IAC-AH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/40506/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 January 2015	**On 11 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR RAMIL JAMIL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Mr Hyder instructed by Simon Noble Solicitors

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First-tier Tribunal, that is Mr Rabil Jamil as the appellant and the Secretary of State as the respondent.

2. The appellant is a citizen of Pakistan born on 20 November 1987 and he entered the UK on 6 October 2009 pursuant to a Tier 4 Student visa with leave to remain until 28 February 2013. It was recorded he stopped

attending college in September 2012. On 12 April 2013 he lodged an application for a residence card on the basis he was in a durable relationship with an EEA national exercising treaty rights. His application was rejected on 16 September 2013 following a joint interview. On 3 October 2013 it was requested the matter be set down for an oral hearing but by letter of 26 June 2014 his solicitors advised that the appeal be "*converted to paper as we believe that the issues are relatively minor*".

3. The respondent had concluded on the basis of the interview with both parties, that is the appellant and his EEA national sponsor on 12 August 2013, that theirs was not a durable relationship. There were a number of discrepancies noted and reference was made to others. Having concluded that the parties had failed to demonstrate they were in a relationship the application for a residence card failed.

4. The appeal came before First Tier Tribunal Judge Dennis who decided the appeal on the papers and allowed it outright.

5. In an application for permission to appeal it was submitted that whilst the couple claimed to have had a child together, born on 10 October 2013, it did not necessarily demonstrate a durable relationship. Neither the appellant nor the sponsor attended the hearing to give up-to-date evidence. It was cited that **Boodhoo & Others (EEA Regs: relevant evidence) [2013] UKUT 00346** was relevant and the judge should look at the facts as at the date of the appeal hearing and the judge should have determined whether the appellant and the EEA national were in a durable relationship at the date of the hearing.

6. The decision made a finding in relation to the date of lodging the appeal on 3 October 2013, a full ten months before the hearing date and this was an error of law.

7. Further circumstances had changed since the reasons for refusal letter in that the sponsor had returned to Latvia on 25 June 2014 and this was the reason for her not being able to attend the hearing. It was not known whether the sponsor was a qualified person for the purposes of the EEA Regulations whilst in Latvia. The respondent had been unable to address this previously and without this the appeal could not succeed.

8. Even if the judge found that the couple were in a durable relationship the matter should be remitted back to the Secretary of State to allow her to exercise her discretion, **FD (EEA discretion – basis of appeal) Algeria [2007] UKAIT 49**.

9. Permission to appeal was granted by First-tier Tribunal Judge P J M Hollingworth, stating that at paragraph 11 the judge had referred to

'very strong concerns to him that the relationship was not enduring and that the decision to determine the matter on the papers so suddenly and from two different solicitors and with witness statement signed as to facts

which should be in the future being couched in terms as having been in the past was an attempt to misrepresent the actual state of the relationship. Prior to this the Judge had referred to inconsistencies in relation to which he had accepted an explanation as plausible. An arguable error of law has arisen in relation to the reasoning leading to the conclusion that the case had been proved on the balance of probabilities. It is arguable that the factors taken into account by the Judge being satisfied that the standard of proof had been met were not factors of sufficient weight in relation to the other factors identified by the Judge which had raised very strong concerns to him'

10. At the hearing Ms Isherwood submitted that at paragraph 8 of the determination the judge accepted that the sponsor had given birth to Mohammad Abdulla Rabil on 10 October 2013 at Harrow and a birth certificate for the child had been produced naming the appellant as his father and his sponsor as his mother with the occupation of the father given as a student. Both parties confirmed the parentage of the child and the judge recorded that "*there is nothing before me to suggest to the contrary*". Ms Isherwood pointed out that at question 33 of the interview conducted by the respondent the appellant was asked "*was your partner still living with her boyfriend when she became pregnant*" and he replied "*yes but they had break up I am the father of baby*". Ms Isherwood submitted that how the judge approached the evidence was materially flawed. Indeed bearing in mind the concerns the judge raised he was not in a position to deal with the matter on the papers and should have requested an oral hearing.

11. She also stated that the whole concern of the relationship was the durability of that relationship and yet at paragraphs 10 and 11 the judge had noted that the sponsor was not able to attend the hearing and that this raised:

> "*very strong concerns to me that the relationship is not enduring and that the decision to determine the matter on the papers, so suddenly and from two different solicitors and with witness statements signed as to facts which should be in the future being couched in terms of having been in the past that this is an attempt to misrepresent the actual state of the relationship*."

The judge should have adjourned for an oral hearing.

