Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02096/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11th July 2014	**On 4th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ABOLORE SUARAKAT BANJO
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No legal representation
For the Respondent: Mr J Parkinson, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction and Background

1. The Appellant appeals against a determination of Judge of the First-tier Tribunal Camp promulgated on 15th April 2014.

2. The Appellant is a male national of Nigeria born 25th November 1983 who on 13th June 2013 applied for a residence card as a confirmation of a right to reside in the United Kingdom.

3. The application was made on the basis that the Appellant is in a durable relationship with Krisztina Olah, a Hungarian national (the Sponsor) exercising treaty rights in the United Kingdom. The Appellant therefore claimed to be an extended family member of an EEA national, and the application was therefore made pursuant to regulation 8(5) of The Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations).

4. The application was refused on 30th November 2013. The Respondent issued a Notice of Immigration Decision of that date indicating that the application had been refused because the Sponsor had failed to prove that she is a qualified person as set out in regulation 6 of the 2006 Regulations. However the Respondent's reasons for refusal letter of 30th November 2013 confirms that the application was refused because it was not accepted that the Appellant was in a durable relationship with the Sponsor, and therefore regulation 8(5) was not satisfied.

5. In giving reasons the Respondent contended that the Appellant would need to demonstrate that he had been living together with the Sponsor for at least two years, that they intended to live together permanently, and that any previous relationship or marriage had broken down, and that the parties were not related by birth. The Respondent would not normally accept that there is a durable relationship where these criteria are not met, although each case was considered on its merits and there would be occasions when the criteria was not met, but it was accepted that a durable relationship existed.

6. In this case it was not accepted that a durable relationship existed as the Appellant had not provided sufficient documentary evidence. It was accepted that there was evidence to suggest that the Appellant and Sponsor had lived together at two separate addresses, but the majority of evidence that verified the length of time that they had lived at the same address was from letters from one company. Due to the lack of evidence submitted, it was not accepted that regulation 8(5) was satisfied.

7. The Appellant appealed to the First-tier Tribunal. He requested that his appeal be determined on the papers. It was contended that he had proved that he was in a durable relationship, and that to refuse his application for a residence card breached Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).

8. The appeal was determined on the papers by Judge Camp (the judge) who found insufficient evidence had been provided to prove a durable relationship and the appeal was dismissed.

9. The Appellant applied for permission to appeal to the Upper Tribunal. In brief summary it was contended that sufficient documentary evidence had been provided to prove the parties are in a durable relationship, and the evidence that the parties lived together emanated from more than one company. It was also contended that the judge had not considered Article 8, which had been raised as a Ground of Appeal.

10. Permission to appeal was granted by Judge of the First-tier Tribunal Vaudin d'Imecourt in the following terms;

> 1. The Appellant seeks permission to appeal, in time, against a decision of First-tier Tribunal Judge Camp who, in a determination promulgated on 15th April 2014 dismissed the Appellant's appeal against the Secretary of State's decision to issue a residence card as confirmation of a right of residence under European Community law pursuant to Regulation 8 of the 2006 Regulations.
> 2. The judge's findings which were made on the papers at the Appellant's request was that on the evidence before him he was not satisfied that they had demonstrated that they had been in a durable relationship.
> 3. The Grounds of Appeal which appear to have been professionally drafted in effect state that the Immigration Judge failed to give reasons or any adequate reasons for findings on material matters leading to an arguable error of law. It also raises the Ground of Appeal that the judge failed to consider the Appellant's Article 8 rights.
> 4. The judge's findings were wholly unreasoned and are unsatisfactory. The grounds are arguable. Permission to appeal is granted on all grounds.

11. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 stating that the application for permission to appeal was not opposed as it was accepted that the decision of the First-tier Tribunal should be set aside. It was suggested that the appeal should be remitted to the First-tier Tribunal for a fresh hearing to take place.

12. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

Error of Law

13. There was no attendance on behalf of the Appellant. I took into account rule 38 of the 2008 Procedure Rules which states that if a party fails to attend a hearing, the hearing may proceed if the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing, and if it is in the interests of justice to proceed with the hearing.

14. I was satisfied that both the Appellant and his legal representatives had been notified of the date, time and place of the hearing. A fax was

received from the Appellant's representatives, stating that they were without instructions in relation to the hearing on 11th July 2014. I decided that it was appropriate and in the interests of justice, to proceed with hearing, as there had been no application to adjourn.

15. Mr Parkinson accepted that there was a material error of law in the decision of the First-tier Tribunal. I set aside the decision of the First-tier Tribunal for the reasons given in the grant of permission. There was a lack of adequate reasons given for the findings made, and in my view, with respect, the judge had not complied with the obligation set out in Shizad (sufficiency of reasons – set aside) [2013] UKUT 85 (IAC) which states that there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, although those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge.

16. A party who loses his appeal is entitled to know the reasons why they lost, and in this case there is a lack of adequate reasoning. As Article 8 had been raised as a Ground of Appeal, it should have been determined.

Re-making the Decision

17. Having set aside the decision of the First-tier Tribunal I was invited by Mr Parkinson to remake the decision. I decided that this was appropriate, and there was no need to remit this decision back to the First-tier Tribunal. In making that decision I took into account paragraph 7.2 of the Senior President's Practice Statements.

18. I therefore heard submissions from Mr Parkinson who contended that there was insufficient evidence to prove that the Appellant was in a durable relationship. Mr Parkinson submitted that the witness statements submitted by the Appellant and Sponsor were of little probative value, and evidence submitted to prove that they lived at the same address did not prove that they are in a durable relationship. I was asked to note that neither the Appellant nor Sponsor attended the hearing before the First-tier Tribunal and there had been no attendance before the Upper Tribunal. I was asked to dismiss the appeal.

19. I reserved my decision.

My Conclusions and Reasons

20. In re-making this decision I have taken into account the Respondent's bundle of documents with Annexes A - F, which includes the documentation submitted by the Appellant in connection with his application, and the Notice of Appeal. I have also taken into account the Appellant's further submissions attached to a letter from his legal representatives dated 19th March 2014.

21. Although there was reference in the Respondent's Notice of Immigration Decision to regulation 6 of the 2006 Regulations, I conclude that the

application was refused with reference to regulation 8(5) of those regulations, and the issue to be decided is whether the Appellant has proved that he is in a durable relationship with the Sponsor.

22. The burden of proof is on the Appellant and the standard of proof a balance of probability.

23. I conclude that insufficient evidence has been provided to discharge the burden of proof. I take into account that the Appellant if he had wished, could have requested an oral hearing before the First-tier Tribunal and he and the Sponsor, and any other witnesses they chose, could have given oral evidence. They did not seek to take that option. Neither the Appellant nor the Sponsor chose to attend the Upper Tribunal hearing and give oral evidence.

24. I note that the Respondent wrote to the Appellants by letter dated 18th October 2013 inviting them to be interviewed in connection with the application. The interview was to take place on 13th November 2013. There has been no indication from either side that such an interview took place, and no explanation given as to why it did not take place. I draw no adverse inference against the Appellant on this, but the lack of such an interview contributes to the lack of evidence, and the burden of proof is on the Appellant.

25. I accept that both the Appellant and Sponsor have given witness statements but they are brief and in the absence of oral evidence I attach limited weight to them.

26. As evidence of a durable relationship the Appellant has submitted photographs. However there are only four, showing himself and the Sponsor together. It is claimed that the Appellant and Sponsor have been living together since February 2011, and I do not find that the production of only four photographs in that time, proves a durable relationship. There is no evidence as to when the photographs were taken.

