and we dismiss the appeal.

32. We add that after the hearing before us had been concluded, the Tribunal received an email from the Appellant's solicitors (at 17:02). They suggested that in "light of the information gained at the hearing" they "must" make a statement about the wrong information on the witness statements of the Appellant and the Sponsor, and wished to submit further evidence. A response was sent by the Tribunal reminding the Appellant's representatives that the resumed hearing before the Upper Tribunal had been completed and the Tribunal had reserved its decision. As we have already noted, we considered an application for an adjournment made by counsel, and it was refused. The Tribunal had heard the evidence and the parties' submissions, and the parties were informed we would reach our decision on the evidence already before us. We made it clear that the Tribunal would not be considering any further evidence that is filed, and refuses permission for any further evidence to be filed. A hearing of an appeal is not a dress rehearsal, and it is not open to parties to plug any perceived gaps or provide explanations for matters arising during the course of the hearing, after the hearing has been concluded. The conduct of the Appellant's representatives (counsel and solicitors) is a matter for the Appellant and his representatives, and if appropriate, is a matter that the Appellant can properly take up through the relevant regulatory bodies.

Notice of Decision

1. The appeal is dismissed.

2. No anonymity direction is made

Signed **L. Shepherd** Date: 7 October 2022

Deputy Upper Tribunal Judge Shepherd

FEE AWARD

As the appeal has been dismissed, we make no fee award.

Signed **L. Shepherd** Date: 7 October 2022

Deputy Upper Tribunal Judge Shepherd