



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/13962/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 16 September 2015**

**Decision Promulgated
On 13 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

PAVEL KHAN

Appellant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Mr Chohan, instructed by Syed Shaheen solicitors
Mr Norton, Home Office Presenting Officer

ERROR OF LAW & REASONS

1. The Appellant is a national of Bangladesh, born on 22nd May 1990. He was granted leave to enter the United Kingdom on 23rd September 2009 as a Tier 4 (General) Migrant. He made a further application for leave to remain on the same basis on 28th December 2011 but this was refused due to a lack of funds. On 25th October 2013, the Appellant applied for a residence card on the basis of his relationship with Ms. Suborna Suborna, a Portuguese national born on 4 August 1993. This application was refused on 18th February 2014 although the Respondent accepted that the relationship is a genuine one but the Appellant had not adduced sufficient evidence to show that they were in a durable

relationship as they had not lived together for 2 years. The Appellant appealed against this decision.

2. His appeal came before First Tier Tribunal Judge Morris for hearing on 21st October 2014. In a decision promulgated on 5th December 2014 she dismissed the appeal. An application for permission to appeal was made on 15th December 2015 supported by grounds of appeal drafted by the Appellant's solicitors. This application was refused on 28th January 2015. A renewed application for permission to appeal was made on 18th February 2015. The grounds of appeal were drafted by counsel and asserted that First Tier Tribunal Judge Morris had materially erred in law:

- (i) in failing to make any findings or take into account relevant considerations applying the correct test as to whether the couple were in a "*durable relationship*."
- (ii) in failing to consider whether the couple had been cohabiting since February 2013 and were continuing to cohabit;
- (iii) in failing to consider or make any findings in respect of whether or not the Sponsor's previous marriage had permanently broken down;
- (iv) in failing to consider whether the couple intended to live together permanently.

3. Permission to appeal was granted by Upper Tribunal Judge Goldstein on 12th May 2015 who stated: "*I am just persuaded that the grounds in support of this renewed application demonstrate that the First Tier Tribunal Judge may have made an error of law in failing to give adequate reasons for his findings on material matters and arguably failed to adequately if at all, address matters potentially of material relevance (see grounds (2)(3) and (4)) and raises arguable issues as to whether he was thus entitled in law to reach the conclusions he did for the reasons given.*"

Hearing

4. At the hearing before me, Mr Chohan sought to rely on the grounds of appeal and helpfully took me through the evidence as to the relationship between the Appellant and the Sponsor in the Appellant's bundle. Mr Norton sought to defend the decision of First Tier Tribunal Judge Morris.

5. After hearing submissions I stated that I found that the First Tier Tribunal Judge had made a material error of law and announced my decision, reserving the reasons for the written decision. I also indicated that the appeal would be remitted back to the First Tier Tribunal for a hearing *de novo* because findings of fact would be required in the light of oral evidence from the Appellant and his Sponsor.

Error of law

6. I consider that First Tier Tribunal Judge Morris materially erred in law in her approach to the appeal. As the Respondent's refusal letter of 18th February 2014, the Respondent's guidance in the form of the European Casework

Instructions, Chapter 5 and the grounds of appeal in support of the renewed application for permission to appeal make clear, assessment of whether or not there is a durable relationship pursuant to regulation 8(5) of the Immigration (EEA) Regulations 2006 requires not only cohabitation in a relationship akin to marriage for 2 years but also an assessment of whether the parties intend to live together permanently, whether any previous marriage/relationship has broken down and that the parties are not related by birth. However, the First Tier Tribunal Judge failed to analyse the facts of this Appellant's case from this perspective. In particular, she failed to make any finding as to:

- (i) the length of the relationship;
- (ii) the length of cohabitation: the evidence before her was that the couple had cohabited since February 2013;
- (iii) whether the parties were still cohabiting;
- (iv) whether the Sponsor's marriage had broken down, despite the fact that there was evidence before her on this issue, including a non-molestation Order against the Sponsor's former husband and her oral evidence as to the fact that she had been forced into marriage with her cousin in Bangladesh;
- (v) whether the couple intended to live together permanently.

