



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

Appeal Number: UI-2022-002472
EA/50580/2021 [IA/04959/2021]

THE IMMIGRATION ACTS

**Heard at Bradford Hearing Centre
On 26th October 2022**

**Decision & Reasons Promulgated
On 16th November 2022**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

**MR GHAFAR KHAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No representation

For the Respondent: Miss Young, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Afghanistan, born in 1995 appeals against the decision of First-tier Tribunal Judge Turner promulgated on 7th April 2022 which dismissed his appeal against the Secretary of State's decision dated 6th March 2021 refusing his application for an EEA residence card pursuant to the Immigration (European Economic Area) Regulations 2016 (the EEA Regulations).

2. The appellant applied on 31st December 2020 on the basis he was a family member of his partner Miss Mihaela Tanase (the sponsor). He asserted he and his partner were in a durable relationship.

The grounds of appeal

3. The judge concluded that the appellant and his sponsor were not in a durable relationship, but the grounds asserted that the judge misdirected himself in law and failed to give weight to the material facts. Secondly the judge failed to take into account the relevant evidence including a statement from the sponsor's mother, a letter from the GP and a letter from a neighbour and also recent evidence of living together.

Ground 1. Misdirection of Law

It was accepted that the judge acknowledged that two years of living together was not the only measure of a durable relationship and identified at [27] that the appellant and sponsor had a child but proceeded at [28]

"that is not the end of the matter. It is not uncommon for a couple to conceive a child only then to end their relationship. This fact alone is not sufficient to demonstrate that the Appellant and Sponsor were and continue to be in a durable and subsisting relationship."

The appellant had explained in relation to the evidence that he was unable to work due to his immigration status and therefore unable to open a bank account. The judge failed to give proper weight to the evidence.

4. **Ground 2. Failure to take into account the relevant evidence**

At paragraphs 30 to 31 the judge recorded that there was little evidence to show the appellant and the sponsor lived together in a relationship. It was submitted the judge failed to take into account other evidence which showed that the appellant and the sponsor had been living in a family unit with their child (SAB/1-3, AB/89-102). There are documents showing individual and joint names for a substantial period at the relevant address. Letters from a GP also confirmed the appellant and the sponsor lived together at the same address with their minor child.

The judge also failed to take into account the supporting letter from the sponsor's mother and the neighbour (SAB/4-6, 8-10).

At paragraph 41 of the determination, the judge's findings went against the documentary evidence.

The judge was imposing his own view of how the parties could reasonably be expected to conduct their relationship (i.e. taking into account irrelevancies) as opposed to evaluating the consistent and supporting evidence that was before him and how they actually did and the findings were contrary, to paragraph 10 of **Goudey (subsisting marriage -**

evidence) Sudan [2012] UKUT 00041. No particular evidence was required.

In addition the tenancy agreement and several pieces of evidence showed the appellant and the sponsor lived in a relationship and had a child from their relationship.

The Hearing

5. The appellant attended the hearing with his partner but without representation. It transpired that the solicitors had advised the Upper Tribunal on 10th October 2022 that they were no longer instructed. Unfortunately no interpreter had been requested. The appellant stated that he could not afford a solicitor but said that he could understand English sufficiently to understand the error of law proceedings and that he wished me to proceed.
6. Miss Young made no objection to that but stated that should the decision be set aside, and the matter remade, cross-examination may be undertaken, in which case the appellant and his partner would need interpretation for the further court proceedings.
7. I considered an adjournment but in view of the submissions from both parties and in accordance with the overriding objective of the Upper Tribunal Procedure Rules I decided to continue to hear the error of law matter. There was no prospect of representation owing to the finances of the appellant. The appellant assured me he could understand sufficiently for me to proceed in relation to the error of law only and indeed encouraged me to proceed. I explained to the appellant that I can only consider the decision itself and the evidence before the First-tier Tribunal and thus could not look at the certificate of Nikkah, the original of which he and his partner produced, when considering any error of law in the extant decision of the First-tier Tribunal.
8. Miss Young opposed the grounds of appeal on behalf of the Secretary of State and relied on the Rule 24 response. She submitted that the judge had reviewed and considered all the evidence and had assessed the oral evidence but found the credibility undermined. It was open to the judge to find that the marriage date should have been recalled more specifically.

