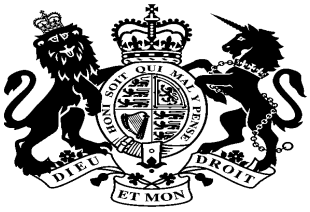

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-003002
(EA/12501/2021)

THE IMMIGRATION ACTS

Heard at: Field House
On: 12th October 2022

Decision & Reasons Promulgated
On: 29th November 2022

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Zain Ul Abidin

Appellant

And

Entry Clearance Officer, Islamabad

Respondent

For the Appellant: Mr P. Georget, Counsel instructed by Queenscourt Solicitors
For the Respondent: Mrs A. Nolan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Pakistan born on the 5th April 1995. He appeals with permission against the decision of the First-tier Tribunal (Judge S.J Clarke) to dismiss his appeal under the Immigration (Citizens' Rights Appeals) Regulations 2020.

2. The background facts can be shortly stated. On the 23rd March 2021 the Appellant made an application under the EU Settlement Scheme (EUSS) for a Family Permit on the basis that he is the family

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member of a relevant EEA citizen. The citizen in question is Netherlands national Ms Shaibih Ul Fatima Shah. It was the Appellant's position that she was his durable partner prior to the 31st December 2020, and that she continued to have that status.

3. The Entry Clearance Officer had regard to Annex 1 of Appendix EU of the Immigration Rules which materially provides that a 'durable partner' shall be defined as follows:

> a) the person is, or (as the case may be) was, in a durable relationship with the relevant EEA citizen (or, as the case may be, with the qualifying British citizen), with the couple having lived together in a relationship akin to a marriage or civil partnership for at least two years (unless there is other significant evidence of the durable relationship); *and*
>
> b) where the applicant was resident in the UK and Islands as the durable partner of a relevant EEA citizen before the specified date, the person held a relevant document as the durable partner of the relevant EEA citizen or, where there is evidence which satisfies the entry clearance officer that the applicant was otherwise lawfully resident in the UK and Islands for the relevant period before the specified date (or where the applicant is a joining family member) or where the applicant relies on the relevant EEA citizen being a relevant person of Northern Ireland, there is evidence which satisfies the entry clearance officer that the durable partnership was formed and was durable before the specified date; *and*
>
> c) it is, or (as the case may be) was, not a durable partnership of convenience; *and*
>
> d) neither party has, or (as the case may be) had, another durable partner, a spouse or a civil partner with (in any of those circumstances) immigration status in the UK or the Islands based on that person's relationship with that party.

4. The ECO concluded that in the absence of supporting documentary evidence that a durable relationship exists, the requirement had not been met.

5. The Appellant appealed to the First-tier Tribunal. Judge Clarke heard evidence from Ms Shah, from her mother and brother. Each of these witnesses supported the Appellant's claim to be in a durable relationship with Ms Shah. None were cross examined because the ECO was not represented at the hearing. Judge Clarke concluded that the witnesses had given consistent accounts of how the claimed couple had first met, and the family connections between them. They described how caring he is towards Ms Shah, who has multiple health issues. That said, there remained "large gaps in the evidence". Ms Shah was apparently unaware that there was any significance to the date of the 18th February 2020, which is the day that the Appellant

claims they met. It was claimed by the witnesses that attempts were made to organise a wedding during 2020 (abandoned because of lockdown) but there was no documentary evidence of this. Nor was there anything in writing to confirm that the date of the 22nd February 2022 had been set for a *nikah* to be conducted via 'zoom'. There was little evidence to support the claim that the couple are in daily contact and such evidence that there is, is surrounding the date of application. In the absence of documentary evidence the Judge found the burden of proof had not been discharged and dismissed the appeal.

6. The Appellant now appeals on the grounds that the First-tier Tribunal erred in its approach to the evidence. Having apparently accepted in its entirety the evidence given by Ms Shah, her mother and brother, the appeal was dismissed for lack of more corroborative evidence. It is submitted that this is an error:

   (i) Because in EU law there is no prescriptive list of documents that are required before such a relationship might be accepted;

   (ii) The unchallenged, and accepted, evidence of the witnesses was sufficient to discharge the burden of proof;

   (iii) Further the 'large gaps in the evidence' were not gaps at all.

7. For the Entry Clearance Officer Mrs Nolan accepted the proposition in ground (i). She however argued that the burden nevertheless lay on the Appellant to prove that he was a durable partner. If the Tribunal was not satisfied that this burden was met notwithstanding its apparent acceptance of the oral evidence, that was simply a matter of weight. I cannot properly interfere with the weight that a Tribunal has given to any piece of evidence unless I am satisfied that the approach taken to it was perverse. Mrs Nolan submitted that the Tribunal was rationally entitled to conclude that the oral evidence itself was insufficient.

