Upper Tribunal

(Immigration and Asylum Chamber) **Appeal number: EA/03204/2019 (V)**

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC **Decision & Reasons Promulgated**

On 10 November 2020 **On 12 November 2020**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

Mthandazo Mhlonitshwa

(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the appellant: Mr S Mustafa , instructed by Synthesis Chambers Solicitors

For the Respondent: Mr A Tan, Senior Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. At the conclusion

of the hearing I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, a citizen of South Africa with date of birth given as 15.2.81, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 23.10.19, dismissing his appeal against the respondent's decision of 3.7.19 refusing his application for an EEA Residence Card as an extended family member (unmarried partner) of an EEA national exercising Treaty rights in the UK, pursuant to Regulation 8(5) of the Immigration (EEA) Regulations 2016.

2. On 6.2.20, the First-tier Tribunal granted permission to appeal to the Upper Tribunal, finding it arguable that the First-tier Tribunal Judge misdirected himself in confusing the issue of durable relationship with that of a marriage of convenience, applying in error Papajorgji v Entry Clearance Officer Nicosia [2012] UKUT 38.

3. Following the postponement of the error of law hearing listed before the Upper Tribunal on 27.3.20, the Upper Tribunal issued directions on 24.4.20 proposing that the error of law decision be made without a hearing and inviting further submissions from the parties.

4. The tribunal received the respondent's written submissions, dated 15.5.20. However, there was no response to the directions from the appellant or his representatives. The deadline for response having expired, and no party having opposed determination of the error of law issue without a hearing, in my decision promulgated on 6.7.20 I concluded, for the reasons there set out, that it was appropriate to decide the error of law issue on the papers pursuant to Rule 34.

5. The respondent's written submissions on the error of law issue accepted as "*the inescapable sequel*" that the First-tier Tribunal Judge may have misdirected himself in law in addressing a relationship of convenience and thereby fell into material error.

6. For the reasons set out in my decision promulgated on 6.7.20, I was satisfied that there is a error of law in the decision of the First-tier Tribunal. It appeared from the two concluding paragraphs of the impugned decision that the judge may well have confused the issue of a durable relationship with that of a marriage of convenience, when concluding that the relationship was one of convenience. The respondent had not asserted a relationship of convenience, only that there was insufficient evidence of a durable relationship. Whilst in the end, the judge has referred to not being satisfied that the relationship is durable, it appears the judge's focus was on the relationship having been formed for the purpose of assisting the appellant to remain in the UK, and, therefore, as one of convenience.

7. I identified a further error of law at [20] of the decision, where the judge mistook the address of the appellant's representative for his home address and relied on that factor, amongst others, as evidence undermining the genuineness of the relationship. That error alone would be sufficient to establish a material error of law.

8. In the circumstances, I concluded that the decision of the First-tier Tribunal could not stand but had to be set aside to be remade in the Upper Tribunal, issuing directions proposing that the remaking of the decision be done remotely, giving the opportunity for submissions as to that proposed course of action.

9. No such objections having been received, the matter was listed before me on 11.9.20 for remaking of the decision in the appeal. Shortly before that hearing, the appellant's representative, Mr Mustafa, forwarded his skeleton argument, a copy of which is now in the Tribunal's Case File. He also indicated that he relied on the supplementary bundle sent under cover of letter dated 17.3.20 by way of an application under Rule 15 (2A). Although the appellant was also present at the remote hearing, Mr Mustafa confirmed that he did not intend to call further oral evidence but was content to rely on the supplementary bundle, the original appellant's bundle, and the oral evidence as recorded in the decision of the First-tier Tribunal, apart from those findings which I have found to be in error of law.

10. However, the respondent's Senior Presenting Officer, Mrs Aboni, had prepared for the hearing on the basis that this was an error of law hearing only. It transpires that she was unaware of my decision made under Rule 34 finding an error of law in the decision of the First-tier Tribunal and it setting aside, to be remade at this continuation/resumed hearing in the Upper Tribunal. Whilst Mr Mustafa's skeleton argument had been forwarded to her by email, Mrs Aboni had not received a copy of the appellant's supplementary bundle. Although this was forwarded to her by Mr Mustafa shortly prior to the commencement of the hearing, understandably, she said she was entirely unprepared for a resumed hearing and sought an adjournment. Mr Mustafa did not actively oppose the adjournment.

11. In these unfortunate circumstances, I acceded to the adjournment request, accepting that the respondent was entirely unprepared for the hearing and, therefore, could not actively participate in the hearing.

12. The appeal came back before me for the resumed hearing on 10.11.20.

13. As stated above, the appellant had applied for an EEA Residence Card as an extended family member (unmarried partner) of an EEA national exercising Treaty rights in the UK, pursuant to Regulation 8(5) of the Immigration (EEA) Regulations 2016, which provides that, "*The condition in this paragraph is that the person is the partner (other than a civil partner) of, and in a durable relationship with, an EEA national, and is able to prove this to the decision maker*."

