



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11424/2016
HU/13124/2016

THE IMMIGRATION ACTS

Heard at Field House
On 23 July 2018

Decision & Reasons Promulgated
On 30 August 2018

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MD SHARIAR [K]
MRS ANITA [I]

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: The Appellants appeared in person

For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. These appeals came before me on transfer from Upper Tribunal Judge Reeds who, by decision promulgated on 21 June 2018, found an error of law in the decision of First-tier Tribunal Judge Barber promulgated on 11 October 2017, dismissing the Appellants' appeal. Although, as the Appellants pointed out at the start of the hearing, Judge Reeds had intended to conduct the resumed hearing to re-make the decision

herself, she was unable at the last minute to conduct the hearing and the appeals were therefore transferred to me. Her very full error of law decision clearly identifies the background facts and issues for resolution and I therefore considered that I was in a position to re-make the decision. I did not consider it to be in the interests of justice, nor indeed in the interest of the Appellants themselves, for the appeals to be adjourned to a later date. Accordingly, I indicated that I would hear both appeals.

2. Much of the background chronology is set out in Judge Reeds' earlier decision and I do not need to repeat that. However, some of that chronology has been clarified by later material and I will therefore need to expand on or clarify some of the chronology. I will though deal with those clarifications when considering the issues and the evidence.
3. I had a substantial amount of material before me and it is therefore convenient to set that out, particularly since some of it was filed late in the day:
 - The Respondent's bundle of documents;
 - Letter dated 28 February 2010 from the Home Office to Corbin & Hassan and other documents relating to the First Appellant's EEA application in 2010;
 - Respondent's skeleton argument dated 20 July 2018 (annexing a translation of a Slovakian judgment in relation to the divorce of the First Appellant's ex-wife);
 - Appellants' skeleton argument dated 20 February 2018 (annexing page from the EEA application made in 2010 and G-CID notes) and reply to the Respondent's skeleton argument dated 21 July 2018 (annexing a document entitled "Muslim Marriages and Divorces (Registration) Act 1974", the birth certificate of the Appellants' child and certificates awarding a MBA to the First Appellant on 3 August 2011 and a MSC to the Second Appellant on 1 December 2010);
 - Appellant's bundle of documents lodged for the First-tier Tribunal hearing running to 349 pages (cited hereafter as [AB/]);
 - Appellant's supplementary bundle of documents lodged on 13 July 2018 running from A00 to D55 (which includes also the Appellant's second skeleton argument) (cited hereafter as [ABS/]);
 - USB stick: Mr Wilding confirmed he was unable to view this and, although I have now received this (after the hearing), I am similarly unable to do so for IT security reasons; it appears in any event that the material on this USB stick relates to the marriage in Bangladesh which the Respondent has accepted for the purposes of these appeals did take place and so there is no need for me to consider this;
 - Letter dated 31 January 2018 from HMRC to the First Appellant relating to his pay and tax details;
4. I also heard oral evidence from both Appellants who gave their evidence in English. They were cross-examined by Mr Wilding for the Respondent. Both Appellants confirmed that they did not need an interpreter and that they were content to give

evidence in English. They were able to understand the questions and to answer them without difficulty.

5. In addition, the First Appellant made oral submissions on behalf of both Appellants and I heard oral submissions also from Mr Wilding for the Respondent. I deal with the relevant submissions and evidence in the context of each of the issues below.

THE ISSUES

6. As I have noted above, Judge Reeds' decision, at [46], sets out the factual issues between the parties which require determination. Those issues have expanded somewhat as a result of later documents submitted by both parties and it is therefore appropriate to reformulate the issues to some extent.
7. I note first and foremost that the Respondent's decision here under appeal is one dated 13 April 2016 in relation to the First Appellant and 6 May 2016 in relation to the Second Appellant. Both of those decisions are made after 6 April 2015 in relation to applications made respectively on 27 November 2015 and 30 November 2015. As such, the Appellants can appeal the decisions on the sole ground that those decisions breach the Human Rights Act 1998. I accept Mr Wilding's submission that I cannot allow the First Appellant's appeal on the basis that he satisfies the Immigration (European Economic Area) Regulations ("the EEA Regulations"). Although the First Appellant did appeal at an earlier date against the revocation of his EEA residence permit, he withdrew that appeal.
8. The Appellants have raised an issue about the risk in particular to the First Appellant on return to Bangladesh. However, he has not made a protection claim, he has not asked the Respondent to consent to him raising that as a "new matter" and the Respondent has not therefore consented to him doing so. As such, that is not an issue which I can consider. For the same reason, I cannot consider the position of the Appellants' child who was born on 20 March 2018 or the position of the Appellants in light of the birth of that child. In any event, the birth of the child could make a difference only if that child were British and there can be no suggestion that he could be unless the First Appellant is able to establish that he was entitled to be treated as settled in the UK at the time of the child's birth, at which point the Appellants may need to make further applications dependent on that position.
9. I also take into account that, as the only ground is whether the decisions breach the Human Rights Act 1998, it is not open to me to conclude that the decisions are "not in accordance with the law" or "not in accordance with the Immigration Rules" ("the Rules") were I to find that the First Appellant has been lawfully resident in the UK for ten years as he asks me to do. The issue of the Appellants' entitlement to remain under the Rules is however relevant to their claim to remain on Article 8 grounds and I do therefore need to consider whether paragraph 276B of the Rules is met by the First Appellant's length of residence and lawfulness of that residence.
10. With that introduction, I set out the issues which I need to resolve as follows:

In relation to the First Appellant

- (1) Has the First Appellant resided in the UK lawfully for ten years as a result of the continuation of his leave under Section 3C Immigration Act 1971 ("Section 3C") (as the result of the lodging of an appeal in 2009 which was not determined: see [46(1)] of Judge Reeds' decision);
- (2) If not, has the First Appellant resided in the UK lawfully pursuant, initially, to his leave granted as a student and then as the family member of an EEA (Slovakian) national exercising Treaty rights in the UK ("LM"). In that context, I need to consider whether the First Appellant became entitled to retained rights of residence or permanent residence either, directly, as a family member (spouse) or as a family member combined with the period spent as an extended family member (partner). In addition to the marriage in the UK on 10 July 2009, the First Appellant now relies on a marriage which took place in Bangladesh on 27 October 2007 (see [46(2)] of Judge Reeds' decision);
- (3) The issue of the First Appellant's potential rights under EU law may turn on the extent to which he and LM were in the UK and exercising Treaty rights during the relevant period and that is also a factual issue for me to determine, based on the documents and the First Appellant's oral evidence (see [46(3)] of Judge Reeds' decision). It also entails a consideration of the relevant dates for the dissolution of the marriage of the First Appellant and LM

In relation to the Second Appellant

- (4) Although the Second Appellant's position depends largely on that of the First Appellant, the Second Appellant has also raised an issue about whether she has continuing leave herself; she claims that when she appealed a previous refusal of leave in 2013/14, she did not receive the appeal decision and that therefore her leave continued (and continues to date) under Section 3C
- (5) Thereafter, even if the First Appellant establishes that he has resided lawfully in the UK for ten years (and would therefore meet the criteria for indefinite leave to remain), that does not necessarily mean that the Second Appellant could succeed; this would turn on her own status and ability to meet Appendix FM to the Rules, including, if appropriate, paragraph EX.1;

DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS

Issue One: First Appellant's Continuation of Section 3C Leave

11. The first issue arises in relation to an application made by the First Appellant on 30 September 2008 for leave to remain as a Tier 1 Post-Study Migrant. It is not disputed that this application was made at a time when the First Appellant had leave to remain and that he was given an in-country right of appeal against the Respondent's decision dated 15 January 2009 refusing him further leave.
12. The First Appellant contends that an appeal was lodged. He relies in this regard on a letter dated 26 January 2009 from Corbin & Hassan solicitors which reads as follows:

“We are writing you to confirm in regards to your immigration matter. You have authorised us to act on your behalf. As your recent application for further leave to remain under Tier 1 Post Study Work category has been refused with a full right of appeal. We are hereby dealing your appeal matter.

We now confirm that your appeal has been lodged and you will have to wait for the tribunal letter for allocated hearing date and court venue. As you have already been informed there is no specific time scale for the hearing allocation.

As your previous application was made in time therefore your current leave is extended by virtue of Section 3C and 3D of the Immigration Act 1971 while your appeal is pending.

You will need to provide us your Statement, all supporting documents and evidence in support of your appeal in due course to prepare appellant’s bundle.

If you need any further clarification in regards to this letter please contact us.”

13. The First Appellant accepts that he has received nothing further from those solicitors in relation to an appeal. Nor does he have a copy of any notice of appeal filed, any notification of an appeal number or any notice of hearing. There is no correspondence at that time or shortly thereafter indicating that the First Appellant chased his solicitors. Interestingly, those are the same solicitors who made an application for a certificate of approval (“COA”) in the same year and then an EEA application on his behalf in the following year but there is nothing to show that the First Appellant took the opportunity when dealing with the firm in relation to those matters to enquire after the progress of his appeal. His evidence contained in his witness statement is that he has definitely appealed because his solicitors told him they had lodged an appeal. He says though that he is unable to prove that because, when Corbin & Hassan were asked by subsequent solicitors to produce the First Appellant’s file, they said that they had destroyed it.
14. It is perhaps odd that Corbin & Hassan should initially say, when asked, that they destroyed the First Appellant’s file in 2009 which would have been at the time that they were still acting. However, the file was not requested by subsequent solicitors until 2015 and it is not unlikely that they would have destroyed it by that date (some six years later). In later correspondence, they indicated that the file was either destroyed or lost during an office move in 2012.
15. I accept that the First Appellant has now provided evidence that he has lodged a complaint with Corbin & Hassan, although he did not do so until 2 April 2018 ([ABS/B01]. Corbin & Hassan responded to that letter on 3 May 2018 [ABS/B04-5]. They confirm that they do not have the First Appellant’s file, that it was lost when the firm moved in 2012 but deny any wrongdoing in that regard and make the point that the First Appellant should have kept papers and/or could have made a subject access request of the Home Office. There is no confirmation that an appeal was in fact lodged. The person said to have been acting for the First Appellant at the time is said to have left the firm. It is confirmed in a later e mail ([ABS/B07]) that the records were held at the time in paper form and not electronically (and therefore they cannot confirm by

that means what occurred in 2009). The firm which is said to have lodged the appeal is therefore unable to confirm that this was done.

