Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/03623/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 26 June 2013	**On 1 July 2013**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

TL

Appellant

and

ENTRY CLEARANCE OFFICER-BANGKOK

Respondent

Representation:

For the Appellant: Mr B.Lams, Counsel instructed by The Legal Resource Partnership
For the Respondent: Ms H. Horsley, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Burma, born on 16 September 1981. Her appeal against the refusal of entry clearance as the unmarried partner of a refugee was dismissed by First-tier Tribunal Judge Kimnell after a hearing on 29 August 2012. After a hearing on 1 March 2013 I decided

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that there was an error of law in the decision of the First-tier Tribunal. I set the decision aside to be re-made in the Upper Tribunal. The error of law decision is attached as an annex.

2. The re-making of the decision proceeded by way of submissions only and I have summarised them. I make further reference to the submissions as necessary in the course of my assessment.

3. The parties agreed that some findings made by the First-tier judge should be preserved. These are to be found at [44], [47], [51] and [53] of the First-tier judge’s determination. In essence, the preserved findings are that the appellant and the sponsor, Mr MT, have been involved in a long-term relationship and that they probably intended to marry in time. They are in a relationship of boyfriend and girlfriend and they have now married. The appellant is the girlfriend to which the sponsor referred during his asylum interview. There is ample evidence of contact since then and they have maintained contact by e-mail, Gtalk “and other means”.

4. Although not referred to at the hearing, it is probably uncontentious to conclude that a further finding that should be preserved is to be found at [51], namely that it is not reasonable to expect the sponsor to return to Burma.

Submissions

5. Mr Lams relied on the skeleton argument. The appellant's and the sponsor's evidence as to the two year period of cohabitation should be accepted. That evidence is supported by the evidence of Professor W.

6. The IDI’s dated March 2006, which were said still to be current, were relied on. The IDI’s indicate that the purpose of the Rule is to allow genuine long term relationships to continue. Short breaks in the period of cohabitation are acceptable according to the IDI’s. Paragraph 352AA does not need to be construed narrowly as requiring two years cohabitation prior to the refugee coming to the UK. The period could include time after he arrived.

7. So far as evidence of cohabitation is concerned, the expectation of what could be provided depends on the circumstances. In this case it should be borne in mind that the country where the appellant lived with the sponsor is an isolated country and the events took place some nine years ago. The Operational Guidance Note (dated 2006) indicates that it would have been impossible for the appellant to visit the sponsor and there would have been difficulties in obtaining an exit visa. She would have to disclose that she was visiting him (a person that has now been granted refugee status).

8. If Article 8 needs to be considered it is important to bear in mind that the appellant would not be able to return to Burma. There is no obvious third country where they could live together and enjoy family life.

9. Ms Horsley relied on the notice of immigration decision. The view that culturally it would not have been acceptable for the appellant and the sponsor to live together in Burma without being married should be given some weight. This was a matter raised in the interview. In that interview the appellant had said that they had not married because the sponsor said that he was not ready to marry.

10. She was not able to produce photographic evidence of their having lived together. The appellant had not in the interview mentioned Professor W and what evidence he could give as to their cohabitation. His evidence does not in any event confirm the two year period. Even if she was not able to provide evidence of bills or photographs, evidence from family members could have been provided. The letter from the sponsor's mother does not deal with the issue of their living together for two years.

11. The rule is clear in requiring a period of two years cohabitation before the sponsor/refugee came to the UK and the IDI's cannot be used to interpret the rule differently.

12. If the appellant is not able to meet the requirements of the Rule, under Article 8 it would be proportionate to refuse entry clearance in the interests of consistent immigration control.

13. In reply Mr Lams submitted that the statement from the sponsor's mother reinforces the contention that this was not a casual relationship. As to the point about the Entry Clearance Officer's ("ECO") local knowledge of the cultural acceptability of cohabitation, no evidence has been submitted on this and given their engagement other cultural considerations could arise. Photographs would not be able to establish cohabitation.

