



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003680

First-tier Tribunal No: EA/10567/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 23 June 2023

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

David Lazaro Valverde Rodriguez
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms R Rashmi, Counsel instructed by Briton Solicitors
For the Respondent: Miss A Nolan, Home Office Presenting Officer

Heard at Field House on 18 May 2023

DECISION AND REASONS

1. The Appellant is a citizen of Cuba. His date of birth is 12 July 1995.
2. He made an application for a family permit pursuant to the Immigration (European Economic Area) Regulations 2016 (the 2016 Regulations) on the basis of his relationship with Yinexy de la Caridad Martinez (the Sponsor), an Italian citizen exercising treaty rights in the United Kingdom which was refused by the ECO on 12 January 2021. The Appellant appealed against the decision.
3. In a decision which was promulgated on 24 January 2023, following a hearing at Field House on 15 November 2022, a panel comprising Upper Tribunal Judge McWilliam and Deputy Upper Tribunal Chana set aside the decision of the First-tier Tribunal (Judge Hussain) to allow the appeal.
4. The reasons for the error of law decision are as follows:-

- “9. The judge correctly identified that the issue was whether the Appellant and the Sponsor were in a durable relationship. Our attention was not drawn to a specific period of time that an unmarried partnership must have continued or a requirement that the parties must have evidence of cohabitation for a period of two years in order to establish that a relationship is durable. However, we are satisfied that the judge focused on whether or not the relationship existed between the parties rather than whether they were in a durable relationship. This is an error of law.
10. While the judge was entitled to attach weight to the Sponsor’s evidence because she maintained resolute in the face of cross-examination, it is the main reason that he gave for allowing the appeal. He also placed reliance on WhatsApp messages about which he said there are many. Although there are many WhatsApp messages we note that there are only a few translated messages which cover a two day period only. Moreover the messages are short messages and do not say very much. The relationship has in the main been conducted when the parties were in different countries. The evidence was that they have lived together for three months. They have no children together and no joint responsibilities. The judge accepted a lack of evidence was explained by there being ‘no internet in Cuba’ without making further enquiry about this.
11. We are reluctant to interfere with a decision of the First-tier Tribunal and recognise the high hurdle when considering a rationality challenge. However, in this case we conclude that that hurdle has been met. It is not clear to the losing party why the judge accepted the Sponsor’s evidence and concluded that the relationship was durable. The judgment is very brief. There was no witness statement from the Appellant. The Sponsor’s witness statement was skeletal. On the basis of the evidence that was before the First-tier Tribunal we conclude that it was not open to the judge to allow the appeal and in those circumstances we find that the judge materially erred. We set aside the decision to allow the Appellant’s appeal.”

5. We made directions for a resumed hearing in the Upper Tribunal.

The Hearing

6. On 13 February 2023 the Appellant served a supplementary bundle which included an updated witness statement from the Sponsor, a marriage certificate and evidence relating to the Sponsor and the Appellant’s young child born on 10 February 2023, evidence submitted in order to support that the Appellant and the Sponsor have lived together and evidence supporting money transfers and travel by the Sponsor and the Appellant.

The Evidence of the Sponsor

7. The Sponsor’s witness statement which was before the First-tier Tribunal is dated 28 January 2022. It is an extremely brief. Her evidence therein is that she first met the Appellant in July 2016. They have been in a relationship since July 2018. They lived together from July 2018 until September 2018 in Cuba. She was not able to return to Cuba in 2019 because she had health issues and thereafter the COVID-19 pandemic prevented travel.