16. The fact that the First Appellant has taken steps to complain about the firm acting at this time takes this issue no further. If anything, it suggests that the First Appellant (at least with the benefit of hindsight) has concerns about the competence of the firm concerned.
17. As Mr Wilding pointed out, there is simply no evidence that an appeal was in fact lodged beyond a mere assertion in a letter from a solicitor at the time which is unsupported by other evidence such as a copy of the appeal notice, appeal number or any receipt from the Tribunal. It is also unsupported by any other evidence from the solicitors concerned. It appears that no enquiries have been made by the Appellants of the Tribunal itself, although given the passage of time (now over nine years), I very much doubt that the Tribunal would still hold any records. On the evidence, although I am satisfied that the First Appellant did instruct Corbin & Hassan to lodge an appeal, I am not satisfied that they did so.
18. Section 3C operates as a matter of law to extend leave where an appeal has been lodged against a refusal. There is no discretionary element to extend that leave where no appeal has been lodged. Accordingly, I am satisfied that the First Appellant's leave to remain was not extended by Section 3C after the period for appealing the 15 January 2009 decision had expired. In 2009, the time for appealing was ten (working) days from service of the notice of decision (rule 7 Asylum and Immigration Tribunal (Procedure) Rules 2005 - "the 2005 Rules"). By my calculation and allowing for service on the second working day after posting, time to appeal expired on 2 February 2009. However, in his decision, the Respondent asserts the date to be 5 February 2009 based on actual service. Although Mr Wilding submitted that time expired on 29 January 2009, I will take the later date given in the decision letter as the date when the First Appellant's Section 3C leave expired.

Issues Two and Three: First Appellant's EU Law Rights as a Family Member or Extended Family Member and Exercise of Treaty Rights by the First Appellant and LM

19. Since issues two and three are both concerned with the First Appellant's rights under EU law, it is convenient to take those together. As I have already noted, I cannot allow the appeal on the basis that the First Appellant's rights under EU law entitle him to any form of residence permit. However, Mr Wilding accepted that the issue of the First Appellant's potential rights in this regard is relevant to whether he has accrued ten years' lawful residence in the UK under paragraph 276B and, in turn, therefore whether the appeal should succeed on Article 8 grounds.
20. I begin my findings of fact with consideration of the evidence regarding the relationship between the First Appellant and LM.
21. The first question is when the couple married. As noted at [13] of Judge Reeds' decision, the First Appellant married LM in the UK on 10 July 2009. However, he asserted at the hearing before Judge Reeds that he married LM previously in

Bangladesh in 2007. That indeed was one of the reasons why the First Appellant said that there was an error of law in the First-tier Tribunal's decision.

22. That the couple underwent a marriage ceremony in Bangladesh is not disputed by the Respondent. Although I note that neither LM nor the First Appellant mentioned any earlier marriage in Bangladesh when they applied for a COA in 2009, the marriage is confirmed by a certificate dated 3 November 2007 [AB/237] and a Nikah Nama dated 27 October 2007 which appears at [ABS/B35]. There are also some photographs said to be of that wedding. Since the Respondent does not dispute that the First Appellant did marry LM in Bangladesh on 27 October 2007, I accept that this occurred as a matter of fact.
23. There is, though, an issue relating to the legal validity of that marriage. In order to deal with that, it is necessary to refer to some of the content of the Nikah Nama. The certificate registering the marriage refers to the marriage being solemnised by the ceremony which occurred on 27 October 2007. It is therefore the evidence given in that document which I need to consider. In that document, LM is described as "the daughter of [PM] and [MM] of [address given in Slovakia]". At [5] of the Nikah Nama, the question is asked "[w]hether the bride is a maiden, a widow or a divorce [sic]". The answer given is that she is a "maiden".
24. In relation to the legal validity of marriages in Bangladesh, the Appellants have produced the Home Office guidance. At [ABS/D47 and 50] that guidance states as follows:
 - "15.1 Bangladesh
 - 15.1.1 Most marriages in Bangladesh are in accordance with the Muslim religion and are governed by the **Muslim Family Ordinance 1961** (see paragraph 15.10 below) and the **Muslim Marriages and Divorce (Registration) Act 1974**.
 - ...
 - 15.10.1 The **Muslim Family Laws Ordinance 1961** came into effect on 15 July 1961 and applies to all Muslim citizens of Bangladesh and Pakistan (and possibly some other Muslim countries), wherever they may be. It provides for all Muslim (or Mohammedan) marriages to be registered by a Nikah Registrar appointed by the Union Council. The Pakistan courts have, in the past, refused to recognise marriages which have not been registered in accordance with the Ordinance. Polygamy (up to 4 wives) is allowed on condition that the man obtains permission for each marriage from the Arbitration Council. The Ordinance is regarded as directive rather than mandatory since it makes no reference to the validity of marriages which do not conform to its requirements."
25. The First Appellant has produced with his third skeleton argument, the "Muslim Marriages and Divorces (Registration) Act 1974" which confirms the requirement of registration of marriages in Bangladesh. The First Appellant submits that the registration of a marriage in accordance with those provisions is conclusive proof of

its legal validity and should be accepted without question. Although that document does not expressly state what the First Appellant says it does, I would accept that the registration certificate (and underlying evidence of the celebration of the marriage) is sufficient evidence of the validity of the marriage by way of the registration of it in accordance with the law there set out and as confirmed by the Home Office guidance, if none of the other evidence casts doubt on the validity of the marriage.

26. The difficulty for the First Appellant is that there is evidence to the contrary, not in terms of the certificate of registration itself but other evidence which undermines the reliance which can be placed on that certificate. In this case, that is the evidence that LM was already married (and not divorced) when she married the First Appellant in 2007.
27. That evidence comes in the form of a Slovakian judgment (in translated form) appended to the Respondent's skeleton argument. Whilst I accept that this was submitted only shortly before the appeal hearing, the First Appellant was able to deal with it in his third skeleton argument. Moreover, it is a document which the Respondent has in his possession because it was submitted by the First Appellant and LM with their application for a COA to marry in the UK. Whilst I accept that it is a document belonging to LM, it should not therefore have taken the First Appellant by surprise. I will come to what he says about this document below.
28. It is necessary to set out some of the content of the document in order to determine its meaning as the First Appellant has placed a different interpretation on it to that relied upon by the Respondent:

"This decision became valid on April 21, 2009

District Court Piest'any dated April 21, 2009

Judgment in the name of the Slovak Republic

8C/20/2009-20

No. 2509200945

The District Court in Piest'any by the Single Judge [name given] in the legal matter of the Plaintiff: [M I A M A S] born [date of birth] permanent residence in [address], temporary residence in [address] against the Defendant [L A S] born on [date of birth], permanent residence [address given] on the divorce of a marriage, has decided

as follows:

The Court hereby divorces the marriage of [M I A M A S] ... and [L A S], maiden name [LM] ... concluded on December 2, 2006 in Hlohovec recorded in the Book of Marriages Hlohovec, File XVIII, Year 2006, page 67, No. 124.

...

Reasoning

The subject matter of the proceeding was the divorce of the marriage of the Parties based on the filed motion by the Plaintiff delivered to the local court on February 4, 2009.

...

In *Piest'any*, dated April 7, 2009

..."

29. The Respondent's position is that this shows that LM was still married to another man when she purported to marry the First Appellant, that the marriage in Bangladesh was polyandrous so that, in the absence of any evidence that a polyandrous marriage is legally valid in Bangladesh, I cannot accept the marriage certificate as being sufficient evidence that the First Appellant was legally married to LM on 27 October 2007.
30. The First Appellant made a number of points. First, he said that the Respondent's reading of the judgment is inaccurate and that it records the ending of LM's first marriage on 2 December 2006 and not the beginning of it. He said that the date of 2009 was given only because that is when LM obtained a copy from the Court for the purposes of their COA application.
31. I do not necessarily blame the First Appellant for misunderstanding the document; English is not his first language. However, "concluded" in the sense used in this document has the meaning of "contracted" or "entered into". It means that the marriage began on 2 December 2006. That this is the correct meaning is furthermore evident from the context. The judgment is dated 7 April 2009 and refers to the judgment "becoming valid" on 21 April 2009 in response to a divorce petition filed by LM's first husband on 4 February 2009. The case number dates from 2009. The marriage is said to have been recorded in the "Book of Marriages" for the year 2006.
32. Next the First Appellant suggested that the document is inconsistent with what LM told him about her divorce. He gave oral evidence that she told him that she divorced in December 2006 which is consistent with his reading of the document. On this point, I did not believe his evidence. The document is, on the face of it, an official one which records, as I have noted, that the marriage began in December 2006.
33. I doubt that LM told the First Appellant anything about this marriage at the time she married him in 2007. It would be more likely, if she was not free to marry, that she would simply say nothing about her marital status. She may have told the First Appellant in 2009 when they relied on the document that it recorded that she divorced in December 2006 and I accept that she may have misled him about the content of the document. However, as I have noted, the document shows that she was in fact and in law already married when she married the First Appellant in Bangladesh. I have no evidence from LM herself to counter what the divorce judgment shows. In any event, she would have considerable difficulty in suggesting that the document could not be relied upon in circumstances where she and the First Appellant submitted it in order to obtain their COA.

34. The First Appellant also suggested that the document made no difference to the legal validity of the marriage in Bangladesh which, as I have said, he contended was legally valid based on the evidence of the registration. However, I cannot accept that submission. Mr Wilding pointed out that there are some obvious discrepancies within the Nikah Nama on which the certificate is based. The first is the address given for LM at the time which is an address in Slovakia whereas the First Appellant said they lived together in the UK. It may be that the marriage certificate is intended to reflect the address of LM's parents and not her address (although I do note that the address given is also the address given for LM in the judgment pronouncing her divorce). In any event, that would not necessarily affect the legal validity of the marriage.
35. However, LM is described in the Nikah Nama as a "maiden". I do not accept the First Appellant's evidence that this is only a reflection of the fact that she was a virgin. On the face of the document, that description is given as an alternative to a widow or divorcee and is clearly intended to reflect her status as a single person.
36. In the case of Cudjoe (proxy marriages; burden of proof) [2016] UKUT 180 (IAC), the Tribunal gave guidance as to the test for determining the legal validity of a marriage as follows:

"1. It will be for an appellant to prove that their proxy marriage was in accordance with the laws of the country in which it took place, and that both parties were free to marry. The burden of proof may be discharged by production of a marriage certificate issued by a competent authority of the country in which the marriage took place, and reliance upon the statutory presumption of validity consequent to such production. The reliability of marriage certificates and issuance by a competent authority are matters for an appellant to prove.

2. ...

3. In cases where a divorce has taken place prior to the proxy marriage and there is an issue as to whether the parties were free to marry, it is for an appellant to show that the dissolution of the previous marriage was in accordance with the laws of the country in which it occurred."

[my emphasis]

37. Although I accept that the present case does not involve the celebration of a proxy marriage, the same principles apply. Thus, were it not for the evidence that LM was still married at the time of her marriage to the First Appellant and did not declare that to the Bangladeshi authorities, the legal validity of the marriage would be presumed by production of the marriage certificate. However, since there is an issue about whether LM was free to marry and whether a second marriage where the first is not dissolved is recognised in Bangladeshi law, I do not accept that certificate as proof of legal validity.
38. It is for the Appellants to show that the marriage is legally valid in Bangladesh notwithstanding LM's marital status at the time. The Home Office guidance to which I refer at [24] above, does not assist as that is clearly confined to the situation where a man marries more than one woman (as shown by the reference to "wives"). Polygamy is moreover a generally accepted practice in the Muslim religion. However,

recognition of polyandrous marriages is not shown to be accepted in the same way and the Appellants have not provided evidence that such a marriage is legally valid in Bangladesh. The inaccurate description of the bride as a single person in the Nikah Nama when she was in fact and in law already married and was not divorced is sufficient to cast doubt on the evidence as to the marriage's legal validity as reflected by the marriage certificate. The Bangladeshi authorities conducting the marriage ceremony and thereafter registering it as legal were not made aware that LM was already married and not divorced. I therefore place no weight on the marriage certificate.