12. Mr Hyder submitted that the Secretary of State had had the opportunity to consider the evidence as the bundle was served five days before the hearing and if the respondent had concerns those should have been raised prior to the hearing. At paragraph 8 of the determination Judge Dennis had clearly mentioned not only the birth of the child but also photographs although he accepted that the mother was not identifiable from the photograph.

13. He did accept, however, that the judge was in error in not referring the matter to the Secretary of State for consideration further to Regulation 17.

14. In conclusion I find the judge made reference towards the close of his determination to the very strong concerns he had that the relationship was not enduring. Further to **Boodhoo** the evidence produced following that decision may be admitted in evidence.

15. The respondent had couched her refusal on the basis that discrepancies arose from the sets of questions given to the EEA national sponsor and the appellant. Nonetheless the judge reasoned that he was prepared to accept the explanations for the discrepancies from the appellant and stated, "*for example he had replied that he had moved to an address in October 2012, that his partner said that she had moved there in December of that year*. *That is explained by the fact that she **joined** him there when they began co-habiting at the end of the year, he having moved in previously on his own"*. The judge stated he found this consistent with their other answers. In fact the appellants gave two entirely different accounts and that the appellant claims that he moved into Lynch Gate Walk at the end of 2010 until October 2012 whereupon he moved out and then moved back again to Lynch gate in January 2013 until 31 March 2013. His partner claims that she "*moved in with my partner at 7 Lych (sic) Gate Walk, Hayes UB6 3NN, I was there from December 2012 until April 2013 and we then moved into current address*". Their accounts were different and not explained by her joining him there. Indeed he had moved out from that property when she stated she had moved in.

16. In addition, the child was born on 21 October 2013. The appellant's claimed partner must have become pregnant in February 2013. At question 33 of the interview the appellant in response to the question, "*was your partner still living with her boyfriend when she became pregnant*?" he responded "***yes,** but they had break up I am the father of baby*". The appellant added at Q30 that the sponsor lived with her boyfriend at 58 Wookham Way and that he, the appellant, never went there. Despite this contradiction in timelines and question in relation to the parentage the judge stated that "*both parties confirmed the parentage of the child and there is nothing before me to suggest the contrary*". There was evidence suggesting to the contrary. The judge also referred to "*a bundle of photographs and a number of medical documents have been produced all to demonstrate the relationship. All of these photographs appear to be fully plausible and consistent with the account of the appellant and his sponsor*" [8]. The judge does not identify that in fact the appellant's partner does not appear in the photographs.

17. Finally the judge stated that:

> "*The witness statement of Ms Isakova is signed 25 June 2014. That of the appellant is signed on the same date and stated that 'due to her mother's severe ill-health she had to fly to Latvia and therefore she could not attend the hearing and we need to make a request to make*

a decision on the basis of the papers'. That same language appears in the witness statement of Ms Isakova stating "she had to fly to Latvia suddenly" and therefore "could not attend the hearing".

18. The judge proceeded at paragraph 11:

> "*Inevitably this raises very strong concerns to me that the relationship is not enduring and that the decision to determine the matters on the papers, so suddenly and from two different solicitors and with witness statements signed as to facts which should be in the future being couched in terms of having been in the past that this is an attempt to misrepresent the actual state of the relationship. Nonetheless I have reminded myself of the standard of proof and the presence of this indisputable evidence of their son, supported by a series of photographs over a period of time has led me to conclude, if only just and somewhat reluctantly, that theirs is a durable relationship at least as at the date of lodging the appeal*."

19. The judge's assessment of the evidence contained some factual errors which may have had material impact on the outcome. In addition should he have had such strong concerns, particularly as the parties were not present, there was no indication he had addressed his mind to whether the matter should be adjourned for an oral hearing or that he considered the evidence as at the date of the hearing itself. Ms Isherwood confirmed that she had no bundle from the appellant. It was suggested that the bundle had been sent to the Presenting Officers' Unit in Feltham and a letter with a tracking reference was presented to me showing that a copy of the bundle had been sent to the Presenting Officers' Unit in Feltham but nonetheless, bearing in mind the very significant concerns that the judge had regarding the appeal, I find that it was an error of law not to address his mind to the requirement of an oral hearing.

20. Notwithstanding the above the judge allowed the appeal outright when he should have remitted the matter to the Secretary of State for consideration and that is an error of law, as conceded by Mr Hyder, **FD (EEA discretion – basis of appeal) Algeria [2007] UKAIT 4**.

Notice of Decision

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

22. Bearing in mind my findings I consider that there is an error of law and the matter should be remitted to the First-tier Tribunal for a full and ***oral*** hearing *de novo*.

No anonymity direction is made.

Signed Date **6 February 2015**

Deputy Upper Tribunal Judge Rimington