My conclusions

14. Paragraph 352AA, so far as material, provides as follows:

> " The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the unmarried or the same-sex partner of a refugee are that:
>
> (i) the applicant is the unmarried or same-sex partner of a person who is currently a refugee granted status as such under the immigration rules in the United Kingdom and was granted that status in the UK on or after 9th October 2006; and

(ii) the parties have been living together in a relationship akin to either a marriage or a civil partnership which has subsisted for two years or more; and

(iii) the relationship existed before the person granted asylum left the country of his former habitual residence in order to seek asylum; and

(vi) each of the parties intends to live permanently with the other as his or her unmarried or same-sex partner and the relationship is subsisting…"

15. Mr Lams, if I understood his submissions correctly, argued that the Rule does not require a strict two year period of cohabitation before the sponsor came to the UK. The IDI's referred to are not apparently specific to refugee cases but I accept the premise of the IDI's, namely that "The intention of the Rules relating to unmarried and same-sex partners is to allow ***genuine long-term relationships to <u>continue</u>***" (emphasis as in the original). However, even if the IDI's are legitimately to be used as an aid to construction (which I doubt, following <u>Mahad</u> [2009] UKSC 16 at [10] and [11]), they do not indicate anything other than that a period of two years cohabitation is a requirement of the Rule.

16. When one looks at the relevant Rule here, the parties are required to have been living together in a relationship akin to a marriage which has subsisted for two years or more. Subparagraph (ii) provides that the relationship must be one that has three qualities: that it involved living together, that it be akin to marriage (in this case) and that it has subsisted for two years or more. The subsistence for two years or more describes the duration of the married-type/living together relationship. Subparagraph (iii) requires that that relationship existed before the [sponsor] left to come to the UK.

17. The intention of the Rule must surely be that 'mere cohabitation' is not sufficient. The Rule requires evidence of some history to the relationship and that has been fixed at two years cohabitation. A different construction would mean that any period of cohabitation would suffice provided the relationship itself had existed for two years, with only a small period of time involving cohabitation.

18. Mr Lams' opening submission was in these circumstances correct. I do need to make an assessment of whether I accept the evidence of the appellant and the sponsor to the effect that they were living together for two years before the sponsor came to the UK. That does not precisely articulate what the Rule requires but it is sufficient shorthand for present purposes.

19. It is as well at this stage to deal with the 'cultural' issue: whether it would have been culturally acceptable for the appellant and the sponsor to cohabit in Burma without being married. Mr Lams was

correct to observe that the issue was not raised in the notice of decision. It arises only as a result of a question put to the appellant during the interview in relation to this application, to the effect that it was very uncommon in Burmese society for unmarried partners to live together. The appellant explained that they had “tried to marry”, that the sponsor was not ready to do so (a matter the sponsor explains in his witness statement), that she loved the sponsor and that her mother agreed to their living together. In the First-tier Tribunal’s determination at [21] the sponsor said that it was socially acceptable if the relatives agreed.

20. Thus, there is no evidence to support the proposition put to the appellant in interview. The basis of the interviewer’s knowledge of the issue is unknown. The only *evidence* on the point comes from the sponsor, and what the appellant said in interview.

21. The ECO in the notice of decision doubted the relationship between the appellant and the sponsor and their intention to live permanently with each other as partners. From my summary of the preserved findings made by Judge Kimnell it is established that a substantial proportion of those doubts have now been resolved in favour of the appellant. It is implicit in those findings that the First-tier judge accepted that the appellant and the sponsor were in a relationship in Burma. This fact is also evident from the asylum interview that took place in June 2007.

22. The contention that they were in a relationship in Burma is supported by the written evidence of Professor W, dated 31 July 2012. He states that the appellant and the sponsor were his “clients in 2004 to 2006” and that he “knew that they lived together like man and wife”. It goes on to state that they took medical advice and assistance from him in relation to contraception, the sponsor planning to go abroad and not wanting to leave the appellant alone with a baby. He states that the appellant regularly took pregnancy tests and stopped contraception when the sponsor left Burma.