27. The Appellant chose not to request an oral hearing so that friends or family members could give evidence about their relationship. The Appellant relies upon two letters from Folashade Taiwo dated 15th May 2013 and Kolawole Alausa dated 17th May 2013 to prove that he is in a durable relationship. The letters are brief and without more, do not prove the couple are in a durable relationship. In the absence of oral evidence from the authors of the letters, I place very limited weight upon them.

28. I accept there is evidence that the Appellant and Sponsor have lived at two separate addresses and there has been correspondence addressed to them at those addresses. However with the exception of BT bills, the correspondence is addressed to them as individuals. The only correspondence addressed to them jointly relates to BT bills.

29. The fact that the Appellants share an address is not evidence, without more, of a durable relationship. There is no evidence as to whether the Appellant and Sponsor own the property or whether they have a tenancy or lease in joint names. There is no evidence as to whether they live together in the property or whether the property is shared accommodation for a number of people. These are issues that could have been answered if there had been an interview with the Appellant and Sponsor, or if oral evidence had been given.

30. For the above reasons I find that the Appellant has not discharged the burden of proof and therefore the appeal cannot succeed with reference to regulation 8(5) of the 2006 Regulations.

31. In relation to Article 8, I must firstly consider Appendix FM and paragraph 276ADE of the Immigration Rules, although the Appellant has not placed reliance on these provisions.

32. I find that the Appellant has not established family life that would engage Appendix FM, and this appeal cannot succeed with reference to Appendix FM.

33. Paragraph 276ADE sets out the requirements for leave to remain in relation to private life. I find that the Appellant arrived in the United Kingdom (according to his solicitor's letter dated 6th June 2013), as a visitor in October 2007. He subsequently overstayed. He has therefore not lived in the United Kingdom for a long enough period to satisfy paragraph 276ADE, with the exception of sub-paragraph (vi). However the Appellant has not proved that he does not have ties to Nigeria. He accepted in section 10.12 of his application form that his siblings and mother still live in Nigeria. In considering the issue of "ties" I have taken into account the guidance given in Ogundimu Nigeria [2013] UKUT 00060 (IAC) in that there must be a rounded assessment of all the relevant circumstances, and this assessment is not to be limited to "social, cultural and family" circumstances. The Appellant has not provided satisfactory evidence to prove that he has no ties to Nigeria.

34. I conclude that the appeal cannot succeed under Article 8 with reference to the Immigration Rules. I then have to decide whether Article 8 should be considered outside the rules. I do not find any compelling circumstances to consider Article 8 outside the rules.

35. However I have gone on to consider Article 8 outside the Rules in the alternative. I have considered Article 8 with reference to the guidelines in Razgar [2005] UKHL 27. I do not find that the Appellant has established family life that will engage Article 8.

36. I accept that the Appellant has established a private life since his arrival in the United Kingdom in 2007, which will potentially engage Article 8. Any interference with that private life would be in accordance with the law as the Appellant cannot satisfy the Immigration Rules.

37. Any interference with the Appellant's private life is necessary in the interests of maintaining effective immigration control, which is necessary in the interests of the economic well-being of the United Kingdom. I find that any interference with the Appellant's private life is proportionate.

38. This is because the Appellant has been in the United Kingdom without leave for a considerable period of time. It would appear that when his visit visa expired, he did not seek to obtain further leave. I have found that the Appellant is not in a durable relationship. The Appellant does not have children in the United Kingdom and there are no relevant medical issues. The Appellant has close family members in Nigeria where he has lived for the majority of his life.

39. His removal from the United Kingdom will not breach Article 8 of the 1950 Convention.

Decision

The determination of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision.

The appeal is dismissed.

Anonymity

The First-tier Tribunal made no anonymity direction. There has been no request for anonymity and the Upper Tribunal makes no anonymity order.

Signed Date 23rd July 2014

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed. There is no fee award.

Signed Date 23rd July 2014

Deputy Upper Tribunal Judge M A Hall