7. The Judge's findings, at [12] focus instead on the detail of the case: at 12(i) the Judge found the Sponsor's explanation as to a gap in Facebook records between March and September 2011 lacked clarity and that the evidence was undermined by the fact that the records are not translated; at (ii) she found the telephone records of limited assistance as there is nothing to link the telephone calls made by the Sponsor to the Appellant; at (iii) in terms of the registration of a notice of marriage in October 2013, however it was evident that the parties were aware that they were not able to marry yet; at (iv) the evidence that both parties were unaware of the whereabouts of the Sponsor's former husband is contradicted by a letter of 25th October 2013 from the Sponsor's solicitors stating "she was forced to marry a stranger" when she was forced to marry her first cousin and that he left the United Kingdom after the issuing of the non-molestation Order; at (v) the Sponsor and Appellant knew very little about the Non-Molestation Order which casts doubt on the exact position between the Sponsor and her husband. She further stated: *"Whilst it is not a requirement of the 2006 regulations that the Appellant and Sponsor were married to each other or that the Sponsor had been through a formal divorce process ... it is reasonable to expect the parties to produce some evidence that they both intended to live together permanently and that the previous relationship or marriage (if any) of either of them had broken down."*

8. I now address these findings. The grounds of appeal at [10] asserts that in respect of 12(i), the Judge failed to address the relevant time period - the couple had been living together the majority of the time and their level of

facebook contact in 2011 and 2012 was not relevant and the same applied to the phone records at 12(ii). I consider that this ground of appeal has merit. Whilst the couple first met in March 2011 the relationship was then interrupted by reason of the Sponsor's parents forcing her to marry her first cousin in December 2011. The Sponsor and Appellant were then in clandestine contact until the Sponsor's husband arrived in the United Kingdom in January 2013 when that relationship broke down due to domestic violence and the Sponsor commenced cohabiting with the Appellant shortly afterwards. Therefore, the key issue before the Judge was the nature of the relationship since February 2013 and the couple's intentions. I agree that the previous contact and nature of that contact prior to February 2013 is of marginal relevance to the issues the Judge needed to decide.

9. In respect of 12(iii) I consider that [17] of the grounds of appeal has merit in that, even if the parties were aware that they would be unable to marry at that time, the fact that they registered a notice of marriage in October 2013 is relevant to their intention to marry, which is evidence that can properly be taken into account when considering whether they intended to live together permanently. Whilst the Judge was aware of this requirement, as she refers to it at 12(v) she entirely failed to take the notice of marriage into account in the correct context. 12(iv) and (v) essentially concern the non-molestation Order made against the Sponsor's husband. Grounds [14]-[16] assert that the Judge materially erred in failing to give due weight to the fact that a family Court Judge had seen fit on the basis of the evidence to make this Order, which was clear evidence that the Sponsor's marriage had broken down and instead the Judge erroneously focused on the fact that the Sponsor did not know when it was due to expire. I consider that this ground of appeal also has merit for the reasons set out in the grounds of appeal.

10. Overall, I consider that the First Tier Tribunal Judge failed to correctly direct herself in respect of the questions she needed to answer, which I have set out at [6] above. Had she viewed the evidence of the Sponsor and Appellant in the correct context, this could have made a material difference to the outcome of the appeal.

Conclusion

11. For the reasons set out above I find that First Tier Tribunal Judge Morris erred materially in law in dismissing the appeal and that decision is set aside. In light of the fact that the Judge did not conduct a full fact finding exercise in respect of the issues she was required to determine, there will need to be a further hearing in order that the Appellant and the Sponsor can give oral evidence. I remit the appeal for a hearing *de novo* on all issues by the First Tier Tribunal.

Deputy Upper Tribunal Judge Chapman

11th November 2015