39. The Appellants have produced no other evidence as to the legal validity of the marriage. For those reasons, I am not satisfied that the First Appellant's marriage to LM in Bangladesh in 2007 is one which was legally valid in that country. It is therefore not a legally valid marriage for the purpose of establishing the First Appellant's EU law rights as LM's family member from that point onwards.
40. The First Appellant also suggested in his oral evidence that he entered into an Islamic marriage with LM in the UK prior to his civil ceremony in July 2009. He said he could call evidence from witnesses who were present at that wedding. There is no such evidence before me. I would in any event be sceptical about the truth of such evidence. It is raised very late in the day. It is also inconsistent with the First Appellant's claim that he married LM in an Islamic marriage in Bangladesh. If that took place (and for current purposes I accept that it did), why would the First Appellant need to go through the same ceremony in the UK? In any event, as Mr Wilding pointed out, Islamic marriages in the UK are not legally valid and would not lead to the First Appellant being treated as a family member in European Law. Any such marriage, at least prior to LM's divorce in April 2009 would also suffer from the same problems as that in 2007. She was not free to marry.
41. The First Appellant's case in relation to his EU law rights is not though confined to his status as LM's family member. His case is that LM was a qualified person for more than five years while they were in a relationship and that, either as her spouse family member or durable partner extended family member during that time, he has completed five years either whilst they were together or thereafter on the basis of a retained right.
42. I begin my consideration of his case with what the evidence shows about the relationship. I have already set out the evidence as to the marriage in Bangladesh in 2007. Whilst that might be said to show a durable relationship at that time, that evidence has to be seen in the context of the fact that LM had married another gentleman in Slovakia only ten months earlier. As such, I do not accept that this evidence, certainly taken alone, shows that the First Appellant and LM were in a durable relationship at that time.
43. There is evidence in the form of a number of joint tenancy agreements purporting to show that the First Appellant and LM were living at the same address at various times between April 2007 and the end of 2012. First, there is an agreement relating to [n]

Brondesbury Park which was let to them from 16 April 2007 for one year ([AB/189]). There is then an agreement which crosses over with that period from 1 December 2007 to 31 May 2008 in relation to [n] Abbotts House ([AB/205]). It is not clear why the couple would have rented two properties between December 2007 and April 2008.

44. Although there is correspondence addressed to the First Appellant and LM sent to those addresses which is consistent with them living at those respective addresses during those time periods, that correspondence is addressed to them individually and there is nothing addressed to them both. Although there is a memorandum of understanding, apparently relating to an agreement about business premises between the First Appellant and LM and other individuals, dated 11 December 2007 ([AB/201-2]) which gives the First Appellant's and LM's address as [n] Abbotts House, that address is written in manuscript which casts some doubt on when and by whom it was inserted. There is also an inconsistency in the form of a council tax bill addressed to the First Appellant at [AB/235] which is a demand for council tax for [n] Brondesbury Park up to 31 March 2008, at a time when other evidence suggests he was living with LM at [n] Abbotts House. In any event, the fact of having correspondence sent to an address does not necessarily mean that both parties are living at that address nor that they are doing so in a committed relationship.
45. Thereafter, the couple are shown as living at [n] Chancery House, by reason of a licence to occupy from 29 June 2008 for six months and a tenancy agreement for twelve months from 1 March 2009 ([AB/231 and 229] respectively). Again, that they both lived at that address is consistent with correspondence addressed to them thereafter at that address but, again, that correspondence is addressed to each individually and there is nothing addressed to them jointly. That they both lived at that address is also confirmed by a letter from their landlord at [AB/232] which reads as follows:

"I'm [TM] [address given] who is the owner of flat [n] Chancery House, Lowood street, London is confirming that Mr Md Shariar [K] (DOB: 10.11.1982) and Mrs [LM] ([date of birth given]) lived together in the property (flat [n] Chancery house, Lowood street, London) from June, 2008 to December, 2012. I confirm that Mr Md Shariar [K] and [LM] is very polite, modest, honest and reliable. In a word we can consider them as very good people..."

The details given of that letting are consistent with the documents and may support the First Appellant's claim that they were living together as a couple during that period. However, I note that the landlord did not live at the Chancery House address and other than knowing that she let the property to both individuals and that, presumably, they (or one of them) paid her rent for the property throughout that period, she does not say how she knows that they were both living there throughout that period. She says they "lived together". She does not say that they lived there together as a couple. They of course divorced during 2012. That is not mentioned.

46. When the First Appellant and LM applied for a COA to marry, in April 2009, they both signed affidavits which are at [AB/243] and [AB/245]. Those affidavits are both dated 22 April 2009 and are in substantially identical terms. They both say that they have been living together for over two years which broadly coincides with them moving to

the same address in April 2007. The affidavits though say little about the relationship save as to where and when they met and that they intend to marry and found a family. I note with some interest, the failure to mention in those affidavits that they had already undergone a marriage ceremony in Bangladesh which may cast some doubt on whether that marriage took place at all, although, as I have already noted, the Respondent does not dispute for current purposes that it did.

47. There are six photographs of the First Appellant and LM together at [ABS/B30 to B/32] (in addition to the photographs of the marriage in Bangladesh). Those are annotated as showing them together at different locations between 2007 and 2012 (one photograph per year) but that annotation is given in manuscript and there is nothing on the photographs themselves which shows when they were taken. Unlike the photographs of the First and Second Appellants at [AB/342 to 348] none of the photographs of the First Appellant and LM together show them as being with other friends. There are no statements from mutual friends attesting to their relationship and little if any evidence from LM herself which provides any detail of the relationship. Even the First Appellant's own evidence is restricted to reference to the dates when they were together and provides no detail about what they did together as a couple, mutual interests, friends etc.
48. Based on that evidence, I accept there is evidence which is capable of supporting the First Appellant's case that he was living at the same address as LM for a period of five years. However, for the reasons I have given I am not satisfied that the evidence shows that they were in a durable relationship for all, or indeed any of that time. I note though that the First Appellant's status as a family member of an EEA national exercising Treaty rights is not disputed by the Respondent in the period between 10 July 2009 when he married LM in the UK and 1 May 2012 when they divorced. It has not been suggested that the relationship was one of convenience.
49. On the basis of the evidence before me, I accept that the evidence shows that the First Appellant was living at the same address as LM from 29 June 2008 based on the letter from the landlord of [n] Chancery House to which I refer at [45] above and notwithstanding the deficiencies which I identify with that evidence. However, I do not accept that the evidence shows that the First Appellant was in a relationship with LM from that date for the reasons I have given. The earliest date when I accept that the evidence shows that he was in a relationship with LM is in April 2009 when an application was made for a COA. That also coincides with the time when divorce proceedings had been started in relation to LM's earlier marriage and, whilst it was her ex-husband who petitioned for divorce (in February 2009), that event suggests that LM had moved on from that relationship and may have formed some sort of commitment to the First Appellant by that date.
50. The Respondent has also taken issue with LM's status as a qualified person in the period when the First Appellant claims to have been in a relationship with her. Mr Wilding spent some considerable time in cross-examination on this topic. I therefore set out my findings on that evidence.

51. LM was registered as an Accession State Worker on 15 October 2005 ([AB/210]). She has worked in the UK as a registered midwife, first, it appears, in an employed capacity and then self-employed, running a company providing a midwifery/nursing service to the health service. A document at [AB/188] shows that LM was registered with the Nursery Midwifery Council on 21 March 2007 as a registered midwife and from 29 November 2006 as a “RN1”. The First Appellant relies on a document at [ABS/D01] as showing that LM would have had to satisfy the authorities that she had completed 450 practice hours in order to register or 900 hours if renewing as both a midwife and nurse. However, that document says nothing about where those hours must be worked. Slovakia became a member of the EU on 1 May 2004. As such, it is probable that the authorities in the UK would accept qualifications and other qualifying criteria as satisfied if those were obtained in Slovakia. I note that LM qualified as a midwife in Slovakia. It is also the case, as is evident from the divorce document referred to at [28] above, that LM was in Slovakia in December 2006 although it is not clear whether that was only for the marriage ceremony to her previous husband.
52. In terms of evidence of actual working in the UK, the earliest evidence is a document at [AB/179] which provides a wages summary for the period 26 August to 14 October 2008. It is of course possible that LM was looking for work before then and was a qualified person as a jobseeker but there is no evidence as to receipt of benefits in the period before then.
53. In the application for a residence permit, on 28 January 2010, Mayday Healthcare plc confirmed that LM has been working for it from 16 January 2009 to that date. An “Annual Fitness for Employment Certificate Review Form” dated 11 February 2011 completed by LM appears to confirm that she was working for (or at least was registered for work) with Imperial Health at Work for a period of at least twelve months prior to that date. I am satisfied on that evidence that LM was working or was looking for work or registered for work from 26 August 2008 to 11 February 2011.
54. Thereafter, on 21 March 2011, LM incorporated “Luciana Services Ltd”, a limited company providing nursing services. There is an enhanced disclosure check carried out in relation to LM on 18 May 2011 ([AB/165]) and confirmation that LM was admitted as a member of the Royal College of Nursing from 16 April 2012 ([AB/144]). There is evidence that the company’s first full year of trading was to 31 March 2012 ([AB/150]). There is then evidence that the company continued to trade to the year ending 31 March 2016. Based on that evidence, I am satisfied that LM was a qualified person throughout the period 21 March 2011 to 31 March 2016.
55. Indeed, Mr Wilding accepted in closing submissions that the Respondent must have been satisfied in January 2011 that LM was a qualified person as he issued a residence permit to the First Appellant on the basis of being a family member of such. On the evidence, I find that LM was a qualified person from 26 August 2008 to, at the latest, 31 March 2016.
56. The Respondent also disputed whether the First Appellant can be said to have been exercising Treaty rights as if he were an EEA national on dates relevant to his claim to

be entitled to a retained right of residence. This too was the subject of extensive cross-examination by Mr Wilding concerning the First Appellant's own employment in the UK. I therefore set out my findings on that evidence.

57. There is evidence in the form of a letter from HMRC dated 31 January 2018 which shows the following:

2006/7: The First Appellant worked for "The Network (Field Marketing & Promotions) Co Ltd" ("Network") earning £104 gross and for McDonalds earning £2557.94 gross. He left McDonalds on 24 June 2006. He worked for West One Restaurants Ltd ("West One") earning £6,376.76 gross.

2007/8: The First Appellant worked for "Network" earning £24 gross. He also worked for "West One". He left that company on 11 December 2007. He earned £5455.78 gross.

2008/9: The First Appellant worked for "Yo! Sushi Limited" ("Yo! Sushi") to 2 April 2009 earning £3265.27 gross. He worked also for McDonalds earning £1119.45 gross and for "Network" earning £24 gross.

2009/10: The First Appellant worked for "Yo! Sushi" earning £8874.77 gross.

2010/11: The First Appellant worked for "Yo! Sushi" earning £11,873.77 gross.

