Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04834/2015

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons promulgated**
On 21 September 2017	**On 22 September 2017**

Before

The Hon. Mr Justice McCloskey, President

Between

REKHA SHARMA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant: Mr R Singer, of counsel, instructed by Woodgrange Solicitors LLP
Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND ORDER

1. We are grateful to both representatives for their helpful submissions.

2. In this appeal the first question considered by the First-tier Tribunal ("FtT") was whether the Appellant's case fell within the compass of Policy GEN 1.2(4). This states in summary that a "partner" is *inter alia* 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

application. This provision of the Rules throws up a series of distinct and separate questions. The first is whether the two people concerned had been living together. The second is: if so, have they been living together in a relationship akin to a marriage or a civil partnership. If yes, the third question is whether they have been so doing for at least two years prior to the date of application.

3. The first reservation we have about the decision of the FtT is that while a case involving this provision of the Rules cries out for the structured approach involved in formulating these questions in this way the judge failed to do so. Though not fatal, this is an unpromising beginning.

4. We analyse paragraphs 8 and 9 of the decision – the key passages - in the following way. The judge appears to have found that the Sponsor made visits to the Appellant in her home country of India. The judge also made findings about the parties taking holidays together. What is strikingly absent from these key passages of the determination is a failure to examine the meaning of the words “living together”. They do not feature anywhere in the critical parts of the determination. In our judgement it was incumbent upon the judge to conduct a careful and penetrating analysis of the nature, quality and duration of the individual periods during which the parties were, on whatever showing, living their lives together. These two words we consider ought to be given their ordinary and natural meaning. The judge failed to do so.

5. It is apparent that the judge was distracted by the characterisation of some of these periods as holidays. While that may be traceable to the Appellant’s own evidence, as recorded in paragraph 4 of the decision, it was not enough for the judge to complete the analysis – i.e. to stop - at the point of characterisation of the periods in question as holidays. The kind of analysis which we consider that was necessary was simply not carried out. We find a clear error of law as a result. Another is apparent in the judge’s adoption of the word “cohabitation”. Cohabitation is nowhere to be found in paragraph 1.24 of Policy GEN 1.2. This simply reinforces the diagnosis that there was an outright failure to pose the question of whether they had been living together.

6. The same approach applies to the judge’s consideration of whether the relationship had been akin to a marriage or civil partnership. The kind of detailed and penetrating analysis of this relationship required in order to provide a sustainable answer to that question is nowhere to be found in the decision of the FtT.

7. As a result of these errors the judge did not reach the stage of posing the final question in the equation namely that of “at least two years prior to the date of application”. Rather this was conflated with the nature of the relationship which the judge viewed through the prism of cohabitation rather than living together – not necessarily identical concepts - in the final sentence of paragraph 9 of the decision.

8. As a result we do not know what the judge's approach to the final question was. What is noteworthy about paragraph 1.24 of Policy GEN 1.2 is that two of the favoured words of the Home Office namely "continuously" and "consecutively" are nowhere to be found in the formulation. It is not necessary for us to determine this issue at this stage. It suffices rather to observe that it is arguable that aggregation of discrete periods - in the manner of in which the Appellant attempted to present his case to the FtT – is potentially compatible with the rule. We go no further. That will be one of the issues to be determined at the next stage of this appeal. As a result ground 1 of the appeal succeeds in substance.

9. Ground 2 also succeeds in our judgement. On the sole basis that the couple "do not live together" (in the judge's language) a conclusion was made that they did not have family life within the compass of Article 8 of the Human Rights Convention. This was a quite inadequate assessment in law. Furthermore there was no attempt once again to examine the nature and quality and duration of the various periods during which the parties undoubtedly did live together. If and insofar as the judge was purporting to say that they do/did not live together permanently or continuously that would not be an adequate assessment for the purposes of Article 8 of the Convention.

10. The immediately following sentence in the decision is strongly suggestive of further misdirection. In accepting that the relationship was genuine and subsisting the judge was adopting a phrase which has consistently belonged to the realm of family life under Article 8 of the Convention rather than private life. It follows that the next succeeding statement namely "I consider that the relationship is part of their private life" is confusing. The judge's treatment of Article 8 of the Convention was plainly erroneous in law and the second ground of appeal therefore succeeds in consequence.

11. It is unnecessary for us to deal with paragraph 3, that is the third ground of appeal, in these circumstances.

12. While our initial inclination is to retain the case in the forum of the Upper Tribunal the main reservation about this is the absence of clear findings of fact on key issues in the judgment. If one confines this firstly to the issues that were addressed, clear and unequivocal findings are difficult to find in the decision and, secondly, it follows logically from our error of law ruling that a series of important questions requiring specific findings was not posed by the FtT with the result that those findings have not been made. Our initial inclination to retain the case in this forum is counterbalanced by these observations.

Order

13. The decision of the FtT is set aside as it is in error of law on the grounds and for the reasons elaborated. We have given careful consideration to

the competition between remittal and retention. Remittal is indicated for two basic reasons.

14. Firstly, there is a failure by the FtT to make necessary and appropriate findings on the issues which were addressed in the decision.

15. Secondly, a series of important issues was not addressed by reason of the failure of the Tribunal to pose the correct questions in law.

16. For this combination of reasons remittal is appropriate. The case will be reheard by a differently constituted panel of the FtT.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 21 September **2017**