23. As I observed in the error of law decision, the evidence of Professor W does not specify the length of time they are said to have lived together. Between 2004 and 2006 would not necessarily amount to two years, depending on when in 2004 the cohabitation started and when in 2006 it ended.

24. The letter is however, evidence that they were in a committed relationship in Burma. It is evidence that they were in a relationship akin to marriage. *By itself* it does not establish that they were living together or that they lived together in such a relationship for at least two years in Burma. What it does do is lend support to the evidence of the appellant and the sponsor in relation to those issues. It covers a period of time that is consistent with the required two year period. It is to be remembered that the bona fides of this evidence has not been doubted.

25. In her entry clearance interview the appellant said that they met on 1 February 2004 and that their relationship began on 14 February 2004. They moved in together in March 2004. She said that the sponsor left Burma on 28 May 2006. In his first witness statement the sponsor gave the same dates for when they met, when the relationship started, when they moved in together and when he left Burma. He said in evidence before the First-tier Tribunal that he stopped living with the appellant when he “absconded” from the authorities in April/May 2006. In the asylum interview he said that he would meet the appellant in the short period before he left whenever he was able to whilst trying to avoid the authorities.

26. On the visa application form (“VAF") between questions 114-121 the appellant gave the same dates for their meeting, the start of the relationship, their moving in together and when he left Burma.

27. At page 32 of the appellant's bundle that was before the First-tier Tribunal is a copy and translation of a letter that is said to be from the sponsor's mother stating that the appellant and the sponsor became engaged on 27 March 2004. In the appellant's interview she said that “We were engaged as we live together” and that they became engaged “When I moved into the house”. The letter therefore, supports the account of their having moved in together in March 2004 and that this was the time of, or amounted to, their engagement.

28. It is clear therefore, that all the evidence from the appellant and the sponsor in relation to significant dates is consistent. There is a minor credibility issue in the sponsor’s evidence in relation to the asylum interview, referred to at [11] and [38] of the First-tier Tribunal’s determination. However, when seen in the context of my analysis of the asylum interview in the error of law decision, it is not significant in relation to the issues which I have to determine.

29. I do not attach any significance to the short time between their meeting and when they are said to have started cohabiting. The appellant was asked about that in the interview. She explained it in terms of his parents and her mother agreeing. It is not an issue that features in the notice of decision. The sponsor gave the same explanation as the appellant, when he was asked about it in evidence at the hearing before the First-tier Tribunal. There is no evidence before me to indicate that such a short interval between meeting and cohabiting is not culturally acceptable in Burma.

30. It *may* be the case that there could have been more evidence from sources other than the appellant and the sponsor to support the claim of their cohabitation for just over two years. For example, as suggested on behalf of the respondent before me, there could have been evidence from family members. What other evidence there could have been is not easy to envisage in circumstances where it seems they are said to have been living in accommodation that was not their own.

Photographic evidence probably would not have established much. I also bear in mind the lapse of time since the sponsor left Burma in 2006.

31. The evidence that I do have has been entirely consistent. The appellant's and the sponsor's evidence is supported by the evidence of Professor W and the letter from the sponsor’s mother. I also bear in mind that the standard of proof to be applied is a balance of probabilities.

32. With all these factors in mind, I am satisfied that the appellant has established that in Burma she and the sponsor lived together in a relationship akin to marriage which subsisted for a period of a little over two years. The issue of their intention at the date of decision, to live together permanently as partners, was settled by the findings of the First-tier Tribunal, but I would in any event have resolved that issue in favour of the appellant on the evidence before me.

Decision

33. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal is set aside and the decision re-made allowing the appeal under the Immigration Rules.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) and consequently, this determination identifies the appellant by initials only.

