Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04620/2013

THE IMMIGRATION ACTS

Heard at Field House	**Date Sent**
On 8 October 2013	**On 15 October 2013**
Prepared 8 October 2013	

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

MANJINDER SINGH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr V Makol of Messrs Maalik & Company
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of India born on 5 June 1985 appeals, with permission, against a decision of Judge of the First-tier Tribunal Rowlands who in a determination promulgated on 1 August 2013 dismissed the appellant's appeal against a decision of the Secretary of State to refuse him leave to remain in the United Kingdom under paragraph 336 of HJC 395 (as amended).

2. The appellant had entered Britain in December 2009 as a student with his wife, Harpreet Kaur. Their marriage broke down and they were divorced in June 2012. In April 2013 the appellant claimed asylum. When claiming asylum he stated that he had a girlfriend, Sandra Plewik, an EEA national.

3. The Secretary of State refused the appellant's application giving reasons in a detailed letter of 10 May 2013. The letter is lengthy and after giving reasons for refusing the appellant's claim to asylum and also refusing his claim under Articles 2 and 3 of the ECHR. In paragraphs 81 onwards the letter the issue of the appellant's relationship with Ms Plewik was considered under the terms of the Citizens Directive and the Immigration (EEA) Regulations 2006. The writer of the letter referred to the terms of Regulation 8 and Regulation 17 before concluding that not only was it not accepted that Ms Plewik could be classified as an individual exercising Treaty rights in Britain but that it was not accepted that the appellant and Ms Plewik were in a durable relationship.

4. When dealing in detail with the issue of whether or not the appellant was in a durable relationship with Ms Plewik reference was made to the determination of the Tribunal in the case of **YB (EEA reg 17(4) – proper approach) Ivory Coast [2008] UKAIT 00062** which indicated that when assessing whether or not the appellant was in a durable relationship the terms of paragraph 295 of the Immigration Rules, HC 395, as amended, should be taken into account. That Rule sets out in some detail the various factors to be taken into account when assessing whether or not an individual was in a durable relationship.

5. It was concluded, applying those factors that it was not accepted the appellant was in a durable relationship.

6. The appellant's appeal was heard by Judge of the First-tier Tribunal Oliver and dismissed on asylum grounds. However it was not considered that he had dealt correctly with the issue of the appellant's rights under the Immigration (EEA) Regulations 2006 and, permission having been granted, Upper Tribunal Judge McKee remitted the appeal to the First-tier Tribunal so that that issue could be dealt with. It was in these circumstances that the issue of the appellant's rights under the Immigration (EEA) Regulations 2006 came before Judge Rowlands. The issue of the appellant's claim to asylum was no longer live before him.

7. Having noticed the terms of the witness statements of both the appellant and Ms Plewik and their oral evidence the judge set out his conclusions in paragraphs 19 to 22 of the determination as follows:

> "19. There is little doubt in my mind that there is some relationship between the Appellant and Ms Plewik, the issue is whether it is durable or not. It is obvious that she has gone to some lengths to try and show her commitment. However, I do not believe that in themselves tattoos are sufficient evidence to satisfy me that their relationship is durable. Neither are the visits that she has made to him before and since his appeal. They are certainly signs of affection but no more than that.
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> 20. It is, in my view, to look at the durability of their relationship in the context of their past history. Neither of them has any history of durability in their previous marriages. Ms Plewik was married for one

week only before leaving her husband to take up with the Appellant. He was married in 2009 and divorced in 2012 so clearly the marriage had effectively ended earlier. They both entered their relationship within a relatively short time after their marriage break-ups. They are from totally different backgrounds and although I accept that that is not necessarily a bar to relationships forming I still believe that looking at the evidence as a whole they have failed to show that their relationship is a durable one at this stage.

21. I have taken into account the evidence of the joint bank account but do not believe that that is anything more than an attempt by them, at an early stage, to put together evidence which might assist him in remaining in the United Kingdom. Neither of them could give me any real explanation as to why they bothered having a joint account. He said it was because she wanted to share everything with him and she similarly said it was because she trusted him. However, at the time that they did this they had only been in the relationship for an extremely short period of time and in fact they had nothing to share. She had a penny in her account and no job and I can reach only one conclusion and that is that this joint account was in some way an agreement reached by them from the very outset to try and be able to show to the authorities that their relationship was more durable than it actually was. I believe that not only the existence of the bank account not confirm the durability of the relationship if anything it casts doubt on the durability of it at all.

22. Ms Plewik has said that if he is returned and removed to India that she would follow him. I have no doubt that if that was the case and she spent some time with him in India it might become perfectly clear that their relationship really is durable and that a later application, should they wish to return to an EEA country might succeed. At this moment in time I am not satisfied that theirs is a durable relationship and accordingly I dismiss his appeal."