Analysis

Ground 1

9. In relation to ground 1 the weight to be given to evidence is a matter of fact and I find no material error of law in that respect. Mere disagreement about the weight to be accorded to the evidence, which is a matter for the judge, should not be characterised as an error of law, *Herrera v SSHD* [2018] EWCA Civ 412. .

10. It is however an error of law to fail to take into account the relevant matters and to take into account irrelevant matters which may have a material effect on the decision.
11. In relation to ground 2 the judge failed when assessing the durable relationship to take into account the relevant evidence and further he took into account irrelevant matters. The context of the evidence is important. Not only did the appellant and sponsor have an ongoing tenancy agreement dating from 25th August 2020 and the hearing before the First-tier Tribunal was on 6th April 2022 but the sponsor and appellant had a child born on 8th November 2020. The documentation indicated that they continued to live in the same household. The judge failed to take into account the Department of Work and Pensions letter to the appellant at 17 Apsley Crescent (same address as the sponsor) and dated 2nd September 2021, failed to take into account the GP letters dated 23rd December 2021 which although addressed individually placed appellant and sponsor and child in the same address.
12. Further the judge failed to take into account the supporting letter from the sponsor's mother dated 29th December 2021 confirming the relationship was genuine, subsisting and durable. The judge also failed to take into account the letter written by Mrs G M Spataru. Both witnesses produced their identification documents, and both attested to the genuine relationship of the appellant and sponsor. I appreciate that those witnesses did not appear at court and the judge does not need to refer to every piece of evidence but in these particular circumstances this evidence was significant evidence which should have been directly addressed even if to give an adequate explanation as to why it should be dismissed. There was no such explanation.
13. **Secretary of State v AJ (Angola) [2014] EWCA Civ 1636** at paragraph 49 confirms that *"there are two categories of case in which an identified error of law by the First-tier Tribunal or the Upper Tribunal might be said to be immaterial: if it is clear that on the materials before the Tribunal any rational Tribunal must have come to the same conclusion or if it is clear that, despite its failure to refer to the relevant legal instrument, the Tribunal has in fact applied the test which it was supposed to apply according to those instruments."*
14. This case falls in neither of these categories.
15. Nor did the judge properly take into account the appellant's explanation as to why he had no financial responsibilities jointly with the appellant because he had no permission to remain and therefore could not access a bank account. The judge speculated that "there are various other financial responsibilities that could be taken jointly" [31] and yet by way of contradiction, dismissed the key financial responsibility of the joint tenancy agreement by merely stating that it had been taken out with a view to supporting the residence application. Bearing in mind the appellant and sponsor had a child together this was an important and

relevant document which supported their claim to be in a durable partnership. The fact that the tenancy agreement was taken out only four months before the application for a residence card omits the existence of the child. The tenancy agreement was in fact taken out two months before the child was born and thus was a highly relevant factor.