58. There is limited evidence of the First Appellant's earnings in 2011/12. It appears from a P14 form at [ABS/C08] that he worked for "Yo! Sushi" until 18 August 2011 when he left that employment having earned a total of £1075.44 gross. This was his only earned income for that tax year as is confirmed by the tax calculation at [ABS/C11]. The First Appellant was certified as medically unfit to work from 21 June 2011 to 18 July 2011 ([AB/220]).
59. The First Appellant was also involved in the setting up of a company, "Shopno Bunon Real Estate Ltd" ("Shopno") which was incorporated on 15 June 2011 ([AB/218]). There is no evidence that "Shopno" traded apart from the Companies House printout which states that the last accounts were made up to 30 June 2014 and the last annual return to 15 June 2014 ([ABS/C14]). Those accounts/ annual returns are not in the bundle. The First Appellant ceased to be a director on 1 January 2014. "Shopno" was dissolved on 26 January 2016.
60. In relation to "Shopno", the First Appellant confirmed in oral evidence that he became a director in 2011. He admitted in oral evidence that the company did not trade between 2012 and 2013. He said that during that time the company was preparing software and had taken some development buildings in Bangladesh. There is no evidence that the First Appellant derived any income from that company or that he had any active involvement in the running of the company.
61. The tax calculation at [AB/215] shows that the First Appellant earned a total of £720 gross for the year 2012-13. As appears from the document at [ABS/C12], those earnings relate to employment by a Mr T Walker and that the First Appellant started

in that job on 4 March 2013. According to his oral evidence, he was employed as a personal assistant.

62. In the year 2013-14, the First Appellant had a number of jobs ([ABS/C24]). He worked for Mr Walker, earning £1768 (see [AB/211]). He also worked for "Winter", earning £507.58. He left that job on 31 May 2013 ([ABS/C20]). He worked for Firezza Ltd earning £472.85 before he left there on 6 August 2013 ([ABS/C21]). He worked for "Select", earning £2110.90. He left that job on 4 September 2013 ([ABS/C19]). He also worked for C Loga earning £2883.73 before leaving on 28 February 2014 ([ABS/C25]).
63. In the year 2014-15, the First Appellant earned £1300 gross working for "Impart" ([ABS/C28]). There is no evidence of any other earnings for that year, nor for any later years. The First Appellant said in oral evidence that these earnings related to a company called "Impartial Business" which was a business which he set up in June 2014. There are no company documents in that regard showing his involvement in the business, when it was set up and its financial situation. The First Appellant's oral evidence is that he continued to work for Impartial Business until the beginning of 2016.
64. The First Appellant admitted in oral evidence that he was not sure if he was employed other than on the dates shown by the documents but insisted that he was nonetheless "commercially active" the whole time. He submitted that the issue whether he was economically active should be broadly construed. He admitted that he "did not believe in working in day to day jobs". He said that he was nonetheless involved in "creative jobs". He also said that he ran an "employment campaign in support of an ex-minister" and was "into business and some creative things". He said that he was "always employed but his focus was on charitable things". There is no evidence from others or documentary evidence to corroborate his oral evidence in this regard and his assertions were broad and vague with no detail provided.
65. Based on that evidence, I am satisfied that the First Appellant can show that he was working up to 18 August 2011 and from 4 March 2013. There is however no evidence of working between those dates. Furthermore, in 2014/15 the evidence is that the First Appellant's earnings were only £1300 for the whole year (from what he says was his own business: see [63] above). There is no evidence of earnings thereafter (even though the letter from HMRC to which I refer at [57] above says that it encloses the self-assessment tax calculations and PAYE P14 pay and tax details for all years up to 2016/17). I note that the First Appellant would not have been entitled to work after his residence permit was revoked in March 2015.
66. The Second Appellant admitted in her oral evidence that she was paying the rent and bills "partially" during 2014 and in 2015. She also said that she would give the First Appellant money when he needed it because she was the one working full-time. She declined to accept though that the First Appellant was fully dependent on her at that time.

67. The Second Appellant also sought to change her evidence in this regard, apparently under some pressure from the First Appellant who also tried to interrupt the Second Appellant while she was giving evidence on this topic. This state of affairs was highly unsatisfactory and gave the appearance of the First Appellant being concerned that the Second Appellant's evidence might undermine his case that he was continually economically active.
68. As it happens, whether or not the First Appellant was or was not working during these years is of little consequence for reasons which follow. However, I find that the evidence which is credible is that which the Second Appellant gave first, namely that she was working full-time (as an assistant manager in Pizza Hut) until she went on maternity leave and that it was she who was paying the bills during that time and that she did give the First Appellant money at times when he needed it.
69. I now turn to the application of the law to the facts as found.
70. The issue of when the First Appellant legally married LM is relevant to the question whether he can claim a retained right of residence as a former family member. The First Appellant's appeal with which I am concerned is not against the revocation of his residence permit as a family member (which appeal was withdrawn previously in favour of an application for indefinite leave to remain based on long residence: see [19] of Judge Reeds' decision). However, part of the claim to have lawfully resided in the UK is based on the First Appellant's rights as the family member of LM and it is therefore necessary for me to determine those rights. If the appeal had continued as one against revocation of the residence permit, which challenged the Respondent's decision dated 9 March 2015, that would be considered under the EEA Regulations 2006 ("the 2006 Regulations") and I therefore refer to the provision of those regulations when dealing with the First Appellant's rights under European Law. The relevant provisions are substantially the same in any event under the 2016 regulations.
71. Regulation 10 of the 2006 Regulations reads as follows (so far as relevant):
- "Family member who has retained the right of residence"**
- 10.- (1) In these Regulations, "family member who has retained the right of residence" means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).
- ...
- (5) A person satisfies the conditions in this paragraph if –
- (a) he ceased to be a family member of a qualified person or of an EEA national with a permanent right of residence on the termination of the marriage or civil partnership of that person;
 - (b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;
 - (c) he satisfies the condition in paragraph (6); and
 - (d) either –

(i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

(ii) ...

(6) The condition in this paragraph is that the person—

(a) is not an EEA national but would, if he were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; or

(b) is the family member of a person who falls within paragraph (a).

...

(8) A person with a permanent right of residence under regulation 15 shall not become a family member who has retained the right of residence on the death or departure from the United Kingdom of the qualified person or the EEA national with a permanent right of residence or the termination of the marriage or civil partnership, as the case may be, and a family member who has retained the right of residence shall cease to have that status on acquiring a permanent right of residence under regulation 15.”

72. In order to determine whether the First Appellant can benefit from a retained right of residence I need to establish whether the marriage subsisted for three years (regulation 10(5)(d)(i)). I have found that the First Appellant was not legally married to LM until he married her in the UK. That marriage took place on 10 July 2009 at a registry office in Tower Hamlets ([AB/240]). At [AB/241] is a copy of the First Appellant’s decree nisi, LM being the petitioner in that divorce. That document is dated 23 February 2012 and notes that the decree (ie the decree nisi) will be pronounced on 20 March 2012. The decree absolute appears at [AB/242] and is dated 1 May 2012.
73. It is not strictly necessary for me to decide what is the relevant date for the ending of the marriage for the purposes of regulation 10 as, whichever date applies, the marriage did not last for three years from 10 July 2009. The European Court of Justice in Diatto v Land Berlin (C-267/83, [1985] ECR 567) made clear, however, that a person ceases to be a spouse (and therefore a family member) when the marriage is dissolved “by the competent authority”. In this case, that was when the decree absolute was pronounced on 1 May 2012. That is less than three years after the First Appellant was legally married to LM and therefore he is unable to obtain a retained right of residence as he cannot satisfy regulation 10(5)(d) (i) of the Regulations. Of course, if the relevant date is that of the lodging of the divorce petition, that occurred several months earlier (prior to 23 February 2012).
74. For completeness, I find that if, the First Appellant had been able to satisfy regulation 10(d)(d)(i), I would accept that LM was a qualified person at the date when divorce proceedings commenced (which is said to be the relevant date: Baigazeiva v Secretary of State for the Home Department [2018] EWCA Civ 1088). However, the First Appellant would also have to show, in order to obtain a retained right, that he has

been exercising Treaty rights as if he were an EEA national (regulation 10(6)). I do not accept that the First Appellant could satisfy that criterion between 18 August 2011 and 4 March 2013.

75. The First Appellant now says however that he does not need to rely on retained rights of residence as he had already acquired permanent residence under regulation 15 of the Regulations before he ceased to be a family member.

76. Regulation 15 reads as follows (so far as relevant):

“Permanent right of residence

15. – (1) The following persons shall acquire the right to reside in the United Kingdom permanently –

- (a) ...;
- (b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;
- (c) ...;
- (d) the family member of a worker or self-employed person who has ceased activity;
- (e) ...
- (f) a person who –
 - (i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and
 - (ii) was, at the end of that period, a family member who has retained the right of residence.

(2) The right of permanent residence under this regulation shall be lost only through absence from the United Kingdom for a period exceeding two consecutive years.

(3) A person who satisfies the criteria in this regulation will not be entitled to a permanent right to reside in the United Kingdom where the Secretary of State or an immigration officer has made a decision under –

- (a) regulation 19(3)(b), 20(1), 20A(1) or 23A; or
- (b) regulation 21B(2) (not including such a decision taken on the basis of regulation 21B(1)(a) or (b)), where that decision was taken in the preceding twelve months.”

77. A “family member” is defined at regulation 7 as follows (so far as relevant):

“Family member

7.- (1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person –

- (a) his spouse or his civil partner;
- (b) ...

...

(3) Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked.

(4) Where the relevant EEA national is a student, the extended family member shall only be treated as the family member of that national under paragraph (3) if either the EEA family permit was issued under regulation 12(2), the registration certificate was issued under regulation 16(5) or the residence card was issued under regulation 17(4)."

78. Regulation 8 in relation to "extended family members" reads as follows (so far as relevant):

"Extended family member"

8.— (1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).

...

(5) 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.

(6) In these Regulations "relevant EEA national" means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4) or the EEA national who is the partner of the extended family member for the purpose of paragraph (5)."

79. The First Appellant relies on his relationship with LM in relation to the period when he was either an extended family member (ie in a durable relationship with her) or her family member (her spouse). He is to be considered a "family member" in European Law until the date of his decree absolute (1 May 2012) (see [73] above). As I have already noted, he became a "family member" when he married LM in the UK on 10 July 2009. The evidence concerning the issue of a residence permit is not entirely clear. The First Appellant has not produced that document. It appears from the Respondent's decision that one was issued first on 28 February 2010 for six months and then on 13 January 2011. That latter permit was valid to 13 January 2016. That permit was revoked on 9 March 2015. I am not clear why the Respondent issued the first permit only for six months and then later for five years. It may be that the first was therefore a certificate of application and not a residence permit. Either way, though, the First Appellant was never granted a residence permit as an extended family member prior to his marriage. As such, he could only be considered to be a family member from the date of his marriage on 10 July 2009 to the date when his marriage was dissolved on 1 May 2012. That period is less than three years.