14. 'Durable relationship' is not defined in the Regulations, and whether a person is in a durable relationship is a matter to be determined on a case-by-case basis. The Home Office guidance on durable relationships provides "*A durable relationship is an unmarried partnership which has normally continued for 2 years or more*." However, it also instructs decision-makers that, "*You must always consider the individual circumstances of*

the application. For example there may be instances when the couple have not been in a relationship for 2 years or more, but you are still satisfied that the relationship is subsisting and durable."

15. The application was refused because the respondent considered that the appellant had failed to provide adequate evidence that he was the partner of an EEA national and that he had a durable relationship with that person. Whilst the respondent did not raise the issue of a relationship of convenience, it is nevertheless implicit in the reasons for refusal that, on the limited information provided with the application, the respondent was not satisfied that there was any genuine relationship.

16. The appellant claimed to have been residing with his partner since March 2019 and provided some documentation in support with the application. However, the respondent observed that the evidence of cohabitation was very recent. There was no evidence of joint finances or responsibilities and the submitted bank statements were in the sponsor's name only. Given that failure, the respondent did not consider the other requirements, including whether the EEA national partner was exercising Treaty rights in the UK.

17. The First-tier Tribunal found a number of clear discrepancies in the evidence of the appellant and the sponsor at the appeal hearing. In the assessment of the judge, they could not provide a consistent account of their relationship, such as where and when they were together or living at separate addresses and when they last socialised together. Their knowledge of each other's background and family was evidently limited.

18. I have carefully considered the various submissions made to me in the remote hearing, together with the evidence adduced on behalf of the appellant, taken in the round, before reaching any findings of fact. No further documentary evidence has been adduced. Although both the appellant and the sponsor were present in the remote hearing, Mr Mustafa again confirmed that he did not intend to call any oral evidence but stated that, if required, any clarification about the documentation could be confirmed with the appellant and the sponsor.

19. In remaking the decision in the appeal, I bear in mind that the burden is on the appellant to demonstrate on the balance of probabilities that he is in a durable relationship with the sponsor. The skeleton argument submits that the first question is whether the relationship is durable and only then should consideration be given to whether it is genuine. It is argued that it is premature to determine whether the relationship is genuine and unless the relationship is durable it cannot be labelled as genuine or of convenience. I am not persuaded that can be right or that it is necessary to distinguish between durable and genuine. In any event, for the reasons set out below, I am not satisfied that the relationship is durable.

20. The appellant claims to have been in a relationship with the sponsor since 31.12.18 and to have resided together with her since March 2019. The Council Tax bill for 2019/2020 is in joint names and states that the single person discount ended on 4.5.19, which is somewhat inconsistent with the claimed start of cohabitation. However, the point is a small one and I do not rely on it.

21. I accept that other documents produced, including utility bills, give the appellant's address as the same as that show for the sponsor in other documents, such as her wage slips and some of the bank statements. However, all the documentary evidence pointing to cohabitation is of very recent date and is, therefore, of limited value in assessing whether the relationship is durable.

22. The mere fact that some of bills are in joint names or individual bills are addressed to either the appellant or the sponsor at the same address is supportive but of itself insufficient to prove that they are in a durable relationship. The same evidence could apply, for example, to two persons not in a relationship but sharing accommodation as a flat-share.

23. I note that in the refusal decision, the respondent was concerned that there was no evidence of joint finances, commitments, or responsibilities. There is some but limited evidence of that now before the Tribunal, which I have carefully considered. However, I note that at the First-tier Tribunal appeal hearing the sponsor initially stated that the appellant paid a share of the bills but it later transpired that he has no money or income of his own and she provides him money with which he contributes to the bills. That remained the situation explained to me at the outset of the resumed hearing. Examination of their respective bank statements reveals that their finances are not shared and there are no funds passing between their accounts.

24. During the course of the hearing, I pointed out to Mr Mustafa that the appellant's bank statements show large sums passing back and forwards between his account and another, unexplained, bank account, the ownership of which is not clear. The documents in the supplementary bundle include his Barclays Everyday Saver account and an Instant Cash ISA account. Both of these show very healthy balances, even though Mr Mustafa confirmed to me that the appellant is not working and that "anything he spends is support from the sponsor." Both of these accounts show large sums of money going into the accounts from another unidentified account ending 3986, which does not match either of the sponsor's two disclosed bank accounts. Between 3.12.19 and 30.1.20, some £5,500 was paid into these accounts. Asked to explain, the appellant first stated that the monies coming into the account represented earnings from occasional courier work. However, large sums in round figures seems most improbable to have come from occasional employment as a courier, of which there no supporting evidence has been adduced. When pressed, the appellant changed his account to state that the monies were repayments "from someone in the UK who is helping me out. A friend." He went on to suggest this

person was sometimes asking him to transfer money. When cross-examined by Mr Tan, he said the monies came either from a friend or were payments for courier work. However, the appellant was unable to explain why £1,000 was transferred from his Barclays account to the 3986 account on 20.1.20, which fact undermined the claim that the monies represent earnings from courier work.

