Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number:**
EA/02702/2019 (P)

THE IMMIGRATION ACTS

Decided under rule 34	**Decision & Reasons Promulgated**
On 12 June 2020	**On 23 June 2020**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

FARRAKH SULTAN ABBASI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation by way of written submissions:
For the Appellant: Lawfare Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. This appeal comes before me following the grant of permission to appeal by First-tier Tribunal Judge Keane on 11 December 2019 in respect the determination of First-tier Tribunal Judge Howorth, promulgated on 12 September 2019 following a hearing at Birmingham on 3 September 2019.

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2. The appellant is a Pakistani national born on 23 November 1986. He entered the UK as a student in September 2010 and had extensions of leave until March 2015. a subsequent appeal against a decision to cancel his leave was allowed in May 2016. It is unclear from the evidence what happened then but at some point he made a private/family life application which was refused on 21 December 2017. A judicial review challenge was unsuccessful and an application for reconsideration was refused on 31 May 2018. On 11 April 2019, the appellant then applied for a residence card as the extended family member of an EEA (Romanian) national. That was refused on 23 May 2019.

3. At the hearing in September 2019, the judge heard evidence from the appellant and the sponsor. She accepted that the relationship was genuine but considered it was too early on in the relationship to decide that it was durable and that although the appellant had claimed that they had undergone a religions ceremony and that the sponsor had converted to Islam, which were matters that might have supported the claim of durability, no documentary evidence of those events had been adduced. She proceeded to dismiss the appeal.

4. The appellant sought permission to appeal on the basis that there was no requirement for a relationship to be lengthy in order to be considered durable. It was also argued that the judge did not seek any explanation from the appellant as to the absence of the evidence she said would have been helpful and that that was unfair. It was maintained that adequate reasons had not been provided.

Covid-19 crisis

5. The matter was listed at Field House for 23 March 2020 but had to be adjourned when the UK went into lockdown due to the corona virus pandemic. In the light of the need to take precautions against the spread of Covid-19, appropriate directions were sent to the parties on 22 April 2020. The parties were invited to make submissions on the error of law issue and to put forward any reasons for why they considered the matter could not be decided without a hearing.

6. The appellant replied to the directions on 6 May 2020 and the respondent on 7 May 2020. No objections were raised as to the issue being decided on the papers and I now proceed to determine the matter.

Discussion and Conclusions

7. I have considered all the evidence and the submissions made.

8. The issue is a narrow one. It is this: having accepted that the appellant and sponsor enjoyed a genuine relationship, did the judge err in law by concluding that it had not been shown to be durable (as per reg. 8(1)(5)) and had she been unfair to rely on the absence of evidence without putting that to the appellant.

9. The appellant met the sponsor on 11 February 2019; they began a relationship on 19 February and on 1 April 2019 they started to cohabit. She was born in September 1975 and has an adult son by a previous marriage. On 8 April 2019, the appellant completed an application form for a residence card which was forwarded to the respondent on 10 April 2019 with an accompanying letter from his representatives. Very little documentary evidence was submitted with the application and the representations from the appellant's solicitors were almost entirely in general terms. More evidence was made available at the hearing.

10. The judge heard from the appellant and the sponsor and submissions were made by both representatives. She found that although there were some inconsistencies, the oral evidence was largely consistent and she, therefore, concluded that the relationship was a genuine one. She then considered the issue of durability, noting, quite properly, that it could not been described as such when the application was made, as it had been made only 10 days after the appellant moved in with the sponsor (in fact the application form was completed even earlier). She then considered whether at the date of the hearing the relationship could be seen as durable. She considered the evidence of shared residence of five months, considered the bank statements and the witness statement from the appellant and the sponsor. However due to the short duration of the relationship, she found that it had not been shown to be durable.

11. I accept that there is no definition of durable in the Regulations. One must be guided therefore by materials that give some indication of how this should be approached.

12. The Home Office guidance of 27 March 2019 says the following about such relationships:

> ‘*If an applicant wishes to apply as the durable (unmarried) partner of an EEA national sponsor, they must satisfy the following requirements:*
>
> • *the applicant and the EEA national sponsor have been living together in a relationship similar to marriage which has continued for at least 2 years:*
>
> > *- you must always consider the individual circumstances of the application*

- the couple may have been in a relationship for less than 2 years but they have a child together

- you can use your discretion if there is enough evidence, for example, if they provided a birth certificate showing shared parentage with evidence of living together

- *the applicant and the EEA national sponsor:*

  - intend to live together permanently

- *are not involved in a 'consanguineous' relationship with one another (they are not blood relatives)*

