Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/21503/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 February 2016	**On 22 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

Mr SHAHIN MIAH
(Anonymity direction not made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Lam (counsel) instructed by David Tang & Co, solicitors
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Abebrese promulgated on 3rd June 2015, which dismissed the Appellant's appeal.

Background

3. The Appellant was born on 18 November 1992 and is a national of Bangladesh.

4. On 29 April 2014 the Secretary of State refused the Appellant's application for an EEA residence card.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Abebrese ("the Judge") dismissed the appeal against the Respondent's decision.

6. Grounds of appeal were lodged and on 16 October 2015 Upper Tribunal Judge Reeds gave permission to appeal stating

> *"1. It is arguable that when considering whether this was a marriage of convenience, the First-tier Tribunal made a factual error referring to the parties having lived together for three years (at [15]) when the evidence referred to a date in October 2012.*
> *"2. Furthermore, when considering the issue, it is arguable that the First-Tier Tribunal failed to take into account in the decision and weighing in the balance material evidence, including the pregnancy of the EEA sponsor and the documentation provided to demonstrate the relationship."*

The Hearing

7 (a) Mr Lam, for the appellant, relied on the grounds of appeal and told me that the Judge had treated one single factor as determinative of this appeal without considering each strand of evidence. He told me that despite the fact that the Judge accepts at [17] that the EEA sponsor is pregnant with the appellant's child, and that the sponsor and the appellant had lived together since October 2012, at [15] the Judge relies entirely on an ambiguous answer given by the appellant to a question posed to him in two parts by an immigration officer.

(b) Mr Lam told me that the appellant was interviewed on 23 July 2014. During that interview he was asked "*your current leave in the UK has just expired. Are you entering into this marriage because your Visa has now ended?"* The appellant answered "*yes*". Mr Lam told me that the answer related to the first sentence of the question only. It was an ambiguous answer and not an admission. He told me that the Judge viewed that answer as being entirely determinative of the appellant's credibility and that the Judge gave inadequate consideration to the positive findings of fact which support the appellant's position that he is in a durable relationship with an EEA national.

(c) Mr Lam urged me to allow the appeal and set the decision aside.

8. For the respondent, Mr Tarlow adopted the terms of the rule 24 response dated 3 November 2015. He told me that the focus in this case is [15] of the decision. He told me that the Judge was correct to take account of a simple answer given to what he described as a simple question. He told me that the Judge had made findings in relation to cohabitation & pregnancy, so that having considered each aspect of this case the Judge was empowered to find one factor to be determinative of the appeal. He told me that the decision does not contain errors of law, material or otherwise, and urged me to dismiss the appeal and allow the decision to stand

Analysis

9. This application was made on the basis of the establishment of a durable relationship. In the reasons for refusal letter the respondent bemoans an apparent lack of evidence of the durable relationship. A supplementary reasons for refusal letter narrates the fact that the appellant and EEA national have made two frustrated attempts to marry.

10. At [14] the Judge sets out his findings that on both 18 July 2014 and 17 November 2014 the appellant and sponsor were intercepted at a registry office and prevented from marrying.

11. In the first sentence of [15] the Judge narrates "*the tribunal has found on the evidence that the marriage of the appellant and the sponsor is not one which satisfies the requirements of the regulations.....*" that is a finding which was not open to the Judge to make because at [14] the Judge records that marriage did not take place. It is a finding which indicates that the Judge approached this case as an enquiry into the genuineness of the marriage, rather than consideration of whether or not the evidence was sufficient to establish a durable relationship.

12. The Judge's findings of fact are contained between [14] and [17]. At [17] the Judge finds that the sponsor is pregnant with the appellant's child. At [15] the Judge finds that a tenancy agreement shows that the appellant and sponsor have been living together. The Judge gives no reasons for finding that neither of those facts form evidence of a durable relationship.

13. In Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038(IAC) the Tribunal held that "*Although neither the Directive nor the Regulations define it, as a matter of ordinary parlance and the past experience of the UK's Immigration Rules and case law, a marriage of convenience in this context is a marriage contracted for the sole or decisive purpose of gaining admission to the host state. A durable marriage with children and co-habitation is quite inconsistent with such a definition*".

14. The failure of the Judge to take account of the sponsor's pregnancy (and the undisputed evidence that the appellant (now) is the father of the child), together with the Judge's failure to properly consider the accepted evidence of cohabitation is an error of law. The Judge's focus on marriages of convenience, when the sponsor and appellant are not even married, is an error of law. I view those errors to be material errors of law, because had the errors not been made, the outcome of the case could have been different. Because I find material errors of law I set aside the decision.

15. Although I set the decision aside, there is sufficient evidence before me to enable me to substitute my own decision.

Findings of Facts

16. The appellant is a Bangladeshi national. He arrived in the UK on 15 June 2011 with leave to remain as a student until 31st May 2014. In September 2011, whilst working at a car wash (in the UK), the appellant met Ms Dace Puke.

17. Ms Dace Puke is an EEA national exercising treaty rights of movement in the UK. Romance blossomed between the appellant and the EEA national and, 12 October 2012, they started to live together. They live together still. On 16 June 2012 the appellant's leave to remain was curtailed because the appellant's college had its sponsor licence revoked.

18. On 17 July 2014 the appellant and the EEA national attempted to marry at a registry office. They were intercepted by six immigration officers who interviewed them separately. They were not allowed to marry. On 17 November 2014 the appellant and the EEA sponsor returned to the registry office once more intending to marry. For the second time they were stopped by immigration officers. The appellant and EEA national have not married.

19. The appellant and EEA national now have a 10-month-old baby who lives with them. Their relationship endures; they are committed to each other and intend to continue to live together.

Conclusions

20. Article 3.2 of the Directive provides that a host Member State shall, in accordance with its national legislation, facilitate entry and residence of, amongst others, the partner with whom the Union citizen has a durable relationship, duly attested. Regulation 8(5) of the EEA Regulations correspondingly states that a person will be an extended family member of an EEA national if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.

21. A "*durable relationship*" is not defined by the Regulations. "Durable" has a number of potential meanings. The dictionary definition suggests that if something is durable it has the ability to withstand pressure and

the wear of time and that it is long lasting. In essence this mirrors the general requirements to be found in Immigration Rules that relationships should be subsisting, that they should in a sense have acquired a sense of permanency either through marriage, civil partnership or by virtue of length of time and that the parties should intend that the relationship will continue on a permanent basis.

22. The appellant and his EEA national partner have been in a relationship since September 2011. They have lived together since October 2012. They now have a child. The weight of reliable evidence indicates that there are committed to each other; they would, by now, be married to each other were it not for the respondent's intervention. I therefore draw the conclusion that they intend to live together permanently and that they are in a durable relationship.

23. I therefore find that the appellant fulfils the requirements of the Immigration (EEA) Regulations 2006.

Decision

24. The decision of the First-tier Tribunal is tainted by a material error of law. I therefore set that decision aside

25. I substitute the following decision.

26. The appellant's appeal under the Immigration (EEA) Regulations 2006 is allowed.

Signed Date 15 February 2016

Deputy Upper Tribunal Judge Doyle