8. A further application for permission to appeal to the Tribunal was then made it being argued that the judge had erred by placing the issue of the durability of the relationship within the context of the appellant's and Ms Plewik's past history. That application was granted and the appeal then came before me to decide whether or not there was material error of law in the determination.

9. At the hearing of the appeal Mr Makol stated that he wished to produce further evidence to show that Ms Plewik was working in Britain and that she and the appellant were living together. He argued that the judge had been wrong to focus on the past relationships of the appellant and Ms Plewik rather than look at their relationship in isolation. He referred to the fact that Judge Oliver had stated that there was a relationship between them and indicated that that had also been the conclusion of Judge McKee. He emphasised that the Regulations did not require a couple to be living together for two years before it could be concluded that they had a durable relationship.

10. He emphasised the number of visits which Ms Plewik had made to the appellant after he had been detained after the refusal of his application for asylum and that they were still together. He stated that she had now put in an application for a residence card which included the appellant as her partner. He stated that she was not divorced from her husband as they had not yet been apart for twelve months but that she would shortly be in a position to initiate divorce proceedings.

11. In reply Mr Nath referred to the terms of the Immigration Rules and stated that that was the context within which the issue of a durable relationship should be considered. He accepted that there was evidence of some relationship and stated that that had been considered by the judge but that the judge had reached conclusions which were fully open to him.

12. I consider that there is no material error of law in the determination of the Immigration Judge.

13. I note that when considering the issue of the appellant's claim to asylum Judge Oliver had stated:-

> "27. The appellant's Article 8 claim is based upon his family life with his new partner. It is made under the umbrella of his asylum claim rather than as a formal application under the Immigration (European Economic Area) Regulations 2006. Both parties were tested for their answers to questions concerning matters of mutual concern. There were some answers which were inconsistent. It was never explicitly suggested that their relationship was being falsely portrayed but there was an attempt to lay the groundwork for such a suggestion. There was good reason to test the relationship in the light of the partner's serious involvement with three different men within a matter of months. I had the benefit of seeing each of them and how they reacted under cross-examination. While I have found that the appellant's asylum claim has been exaggerated to the point of fabrication I find that his evidence in respect of his partner is generally credible. I come to this conclusion because I formed a favourable view of the reliability of her account of their relationship. In particular her body language was appropriate to the claimed relationship and her reaction in cross-examination when an apparent inconsistency was put to her caused me to accept her evidence. The judgment I have formed is that the few inconsistencies that were elicited between their answers on mutual matters were those that would be expected of two people sharing a close relationship but one which was still at a very early stage. Had the matter fallen for consideration under the EEA Regulations I would have held that it had not yet reached the point of durability. It has, after all, not yet been tested."

14. Judge Oliver went on to conclude that notwithstanding the relationship between the appellant and Ms Plewik he considered that it would not be a disproportionate interference with the appellant's rights under Article 8 of the ECHR for him to be removed to India.

15. I note therefore that it was the conclusion of Judge Oliver that the appellant was not in a durable relationship such that he could benefit from the provisions of the Immigration (EEA) Regulations 2006.

16. I would add that Judge McKee made no finding himself on the issue of the relationship but merely found an error of law in Judge Oliver's determination.

17. In determining the appeal before him Judge Rowlands did take into account the visits made by Ms Plewik to the appellant while he was in detention, the fact that she bore a tattoo with his name and the fact that she had attended a number of hearings and indeed set out at some length both her and the appellant's statements. He concluded that there was "some relationship" between the appellant and Ms Plewik but found that they had not proved that that relationship was durable.

18. The issue of whether or not two people are in a durable relationship is a difficult and complex one. Clearly the judge endeavoured to grapple with all the evidence before him and I consider that he made no error of law in considering the issue holistically, taking into account the fact that neither Ms Plewik nor the appellant had any history of durability in their previous marriages and that Ms Plewik was married for one week only before leaving her husband to take up with the appellant. The factors to which the judge referred in paragraph 20 were relevant. It is not the case that he stated that because the appellant and Ms Plewik's past relationships had been short-lived that he did not find that the relationship was durable. Rather, having taken all relevant factors into account he concluded that the appellant had not discharged the burden of proof upon him. He was entitled to take into account the length of their past relationships and indeed in particular the fact that Ms Plewik had only been married for one week before leaving her husband (and indeed, of course, she was still married to her husband) before concluding that the appellant could not benefit from the provisions of Regulation 8 of the Immigration (EEA) Regulations 2006.

19. As stated above I have concluded that that was a decision that was open to him on the evidence.

20. I therefore find that the determination of the Judge of the First-tier Tribunal shall stand and I re-make the decision, again dismissing this appeal. I would add, however, that, taking into account all relevant matters and in particular the visitors' log of visits by Ms Plewik to the appellant while he was detained, should she and the appellant marry I consider that it would be difficult for the Secretary of State to conclude that the marriage was one of convenience.

Signed Date

Upper Tribunal Judge McGeachy