- *any previous marriage or similar relationship by either party has permanently broken down.*

The 2016 regulations now make it clear that durable partners do not include parties to durable partnerships of convenience as defined in regulation 2 …'

13. Case law confirms that the above guidance 'should not be taken as necessarily correct in every particular'. In YB (EEA reg 17(4) – proper approach) Ivory Coast [2008] UKAIT 00062, the Tribunal held that 'durable relationship' is a Community law term and to seek to reduce it to the criteria contained within the Immigration Rules would run contrary to Community law. However, It also held that the Secretary of State is entitled to have some regard to comparable provisions of the Immigration Rules when deciding whether to issue a residence card. Thus the length of residence is a relevant consideration although the two year period is not essential or determinative. The head note in YB thus states:

> "*1. Neither the Citizens Directive (2004/38/EC) nor regulation 17(4) of the Immigration (European Economic Area) Regulations 2006 confers on an* "*extended family member*" *of an EEA national exercising Treaty rights a right to a residence card; consistent with the Directive, reg 17(4) makes it discretionary.*
>
> *2. In deciding whether to issue a residence card to an extended family member of an EEA national under reg 17(4) the decision-maker should adopt a three-stage approach so as to: firstly, determine whether the person concerned qualifies as an extended family member under reg 8. Next have regard, as rules of thumb only, to the criteria set out in comparable provisions of the Immigration Rules. Finally, ensure there has been an extensive examination of the personal circumstances of the applicant*".

14. The issue of the length of the relationship was, therefore, a factor the judge was fully entitled to have regard to. This is, indeed, further confirmed by the Upper Tribunal in Dauhoo (EEA Regulations – reg 8(2)) [2012] UKUT 79 (IAC):

> "*Although Mr Subramanian did not raise the point, it is accepted by the Tribunal in reported decisions that despite the reference in UKBA European Casework Instructions to proof of a durable relationship requiring evidence that the relationship has lasted two years, the concept of a durable relationship is a term of EU law and as such it does not impose a fixed time period: see YB. Having said that, on the judge's findings the relationship had only been shown to exist, if at all, very recently and on the appellant's own evidence his partner was economically self sufficient. Mr Subramanian sensibly did not seek to argue that the appellant was entitled to succeed in showing that the relationship was durable if only a very recent relationship could be established. For the avoidance of doubt I would add that on the basis of the evidence before the FTT judge a durable relationship had not been established (at 21; added emphasis).*

15. It cannot be the case that all genuine relationships must also be found to be durable particularly if they are in the early stages of existence such as in the present case. Of course, most relationships would be genuine when they start out otherwise there would be no point to them (unless there is some other underlying motive) but it cannot be said that durability is demonstrated by all. The term itself implies something that is long lasting and the judge was entitled to find that a five month period of cohabitation (indeed just a few days at the time of the application) had not demonstrated that.

16. Much is made of the fact that the First-tier Tribunal Judge also relied on an absence of evidence to dismiss the appeal without putting the point to the appellant. The judge was referring to the absence of any evidence relating to the Nikah marriage and the sponsor's alleged conversion to Islam. The appellant had already dealt with the absence of the Nikah certificate in evidence so that was a point he was already aware of. The same principle applies to the conversion. It is an obvious point that a conversion to Islam, if it genuinely occurred, would have been an important piece of evidence to show long term commitment to the relationship and no evidence of this was adduced. There was no need for the judge to ask the appellant about the absence of the evidence; it was his duty to adduce all relevant evidence. This was something that he could have been expected to easily produce and its absence is indeed puzzling. I do not find there

was unfairness on the part of the judge to question the appellant about the absence of this evidence. He was legally represented at the hearing and with his representative would have been aware of the importance of providing supporting evidence. However, in any event, the judge arrived at her conclusion on durability before commenting on the lack of this evidence so even if there were an error in her approach, it is not material to the outcome.

17. The appellant has the option of making a fresh application with all the evidence including any evidence of a civil marriage if indeed it took place in December 2019 as it was claimed it would in the oral evidence. In the absence of a Nikah certificate he could adduce confirmation from the Imam as to why a certificate was not adduced and statements from witnesses and/or guests who would have been present.

18. For the above reasons, I conclude that the determination does not contain any errors of law.

Decision

19. The decision of the First-tier Tribunal does not contain any errors of law. The decision to dismiss the appeal is upheld.

Anonymity

20. There has been no request for an order for anonymity at any stage and I see no reason to make one.

Signed

R. Kekić

Upper Tribunal Judge

Date: 12 June 2020