Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48051/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4th September 2014	**On 15th September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAIRD

Between

MR CHRISTIAN CHISOM OKEIYI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Collins - Counsel
For the Respondent: Mr Avery - Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by Mr Christian Chisom Okeiyi, a citizen of Nigeria born 14th August 1980. He appeals against the determination of First-tier Tribunal Judge Prior issued on 31st March 2014 dismissing under the Immigration (EEA) Regulations 2006 ("the EEA Regs") his appeal against the decision of the Respondent made on

7th November 2013 to refuse to grant a residence card as the unmarried partner or extended family member of a Polish national. The Appellant's partner's name is Ewelina Zaneta Wojtuszkiewic. On 9th May 2014 a Judge of the First-tier Tribunal refused permission to appeal concluding that Judge Prior had found the Appellant to be an unreliable witness and reached conclusions open to him on the evidence.

2. Grounds were then submitted to the Upper Tribunal and on 2nd July 2014 Upper Tribunal McGeachy granted permission. He said:

> "1. The Grounds of Appeal assert that the Judge of the First-tier Tribunal was wrong to find that the Appellant was not credible with regard to his relationship with an EEA national and that he was wrong to consider the Appellant's underlying intentions. They assert that he was wrong to find that the relationship was not durable.
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> 2. I consider that there is a lack of clarity in the findings of the Judge of the First-tier Tribunal who states that he found the Sponsor to be consistent and credible but does not accept the evidence of the Appellant. It is arguable that the lack of clear findings relating to how long the Appellant and the Sponsor have lived together and the nature of their relationship is an error of law.

3. It is submitted in the grounds seeking permission that Judge Prior erred in:

> (i) applying the wrong test in assessing durable relationships;
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> (ii) failing to give proper weight to material factors in assessing that relationship;
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> (iii) giving inordinate weight to matters peripheral to the assessment of that relationship; and
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> (iv) mischaracterising the Appellant's evidence as incredible and reliable."

4. It is further submitted that the meaning of "durable relationship" employs consideration of the quality of the relationship hitherto. It is arguable therefore that the Judge applied the wrong test by saying that the central issue was the couple's "mutual intent to live permanently together". This language and concept comes from the Immigration Rules but does not apply to Regulation 8(5) of the EEA Regs. That provision is in the present tense i.e. "is in a durable relationship". The Judge should not have applied a "future-focussed" Immigration Rule concept to this case. He arguably also strayed into the area of enquiring into motive. It is further submitted that the Judge did not give due weight to photographic evidence of the couple together since 2009 or of the fact that the Appellant's partner is financially supporting him. It is submitted that the evidence of one partner to the relationship is as weighty as the other and the credible evidence of one party is sufficient to discharge the burden of proof. It is submitted that the Judge also erred in referring to

and apparently relying on the Appellant's "unhappy recent personal or immigration history" which irrelevant in the context of the EEA Regs.

5. The facts of this case are that the Appellant had come to the United Kingdom initially in 2006 with a Slovakian national. They lived together in the UK and had a son born to them on 4th June 2007. The relationship ended in September 2009. The Appellant was apparently not clear about when his relationship with the Sponsor in the current appeal had begun in that he claimed to have met her in August 2009, saying firstly that his previous relationship had not broken down by then and then that it had broken down in about May 2009 or about three months before he and the Sponsor met. He then said that he was still living with his first partner when he met the Sponsor in August 2009 leaving her house a few weeks later to go and live with the Sponsor at her address. Judge Prior acknowledged that photographs had been produced showing the couple together between November 2009 and February 2010 with some others from March 2012. Evidence had also been provided that the Sponsor had provided funds for the benefit of the Appellant's son in the period September to December 2013 and there was a water bill dated 22nd July 2013 in the names of both parties. What the Judge said at paragraph 8 was that he found the Sponsor to be a consistent, unhesitant and plausible witness whose testimony was only undermined by the fact that she was uncertain about the dates she had resided with the Appellant at their various addresses. The couple were both inconsistent about those dates. He went on to say that the Appellant's evidence about this issue differed from that of the Sponsor and that that was a very small example of the poor quality of the Appellant's testimony manifested in much more significant instances. Judge Prior took into account that the Sponsor could not remember when he first met the Appellant in person (they had been chatting on a website) despite the fact that according to the evidence of the Sponsor it was his birthday. His evidence of his break up from his previous partner was inconsistent and unreliable. He attributed the cause of the break up of the relationship to his inability to work and support his family, a situation that prevails in the context of his relationship with the Sponsor.

