Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/20372/2013

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On: 9th June 2015	**On: 14th July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Rodney Orlando Faniel
(no anonymity direction made)

Appellant

and

Entry Clearance Officer, Sheffield (USA)

Respondent

For the Appellant: Ms Tinubu, Immigration Advice Service
For the Respondent: Mr Tarlow, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of the United States of America born on the 20th February 1965. He appeals with permission[1] the decision of the First-tier Tribunal (Judge RBL Prior) to dismiss his appeal against a decision to refuse to grant him entry clearance for the purpose of settlement.

[1] Permission was refused on the 19th January 2015 by First-tier Tribunal Judge Chambers but granted by Upper Tribunal Judge Kekić on the 1st May 2015.

2. The Appellant's case was that he is in a long-term relationship with a British woman, Ms Elaine Davis. The met in the United States in 1993 and have been in a continuous relationship since then. They have two children, Jared who was born in 1996 and Western, born in 1999. Jared was born in the United States and so has dual British and American nationality. Western was born in the UK and is British. The family have always lived between the United States and the United Kingdom. The Appellant has maintained his family relationships by lengthy visits, always returning to America before the time permitted by his visa elapsed. They in turn have visited him in America. They had been happy to continue with this arrangement until in 2013 two matters arose which made them decide that they needed to stay together permanently. The first was that Western started exhibiting behavioural problems and difficulties at school. The Appellant visited him during the first part of 2013 and observed that during the period that he was in the UK Western's behaviour stabilised; he was awarded a certificate for being the "most improved student" in the school. The second was that Elaine was diagnosed with throat cancer. So it was that in August 2013 the Appellant made an application to settle permanently with his family in the UK.

3. The Respondent considered the application under Appendix FM. It was found that the Appellant could not meet the eligibility requirements because he was not a "partner". GEN 1.2 defines that term as being limited to a spouse, a civil partner, a fiancé, or at (iv):

> "a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of decision"

Since the Appellant and Ms Davis had failed to demonstrate that they had been living together "at any time apart from during [his] visits to the UK" he was not a "partner"[2].

4. When the matter came before the First-tier Tribunal the Appellant submitted that the application could and should have been considered under paragraph 295A of the Immigration Rules:

> 295A. The requirements to be met by a person seeking leave to enter the United Kingdom with a view to settlement as the unmarried or same-sex partner of a person present and settled in the United Kingdom or being admitted on the same occasion for settlement, are that:

[2] The application was also refused on the ground that the Appellant had failed to supply specified evidence of Ms Davis' income, or written consent from the landlord agreeing that he could live in her property with her and the children. In a review conducted by an Entry Clearance Manager on the 19th March 2014 this reason for refusal was withdrawn.

(i) (a)(i) the applicant is the unmarried or same-sex partner of a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement and the parties have been living together in a relationship akin to marriage or civil partnership which has subsisted for two years or more; and

--(ii) the applicant provides an original English language test certificate in speaking and listening from an English language test provider approved by the Secretary of State for these purposes, which clearly shows the applicant's name and the qualification obtained (which must meet or exceed level A1 of the Common European Framework of Reference) unless:

…

--(iii) the applicant is a national of one of the following countries: Antigua and Barbuda; Australia; the Bahamas; Barbados; Belize; Canada; Dominica; Grenada; Guyana; Jamaica; New Zealand; St Kitts and Nevis; St Lucia; St Vincent and the Grenadines; Trinidad and Tobago; United States of America; or

…

(ii) any previous marriage or civil partnership (or similar relationship) by either partner has permanently broken down; and

(iii) the parties are not involved in a consanguineous relationship with one another; and

(iv) DELETED

(v) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and

(vi) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds; and

(vii) the parties intend to live together permanently; and

(viii) the applicant holds a valid United Kingdom entry clearance for entry in this capacity; and

(ix) the applicant does not fall for refusal under the general grounds for refusal.

5. The Appellant submitted that he and Ms Davis had lived together for an aggregate total of 13 years in the preceding 20 years and in those circumstances they were in a relationship of sufficient constancy to be considered unmarried partners. In the alternative the Appellant submitted that the appeal should be allowed on Article 8 grounds.