Upper Tribunal Judge Kopieczek

27/06/13

ANNEX

Representation:

For the Appellant: Mr B.Lams, Counsel instructed by The Legal Resource Partnership
For the Respondent: Mr L. Tarlow, Home Office Presenting Officer

DECISION AND DIRECTIONS

Introduction

1. The appellant is a citizen of Burma, born on 16 September 1981. Her appeal against the refusal of entry clearance as the unmarried partner of a refugee was dismissed by First-tier Tribunal Judge Kimnell after a hearing on 29 August 2012. Permission to appeal having been granted, the appeal came before me.

2. Judge Kimnell accepted that the appellant and the sponsor were in a relationship of boyfriend and girlfriend and that they intended to marry (and have now married). However, he did not accept that they lived together in Burma in a relationship akin to marriage for at least two years before the sponsor left Burma. The ground of appeal based on Article 8 of the ECHR was dismissed on the basis that the decision was a proportionate one.

3. The grounds of appeal before me contend, in summary, that the First-tier judge's assessment of the evidence of their relationship in Burma

was flawed and that the proportionality assessment under Article 8 was similarly erroneous.

4. I do not consider it necessary to set out a separate summary of the parties' submissions which I refer to as necessary in my reasons below. Suffice to say that on behalf of the respondent, Mr Tarlow relied on the 'rule 24' response and submitted that the First-tier judge's determination was more than adequately reasoned. He did refer specifically to a doctor's letter to which I refer below, submitting that the judge's assessment of that letter was satisfactory.

My assessment

5. Paragraph 352AA of HC 395 (as amended), so far as material, provides as follows:

> "…
> (ii) the parties have been living together in a relationship akin to either a marriage or a civil partnership which has subsisted for two years or more; and
>
> (iii) the relationship existed before the person granted asylum left the country of his former habitual residence in order to seek asylum…"

6. In issue in this appeal is subparagraph (ii). Part of the evidence before Judge Kimnell in relation to the two year cohabitation period was a letter dated 31 July 2012 from a Professor [W] from […] in Burma. It states that the appellant and the sponsor "have been my clients in 2004 to 2006" and that he knew that "they live together like man and wife". It goes on to state that they took medical advice and assistance from him in relation to contraception, the sponsor planning to go abroad and not wanting to leave the appellant alone with a baby. He states that the appellant regularly took pregnancy tests.

7. At [43] Judge Kimnell noted that although Professor [W] confirmed that they were both his patients between 2004 and 2006 he does not specify the length of time that they lived together as husband and wife and he does not state how he came by that information. He concluded that given the nature of the advice that was given, it was not clear that there would have been any need for a home visit and thus he could not conclude that his observation about the couple's relationship was based on his own observation.

8. The grounds of appeal, relied on in submissions, suggest that this evidence is compelling contemporaneous evidence that a relationship akin to marriage existed, otherwise why would consultations between 2004 and 2006 have taken place. It is also suggested that this evidence would not have been fabricated in anticipation of this application eight years hence. It is argued that there was no challenge to the bona fides of the doctor at the hearing and no questions were asked of the sponsor in relation to it.

9. It is suggested in the grounds that the judge misunderstood the significance of that piece of evidence. I do not agree. The First-tier judge plainly did understand the potential significance of the evidence which is why he gave it careful consideration. He was entirely correct to state that although the letter states that they were his patients between 2004 and 2006, the doctor does not specify the length of time they are said to have lived together. Even if it was between 2004 and 2006, that would not necessarily amount to two years, depending on when in 2004 the cohabitation started and when in 2006 it ended. Similarly, as Judge Kimnell said, it is not evident how he is said to have known that they were living together.

10. Subject to what is said below at [17], the judge's conclusions on the letter have nothing to do with the credibility of the doctor and it was not incumbent on the judge to question the sponsor about that evidence which was advanced by the appellant in support of the appeal.

11. In concluding that the appellant and the sponsor had not lived together for a period of two years, the First-tier judge considered what was said by the sponsor in his asylum interview, which appears to have taken place in June 2007. At [11] and [18] he referred to the sponsor’s evidence in relation to what he said in the asylum interview. At [38]-[41] he concluded that the evidence from the interview as to the sponsor's visits to the appellant whilst he was still living in Burma, indicated that he was not in fact living with her at all.

