Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/01175/2020**
(EA/50338/2020)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 10 February 2022	**On the 30 March 2022**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR AZIZJON KHAMROKULOV
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Rahman, Counsel instructed by Visas 24/7
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with the permission of the Upper Tribunal against the decision of the First-tier Tribunal promulgated on 11 April 2021 to dismiss his appeal under the Immigration (European Economic Area) Regulations 2016("the EEA Regulations"), against the decision to refuse him a residence card as the extended family member of an EEA national of whom it is said he is the durable partner.

2. The appellant's case is that he is in a relationship with a Spanish national, Ms Concha, who has a child in the United Kingdom who lives with her but

who spends some of the time with his biological father. The appellant's case is that it is a relationship akin to marriage, that they cohabit and they share their life together.

3. The Secretary of State was not satisfied that this was a durable relationship for the reasons set out in the refusal of 1 September 2020. In summary, this was due to a lack of documentation relating to the durable relationship, that is an absence of council tax bills, utility bills and similar, nor had the appellant shown that he was making any financial contribution.

4. As the judge noted, there was a review of the decision subsequent to refusal but it was upheld. The judge then heard evidence from the appellant's partner and a Mr Isroilov, who had also produced a witness statement. The judge directed himself in line with YB (Ivory Coast) [2008] UKAIT 62 and set himself first the question as to whether the couple concerned were partners in a relationship akin to marriage or civil partnership, concluding that this was not so and that even if he had found otherwise, the durability was not such to be shown to the required standard.

5. The judge concluded, having heard evidence, that the appellant and Ms Concha approach the relationship differently in that she saw this as a relationship involving her 10 year old son, which is akin to marriage and she wishes it to continue. He concluded that the appellant did not, giving a number of reasons set out at paragraphs [24] to [27], concluding that he had had the advantage of hearing from the appellant in person and listening to him to be questioned by his Counsel and that he is an intelligent and glib individual who understands what he has to do or say if he is to gain a residence card under EU law.

> "Whatever the intentions of Ms Concha, a relationship has to be between two people and normally has a significant degree of equality about it. On the evidence available to me, both from the appellant and the third witness, I do not find that there is that sort of relationship. MsConcha undoubtedly wishes it to be so not least, as she said, for the benefit of her son but my conclusion is that they are not in a relationship of partners."

6. The judge also concluded that given the short length of the partnership and he found that it was not a durable relationship and they lived in the same property but were not cohabiting as true partners. He also set out his conclusions as to the motivation of the appellant, which he found not to be the basis of a durable relationship.

7. It is worth noting that the judge's conclusion was in effect that the appellant was using his partner and he was in all probability facilitating two other men from Uzbekistan to remain in this country as economic migrants, stating: "It is highly convenient for him to have a qualified EEA national as part of the household because she can contract for living accommodation and access utilities and similar without question. She is also his passport to any form of status here."

8. The appellant sought permission to appeal on a number of grounds, in effect noting that the judge had used the word glib without adequate reasons to come to that conclusion, that there were inadequate reasons for the conclusion that they were not partners, specifically that there was no explanation of why the partner believed that she was in a durable relationship but concluding that the appellant did not, that irrelevant matters had been taken into account regarding the third male living in the property and the absence of a tenancy agreement and the questioning about rent payments and the judge had failed to give reasons as to why he was able to assess that the appellant had found it convenient to reside in the property, the appellant's partner being his passport to form status.

9. I heard submissions from both representatives. Mr Rahman submitted primarily that there was a lack of reasoning and relied on his skeleton argument.

10. Mr Kotas submitted that an Appellate Tribunal should be reluctant to in effect second-guess a judge in the First-tier who had had the benefit of hearing and see the appellant, partner and the other witness give evidence. He submitted further that the judge was entitled to take into account the matters referred to and that contrary to what appeared to have been submitted, the issue of the child was noted. Mr Kotas submitted further that the analogy here was with a marriage of convenience and apparently one party had been intending to obtain an advantage, then it could be a marriage of convenience and the same logic could apply to the durability or genuineness of a durable relationship.

11. This case has troubled me to a greater extent than I had thought when I first read the papers. In essence, the logic of the judge's finding is that although the appellant's partner believes it is a genuine relationship and all that flows from that and from her evidence that she believes it is a genuine, cohabiting relationship, the appellant intends it simply to be convenient and does not intend it to be a durable relationship; by which it long-lasting. It is in effect a finding that the appellant has been fundamentally deceptive. That is clear from the judge's observation at [27] to which I have already referred.

12. Yet, the focus has been not on how the appellant and his partner conduct their lives, which one might consider is the basis for testing the durability or genuineness of a relationship which has at its base an emotional connection. Instead, the focuse has been on what might be stated as external evidence, that is the payment of rent, the nature of the tenancy agreement and the fact that other people live in the property.

13. I consider that there are a number of reasons why the judge's reasoning is unsafe. That is not a conclusion I reach easily nor one which I would often do in respect of an experienced judge who had the advantage of hearing evidence but the reference to the evidence being glib is, I consider, contrary to Mr Kotas's submission, not simply that he gave it easily. It is a word which has pejorative overtones. Second, it does not appear to me to be clear how the judge was able to conclude not only that the appellant's

intentions were simply to enter into a relationship which perhaps was not serious but then to go on to consider that in addition to that, he was satisfied, the phrase being in all probability, that he was facilitating other people to enter the United Kingdom and that he was in fact using Ms Concha.

14. The consideration is, as I have noted, primarily based on external evidence rather than on evidence of emotional commitment or the lack thereof. I consider that it was inappropriate to take into account, as the grounds raise at paragraph 4, the failure to mention the name of the third male living in the property as being relevant to the core issue nor has the judge explained adequately why the nature of the tenancy agreement was relevant to the core issue. The fact that people are unlawfully subletting is something that goes on. It is accepted that the appellant as a foreign national would not be able to rent easily but that does not in and of itself or indeed in combination with the other factors provide a sufficient basis for the very negative findings raised.

15. Ultimately, I come to the conclusion that there has been in this case a failure of reasoning and a failure properly to explain how it could be that one party to the relationship thinks it is an entirely genuine, durable relationship, yet the other not only does not intend that but has an entirely different attitude and I conclude therefore that the judge erred with respect to the finding that they were not partners. I consider also that there appears to have been a lack of focus on the fact that the child had been brought into a family relationship. Whilst that is indicative of the appellant's partner's intention, it may also be indicative of the appellant's intentions.

16. Having concluded that the finding that they were not partners is unsafe, I turn next to the finding in the alternative that the relationship was not durable. They had cohabited for only sixteen months or so but the reasoning that it is not durable is primarily, as is set out at paragraph 30, based on the findings as to the intentions which, for the reasons I have given, are not safe.

17. Accordingly, for these reasons I consider that the decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.

18. The question that remains is whether this should be remitted to the First-tier Tribunal. There is no purpose to be served in retaining it in the Upper Tribunal as the whole decision will have to be remade and very nearly another year has passed since the last hearing and in all the circumstances I consider that it would be appropriate to remit the appeal to the First-tier Tribunal for a fresh hearing. None of the findings of fact are preserved.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set is aside.

2. The appeal is remitted to the First-tier Tribunal for a fresh decision on all issues to be made

Signed Date 21 February 2022

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul