Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number:
OA/06535/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 5th April 2016	**On 13th April 2016**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Entry Clearance Officer, Kingston

Appellant

and

Miss Debra Wendy Ann Adonis
(no anonymity direction made)

Respondents

For the Appellant: Mr Walker, Senior Home Office Presenting Officer
For the Respondent: Mr Bazini, Counsel instructed by Immigration Visa Services

DECISION AND REASONS

1. The Respondent is a national of Grenada date of birth 30th August 1979. In a decision promulgated on the 20th January 2015 the First-tier Tribunal (Judge Pooler) allowed her appeal against a decision to refuse to grant her entry clearance as the partner of a person present and settled in the United Kingdom. The case concerned whether or not the Respondent met the definition of a 'partner' in GEN.1.2 of Appendix FM. The First-tier Tribunal found that she did, and so allowed her appeal with reference to the Immigration Rules. The Entry Clearance Officer (ECO) now has permission to appeal against that decision[1].

[1] Permission granted by First-tier Tribunal Judge Grimmett on the 1st April 2015

Background

2. The application for entry clearance was made in November 2013 and was supported by numerous documents including detailed representations and written statements by both Respondent and her Sponsor, British national Mr Ian Wilkins. The tenor of their evidence was that they had known each other for many years but had been in a relationship since May 2009. Mr Wilkins is employed by HSBC in London as a Computer Systems Programmer and does not wish to leave his employment. The couple have spent various periods living together since July 2009 but have not lived together for a continuous period of two years. She has visited the UK and stayed with him, and he has travelled to the Caribbean to be with her. A schedule of the time that they have spent together was provided. They have had two children together, one of whom was stillborn. The written representations accompanying the application acknowledged that GEN.1.2 requires unmarried couples to have lived together in a relationship akin to marriage for at least two years prior to the application being made, but relied on published guidance given to ECOs which stated that there could be gaps in the continuous cohabitation. It was submitted on the Respondent's behalf that circumstances have prevented her from living with Mr Wilkins for a *continuous* period of two years but that according to that guidance, this is not a problem. The following extract was cited:

> *SET5.12 Assessing whether the relationship has subsisted for two years*
>
> 'Living together', should be applied fairly tightly, with a couple providing evidence that they have been living together in a relationship akin to marriage or civil partnership which has subsisted for two years or more.
>
> Periods apart for up to six months would be acceptable for good reasons, such as work commitments, or looking after a relative as long as:
>
> - it was not possible for the other partner to accompany; and
> - the applicant can show evidence that the relationship continued throughout that period, for example, by visits, letters, logged phone calls.

The letter of representations covering the application asserts the parties' intentions to live together permanently in the UK in a relationship akin to marriage, relies on the guidance and submits that the Respondent meets the requirements of the Rule.

3. In the Notice of Refusal the ECO refers to paragraph EC-P.1.1(d) of Appendix FM which requires the applicant to be the 'partner' of her Sponsor. That term is defined at GEN.1.2. The ECO refers to the Respondent's acknowledgment that she has lived with Mr Wilkins "for at least six months every year since 2010" and finds that this demonstrates that she has not lived with him for at least 2 years. The ECO finds that furthermore the Respondent has not provided evidence of cohabitation.

4. On the 8th October 2014 an Entry Clearance Manager upheld the decision. In her detailed review the ECM refers to the guidance relied upon by the Respondent (cited above) and emphasises the requirement that it should not be *possible* for the parties to be together. Since there would appear to be no particular reason why they chose to live apart, they cannot be considered to be partners under the Immigration Rules.

5. When the matter came before the First-tier Tribunal Mr Wilkins gave live evidence and the Respondent submitted further documentary evidence. The determination sets out in detail the periods that the couple were living together, and the evidence of Mr Wilkins that he felt unable to leave his job with HSBC as there was not really be an equivalent position in Grenada. They wanted to live together in the UK. They had lost a child in 2012 and in 2013 their son had been born. They wanted to recover and settled down together before planning a marriage. They wanted to take their time over this – that is why she had not applied for a fiancé visa, because they did not intend to be married within 6 months. The Tribunal adopted the calculations in a prepared schedule which showed that in the two years "prior to the application" being made the parties had been living together for a total period of 329 days and apart for a total of 394 days. The longest single period that they had been apart was 124 days. The parties agreed that the Tribunal should have regard to the guidance cited in support of the application and relied upon by the ECM, but Judge Pooler identified that in fact this guidance applied to the old pre-Appendix FM Rules. He invited written submissions on whether this made a difference to the task he had to undertake. The ECO made no submissions; the Respondent submitted that it was for the Tribunal to interpret the phrase "living together". The determination makes the following findings:

> "I am satisfied that the parties had prior to the date of application spent 329 days together in a period of two years. They had a future intention to marry but for practical and personal reasons had chosen not to marry prior to that date. They had a child together and their relationship was both genuine and subsisting. Their decision not to live together was based on reasons which were cogent and reasonable: the appellant was not permitted to live permanently in the UK while the sponsor's employment was based in the UK and he could not relocate if he was to continue providing for his wife and child. I find that they had been living together for at least two years

> prior to the date of application because they demonstrated a degree of commitment to each other similar to that found in a marriage or between those engaged to be married"

On that basis the appeal was allowed under the Immigration Rules.