12. The grounds of appeal argue that the judge's assessment of the evidence from the interview fails to take account of the context which indicates that the visits that the sponsor was making to the appellant were when he was ‘on the run’ from the authorities, after they had already been living together for two years in Burma.

13. The First-tier judge did not have the full asylum interview before him, although it was provided to me. I have considered the interview as a whole and the context of the answers that the judge referred to and about which the sponsor was questioned. From that context it is clear that the visits to his family and girlfriend that the sponsor was referring to in his asylum interview were visits during the time that he says he was seeking to avoid the authorities. At question 118 he is recorded as having said that he would go and meet his girlfriend when he had the opportunity, as well as his mother niece and sister. However, from questions 116-118 and earlier questions, it is clear that this was whilst he was waiting to leave the country. For example at question 117 he was asked whether he was worried about the authorities finding him (whilst-question 116-he was waiting for the visa and tickets for travel).

14. The judge referred to question 135 where the sponsor was asked where he would meet his girlfriend. He is recorded as having said that he

would go and collect her from where she lived and they would then go to the park or a pagoda. Again however, from the context of the earlier questions it is apparent that the sponsor was again referring to a time when he was hiding from the authorities. The same observation holds good for his answer to question 136 that the judge also relied on. In this respect he said at [40] that if he was living with his girlfriend he would not have needed to take the steps referred to in question 136. There he said that he was worried about the authorities when he was seeing his family and girlfriend but he did not know when he would see them again as he was planning to leave the country.

15. I note that at [41] Judge Kimnell stated that he rejected “the sponsor’s evidence” that he was meeting his girlfriend having absconded to live elsewhere. He concluded that he would not be likely to have returned frequently to see his parents at the address where he lived, or would be meeting his girlfriend either from her home or from work if he was trying to avoid the authorities.

16. What the judge appears to have been referring to here, in terms of the sponsor's “evidence”, is evidence that he gave at the hearing, set out in summary at [11]. The conclusion set out at [41], referred to above, was not made with reference to the asylum interview.

17. I am satisfied that in considering what the sponsor said in the asylum interview the judge did erroneously fail to take into account the context of the questions he referred to. That erroneous assessment was plainly crucial to his conclusion at [44] that the appellant and the sponsor had “concocted a story of having lived together for a period of slightly over two years before the sponsor came to the United Kingdom to claim asylum.” The relevance of the doctor’s letter comes back into play in this context because, as is suggested in the grounds of appeal, the credibility of the doctor’s letter was not challenged and it relates to a period from 2004, well before this present application. This relates to the judge's conclusion that the account of living together for two years has been concocted.

18. I am thus satisfied that the First-tier judge erred in law in his assessment of the credibility of the claim that the appellant and the sponsor have been living together in a relationship akin to marriage which has subsisted for two years or more before the sponsor came to the UK to seek asylum. That error of law is such as to require the decision to be set aside.

19. Mr Lams, rather tentatively it should be said, canvassed the question of whether, in the event that I was to find an error of law requiring the decision to be set aside, the matter should be remitted to the First-tier Tribunal for reconsideration. I expressed my provisional view that I did not consider that that would be an appropriate course of action. I am

still of that view having regard to the Practice Statement at paragraph 7.2. The decision therefore is to be re-made in the Upper Tribunal.

20. I have considered then, whether it is possible for me to go on to re-make the decision on the basis of the evidence already provided, taking into account the positive findings made by Judge Kimnell. It does seem to me that that is an appropriate course of action. However, at the hearing I did not hear submissions from the parties as to the merits on any re-making. Those submissions could reasonably be provided in writing. However, I have decided in the first instance to list the matter for hearing for submissions only.

DIRECTIONS

1. The appeal is listed for further hearing on the basis of submissions only.

2. The parties must be in a position at the next hearing to make submissions as to what findings of the First-tier Tribunal can be preserved.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) and consequently, this determination identifies the appellant by initials only.

Upper Tribunal Judge Kopieczek 1/05/13