IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/00980/2020**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 20th September 2021	**On the 26th October 2021**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

MR ASAD MUSHTAQ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Dhanji, Counsel instructed by Malik & Malik Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

The appellant is a citizen of Pakistan born in December 1978. On 2 October 2019 he applied for a residence card under the Immigration (EEA) Regulations 2016 to confirm that he was an extended family member of a Ms Kata Miskovic (whom I will refer to in this decision as "KM"), who is an EEA national.

On 13 January 2020 the appellant's application was refused on the basis that he had not established that he was in a durable relationship with KM. The appellant appealed to the First-tier Tribunal. The appeal came before Judge of the First-tier Tribunal Lingam ("the judge"). In a decision promulgated on 15

April 2021 the judge dismissed the appeal. The appellant is now appealing against that decision.

There are four grounds of appeal but it is only necessary to consider the first, which is that the judge failed to consider documents that the appellant adduced in order to establish that he and KM have been cohabiting for several year. These documents are correspondence sent to the appellant and to KM (but not to them jointly) at the two addresses the appellant claims he and KM have lived together in. I will refer to these documents as "the residence documents".

In the decision, at paragraphs 21-22, the judge summarised how she planned to consider the evidence, including the residence documents. The judge stated:

> "21. … The skeleton also lists the appellant's supporting evidence as
>
> (i) oral evidence of the appellant and sponsor;
>
> (ii) corroborative evidence from the sponsor's daughters Dragana and Jelena and the couple's friends;
>
> (iii) various bills, bank statements and medical documents confirming their address as 59 [~], Romford which is being argued as inferring that they have been cohabiting."
>
> 22. I start my analysis of the evidence as set out under brackets (ii) and (iii) with a final overview of the oral evidence collated during the hearing."

It is apparent, from what she wrote in paragraph 21(iii), that the judge recognised that the residence documents formed a part of the appellant's case; and it is apparent from paragraph 22 that the judge intended to consider them.

However, a careful reading of the paragraphs which follow paragraph 22 leaves the reader in doubt as to whether the residence documents were in fact considered. In paragraphs 23 to 24 the judge set out some of the background history pertaining to the relationship between the appellant and KM. In paragraphs 25 – 26 the judge considered a discrepancy between what is said in a letter from a former partner of KM's daughter and the evidence of KM and the appellant about when KM's former marriage broke down. In paragraphs 26-27 the judge considered multiple letters submitted in support of the appellant. In paragraphs 28 – 29 the judge found there to be an inconsistency in the evidence as to where KM was born. In paragraph 30 the judge referred again to the letters sent in support of the appellant and stated that they consistently state that the appellant and KM had been in a relationship since 2015. In paragraphs 31 – 33 the judge identified inconsistencies in the oral evidence of the appellant and KM about recent meetings with family. In paragraph 34 the judge noted that a P60 submitted by KM showed a previous address, rather than the address that she claimed she currently lives at with the appellant. In paragraph 35 the judge summarised her conclusions as follows:

> "Having carried a close examination of evidence before me, I am satisfied that there is a sufficient level of unexplained discrepancies in relation to the

> appellant's claim he is in a durable relationship with the sponsor. Hence the lack of evidence on their joint responsibility, inconsistencies and as well inconclusive proof on their durable relationship leads me to find on a balance that the appellant has failed to discharge his evidential burden of having to show that he qualifies for residence under Reg 8(5) of the 2016 Regulations (as amended)."

There is not, in these paragraphs, any express consideration of the residence documents.

Mr Clarke argued that it was not necessary for the judge to make specific references to the residence documents because it was not found by the judge that the appellant and KM were not cohabiting. Mr Clarke maintained that, reading the decision as a whole, it is apparent that the judge accepted that KM and the appellant lived together, but not that they were in a durable relationship. Mr Clarke submitted that the judge gave multiple sustainable reasons, including the absence of evidence showing joint responsibilities (such as documents showing accounts in their joint names), for finding that the appellant and KM were not in a durable relationship despite cohabiting.

If the judge had expressed her decision in the way it was framed by Mr Clarke I would not have found an error for failing to consider the residence documents, as if the judge accepted that KM and the appellant were cohabiting it would not have been necessary to consider them.

However, the judge did not make a finding that the appellant and KM were cohabiting. Mr Clarke argued that this could be inferred from the decision, and is apparent when reading it as a whole. I do not agree. It may be that this is what the judge intended to find, but I am not satisfied that it is sufficiently clear from the decision that this is what she actually found. The question of whether the appellant and KM lived together was in dispute. This is plain from paragraph 19 where the judge recorded the submission of the Presenting Officer that "there is little evidence to place the appellant and [KM] together". It is also apparent from paragraphs 21(iii) and 22 of the decision, which are set out above, that the judge considered it to be necessary to evaluate the residential documents, in order to decide the question of whether the appellant and KM have been cohabiting. Despite this, as argued by Mr Dhanji, there is no consideration of the residence documents in the decision, and no express finding on whether or not, in the light of residence documents and other evidence that was before the judge, it was accepted that the appellant and KM cohabited. The judge therefore erred as claimed in the first ground of appeal by failing to consider the residence documents.

The error is material because although cohabitation is not sufficient to establish the existence of a durable relationship it is a relevant consideration. If the residence documents had been considered, the judge may have reached a different overall conclusion. In the light of this error, the decision will need to be made afresh. It is therefore not necessary to consider the other grounds of appeal. Remittal to the First-tier Tribunal is appropriate in this case because the nature of the error of law I have identified is such that findings of fact will need to be made afresh, and the fact-finding exercise is likely to be extensive.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

The appeal is remitted to the First-tier Tribunal to be made afresh by a different judge.

No anonymity direction is made.

Signed

D. Sheridan

Upper Tribunal Judge Sheridan Date: 29 September 2021