8. The Appellant was married to another man but they separated in July 2013. They divorced on 13 April 2021.
9. The Sponsor's updated witness statement of 11 February 2023 gives evidence about when the Appellant and the Sponsor met. She confirmed that the Appellant is the father of her son who was born on 10 February 2023 at Royal London Hospital. Moreover, there is evidence of money transfers to the Appellant from 17 February 2021 up until 6 August 2022.
10. At the hearing before me the Sponsor attended and gave evidence. She did not need an interpreter and gave evidence in English. She was extensively cross examined by the Home Office presenting officer.
11. Her evidence can be summarised. The Appellant and the Sponsor met in 2016 in Cuba. He lived in an area close to where the Sponsor's father lives. They became friends. In 2018 they started a relationship during a visit by the Sponsor to Cuba. They lived together for a period of three months from June 2018 to September 2018 when she returned to the United Kingdom. They lived with various family members and for a few days at the Sponsor's home in Cuba which she was renovating at the time. When asked why she travelled to Cuba she explained in evidence that she and the Appellant decided over the telephone that they would make their relationship "concrete". She was not able to see the Appellant again until 2022. This was as a result of the pandemic and her health condition. The Sponsor next saw the Appellant in 2022 when she visited him in Uruguay (where he now lives). She provided evidence of travelling to Uruguay on three occasions; February 2022 returning to the UK in May 2022; April 2022 returning to the UK in June 2022 and September 2022 returning to the UK that month. During the latter visit the Appellant and the Sponsor were married.
12. The Appellant lives in Uruguay where he worked in a food factory. He had to travel to Brazil in 2020 to make an application for entry clearance and lost his job as a result. His situation in Uruguay is not stable. He lives in a small room in a shared house. He is unable to find a job there because of his precarious situation. The Sponsor has been sending the Appellant money since he has been unemployed.
13. In cross-examination the Sponsor stated that in July 2018 when she visited the Appellant she was pregnant but did not realise this. She stated that her daughter was born at 36 weeks gestation in July 2019. She was cross-examined on this issue to try to understand the chronology. The Sponsor eventually agreed that she must have got pregnant after visiting the Appellant in Cuba. She then stated that she had a relationship with another man. They met a couple of times and she ended the relationship in October 2018. She then disclosed that when she went to Cuba in July 2018 the relationship between her and the Appellant was not serious. He said that he wanted to move to Uruguay and she thought it would be better if he stayed in Cuba, but his plan had been to go on to America from Uruguay. She said that she became serious about the relationship from the time her daughter was born in July 2019 when he disclosed to her that he had had the opportunity to go to America but had decided to stay in Uruguay pending entry clearance to the UK.

The Secretary of State's submissions

14. Miss Nolan submitted that I need to be satisfied that the relationship was durable between December 2018 and December 2020. She said that there is a

lack of documentary evidence relating to the time that the parties spent together in 2018. The Sponsor's evidence is that she remained in contact with the Sponsor before she travel to Cuba in 2018 but there is no evidence of this. There is no evidence from the Appellant. The totality of the evidence is two days worth of WhatsApp messages which do not show a durable relationship. The WhatsApp messages clearly show that there were problems in the relationship in February 2020. They show trust issues between the parties. The Sponsor's evidence is undermined by her pregnancy in 2018. The parties did not marry until two years later. The relationship may have become durable at some stage after December 2020, but not before.

The Appellant's submissions

15. I heard representations from Ms Rashmi who submitted that the WhatsApp messages suggest a durable relationship in 2020. She referred me to evidence of money transfers and submitted that there would be no purpose behind the Sponsor sending the apparent money if the relationship was not durable. She referred me to a care plan relating to the Sponsor which indicates that she was living alone [with her children] on the 10th of November 2020. She urged me to allow the appeal.

Conclusions

16. At the start of the hearing the parties identified the sole issue was durability of the relationship between the Appellant and the Sponsor in December 2020. Regulation 8 of the Immigration (European Economic Area) Regulations 2016 sets out circumstances in which a person will be considered the "extended family member" of an EEA national. Unlike a family member who falls within Regulation 7, such a person does not have a right to reside in the UK until issued a residence card. The Appellant must establish that he is in a durable relationship with the EEA national. There is Home Office guidance relating to how a relationship will be considered and this includes that a couple have been living together in a relationship similar to marriage for at least two years.
17. In YB (EEA Regulation 8 17(4) - proper approach) Ivory Coat [2008] UKAIT 00062 the Tribunal stated that "durable relationship" is a community law term and seek to reduce it to the criteria contained within the Immigration Rules would run contrary to community law. However, the Home Office is entitled to have some regard to similar provisions of the Immigration Rules as to whether it is appropriate to issue a residence card. Two years cohabitation is not essential and cannot be determinative of the issue.
18. There is no legal requirement for a couple to have lived together for a period of two years for a relationship to be durable. There is no legal requirement for a couple to have lived together at all for a relationship to be considered durable. Home Office guidance suggests that as a rule of thumb a couple should have lived together for a period of two years. However, there is nothing to support that long distance relationships cannot be durable. There is no legal definition of a durable relationship
19. Having considered the evidence as a whole, while acknowledging problems in the Sponsor's evidence, I am satisfied that overall she was a credible witness who may at times be prone to confusion and exaggeration. I am satisfied that the relationship was a durable relationship in December 2020. I find that at this time both the Appellant and Sponsor intended to live together permanently and, as far

as their long distance relationship allowed, were in a relationship akin to marriage.

