Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34984/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
On 25th August 2015	**On 1st September 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

SHABBIR ALAM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E MacKay, of McGlashan MacKay, Solicitors
For the Respondent: Mrs S Saddiq, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Pakistan, born on 25th September 1973. He applied for a residence card under Regulation 8 of the Immigration (EEA) Regulations 2006 on the basis of a durable relationship with Radostina Genchevar Murtaza, born on 25th March 1987, who is a Bulgarian national.

2. By letter and notice dated 15th August 2014 the respondent refused that application, saying at page 2 that it could not be accepted that the appellant was in a durable relationship with his EEA sponsor while "still married to another individual", and going on to say that there was

insufficient documentary evidence to show the claimed cohabitation of two years.

3. The appellant appealed to the First-tier Tribunal. Judge Quigley dismissed his appeal by determination promulgated on 12th December 2014.

4. The appellant sought permission to appeal to the Upper Tribunal, on the following grounds:

> "The judge held that despite having a child together who for reasons significantly disputed by the parties has been taken into social work care and the apparently undisputed evidence of an extensive period of cohabitation and there being no evidence … that either party intended that to end the judge held the couple are not in a durable relationship. That finding is perverse. No reasonable judge could have come to that conclusion withstanding the facts of the couple having a child they each intends to live with.
>
> The judge places significant weight on failure of the appellant to seek a divorce from the wife who he has been separated from for many years … the judge left out of account that many who separate do not divorce (ever) and that 'durable relationships' i.e. cohabitating couples do not always eventually marry. To proceed on a different basis is an error in law.
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> The judge at paragraph 31 concludes that the appellant has sought to downplay his relationship with his wife by not referring to her in a Home Office application form. Another possibility is that the appellant had no connection with his wife in Pakistan that required him to name her on the form. The judge failed to explain why she interpreted the evidence in the way she did. That is the provision of inadequate reasons.
>
> The judge finds at paragraph 31 that she doubts whether the appellant intends to marry his partner. That is irrelevant. Whether both the couple intend to marry and whether they intend to live together in the long term are different (often) independent questions. The judge conflated those questions and so erred in law."

5. The evidence before the First-tier Tribunal was that the sponsor had considered obtaining a divorce from her husband, but there were difficulties over obtaining his agreement to sign papers. The appellant had not taken any steps towards divorce.

6. The appellant and sponsor have a child, Sarah Alam, born on 8th February 2013. That appears to have been made clear at the time of the application to the respondent, although it is not mentioned in the refusal decision.

7. The information available up to the time of the hearing in the First-tier Tribunal was that the child was in social work care due to concerns that a brain injury had been caused deliberately by a care-giver; a proof was pending before the Children's Reporter on 16th to 27th March [apparently of 2014]; the parents had contact with the child three times per week for a minimum of three hours; and if the allegations were not established, the

child would return to their full-time care. No further information was provided to the judge at the hearing about the child.

8. Further to the grounds, Mr McKay acknowledged that it might go too far to say that lack of evidence of pursuit of a divorce, or of intention to marry, was entirely irrelevant, but he argued that such factors were not conclusive and that the judge looked to them to the exclusion of all else. There had been undisputed evidence regarding the existence of the child, the appellant's relationship with the older child of the sponsor, parenting agreements, utility bills, and so on. The judge mentioned some of that evidence and noted that the Presenting Officer in the First-tier Tribunal acknowledged that there were few anomalies in oral evidence between the appellant and the sponsor. That was not reflected in the outcome. The determination should be set aside. On the basis of the evidence which had been before the First-tier Tribunal, it should be reversed. That would require the Secretary of State to make a fresh decision, exercising her discretion in light of the findings.

9. Mrs Saddiq submitted that the respondent raised the issue of whether the sponsor is a qualified person in terms of the Regulations, but the judge failed to touch on that significant point. On checking the papers, however, Mrs Saddiq acknowledged that this is not raised in the refusal letter. It may be reflected in the notes kept by the Presenting Officer in the First-tier Tribunal on the respondent's file, but it is not reflected in the determination and is not dealt with in the Rule 24 response.