80. The First Appellant says however that he should be treated as if he were a family member from an earlier date based on his durable relationship with LM prior to the date of their marriage. He says that the Respondent had recognised this as a durable relationship from 2007. He relies in particular on the outcome of the application made on 27 April 2009 for a COA to marry. The COA was granted on 1 June 2009 expiring on 1 September 2009. The First Appellant relies in that regard on a Home Office G-CID note dealing with the COA which he suggests shows that the Respondent must have accepted that he had been in a relationship for two years when he applied for “a residence permit” in 2009 ([ABS/A27-28]) because the Respondent only accepts as “durable” a relationship which has subsisted for two years.
81. I observe, firstly, that, as a matter of fact, the note on which the First Appellant relies does not read as he suggests. The note is concerned only with whether a COA should be granted to permit the First Appellant to marry LM. It was not dealing with an application for a residence permit. The COA process was a domestic legal scheme which was unconnected to EU law rights. Any suggestion that this determines any EU law right is therefore fundamentally misconceived.
82. In any event, the note begins by stating that “[d]ue to the outcome of the May 07 Court of Appeal ruling we are having to consider the COA application on the basis of the genuine nature of the claimed relationship”. That would appear to be reference to the Court of Appeal’s judgment in Secretary of State for the Home Department v Baiyai and others [2007] EWCA Civ 478 which was concerned with the lawfulness of the COA scheme. At [51] of the judgment the Court of Appeal remarked that one of the difficulties for the Secretary of State in arguing that the scheme was proportionate was because “the COA scheme does not turn at all on the genuineness of the marriage, but only on the applicant's immigration status, together with any compassionate circumstances”.
83. For those reasons, although the First Appellant is entitled to point to what is said thereafter in the note by reference to the evidence, that “on the balance of the evidence provided it appears the couple are in a genuine relationship” that is not the “extensive examination” of the couple’s case such as is required where the Respondent is considering whether to recognise an “extended family member” as a family member. Confirmation of that fact, if such is needed, is to be found in what follows from the grant of the COA where it is noted in the G-CID note that “this is NOT a grant of leave and is NOT a barrier to removal”. It goes without saying that, if the Respondent was recognising a right as a family member, it would not be possible to remove the First Appellant. In any event, even if the COA decision did find the relationship to be genuine, it did so only as at the date of the G-CID note – 1 June 2009. It was not a determination whether there was a “durable relationship” nor whether that relationship had lasted for two years.
84. Even if the First Appellant might be able to rely on the Respondent’s acceptance of the position as an extended family member as an implied acceptance that a relationship has subsisted for a period of two years (based on the Respondent’s view of what constitutes a “durable relationship”), there has never been such an examination of his

case on that basis. By the time that the Respondent was asked to grant a residence permit (by way of an application in January 2010), that was on the basis that the First Appellant was a family member of LM, since they had already married in July 2009.

85. As a matter of law, as Mr Wilding pointed out, following the Court of Appeal's decision in Macastena v Secretary of State for the Home Department [2018] EWCA Civ 1558, a period spent in a durable relationship, even if that were accepted to be such in the period in question, could not count towards permanent residence unless and until a residence permit is issued (see in particular [17] of the judgment in that case). Accordingly, even if the First Appellant were in a relationship which could be described as "durable" under EU law, that could not count towards his entitlement to a permanent right of residence until he was issued with a residence permit on that basis. He was never issued with a residence permit as a partner. He did not apply for or obtain that permit until after his marriage.
86. The First Appellant sought to distinguish Macastena on the basis that the Court of Appeal had not determined the issue fully but had remitted the appeal to the Upper Tribunal. That submission is misconceived. The Court of Appeal remitted the appeal in order that the Upper Tribunal could consider Mr Macastena's rights under Article 8 ECHR including that he missed out on EU law rights by only five days ([27]). In light of what is said by the Court of Appeal at [15] to [20] and [25] to [26] of the judgment, the issue which is relevant to this case (whether the Tribunal can take into account when considering permanent residence a period when an extended family member does not have a residence permit) is clearly and conclusively determined in the Respondent's favour.
87. Accordingly, the First Appellant's EU law rights for the purposes of permanent residence did not commence until he married LM on 10 July 2009. He ceased to be a family member on the date of divorce from LM on 1 May 2012. That period is less than three years and he could not obtain a permanent right of residence on that basis.
88. The First Appellant also suggests that the period after his divorce from LM and until his residence permit was revoked on 9 March 2015 can be taken into account in relation to his EU law rights because he says that the relationship in fact continued. In circumstances where a petitioning party is required for the purposes of a divorce to state that the marriage has permanently broken down and where the Court has to be satisfied that this is the case before pronouncing the divorce, I would take some persuading, with sufficient evidential underpinning, that the relationship in this case continued during the period from, at the latest, when the decree absolute was pronounced on 1 May 2012 and 9 March 2015 when the residence permit was revoked.
89. Judge Reeds refers at [17] of her decision to a letter from LM which is undated and refers to them "still living together as a couple". It appears from a document now at [ABS/B19] that the letter (which is reproduced at [ABS/B19.1]) was in fact sent by e mail on 15 June 2012, some six weeks after the divorce was pronounced. Even if the First Appellant could rely on the letter from LM as showing that they were still in a relationship at that date, therefore, it could make no difference to his EU law rights

which have subsisted only from 10 July 2009 when the couple married and therefore still under three years by the date of LM's letter.

90. In any event, far from being underpinned by the evidence in this case, the First Appellant's assertion in this regard, is undermined by his own evidence. In his witness statement at [AB/28], he says this:

“[6] Although my marriage with [LM] was love marriage but eventually it did not work out longer and our relationship died in just over five years. Our Marriage dissolved in May, 2012. Afterwards She got married again and my visa was curtailed from March 2015 with a right of appeal...”

It will be recalled that the First Appellant claims that the relationship with LM began in February 2007 and therefore five years coincides with the period leading up to the couple's divorce. It is also apparent that, after the divorce, LM sought to marry for a third time.

91. Further and in any event, any suggestion that the relationship between the First Appellant and LM continued after the date of divorce is undermined by the evidence of the Appellants as to the relationship between them. They say they met in September 2013 and their relationship developed, culminating in their marriage on 1 March 2015 after the First Appellant says that he had been “leaving together over 2 years” ([AB/28 § 9]) (by which I assume that he means “living together”). That would suggest that the First Appellant was no longer living at the same address as LM by March 2013 at the latest although I accept that the Second Appellant said in oral evidence that they had been living together only since early 2014. That the First Appellant and LM only lived together until the end of 2012 is however consistent with the letter from the First Appellant's and LM's landlord referred to at [45] above that they both lived at Flat [n], Chancery House only until end December 2012.
92. Based on the chronology as set out in Judge Reeds' decision at [11] to [19] as expanded upon above and for the reasons given above, therefore, I am satisfied that the First Appellant can rely in terms of lawful residence on EU law rights only in relation to the period from when he became LM's spouse in a legally valid marriage ceremony on 10 July 2009 until, at the latest, the date of their divorce on 1 May 2012, a period of two months short of three years. That is insufficient to permit the First Appellant to rely on any retained right of residence (as the marriage lasted less than three years) and insufficient to establish any permanent right of residence prior to dissolution of the marriage.
93. The issue whether the First Appellant has established a permanent right of residence or has a retained right of residence is not necessarily determinative of whether he can establish that he is entitled to indefinite leave to remain under paragraph 276B of the Rules which requires that he has ten years' continuous lawful residence in the UK. The First Appellant entered the UK as a student on 12 October 2005 and therefore has to show that his presence was continuous and lawful until 12 October 2015.

94. As is made clear by paragraph 2 (2) of Schedule 2 to the Regulations, the family member of a qualified person or who has retained a right of residence is not to be treated as “settled” by virtue of that status. However, the Home Office has guidance in place entitled “Long Residence (version 15)” published on 3 April 2017 which states the following:

“Time spent in the UK does not count as lawful residence under paragraph 276A of the Immigration Rules for third country nationals who have spent time in the UK as:

- the spouse, civil partner or other family member of a European Union (EU) national • an EEA national exercising their treaty rights to live in the UK but have not qualified for permanent residence
- former family members who have retained a right of residence

...

However, you must apply discretion and count time spent in the UK as lawful residence for an EU or EEA national or their family members exercising their treaty rights to reside in the UK. Sufficient evidence must be provided to demonstrate that the applicant has been exercising treaty rights throughout any period that they are seeking to rely on for the purposes of meeting the long residence rules.”

95. As I conclude at [18] above, the First Appellant’s leave to remain as a points-based system migrant expired on 5 February 2009 when his Section 3C leave expired. At that time, the First Appellant’s case is that he was already in a relationship with LM. It was shortly before an application was made for a certificate of approval. He in fact married LM on 10 July 2009 and from that point until the divorce (as I have concluded) he was, on the face of it, the family member of a qualified person for the purposes of EU law.

96. There is therefore a gap in lawful residence at that point of only just over five months. Even accepting for these purposes that the First Appellant was in a “durable relationship” in February 2009 and that this should be treated as if it were lawful residence, his presence could only be said to be lawful for the period up to the date of divorce on 1 May 2012. At that point in time, he had accrued a period of lawful residence of only six years and (just under) seven months which is significantly short of the ten years required. I have explained why the evidence does not show that the First Appellant can rely on EU law rights in the period after the divorce and up to revocation of his residence permit (see [89] to [92] above); he was no longer a family member at that time.

Conclusions: Issues one to three: First Appellant’s entitlement to indefinite leave to remain

97. For the reasons given above, I conclude that the First Appellant is not entitled to indefinite leave to remain under paragraph 276B of the Rules. He is not entitled to either a retained right of residence or permanent residence under EU law. I therefore

move on to consider the position of the Second Appellant before dealing with the issue which I have to determine which is whether the appeal succeeds on Article 8 grounds.

Issue Four: Second Appellant's status

98. The chronology in relation to the Second Appellant's status can be summarised as follows. She entered the UK as a student in October 2009. She was granted leave to remain first as a Tier 1 post-study worker and then applied, on 22 February 2012 for further leave as a Tier 1 entrepreneur. That application was refused on 3 June 2013. She appealed and had a hearing on 4 February 2014. It is suggested that neither she nor her solicitors received the appeal decision.

99. The Second Appellant's evidence in this regard as set out in her witness statement is as follows:

"... [5] I made the appeal of the decision to the Tribunal through Immigration 4U. As my hearing date was coming close and I did not hear anything from my representatives I tried to contact Immigration 4U. Unfortunately I came to know that the organization has been closed and they are not in practice. I felt so hopeless at that point as I was not informed anything at all. However I had my file copy and I instructed Farrington Solicitors to carry on with my appeal.

[6] On 4th Feb 2014 I had my hearing date in IAC Tailor house [sic]. On that day, I have further submitted all the relevant documents to satisfy the respondent and I believed the questions I was faced were also satisfactory to the court. And we ended up declaring that I will get the decisions in six to eight weeks. I eagerly had been waiting for the decision as I couldn't pursue my career. After the stated period, I informed my appointed solicitor Farrington Solicitors about the outcome of not hearing anything regarding the decision. My solicitor confirmed me that they emailed to the respected department to check for my hearing outcome and advised me to wait until they hear anything from the court. I started waiting for the decision since then. I contacted tribunals several times myself for the determination I was informed it was sent to my address. Unfortunately I never received the decision. Otherwise I could have perused my case accordingly.

