



**Upper Tribunal
(Immigration and Asylum Chamber)**
IA/00740/2015

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 12 May 2016**

**Decision & Reasons
Promulgated
On 21 July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**MR. BENSON IZEKOR
(NO ANONYMITY ORDER MADE)**

Appellant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ERROR OF LAW DECISION & REASONS

Representation:

For the Appellant: Mr J. Collins, counsel instructed by G. Singh solicitors

For the Respondent: Mr S. Kotas, Home Office Presenting Officer

1. The Appellant is a national of Nigeria, born on 10 August 1972. On 11 June 2014, he applied for a residence card as confirmation of his right to reside as a person in a durable relationship with Ms Andrea Gyoriova, a national of Slovakia. This application was refused on 9 December 2014 and the Appellant appealed to the First tier Tribunal against this decision.

2. His appeal came before First tier Tribunal Judge Boyes for hearing on 10 July 2015. In a decision promulgated on 25 September 2015, she dismissed the appeal. At [35] she found as a fact that the Appellant and his Sponsor are in a genuine relationship which began in around April 2013 and had been living together since March 2014 but at [42] she found they had not demonstrated that they were in a durable relationship.

3. An application for permission to appeal was made on the basis that:

- (i) the FtTJ erred in misreading YB (EEA reg 17(4) – proper approach) Ivory Coast [2008] UKAIT 00062;
- (ii) it was perverse to purport that the relationship was not a durable one;
- (iii) the submissions in (ii) were supported by the decision in Dauhoo (EEA Regulations – reg 8(2)[2012] UKUT 00079 (IAC) at [21] where the Tribunal reiterated that there is no fixed time period to a durable relationship.

4. In a decision dated 12 April 2016, Upper Tribunal Judge Freeman granted permission to appeal on the basis that

“Arguably the passage from YB (EEA reg 17(4) – proper approach) Ivory Coast [2008] UKAIT 00062, accurately cited by the Judge at paragraph 28, meant that she needed to deal with the durability of the parties’ relationship, which she found genuine, on the basis that the two years cohabitation required by the Immigration Rules represented a “rule of thumb” not amounting to a presumption which had to be displaced by further evidence of the kinds she considered.”

Hearing

5. At the hearing before me, Mr Collins sought to rely on his original grounds of appeal of 9 October 2015 and the grounds in support of the renewed application for permission to appeal to the Upper Tribunal. He drew my attention to the relevant case law *viz* YB and

Dauhoo the fact that he was also making a perversity challenge. He submitted that on the Judge's findings, based on the evidence of five live witnesses, it was clear that the Appellant and his Sponsor were in a durable relationship notwithstanding that at the date of hearing it had not lasted for 24 months. The couple met in April 2013, described themselves as a couple in December 2013 ; the application was made in June 2014; the decision was in December 2014 and the hearing in July 2015. In respect of the Judge's findings at [40] there is no mortgage but this could be said of many people everywhere and would be difficult for the Appellant to get a mortgage; they have no children together but they are in their 40's. He submitted that the decision was perverse on the facts of the case.

6. In response, Mr Kotas submitted that it was clear that the Judge knows they have not lived together for 2 years and this is reflected at [28], [38] and [42] of her decision. He submitted that perversity is an incredibly high threshold and that there was a spectrum in that one can be in a genuine relationship but whether it is durable is another question. The Judge does give reasoning at [40] but these are just illustrative examples and no financial commitment has been made by the couple [39]. Mr Kotas also pointed out that even if I found a material error, the matter would have to be remitted back to the Secretary of State in order to exercise discretion. He was not prepared to accept, absent evidence, that the couple had continued to cohabit and had now cohabited for a period of time in excess of 2 years.

7. In his reply, Mr Collins submitted that whilst the Judge might have been well aware of the authorities the issue is whether they had been applied properly and the YB approach had not been followed.

My findings

8. At [35] of her decision, the First tier Tribunal Judge expressly accepted that the Appellant and his Sponsor are in a genuine relationship, which began in April 2013 and they began cohabiting in March 2014 and had lived together since that date. She also accepted at [36] that they planned to marry. At the date of the hearing before her, the couple had been in a relationship for 2 years and 3 months and had cohabited for 1 year and 4 months. The Judge also noted at [23] the evidence of the Sponsor's son and daughter that they supported the relationship and that whilst initially suspicious because they hardly knew anything about the Appellant, it was only a matter of time before they realized he was a good, decent man and they can see how happy and well looked after their mother is.

9. In YB (EEA reg 17(4) – proper approach) Ivory Coast [2008] UKAIT 00062 the Upper Tribunal held at [35]:

“Even if the respondent wrongly considered that the criterion contained in the Immigration Rules at para 295D(vi) of two years’ living together afforded a definition of the proper meaning of “durable relationship” and wrongly treated that as a mandatory requirement, the fact that the couple’s relationship was at this point only 12 months old plainly did not suffice on its own to show it was durable.”

It is clear from this that: (i) two years cohabitation is not a mandatory requirement; (ii) a relationship of 12 months duration is not sufficient on its own to show durability.

10. In Dauhoo (EEA Regulations – reg 8(2)[2012] UKUT 00079 (IAC) the Upper Tribunal, following YB held at [21] “*the concept of a durable relationship is a term of EU law and as such it does not impose a fixed time period.*” However, again on the facts of that case the relationship was very recent. That is the not the case here.

11. I find that First tier Tribunal Judge Boyes erred materially in law in dismissing the appeal in light of her findings of fact and positive credibility findings. Whilst the period of cohabitation was 16 months at the date of hearing, the relationship itself had lasted well over 2 years and the couple planned to marry, which I find is a clear indication of their intentions and thus the durability of the relationship. Given that the jurisprudence clearly indicates that there is no mandatory requirement of 2 years cohabitation, I find that the First tier Tribunal Judge materially erred, on the basis of her findings of fact, in failing to find that the relationship between the Appellant and his Sponsor was a durable one. I further note that, whilst Mr Kotas was not prepared, absent evidence, to accept that the couple are still cohabiting, they appeared together at the hearing and I have no reason not to believe that they are still cohabiting.

Decision

12. For these reasons I allow the appeal against the decision of First tier Tribunal Judge Boyes, on the basis that the Appellant meets the requirements of regulation 8(5) of the Immigration (EEA) Regulations 2006. However, there has been no consideration by the Secretary of State regarding her exercise of discretion pursuant to regulation 17(4)(b) and (5) of the aforementioned Regulations. Consequently, I allow the appeal to the extent that it is remitted back to the Secretary of State to consider exercising her discretion

to issue a residence card to the Appellant as an extended family member of an EEA national.

Deputy Upper Tribunal Judge Chapman

7 July 2016