10. Mrs Saddiq went on to argue that the judge was entitled to rely on the absence of any divorce proceedings in respect of the appellant's spouse in Pakistan and the absence of any mention of her on his application form. He had been cross-examined about these matters at the hearing, and the judge had plainly not been satisfied with his answers. The appellant and sponsor were both still married to other parties. There had not been sufficient evidence of cohabitation for periods sufficient to justify a finding of a durable relationship. Having a child was relevant but not in itself conclusive. There was no evidence of significant or genuine co-parenting of the child. The appellant's child of his first marriage had lived with him in the UK for a period. That also cast doubt on whether his relations with another partner were genuine. The sponsor had not given a full and frank disclosure of the circumstances, for example he did not say whether there was more than one child of his marriage. The judge's findings had been open to her, adequate reasons were given, and the determination should stand. If error were to be found, there would have to be a pre-hearing of the oral evidence. The evidence was not such the Upper Tribunal could simply substitute another decision.

11. Mr MacKay in response said that the case had proceeded throughout on the assumption that the sponsor was a qualified person exercising treaty rights. The point had never been taken so that could not now count against the appellant. There had been evidence of co-parenting of the child in the form of a social work letter addressed to both parties and a

letter from the solicitors involved in the family law case. In essence, the judge had made too much of a single factor in reaching her conclusion, and it could not safely stand.

12. I reserved my determination.

13. It is too late now to raise the question whether the sponsor is a qualified person for purposes of the application.

14. Parties did not focus either in the FtT or in the UT on the meaning of a durable relationship, or what it takes to prove one. The term is not defined in the Regulations. It has been generally accepted that the criteria in comparable provisions of the Immigration Rules are to be taken as "rules of thumb" – *YB* [2008] UKAIT 00062. MacDonald's Immigration Law and Practice 9th ed., vol.1, 6.131, says:

> 'Home Office Guidance … specifies a range of requirements that are normally to be satisfied, including a period of two years cohabitation in a relationship akin to marriage which has subsisted for at least two years, and an intention to live together permanently, although "each case must be considered on its merits" and accepts that a durable relationship may exist notwithstanding that the specified factors are not satisfied.'

15. Within that rough framework, the existence of a durable relationship was a question primarily of fact for the judge to decide.

16. The refusal letter went too far in giving at one point the appellant's legally subsisting marriage as a sufficient reason in itself for finding that he was not in a durable relationship with the sponsor. There may, as the grounds point out, be a durable relationship between persons both of whom are married to other parties. However, it would go too far the other way to hold that legal ability and intention to marry are irrelevant. Although not part of the essential definition, such matters will very often bear on whether there is in fact a durable relationship.

17. The argument for the appellant seeks to have it that while legal ability and intention to marry are of little significance, the existence of a child is conclusive, or nearly so. That does not come close to a rule either. The existence of a child, and the relationship of the parties with that child, will always be important, no doubt often crucial, but children are born of fleeting as well as of durable relationships. There was evidence here of a child and some evidence of contact but it was limited and notably it was not expanded upon or updated at the hearing.

18. This is not a case, as the grounds would have it, which on the evidence presented could have gone only in favour of the appellant. The appellant fails to make out perversity.

19. The judge did not conflate the issues of intention to marry and intention to live together; she took the first as one way, but not the only way, of measuring the second.

20. It is not an error of law that another judge might have interpreted the evidence differently and come to another conclusion. The remaining question posed by the grounds is whether the judge gave legally adequate reasons for coming down on the side she did.

21. The judge summarised the evidence before her. She did not make a specific finding on whether there had been two years' cohabitation, but it was the durability not the length to date of the relationship which concerned her. She prefaces her final discussion at paragraph 29 with the statement that she has "considered carefully all the evidence" and at the end of paragraph 31 says that her finding is "on the basis of all the evidence both oral and documentary". A recital of considering the evidence is not by itself enough to prove that it has been done, but in this case I think it is clear that the judge took on board all the evidence and then naturally concentrated her analysis on the points which concerned her.

22. I do not think that the judge over-concentrated on one factor. She found that notwithstanding the other surrounding evidence on the balance of probability the appellant's intentions towards the sponsor are not as he says. She did not consider that evidence of seeking a divorce would by itself decide the case. On the application form (at page 31 of 37) the appellant was asked to tell the respondent about any family, friends or other connections with Pakistan. The judge was entitled to take the absence of divorce proceedings, and the appellant's coy approach on the application form, as shedding light on his state of mind and intentions which were crucial to the durability of the relationship.

23. I note in passing that if on up to date evidence the appellant has a case for a right to reside in the UK under European law, it remains open to him to make a further application.

24. The appellant has not shown that the making of the decision involved the making of an error on a point of law, so the determination shall stand.

25. No anonymity direction has been requested or made.

Upper Tribunal Judge Macleman

28 August 2015