[7] On 22nd November 2015 there was an immigration enforcement raid at my home [n] Shrewsbury Road, London E7 8AJ and after various immigration related questionnaires I was told I didn't have any leave to remain in UK moreover I am an overstayer, I told the fact of my immigration status in details and in fact, I had believe that I was protected under statutory leave in section 3D [sic] of the immigration act 1971. But, the officers confirmed that the appeal decision I was waiting for came negative decision, hence I didn't have any valid Visa category. I was very surprised and upset to know that all my efforts went in vein [sic]. They arrested me and took me in detention centre.

[8] Here I would like to add that, I moved my house from [n] Davidson Terrace to [n] Shrewsbury road and I changed my address in Home Office not to miss any letters. Moreover, I did redirection my address in Royal mail services as well

to get assurance not to miss any letter. Here, I solemnly affirm that I haven't received any decision from Immigration Tribunal. If I would receive, I would have taken appropriate action and wouldn't have to be detained."

100. There is no evidence from Farringdon Solicitors to confirm that they did not receive the appeal decision. Rule 55 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 in force at that time provided that, where a party is represented, documents must be served both on the Appellant and that representative. Rule 55(4) provided that such service on the representative is deemed service on the Appellant. That would be sufficient to determine the Appellant's appeal at the time which would stop the clock in relation to Section 3C leave even if the Appellant did not herself receive the decision.
101. I do not in any event accept the Second Appellant's evidence on this point. She has not produced any of the correspondence to which reference is made. Even if she spoke to the Tribunal by telephone to inform them that she had not received the decision, I find it inconceivable that, on learning that the appeal had in fact been determined, she would not have asked for a copy of the appeal decision to be sent to her and equally inconceivable that the Tribunal would not have offered to send a further copy whether she requested one or not. Similarly, having been told by those who detained her in November 2015 and, on her case, not knowing prior to that date that she had lost her appeal, she apparently took no steps to ask the Home Office for the appeal decision in order to seek permission to appeal it out of time. Nor did she challenge the actions of the officials who detained her on the basis that she said that she had continuing leave (and would not therefore have been a person liable to be removed and detained).
102. It is worthy of note that, in the covering letter with the application made to the Home Office on 30 November 2015, there is only an oblique mention of the Second Appellant having not received the appeal decision. The letter states that the appeal was dismissed and goes on to say that "[a]lthough in general interpretation our client has overstayed in the UK but having regard to the circumstances that she was not aware at all as to the decision of application for permission to Upper Tribunal against the dismissal of First Tier Immigration Tribunal, our client did not overstay for long as she was in statutory leave under Section 3D of Immigration Act 1971". That assertion is inconsistent with the Second Appellant's case that she did not know her appeal had been dismissed and suggests rather that she knew it was dismissed but did not know that an application for permission to appeal the First-tier Tribunal decision had failed.
103. The Second Appellant has also failed to seek corroboratory evidence from the Tribunal about what happened with her appeal and where the decision was sent. Whilst it is possible that the appeal file would by now be destroyed, that is unlikely to have been the case in November 2015 when on her case she became aware that the appeal had been dismissed.
104. For the above reasons, I am satisfied that the Second Appellant did receive the appeal decision or that, at the very least, it was sent to her representatives and therefore served in accordance with the relevant procedure rules. That would be sufficient to

bring to an end her Section 3C leave which therefore ended at some time prior to 30 November 2015 when she made the application which led to the Respondent's decision under challenge.

Issue Five: Second Appellant's Status as the First Appellant's Partner

105. Since I have concluded that the First Appellant is not entitled to indefinite leave to remain, I do not need to consider whether the Second Appellant can succeed based on her relationship with him. He is not a qualifying partner for the purposes of Appendix FM to the Rules.
106. Even if I am wrong in my conclusions about the First Appellant's status, I do not accept in any event that the Second Appellant could succeed under the Rules in relation to her family life with the First Appellant. I have indicated at [100] to [104] above, why I am unpersuaded by the Second Appellant's case that she has continuing leave based on non-receipt of the decision in her previous appeal. Accordingly, she cannot show that she had lawful leave at the time when she made her application to remain based on her Article 8 rights.
107. In order to succeed under the Rules, therefore, the Appellants would have to show that they meet paragraph EX.1 of Appendix FM and that there are insurmountable obstacles to them continuing their family life in Bangladesh (even if the First Appellant were entitled to indefinite leave to remain which I have concluded he is not).
108. The only issue raised in this regard is the attitude of the Second Appellant's family to the relationship between her and the First Appellant.
109. The Second Appellant says that her family have disowned her because they disapprove of the marriage. Her case in that regard is confirmed by the letter said to be written by her father at [AB/338] which reads as follows:

"By the grace of Almighty I hope you are doing fine in your new life. By this letter I want to tell you something about our thought of your decision.

You are our only one daughter and since you born we had a big hope that one day you will shine not only my name but also whole family's name by your success. You were a very good at your studies since your childhood. I always tried my best to fulfil any of your wishes with my all afford. We decided to send you UK for higher studies for your bright future and career. On that time all of family members were against me sending you (a girl) abroad all alone. But I had faith on you that you would look after the family pride and honour. But, your decision of getting married to a divorced person is just heart breaking. We told you repeatedly not to get involved with Shariar [K] as he is not suitable for you. Our family values are different. [K]'s family is not compatible with our family in any manner. You have just ignored me, your mom and whole family, finally you got married without our consent. This is so shameful for us, you just destroyed all our pride and family prestige. Wish you all the best with your new life and don't ever think that we will accept you as our daughter or your husband as our family member."

110. I accept the evidence that the Second Appellant's family do not approve of and have not accepted her marriage to the First Appellant. Her oral evidence that she had tried to contact her parents when her son was born and that her mother cried and put down the phone was convincing. She was clearly distressed by the rift that her marriage has caused with her family.
111. I do not however accept the First Appellant's suggestion that the Second Appellant's father would kill him if they returned to Bangladesh. There is nothing in the Second Appellant's father's letter which suggests that he intends any physical harm to the First or Second Appellant and in fact wishes his daughter well in her new life. There is no suggestion of any threat in the Second Appellant's witness statement. She says only that she will not be accepted by her family and society in Bangladesh.
112. There is no evidence that the Appellants' marriage is not one which will be accepted by society more generally. The First Appellant's family are not said to have objected to it. Indeed, the oral evidence of the Appellants is that they both speak with the First Appellant's family members by telephone or via Skype. Nor does the First Appellant's witness statement refer to such threats. His only fear and any threat is said to arise because of his political activities (which as I have already noted at [8] is a new matter with which I cannot deal; see also [13] of the Second Appellant's statement). I find that the First Appellant's oral evidence that he would be at risk on return from the Second Appellant's father is a (late) embellishment designed to bolster the Appellants' case and is not credible.
113. As such, I am satisfied that there are not any insurmountable obstacles to the Appellants living together in Bangladesh. Accordingly, even if I were satisfied that the First Appellant has resided lawfully in the UK continuously for ten years, which for the reasons I have given I am not, that would not entitle the Second Appellant to leave to remain as his wife. They could continue their family life in Bangladesh.

Article 8 ECHR

114. Having determined the factual issues which required resolution in this case, I therefore turn to what is in fact the only issue for me to determine, namely whether the Respondent's decision is unlawful under the Human Rights Act 1998. As I made clear at the outset, I cannot take into consideration in this decision, the protection claim which the First Appellant has raised in his witness statement nor the fact of the birth of the Appellants' child. Both are "new matters" and the Respondent has not consented to those being raised. It is of course open to the Appellants to make those claims to the Respondent by way of further applications made in the appropriate fashion (in person in relation to protection and by way of further application in relation to the child).
115. I have concluded that neither of the Appellants have a right to remain in the UK. The First Appellant's status is unlawful (and has been since 1 May 2012). I am not satisfied that the Second Appellant's status is lawful (or was at the date of application). Her lawful status came to an end when the appeal was determined by service of the appeal decision which I have found (in the absence of evidence to the contrary) was served

on her former solicitors (even if she did not herself receive it which I do not in any event accept).

116. Neither Appellant can claim to be settled in the UK. That means that neither can support an application by the other to remain under the Rules as a partner.
117. The First Appellant has been in the UK for just under thirteen years. The Second Appellant has been here for just under nine years. Neither can meet the residence requirements of paragraph 276ADE of the Rules.
118. I have already indicated that I cannot take into account the First Appellant's asserted protection claim (which is largely unevidenced in any event). Leaving that to one side, the Appellants have failed to show that there are any "very significant obstacles" to their integration in their home country of Bangladesh.
119. I have explained why, although I accept that the Second Appellant's parents will not accept the relationship and have disowned the Second Appellant, there is no threat to the couple. The First Appellant's family are not opposed to the marriage and, although the First Appellant said in his evidence that they are not solvent financially, there is no reason why they cannot assist the couple to reintegrate in other ways.
120. Both Appellants are from Bangladesh and left there when they had already spent their formative years there (the First Appellant was aged nearly 23 years and the Second Appellant was aged 27 years when they left). They will be familiar with the customs, language and way of life in that country.
121. Both the First and Second Appellants are educated. The First Appellant claims that he has set up at least two businesses in the UK. It is not entirely clear that those have had any success but there is no reason why he cannot continue with his entrepreneurial ambitions in Bangladesh. Both Appellants have failed to establish that they can meet the requirements as entrepreneurs or workers in the UK. However, there is no reason why they cannot find work in their home country. Both have qualifications which will assist in that regard.
122. The fact that the Appellants have no basis of stay within the Rules is relevant when it comes to consideration of whether they can succeed outside the Rules. I accept that the Appellants can show that they have established a private life in the UK with which removal will interfere. There is limited evidence as to their private lives, and such evidence as there is, is mainly contained only in their own witness statements (at [16] and [17] of the First Appellant's statement at [AB/30] and [15] of the Second Appellant's statement at [AB/35]). However, they have been in the UK for about thirteen and nine years respectively and although it appears that, at least the First Appellant, has been back to Bangladesh during that period (on his case in 2007 when he married LM), they are likely to have assimilated to some extent to the culture in the UK and to have made friends. There are photographs of them with others even if there are no supporting statements from such friends.