6. Much reliance was placed by Mr Collins at the hearing before me on paragraph 11 of the determination in which Judge Prior said that a central issue in the appeal was "the degree of the commitment of the couple to each other and whether it was their mutual intent to live permanently together". He said that in contrast to the Sponsor he was not satisfied as to any durable degree of commitment to the relationship on the part of the Appellant or as to his intent to live permanently with the Sponsor. When he was cross-examined about this he began immediately by stressing how very hard his situation was and how because of his immigration status he had no way in which to prove himself. Only after that did he add that he loved the Sponsor and wanted to be with her and have a good future in England. Judge Prior said that his conclusion was, "taken with the thrust of the evidence that he had quoted from the Appellant's statement" that the Appellant's only real commitment was to secure legal status in the United Kingdom, have an economic future in the country and secure remunerated employment. He went on to accept that the couple have a social life together but pointing out that the letter from a friend confirming this reveals nothing about the underlying intentions and agenda of the Appellant. He said that

the same observation has to be made when considering his finding that the couple had lived together for approaching two years at the date of the hearing at a house in Basildon. One water bill dated January 2013 addressed to them in joint names at that house had been supplied for a previous address that they lived at. He concluded that the couple's residence at the house in Basildon was satisfactorily documented in the Appellant's bundle. He went on to conclude that the Appellant "does not have an unhappy recent personal or immigration history and proved to me to be an unreliable witness. I was not satisfied that he had discharged the burden of proof in the appeal."

7. In oral submissions Mr Collins said that he had been unable to find in the case law any definition of "durable relationship". He cited Regulation 8(5) which states:

> "A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national."

8. Mr Collins said that the UKBA casework instruction for EEA cases says that what a person considering an application for a residence card on the basis of a durable relationship has to consider is whether the parties have been living for two years in their relationship akin to marriage and whether they intend to live together. He said this is an attempt to marry the EEA Regs with the Immigration Rules and it is not a requirement of the EEA Regs that future intention be considered. He asked me to take into account that Judge Prior had failed to take into account that the Appellant was in a previous relationship with an EEA partner. There is nothing to suggest that he is an economic migrant.

9. Mr Avery referred to the decision **YB** saying the view of the Secretary of State is that the criteria set out in the Rules should be applied in such cases. He said the question is whether the Judge believed the Appellant and whether his reasoning is sustainable. He submitted that he did not believe the Appellant and his reasoning is sustainable. It is perfectly feasible that one partner in a relationship will have a different view of it to the other. Intention is crucial when one is considering whether or not a relationship is durable otherwise it would be an unacceptable test. It would be perverse to say that intention is irrelevant.

10. In response Mr Collins questioned how the Judge got to the conclusion he did which flies in the face of the previous evidence that he accepted as showing that the couple had been living together for two years.

11. In **YB (EEA reg 17(4) - proper approach) Ivory Coast [2008] UKAIT 00062** the Upper Tribunal set out the corret approach to be adopted by a decision –maker when deciding whether or not to issue an EEA Residence card to an extended family member.

> (b) next have regard, as rules of thumb only, to the criteria set out in comparable provisions of the Immigration Rules. To do so ensures the like treatment of extended family members of EEA and British nationals and so

ensures compliance with the general principle of Community law prohibiting discrimination on the grounds of nationality. The foregoing means that for Reg 17(4) purposes the comparable immigration rules cannot be used to define who are extended family members, but only to furnish rules of thumb as to what requirements they should normally be expected to meet. The fact that a person meets or does not meet the requirements of the relevant immigration rules cannot be treated as determinative of the question of whether a residence card should or should not be issued.

12. Judge Prior did not find the Appellant to be credible and gave sound reasons for that. Mr Collins submitted that the evidence of the Sponsor, who was found to be credible was sufficient but that can only apply to her evidence about the fact that they were living together. Her perspective of the relationship may have been different from the Appellant's and she could not speak to his intentions. I also do not agree with Mr Collins that the fact that the Appellant had a previous relationship with an EEA national assists in an assessment of his intentions.

13. There is no definition in the EEA Regs of 'a durable relationship' and I can find no caselaw to assist. What Reg 8 says is that the decision-maker has to be satisfied that the applicant is in a durable relationship. Mr Collins relied on the fact that this is in the present tense but my understanding is that 'durable' means 'capable of lasting' and that imports the future. Whilst it may well be that Judge Prior placed too much emphasis on wording that appears to come from the Immigration Rules, I do not accept that he was obliged to allow the appeal simply because he found that the Appellant and his partner had lived under the same roof for two years without taking into account whether the relationship was genuine and capable of lasting, a question that required an assessment of the intention and possibly motives of the parties. Such a question is common in the application of the Immigration Rules and in my view is within the ambit of what was said in **YB**.

DECISION

I find that the determination of the Upper Tribunal does not contain a material error of law and shall stand.

Signed Date: 12th September 2014

N A Baird
Deputy Upper Tribunal Judge