The Grounds, Response and Submissions

6. The Secretary of State was granted permission to appeal on the grounds that the Tribunal erred in law by:

   i) Making contradictory findings: having accepted that the couple had only lived together for 329 days, finding that they met the requirements of GEN.1.2 that they had lived together for two years;

   ii) Misconstruing GEN.1.2 to find that the nature of the relationship would be capable of compensating for the lack of cohabitation.

7. Mr Bazini opposed the appeal. He argued that whatever might be said about the First-tier Tribunal's calculations or reasoning, the decision had been the right one because it was apparent from the chronology – expressly accepted by the Tribunal – that the couple had in the past cohabitated for well over 2 years. They had, for instance spent 565 days together between April 2010 and April 2012 with only one substantial separation of approximately 5 months, necessitated by visa restrictions and the fact that the Sponsor had to work. These were found to be cogent reasons by the Tribunal in accordace with the stated policy, and the overall reasoning was sound. Where Mr Bazini diverged from the Tribunal was in its apparent reading-in to GEN1.2 of a requirement that the couple had been cohabiting for the two years *immediately* prior to the application being made. It would appear that this was the basis of the calculation that the couple had only spent 329 days together.

8. Before me Mr Walker very sensibly declined, having had regard to the chronology, to pursue these grounds. He acknowledged that GEN.1.2 contains no requirement that the couple need to have been living together for the two years immediately prior to the application, as both the drafter of the grounds, and indeed the First-tier Tribunal, appear to have thought. The chronology, based upon the accepted testimony of Mr Walker and documentary evidence of travel, showed that between the years 2009 and 2013 the couple spent far more time together than they had apart. Mr Walker accepted that read in light of the guidance, this must be construed to be 'living together'.

Error of Law Decision

9. GEN.1.2 defines a "partner" for the purpose of Appendix FM as:

> (i) the applicant's spouse;
> (ii)the applicant's civil partner;
> (iii) the applicant's fiancé(e) or proposed civil partner; or
> (iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application.

10. The agreed chronology of cohabitation is as follows:

Period From	To	Place	Days
May 2009	June 2009	Grenada	42
2.4.10	16.9.10	UK	168
27.3.11	18.8.11	UK	176
18.9.11	18.10.11	Grenada	30
17.11.11	10.5.12	UK	176
25.5.12	8.6.12	St Lucia	15
9.6.12	29.11.12	UK	174
1.3.13	8.3.13	UK	7
11.7.13	6.8.13	Grenada	27
4.11.14	2.12.13	Grenada	18

11. The application was made on the 11th February 2014. As can be seen from the dates above, it is apparent that prior to that date the Respondent and her Sponsor spent substantial periods of time together. The Respondent had, in the two years between March 2011 and March 2013, spent so much time in the United Kingdom that an Immigration Officer saw fit to stop her at Heathrow Airport and revoke her visitors visa on the grounds that she was in effect living here. That occurred on the 1st March 2013, and from that date to present the family have been severely hampered in their ability to be together, since she cannot gain entry to the UK, and Mr Wilkins ability to visit Grenada has been limited to the time he can get off work. In the two years prior to that decision to refuse entry (the seven days she then spent in the UK was on temporary admission) they had spent 578 days together. The longest that they had been apart had been the three months immediately prior to that last attempted visit. I am satisfied that it can properly be said that they were cohabiting during that period. Any sensible construction of GEN.1.2 must allow for some periods apart, where there are good reasons. The good reason in this case was found by

the First-tier Tribunal to be the fact that the Sponsor has no desire to give up his well paid employment with which he supports his young family: I might add to that the Respondent's unwillingness to breach the conditions of her visit visas.

12. Whilst it is arguable that the First-tier Tribunal erred if it did, as it would appear, count backwards from the date of decision, I am satisfied that the decision contains no material error. That is because on the facts it was quite proper that this appeal be allowed under the Immigration Rules.

Decision

13. The determination of the First-tier Tribunal does not contain an error of law and it is upheld.

14. In view of the delay in this matter, and the fact that a young British citizen child is currently separated from his father, I direct that entry clearance be granted as soon as is practicable.

Upper Tribunal Judge Bruce
5th April 2016