123. The issue which arises is therefore the proportionality of the interference with their private lives. Their family life will be unaffected as they will return to Bangladesh as a family unit and there is no suggestion that they have other family members in the UK from whom they will be separated.
124. The Appellants' private lives, established whilst here with precarious status (as points-based system migrants) and thereafter unlawfully should be accorded little weight. That does not mean that they should be given no weight. However, I have to take into account that there is little evidence of any strong private life being formed in the UK by either Appellant.
125. The highest that the First Appellant puts it in his statement is that he has "studied, work, business all is in here for so many reputed organization, successfully launching few of the international project operating from UK which will help the nation financially and socially". However, no detail is provided of the "reputed organisations" or "international projects" and these assertions are simply unsupported by other evidence. That other evidence shows only that the First Appellant has set up one company ("Shopno") which, even on his own evidence, did not ever get off the ground. There is no evidence about the setting up of the other business. The First Appellant's assertion that he has "lunched [sic] one of the greatest idea that will make sure that not a single person will be unemployed globally", whilst no doubt a laudable aim, is not supported by any detail as to what is this idea or how his aspiration would unfold.
126. The Second Appellant has worked in the UK but provided little detail about her private life in either her witness statement or in oral evidence.
127. Other than the assertions made by the First Appellant to which I refer at [125] above, the Appellants rely only on their adoption of the culture of the UK which assertion is otherwise unevidenced and which claim lacks detail.
128. I have regard to Section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B"). The maintenance of effective immigration control is in the public interest. The fact that the Appellants are unable to meet the Rules is relevant to that public interest as they should not be permitted to stay if they cannot meet the Rules unless there are circumstances in their cases which render removal unjustifiably harsh (see Agyarko and Ikuga v Secretary of State for the Home Department [2017] UKSC 11 at [60]). I have already indicated why I do not find there to be "very significant obstacles" to the Appellants' integration in Bangladesh. The question whether the consequences of removal would be "unjustifiably harsh" involves a similarly high threshold which is not met in this case for the reasons which I have given.
129. The fact that the Appellants speak English is a neutral factor for Section 117B purposes (see Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803 at [60] and [61]). There is no evidence that the Appellants have been reliant on benefits but there are certainly gaps in the First Appellant's employment history and it is not clear how the Appellants have been supporting themselves. The main breadwinner

for the time they have been together appears to have been the Second Appellant who would not have been entitled to work after her appeal was determined against her. She has also been on maternity leave. In any event, that factor too is a neutral one if met.

130. Even if I could take into account the birth of the Appellants' child which, as a new matter I cannot, that would not avail them since that child is not a British citizen and was born only recently so has not been in the UK for seven years. He is not a qualifying child for the purposes of Section 117B (6).
131. When the weak evidence of the Appellants' private lives and interference with their private lives caused by removal is balanced against the strong public interest in removing those with no basis of stay in the UK under the Rules and who are not therefore entitled to remain, I conclude that the decision to refuse the Appellants leave is proportionate. It follows that the Respondent's decision is not unlawful under the Human Rights Act 1998. I therefore dismiss the Appellants' appeal.

Decision

I dismiss the Appellants' appeal.

Signed 
Upper Tribunal Judge Smith

Dated: 21 August 2018



IAC-AH-SC-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/11424/2016
HU/13124/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 21st February 2018**

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE REEDS

Between

**MR MD SHARIAR [K]
MRS ANITA [I]
(NO ANONYMITY DIRECTION MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: The applicants in person

For the Respondent: Mr Wilding Senior Presenting Officer

DECISION AND REASONS

1. The Appellants, who are nationals of Bangladesh appeal with permission, against the decision of the First-tier Tribunal, who, in a determination promulgated on the 11th October 2017, dismissed their appeals against the decisions of the Secretary of State to refuse leave to remain.

2. Permission was granted by First-tier Tribunal Judge Holmes on the 15th December 2017.
3. At the hearing before the Upper Tribunal the Appellants appeared in person and Mr Wilding, Senior Presenting Officer appeared on behalf of the Secretary of State. I explained the nature of the proceedings to the Appellants and gave them the opportunity to ask any questions during the proceedings. It is right to note that for the purposes of the hearing, the first Appellant produced a skeleton argument exhibiting to it extracts of the GCID case record sheet. He had previously provided a large bundle of documentation. That bundle was not in the papers held by Mr Wilding (although the Appellant stated they had been served) and it is of note that there had been no presenting officer before the First-tier Tribunal originally.
4. The Appellants' immigration history is set out within the determination at paragraph 3 onwards, however it was clear after hearing from the First Appellant that the chronology set out as to history and the applications made (in conjunction with the documents provided) was not accurately recorded. The Judge did not have the advantage of a Presenting Officer and this may have impacted on the relevant issues being identified. It was by this process that it also became clear that Mr Wilding on behalf of the Respondent conceded that the decision of the First-tier Tribunal Judge did contain errors of law which required the decision made to be set aside and for the appeal to be re-determined afresh.
5. I will set out below the history so far as I have been able to ascertain it from both parties and identify the agreed errors of law.
6. On 12 October 2005 the first Appellant entered the United Kingdom with entry clearance as a student valid from 6 October 2005 until 31 October 2008.
7. In a witness statement (page 25) the first Appellant stated that he had met an EEA national, LM, and that they had started living together from February 2007.
8. On 30 September 2008 he lodged an application for leave to remain as a Tier 1 post study migrant.
9. On 15 January 2009 this application was refused with a right of appeal. It is the Appellant's case that he had instructed solicitors to act on his behalf who had lodged an appeal on his behalf. He relies upon a letter from those solicitors dated 26/1/2009 (see page 248). There is no reference number for the appeal or any hearing notice provided.
10. It is further asserted on behalf of the Appellant that when he communicated with his solicitors they advised him to apply for a residence permit as the partner of an EEA national.
11. In the papers at page 249 there is a letter dated 27 April 2009 from his solicitors to the respondent applying for a certificate of approval for marriage between the Appellant and the EEA national, LM, a citizen of Slovakia.
12. Annexed to the skeleton argument produced at this hearing was a copy of the GCID notes dated 29/4/09 in which it appears to be accepted from the evidence provided

that the couple were in a genuine relationship and therefore granted the certificate of approval.

13. The parties were married on 10 July 2009 in the UK (see partial marriage certificate at page 240). However in his oral submissions to me, the Appellant stated that he had married the EEA national in 2007 in Bangladesh and that there were documents to support this (see page 237 and 245) and that this had not been taken into account by the judge.
14. On 1 February 2010 the first Appellant lodged an application for a residence permit under the EEA regulations as a spouse of an EEA national and was issued with a residence permit valid from 28 February 2010 until 15 October 2010.
15. On 30 September 2010 he lodged a further application for a residence permit under the EEA regulations and again was issued with a residence permit valid from 13 January 2011 until 13 January 2016.
16. The Appellant asserts that the marriage to the EEA national was not happy and that this resulted in divorce proceedings. It is unclear on the evidence provided so far as to when the relationship ended and this is an issue that was not considered by the First-tier Tribunal in the circumstances of the parties during this period. What is known from the documents provided is that on 23 February 2012 the County Court certified that the petitioner (the EEA national) approve the contents of the petition on the grounds that the marriage had irretrievably broken down the facts being the respondent's unreasonable behaviour thus a decree nisi was pronounced on 20 March 2012 (see page 241) which was followed by decree absolute on 1 May 2012.
17. Whilst the parties were formally divorced in accordance with the orders made by the County Court, it is asserted by the Appellant that the parties continued to live together. Again this is an issue that requires further consideration and exploration in oral evidence as this was not an issue that was considered by the First-tier Tribunal. There is a letter (undated) from the EEA national making reference to them "still living together as a couple" (see page 247).
18. As set out above, it is unclear evidentially as to the date in which the parties did separate finally and this will be a matter to be resolved at any future hearing.
19. On 9 March 2015 his residence permit was revoked and on 23 March 2015 he lodged an appeal against that decision but on 25 January 2016 withdrew his appeal.
20. On 27 November 2015 he applied for indefinite leave to remain on the basis of long residence, including the length of a residence as the spouse of an EEA national. The reasons for doing so are set out in a letter dated 20 November 2015 (see B1 of the respondent's bundle). In that letter he referred to his immigration history stating that he was "on a student visa until October 2008, in the meanwhile since 2007 February he and his ex-wife LM started living together stop after proving two years relationship I've got family member of an EEA national on the worker scheme Visa up until October 2010 and then January 2011 on the basis of our marriage on 10 July 2009 I've residence card of the family member of the EEA national till January 2016". He then refers to having been resident in the UK for over 10 years and therefore qualifies for settlement.

21. The application made by the first Appellant is set out at A1 - A 22 of the respondent's bundle.
22. The first Appellant underwent a marriage ceremony with the second Appellant on 1 March 2015 (see page 278).
23. The second Appellant's immigration history is as follows. She entered the United Kingdom on 8 October 2009 with leave to remain as a Tier 4 student valid from 30 September 2009 until 8 February 2011.
24. On 24 January 2011 she applied leave to remain as a Tier 1 post study migrant. This was granted on 22 February 2011 until 22 February 2013.
25. On 22 February 2013, she applied leave to remain as a Tier 1 entrepreneur which was refused on 2 June 2013.
26. In a witness statement filed in the bundle at page 34, she states that she met the first Appellant in September 2013. He was divorced at that time. She has been living with the first Appellant following their marriage under Islamic law on 1 March 2015.
27. She further claims in a witness statement at page 32 that following the refusal of her Tier 1 entrepreneur application she instructed various firms of solicitors and lodged an appeal with a hearing date on 4 February 2014 at Taylor house. She claims that she has never received any determination of the Tribunal. She asserts that throughout the period she had statutory leave under the Immigration Act 1971. Again this does not appear to have been an issue that was canvassed during the hearing.
28. On 22 November 2015 an immigration enforcement raid was undertaken at her home and she was arrested and taken to a detention centre. She claims that she has not received any decision from the Immigration Tribunal. She was released on 1 December 2015 and applied further leave to remain based on her relationship with the first Appellant.
29. Her application which is made on 30 November 2015 is set out in the bundle at A1 -34. Along with the application was a letter from her legal representatives (B1) dated 30 November 2015 setting out her immigration history and stating that she had "applied for a Tier 1 entrepreneur which was refused and she lodged appeal and it also dismissed". In that covering letter it made reference to her family in Bangladesh not accepting the relationship and that her husband was an "active member of the BNP and that "both of them would have high life risk in Bangladesh."
30. In a decision letter dated 6 May 2016 the Secretary of State refused her claim for leave to remain. The reasons given in the decision letter are as follows. Her immigration history was set out and the basis of the application was referred to at page 1 namely that she applied for leave to remain on an FLR (O) application form and indicated the immigration route she wanted consideration under was not covered on any other form. She raised that she had been married to her partner who claimed to have resided lawfully in the UK for 10 years. The application considered under Appendix FM and paragraph 276 ADE (1) - CE of the immigration rules and outside the rules on the basis of exceptional circumstances.