16. The judge also asked the appellant “why he and the sponsor were not married”? Bearing in mind the appellant and sponsor claimed a durable relationship that too was an irrelevant factor. The judge justified the question by stating “this is not a requirement however I found their responses again concerning”. There may be many reasons why people do not marry. That said the appellant and sponsor confirmed that they were in fact married under Islamic Law. Even when the appellant and sponsor were asked about their Nikkah the judge portrayed the evidence as being inconsistent and took that into account when in fact it was not inconsistent. The appellant stated they were married twelve to eighteen months ago whilst the sponsor stated eighteen months. Those responses are not inconsistent. The judge at [34] also took into account that they were legally represented and yet had not produced the Nikkah and stated, “if the appellant had confirmed that they had a document such as a Nikkah, they would have been advised the significance and the need to provide it as part of the appellant’s evidence”. There is no indication that any question was asked of the legal representative in that regard. The judge proceeded “the appellant and sponsor however stated that they did not feel that the Nikkah was relevant as it was not legally recognised in the UK”. I acknowledge that the Nikkah certificate was not produced but the appellant and sponsor specifically stated at the hearing before me that the solicitors had told them the Nikkah was not relevant. Indeed at the hearing before the First-tier Tribunal the appellant and sponsor must have given that same evidence separately and thus consistently. Again the judge appears to have proceeded on an incorrect basis whilst ignoring a relevant factor.
17. At [35] the judge rejected the appellant’s credibility when criticising the appellant’s and sponsor’s description of the sponsor’s conversion to Islam eighteen months ago as being “recent”. I find that the judge again took into account an irrelevant factor. The concept of “recent” is clearly subjective. To describe, as the judge does, the various photographs at [36] which included two people and their child in bed together as being “not intimate” was surprising as indeed was the comment that it was “not credible (during the pandemic) that in the two years that they claimed to have been in a relationship, they have done nothing more than walk, clean and prepare food”, but I shall say no more about that because this veers towards irrationality which was not a ground of appeal. It is self-evident that the couple have also had a small child to care for and the sponsor worked. The judge made his finding on credibility as to that aspect of the relationship prior to factoring in the issues around childcare.
18. The events of their meeting were also irrelevant. The judge was not satisfied that it was “common” to meet your significant other whilst

shopping and was not satisfied as to what first attracted them to each other and what they did on their first date. What is relevant is that they clearly met and proceeded to have a child. The birth certificate naming the appellant and sponsor as the parents, was accepted by the Secretary of State. The judge also took into account an inconsistency of description of their first date being that the appellant stated that they “went to eat” while the sponsor stated they “went to eat at a restaurant called Zafron”. Again the judge took into account an irrelevancy that the appellant did not mention the restaurant.

19. The judge was simply wrong to state that there was no evidence of joint financial responsibility. The tenancy agreement is exactly that as indeed is the council tax documentation in joint names. The judge concluded despite the child, that they were simply housemates.
20. Overall the judge took into account irrelevancies and yet failed to take into account relevant matters. Despite assertions by the judge that the evidence was looked at in the round the errors, cumulatively, rendered this decision unsafe. I set it aside in its entirety and no findings are persevered.
21. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Directions

22. The appellant and sponsor produce the original certificate of their Nikkah following a ceremony at the Jameela Mosque Tabligh ul Islam Bradford BD7 2ED. The formal certificate 00152 was issued on 20th October 2020 by the Jamiyat Tabligh ul Islam Central Office 68/69 Southfield Square, Bradford BD8 7SL. The same address recorded on the certificate was the same address for both the appellant and sponsor that being 17 Apsley Crescent, Bradford, BD8 7EY. **This document together with the ongoing council tax documentation should be sent to the Secretary of State and indeed these documents were scanned at court with the direction that they would be forwarded by the Tribunal to the Secretary of State.**
23. Despite the fact that both the appellant and sponsor can speak English they should be **provided with interpreters** for the forthcoming First-tier Tribunal hearing.
24. Miss Young objected to the matter being remade before the Upper Tribunal not least because of the lack of interpreter which is understandable.

Nonetheless it is my provisional view that had the parties acceded to remaking the decision before me, on the objective evidence provided, and the oral evidence taken already, I would have allowed the appeal. There is ample evidence of a durable relationship on the documentary evidence. It is not the case that the appellant can make another application under the Immigration (European Economic Area) Regulations 2016.

25. Miss Young confirmed that she would refer this matter to the Secretary of State for **immediate review** prior to any First-tier Tribunal hearing in order to avoid the further inefficient use of resources.

No anonymity direction is made.

Signed Helen Rimington

Date 15th November 2022

Upper Tribunal Judge Rimington