25. When asked to confirm that the sponsor pays all the household bills, the appellant confirmed this, adding that because finances were difficult he also had to step up, thereby purporting to explain his occasional courier work. However, the bank account do not show that the appellant or for that matter the sponsor are in any financial difficulties, in fact to the contrary, they are financially comfortable.

26. Mr Tan asked the appellant about the water utility bill which is in his name. This document shows that it is paid by direct debit from the same 3986 bank account referred to above. The appellant claimed that the direct debit was paid from his bank account but that does not appear in the bank statements he has disclosed. If 3986 is his account, he has failed to disclose that account. It would also be inconsistent with his varying account in evidence that the monies paid into his account were either payment for his occasional courier work or transfers from a friend.

27. Taking this evidence in the context of the whole, I found the appellant's evidence on this issue entirely incredible. I do not accept he was telling the truth and reject the claim that the monies paid into his Barclays Bank account represent either repayments from a friend or payment for courier work. It is clear that there is another bank account the ownership of which has not been disclosed and the purpose for the transfers of large sums has not been adequately explained. It follows that the financial circumstances of the appellant and the sponsor have not been fully disclosed, all of which tends undermine the claim of a durable relationship.

28. Further difficulties for the appellant arise from the medical document at page 4 of the supplementary bundle. This purports to be either an appointment or referral for ultrasound scan arising from the clinical information: "3 months post miscarriage pain." Mr Mustafa relied on this as evidence of a physical relationship between the appellant and the sponsor. However, as Mr Tan pointed out, it does not necessarily follow that the undated document has anything to do with the appellant, to put it delicately.

29. Of greater concern is that the sponsor's address given in the medical document, and to which it was evidently sent, is [~], Addlestone, Surrey, and not [~] in Reading, the address at which the appellant and the sponsor claim to have resided together since March 2019, and some 28 miles away. I also note that the referring GP practice is also at an address in Addlestone. In this regard I note that in evidence at the First-tier Tribunal appeal hearing the appellant stated that the sponsor spent 2-3 nights a week living in accommodation provided by her employer but her evidence was that she spent each night at their home in Reading, contradicting the appellant. The sponsor

told me that she had kept that address as it was more convenient for her work, which is in Addlestone. That may be possible, but the fact is the discrepancy in address detract from rather than assist the appellant's claim of a durable relationship in which they reside together at the address in Reading.

30. In this regard, I note that there has been no challenge to the findings of the First-tier Tribunal identifying "*clear and obvious*" discrepancies between the appellant and the sponsor in their oral evidence at the First-tier Tribunal appeal hearing in September 2019, set out at [18] of that decision. They were discrepant as to whether the sponsor always stayed at their joint address; what they had each done the previous weekend; when they last socialised together; and what family the appellant had in South Africa.

31. As set out at [19] of the same decision, the sponsor was found to have little and limited knowledge of the appellant's background. She had only met one of his friends, a person whose name she could not recall. She did not know the name of the town in South Africa he came from, or anything about it. She had never spoken to his family. For his part, the appellant had never spoken with the sponsor's family, although she claimed she was not herself engaged with her family.

32. Whilst they both make the simple assertion that they have been living together since March 2019 and enjoy a durable relationship, the witness statements of the appellant and the sponsor are very brief and provide surprisingly little to no detail of any joint or shared lives. For example, there is no reference to shared interests or activities, or indeed any aspect of a shared relationship. I find force in Mr Tan's submission that if they had been in a durable relationship since March 2019 it would be reasonable to expect to see by now more and better evidence of their shared lives. The absence of such evidence tends to undermine the appellant's case.

33. Considering the evidence overall, in the round and in the context of the whole, and for the reasons set out above, I find that the appellant has failed to demonstrate that he is in a durable relationship with the sponsor. The limited evidence adduced is woefully inadequate to demonstrate anything more than some form of cohabitation, and begs far more questions than it answers. It follows that the appeal must be dismissed.

Decision

The appellant's appeal to the Upper Tribunal was allowed to the extent that the decision of the First-tier Tribunal was set aside to be remade afresh.

I remake the decision in the appeal by dismissing it.

I make no order for costs.

I make no anonymity direction.

Signed: DMW Pickup

Upper Tribunal Judge Pickup

Date: 10 November 2020