31. It was not accepted that she met the eligibility requirements as she did not meet the definition of partner as they were married under Islamic law which was not recognised in the UK. Her spouse also was not a British citizen present or settled in the UK. It was further not accepted that the relationship with the first Appellant was genuine and subsisting because she had not provided any evidence that she resided with her partner. As a result of that lack of evidence, the Secretary of State considered that the EX1 did not apply in her case and therefore could not meet the requirements of Appendix FM.
32. As to private life, it was noted that she was a national of Bangladesh; had entered on 8 October 2009 and the date of the application she was 33 years of age. That she lived in the UK for five years and 11 months and had not lived continuously in the UK for at least 20 years. It was further considered that there were no very significant obstacles to her integration to Bangladesh if she were required to leave because she had spent the majority of her life there is not accepted that she had lost all social, cultural and family ties to her home country thus she could not meet Paragraph 276 ADE(1).
33. The Secretary of State took into account if there were any other circumstances to grant leave outside of the rules and expressly considered her claim that she could not return because her family would not accept the relationship. The respondent noted that she had not provided any evidence to show that the family did not agree with the marriage and that they had entered into an Islamic marriage knowing that the family may not accept it was said they could return to Bangladesh together continue family and private life elsewhere thus it was not accepted that she would face any insurmountable obstacles upon return to Bangladesh. Thus the application was refused.
34. She lodged an appeal against that decision on 20 May 2016 and provided evidence of cohabitation (see documents which consisted of the Islamic marriage certificate and partial copy of the first Appellant's passport and three photographs of the couple together) and in the box relating to "human rights decision" it was stated "the decision refusal is contrary to article 6 of the ECHR, the decision refusal is also against article 3 of the ECHR." Under the section entitled "protection decision" nothing was stated. Accompanying the written form were typed grounds of appeal purporting to set out material facts and in the grounds it was asserted that the Appellant had provided all the evidence in support of the application which were not considered and that the Secretary of State "ignore the Appellant's human rights grounds and article 3 as the Appellant safety of life was not good enough to travel to his home country. It also made reference to the fact that she had been "living in the UK who resided lawfully 10 years in the UK but the Secretary of State unreasonably refuse the application harshly".
35. In respect of the first Appellant in a notice of decision dated 13 April 2016 his application for leave to remain was refused. The application is set out his immigration history in so far as the respondent had considered it.
36. As to long residence under paragraph 276B of the immigration rules, the respondent noted that he had an lawful leave following his arrival on 12 October 2005 until 31 October 2008 and that he had attempted to vary his application on 30 September 2008 but the application was refused on 15 January 2009 but no appeal was lodged therefore was appeal rights exhausted on the 5th February 2009. It was further noted that he

married his EEA partner on 10 July 2009 and in February 2010 and September 2010 applied for a residence card of the confirmation of the right of residence to reside at the married partner of the EEA national in accordance with 2006 regulations at the time of the issue of the residence cards on the 28th of every 2010 and 13 January 2011 it was acknowledged that he had a right to reside under the regulations as his partner was exercising her treaty rights at that time. However a decree was issued on 1 May 2012 showing that the marriage had been dissolved. The refusal letter went on to state that he had been unable to provide evidence to demonstrate that his partner continued to reside in the United Kingdom from the date of the marriage until the time of the divorce in accordance with the regulations as either a job seeker, worker, self-employed person, subdivision person or a student. Thus the period was not accepted to contribute to the 10 year legal leave period as a whole because he had not been able to demonstrate that he resided in accordance with such Regulations.

37. Furthermore the decision letter it was noted that because the marriage was dissolved on 1 May 2012 he held no basis of stay in United Kingdom since this point and the application of 27 November 2015 was lodged over 28 days after his lawful leave ceased and therefore could not satisfy the requirements of paragraph 276B (v) where the applicant must not be in the UK in breach of the immigration laws except that any period of overstaying repeated 28 days or less will be disregarded.
38. As to paragraph 276 ADE and Appendix FM, the respondent considered that he could not meet the requirements under Appendix FM or under private life. He had entered the United Kingdom in 2005 but it had not been accepted that he was continuously resident for 20 years and that having spent the majority of his life in Bangladesh it was not accepted that he no longer had any social or cultural ties to his home country and therefore the secretary of state was not satisfied that could meet requirements of rule 276 ADE (IV). As to exceptional circumstances outside of the rules, it was noted that no circumstances had been raised by the first Appellant therefore the application did not fall for a grant of leave to remain outside of the rules.
39. He lodged an appeal against that decision on 22 April 2016. Accompanying the form was a written document entitled "grounds of appeal". It set out that he had completed his education and work hard to fulfil the requirements to establish "a good impression of his capabilities". As time lapsed by October 2014 the Appellant had changed of circumstances as the Appellant completed his 10 years lawful residents in the UK and made a variation application for the indefinite leave to remain under the long residency category unfortunately application was refused and the reason was mention in the refusal about his immigration history and continuous leave ignoring the fact that the Appellant submits that he was under extended leave stop therefore the decision taken in this regards is unfair and not in accordance with the law" (see pages 25 and 26 of the respondent's bundle).
40. The appeals came before the FTT on the 25th of September 2017 and in a decision promulgated on the 11th of October 2017 their appeals were dismissed. It is recorded in the determination that the Appellants were represented by a solicitor but that the respondent did not appear nor was she represented. The judge made reference to a large bundle of documents provided which accords with the bundle in the file before

me. At paragraph 3, of the determination the judge recorded that the second Appellant's appeal is predicated on the outcome of the first Appellant's appeal. It was accepted by their solicitor that if the first Appellant was unsuccessful in the second Appellant's claim would fall as well.

41. The judge went on to make findings of fact at paragraphs 5-14 relating to the long residence aspect of the appeal. He did not find that there was any valid appeal lodged in 2009 (see paragraph 5 and 6) therefore could not show that he was lawfully present in the UK between February 2009 and July 2009 (see paragraph 11). The judge also did not accept that the periods of time in which he was a family member of an EEA national exercising treaty rights with United Kingdom had been evidenced by any documentation in this respect (paragraph 12) and that following the dissolution of the marriage in May 2012, it had not lasted three years and therefore could not establish a residual right to reside either.
42. As to any claim to be risk in Bangladesh, the judge paragraph 7 noted that he travelled a number of times to Bangladesh and the contrary to his claim to have been actively politically he had made no claim for asylum although he provided some photographs attending various political rallies. He provided no objective evidence in relation to any risk and despite being active number of years was really able to travel to and from Bangladesh (see paragraph 8).
43. Thus the second Appellant's claim could not succeed and it had been acknowledged that neither Appellant could come within the scope of the rules either under Appendix FM (paragraph 17).
44. At paragraphs 18 - 26 considered paragraph 276 ADE in relation to both Appellants but found that they were no "very significant obstacles" to their reintegration to Bangladesh for the reasons given. As to the claim made by the second Appellant that she would not be accepted back into family upon return as a result of her marriage, the judge found that there would be no bar to return to Bangladesh, let alone a "very significant obstacle" and was satisfied that even without the parental support of the second Appellant's family they would be able to return to Bangladesh and start life that the judge also made reference to his earlier findings that he did not accept the possibility of the claim that the first Appellant could not return to Bangladesh as a result of fear of persecution given the lack of evidence in this regard and his failure to claim asylum allowing the respondent to properly investigate the issues arrive at a reasoned decision this there was no basis for any claim under Article 3.
45. As I have set out earlier in this determination, it became clear during clarification with the Appellant about the immigration history which he relied upon and the documents that he had provided in the bundle, that not all of the issues had been determined. In those circumstances Mr Wilding conceded that there had been material errors of law which would require further evidence to be provided and in particular for the evidence of the parties to be given.
46. For the avoidance of doubt those issues are identified as follows:
 - (1) The issue of whether or not the appeal had been lodged in 2009 and the evidence provided concerning the party's ability to obtain documents from the solicitors.

- (2) The date of the marriage between the first Appellant and the EEA national. Whilst it is accepted that they were married on 10 July 2009, it was asserted by the Appellant that he in fact had married the EEA national two years earlier in 2007 (relying on document set out at pages 237 – 239 and affidavit page 245). This is relevant to the length of the marriage and the issues arising under the 2006 Regulations/length of residence.
 - (3) The date that the EEA national and the Appellant separated in the circumstances of the parties thereafter. Contrary to the First-tier Tribunal decision, there was evidence the bundle relating to exercising treaty rights (see page 36-210 and 211 – 236).
 - (4) Mr Wilding identified that the Appellant needed to address the period before 2007 and exercising treaty rights.
47. Whilst the Appellant also has raised a challenge against First-tier decision on the basis a failure to consider “the asylum grounds” (see paragraph 10 skeleton argument), Mr Wilding submits that there was no asylum claim before the First-tier Tribunal and thus there was no jurisdiction for the First-tier Tribunal to consider any such protection claim. This was a “new matter” under Section 85 of the Nationality, Immigration and Asylum Act 2002. As set out in the legislation, a “new matter” is a matter which constitutes a ground of appeal of the kind listed in section 84, as required by section 85 (6) (a) of the 2002 Act. To constitute a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal (see *Mahmud (s85 NIAA 2002 - “new matters”)* [2017] UKUT 488 (IAC)).
48. In this appeal, the first Appellant asserts that he raised asylum grounds before the Secretary of State. However, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82 (1) or statement made by the Appellant under section 120. In the application made by the first Appellant for further leave to remain there was no reference to any protection grounds/asylum claim. The letter exhibited at B1 which accompanied the application and which is dated 20 November 2015 makes no reference to any asylum/protection claim. Nor does the application made before the Secretary of State which relied upon Article 8 issues, including long residency and the effect of length of residence in the UK. The grounds of appeal also makes no reference to any such claim. The first Appellant has not submitted any section 120 notice either setting out any such claim. The first evidence was provided before the First-tier Tribunal in the bundle of documentation. Whilst the second Appellant has made reference to her husband’s difficulties that relies upon the first Appellant having raised this as an issue. The First-tier Tribunal judge in any event dealt with the claim made by the second Appellant relating to her marriage to the first Appellant and the difficulties that would create for them as a couple in Bangladesh. This is consistent with the matters referred to by the Secretary of State when refusing the application.
49. It does not appear that the judge had been referred to the legislation on this issue by the legal representative who appeared before him. There was no presenting Officer in attendance either. Whether something is a “new matter” goes to the jurisdiction of the First-tier Tribunal in the appeal and thus must determine that issue itself (see section

85 (5) and (6) of the 2002 Act). A Tribunal may consider “new matters” if the Secretary of State has given the Tribunal consent to do so. Section 85 (5) of the 2002 act requires actual consent by the respondent. The respondent has a policy entitled “rights of appeal” in which it provides guidance for those acting on behalf of the respondent as to the consideration of “new matters”. This includes when any “new matter” should be considered, before the appeal hearing if possible and if not at a CMR or substantive appeal hearing. It is unclear to me when the large bundle of documents was sent to the respondent. It is in those documents that the “new matter” is raised. There was no CMR and there was no presenting Officer at the substantive appeal. No written reasons have been provided for any refusal to give any consent. However a failure by the respondent to follow her own guidance is a public issue which can only be challenged by an application for judicial review which is outside the scope of this appeal which is a statutory appeal. There is no power for the First-tier Tribunal or the Upper Tribunal to determine whether the respondent has appropriately withheld consent. Consequently unless the respondent expressly gives consent for the consideration of a “new matter” by the Tribunal, the issues may not be considered. As I understand the position, there has been no consent given either then or now.

50. As to remaking the decision, whilst Mr [K] set out in his skeleton argument that in the event of the decision being set aside he would require a remittal to the First-tier Tribunal, at the hearing before me he changed his stance and requested that the appeal remain before the Upper Tribunal to be remade at a further hearing.
51. Mr Wilding did not oppose that suggestion therefore for the reasons that I have set out above, I set aside the decision of the First-tier Tribunal and the appeal will be relisted as a resumed hearing before the Upper Tribunal in accordance with the issues outlined in this determination and the directions accompanying this decision.

Decision:

The decision of the First-tier Tribunal did involve the making of an error on a point of law. The decision is set aside and is to be remade by the Upper Tribunal in accordance with the direction attached to this decision.

SM Reeds

Signed

Date: 22nd March 2018

Upper Tribunal Judge Reeds