6. The Tribunal found that the terms of GEN 1.2 and paragraph 295A (i)(a)(i) were in the "present not the pluperfect tense" and that the Appellant could not qualify as an unmarried partner under either provision. That was because there had not been a period of two years continuous co-habitation immediately preceding the application. It was noted that since the Appellant had returned to the United States in August 2013 there had been no relapse in Western's behaviour and that they had maintained their relationship over the phone. That long-distance relationship was "no longer contrary" to Western's best interests. In her illness Ms Davis had the emotional support of her mother and friends and there were no exceptional or compassionate circumstances to justify allowing the appeal under Article 8.

7. The Appellant now has permission to appeal against that decision. It is submitted that:

    i) The determination contains a material misdirection in law in that there is nothing in either 295A (i)(a)(i) or GEN.1.2 which requires that the parties have been living together for two years *immediately prior* to the application being made or the decision being reached;

    ii) Nor does either rule require that the two year period is continuous;

    iii) The purpose of the Rule is only to admit those for settlement who are in a relationship akin to marriage;

    iv) Failure to consider the "serious compassionate circumstances" raised by the family's current circumstances. The children are separated from their father at a time of crisis for their family viz their mother's illness.

8. Mr Tarlow was not able to direct me to any other material, for instance ministerial statement of policy guidance, which might support the narrow reading of the Rule which the First-tier Tribunal imposed.

My Findings

9. The only issue in this appeal is whether the Appellant can be said to be Ms Davis' "partner" within the meaning of the Rules. The other matters in the original refusal have been resolved in his favour. If I find that the First-tier Tribunal erred in its approach to this question, it follows that the appeal will be allowed.

10. The Entry Clearance Officer, Entry Clearance Manager and First-tier Tribunal have all applied the same rationale in rejecting the Appellant's interpretation of the Rule. Each of these decision-makers have found a requirement, in both 295A and GEN.1.2, that the "two years" must mean continuous cohabitation, and that it must immediately precede the date of application, or decision.

11. I cannot find any justification for either of these conclusions. GEN.1.2 requires that the sponsor *has been* living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of decision. Paragraph 295A (i)(a)(i) is drafted in very similar terms: the parties must "*have* been living together in a relationship akin to marriage or civil partnership which has subsisted for two years or more". I can find no reference in either provision to the period in question being continuous, or to it falling immediately before the application. It simply states that there must, in the past, have been such cohabitation.

12. In respect of continuity, there are two points to be made. In her review dated the 19th March 2014 the Entry Clearance Manager H. Norman accepts that there can be "gaps" in the cohabitation but that it must be for "good reasons". It would seem from the conclusion that the decision of the adult parties to conduct their private and family life in a manner that suited them did not, in the view of the ECM, constitute such "good reasons". I cannot see why. Modern family life can take on many and varied forms. Committed couples are often separated by work or family commitments; that does not stop them being committed couples. The second point to be made is that the accepted facts of this case are that in the preceding 20 years the sponsor and Appellant spent a total of 13 years together, thus far exceeding the "two year" mark.

13. At paragraph 18 of the determination the First-tier Tribunal finds that the rule is expressed in "the perfect rather than pluperfect" tense, and that as a result there must be a requirement that the cohabitation in question is current at the date of application. As Ms Tinubu rightly points out, this would make little sense in respect of applicants for entry clearance who seek to join spouses already settled in the UK. It is implicit in the Rule that one of the parties can already be in the UK, thus precluding the cohabitation being current, or immediately preceding the application.

14. I find that the First-tier Tribunal erred in its interpretation of the Rules. There is nothing on the face of the provisions themselves which support the narrow reading they are given in the determination. If there is ambiguity in the Rules, they must be given a purposive interpretation. The purpose is plainly "to allow genuine long-term relationships to continue" (paragraph 11.72 MacDonald's Immigration Law and Practice 8th ed.). This is a long-term, stable and committed relationship of some twenty years standing, and it should be allowed to continue.

15. I allow the appeal under the Immigration Rules. I do not therefore need to address the Article 8 arguments in the grounds.

Decisions

16. The determination contains an error of law and it is set aside.

17. The appeal is allowed under the Immigration Rules.

Deputy Upper Tribunal Judge Bruce
19th June 2015

Fees

This appeal has been allowed on evidence that was all before the Respondent at the date of decision. I therefore make a full fee award.

Deputy Upper Tribunal Judge Bruce
19th June 2015