20. What I would say about the circumstances of this case is that they are unusual. The Sponsor has not been able to travel freely throughout the COVID-19 pandemic and I have seen a care plan which discloses that she has health problems which I accept would have made travel very difficult for her in 2020. I don't accept that in 2018 the relationship was durable. I did not accept the Sponsor's evidence about this, which in any event changed throughout the hearing. The first time they had had a face to face relationship was in July 2018. The Sponsor was in a relationship, at this time, with another man which continued until October 2018. It was clear that the Sponsor was genuinely very confused about dates. I do not find that she intended to mislead the tribunal. However, I find that the relationship with the father of her daughter who was born in July 2019, continued after her return from Cuba to the United Kingdom in September 2018. This undermined her evidence that the relationship with the Appellant was durable at that point. The Sponsor exaggerated the status of her relationship with the Appellant in 2018. However, I accept that by the time the Appellant made an application, and certainly by December 2020 the relationship was durable.
21. There is limited evidence of WhatsApp messages. Miss Nolan relied on these to support a submission that the relationship at this time was problematic and the dialogue established "trust issues" between the couple. I have read the transcript and I agree that the conversation establishes that in February 2020, the relationship was strained. However I accept the Sponsor's evidence that the separation has been very stressful. What is clear from the evidence is that the parties were in a relationship in February 2020 whether it was durable at that time is extremely difficult to determine on the basis of the WhatsApp messages. However evidence of an argument between a couple and "trust issues" could be features of a durable or non durable relationship. There are a significant amount of WhatsApp messages which have not been translated. I accept that funding has been an issue for the Appellant and Sponsor. I have no idea what the Appellant and the Sponsor have said to each other throughout the time of the WhatsApp messages; however, the fact that there is a significant amount of communication supports a relationship over a period of time.
22. I do not condone the Sponsor having exaggerated evidence about her and the Appellant's intentions in 2018 and accept that this may be capable of undermining the evidence generally. The cause of this may be that she was of the view that she and the Appellant had to establish that the relationship had been durable for a period of two years, in this case from December 2018 to December 2020. This was the position that the Secretary of State had taken.
23. The Sponsor has been able to produce evidence establishing that she travelled to Uruguay in order to visit the Appellant albeit it post 2020. There is nothing incredible about her account of how the couple met. There is nothing inherently implausible about the Appellant and the Sponsor having a relationship. I accept that there is little documentary evidence. There are no witness statements from members of their families. However, I take into account the lack of funds available to the Appellant and the Sponsor. He has made an application to join the Sponsor in the UK. They are now married and they have a child together. I have taken into account that she has been sending money to the Appellant from the time he made the application on the basis that he lost his job at this time.

This is evidence that is capable of supporting that the relationship in December 2020 was durable.

24. I have given consideration to whether Sponsor is in a relationship which she considers to be durable, but the intentions of the Sponsor or not genuine. In this context I have considered that the Appellant's witness statement is lacking in detail (contrary to Ms Nolan's submission there is some evidence from the Appellant, though I accept it is not detailed). However, on balance, I find that this relationship was durable at the relevant time in December 2020. I am not able to say with any certainty when exactly it became durable, but I am satisfied that it was durable at the relevant time. I have reached this conclusion because on balance I accept the evidence of the Sponsor about her intentions and those of the Appellant at this time. I accept her evidence that it was around the time of the birth of her second child in 2019 that the relationship became durable on the basis that the Appellant disclosed that he had forgone an opportunity to travel with others to the United states (which I find was more than likely his intention when he travelled to work in your Uruguay). This evidence was disclosed in cross-examination.
25. The appeal is allowed.

Joanna McWilliam

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 June 2023