8. I note that a further ground, based on Article 18(1)(r) of the Withdrawal Agreement was not pursued in light of the decision of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC).

Discussion and Findings

9. Mr Georget is quite right to say that EU law requires no particular form of evidence to prove a relationship, but I do not perceive the First-tier Tribunal to have understood that there was. Nowhere in the decision does the Tribunal misdirect itself to that effect, and I am unable to infer from its reasoning that it misunderstood the law in this regard.

10. I am nevertheless concerned about the way that the Tribunal approached the evidence overall. It identified that there were what it thought to be "large gaps in the evidence". With the greatest of respect to the Tribunal, I am unable to accept that the negative inferences it plainly drew from these gaps were rationally merited. In particular:

(i) The Tribunal notes that the Appellant stated that the relationship began on the 18th February but the Sponsor did not know the significance of the date. Having made this point the Tribunal goes on to say "If the 18th February is a special day there are no anniversary cards or messages". I am quite satisfied that this was irrational reasoning. First it is not at all clear that the Appellant did identify that date as a "special" one. He simply said that this was when the relationship started. There is no reason to assume that he or she regarded it as a date to be marked by cards etc. There are plenty of couples who do not mark such anniversaries. Furthermore there were in my view a number of cultural factors making it even less likely that the date would be marked by this couple. They are both Muslims of Pakistani origin who would, in the ordinary course of events, be very unlikely to declare themselves "in a relationship" prior to marriage at all. Islam has no tradition of marking anniversaries such as birthdays or marriage dates, so it is even less likely that the date would be marked in the way expected by the Tribunal;

(ii) The witnesses told the Tribunal that there was going to be a marriage during 2020 which had to be postponed because of lockdown. Of this the Tribunal notes the absence of "any travel itinerary or invitations etc to confirm this wedding that would have taken place". This is a relationship which started, as the Tribunal was aware, a matter of weeks before the world went into lockdown in response to the Covid-19 pandemic. The evidence to the effect that the couple had intended to get married during that year has to be read in that context. They may, in those last weeks of February and the beginning of March 2020, have planned to get married during the course of the year. Pakistan went into lockdown on the 22nd March, the UK on the 23rd. Like many people across the world, they may have hoped that everything would return to normal fairly quickly, thus keeping alive their hopes of marrying during 2020. As days turned to weeks, and weeks to months, that hope was obviously dashed. That being the case I do not think it remotely odd or suspicious that no one booked a flight, or sent out invitations. In reaching this finding I am satisfied that the Tribunal has failed to have regard to the uncontested fact that international air flights were severely restricted, and wedding venues closed;

(iii) The witnesses told the Tribunal that a *nikah* was been planned for the 22nd February 2022, some three weeks after the hearing. It was to take place via Zoom. The Tribunal draws adverse inference from the lack of invitations etc. to this event. I am satisfied that the Tribunal has here misunderstood the nature of a *nikah*. A *nikah* is a contract for marriage between a man and a woman. Whilst it is usually a officiated by an Imam there is no legal or religious requirement for this to be the case; very often the only people in attendance are the parties to the marriage (although this is not even necessary), and the witnesses/guardians of the bride. Many Muslim couples contract a *nikah* with no 'guests' at all. The guests are for the after party, and that quite evidently was not going to take place via Zoom. In South Asian culture a party can take place many weeks, months or even years after a *nikah* has been contracted. The Tribunal therefore drew adverse inference from a lack of invitations to an event that would be very unlikely to have invitations issued to it in the real world, never mind on Zoom.

11. I accordingly must set the decision aside, since these were the only reasons for dismissal and each of the reasons is flawed.

12. We are then left with some supporting documentary evidence, and the evidence of the witnesses, which the Tribunal found to be consistent regarding details of how the couple met, the family connections which led to the introduction, how caring he is towards her and even such vignettes as how the Sponsor's mother is kept awake by her daughter and the Appellant talking into the night in the adjacent room. All of that evidence, unchallenged and accepted, strongly supported the claimed relationship existing prior to December 2020. As the parties acknowledged before me, in remaking I would also be entitled to take into account any evidence post-dating the decision but going to the existence of the claimed relationship prior to IP completion date. Here, importantly, is the evidence that the couple have now contracted their *nikah.* This is strongly supportive of them being a genuine couple in a durable relationship, and this taken with the consistent and detailed evidence of the witnesses who appeared before the First-tier Tribunal, is sufficient to discharge the burden of proof.

13. I therefore remake the decision in the appeal by allowing it, the only matter in issue being resolved in the Appellant's favour.

Decisions and Directions

14. The decision of the First-tier Tribunal is set aside.

15. The decision in the appeal is remade as follows: the appeal is allowed.

16. There is no order for anonymity.

Upper Tribunal Judge Bruce
22nd October 2022