Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/04883/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 13th May 2021	**On the 22nd June 2021**

Before

UPPER TRIBUNAL JUDGE PITT

Between

MR RANA MUDASSAR HUSSAIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Bazini, Counsel, instructed by HC395 Ltd
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a remaking of Mr Hussain's appeal against the respondent's decision dated 29 August 2019 refusing an application for a residence card confirming his status as the extended family member (EFM) of Ms Natalja Krivula, a Lithuanian national.

Background

2. The appellant came to the UK on 1 April 2004 on a work permit and had leave to enter valid until February 2005. He stayed beyond that leave and therefore became an overstayer. In 2008 he met a British national, married and obtained leave to remain on the basis of the marriage on 2

June 2014. He was granted further leave on the basis of the marriage until 2018. The marriage broke down in March 2018, however, and the appellant applied for a divorce. He was issued with a decree absolute on 14 November 2019.

3. Ms Krivula came to the UK in approximately 2007 and it is not disputed that she has worked here ever since, exercising Treaty Rights. The appellant and Ms Krivula maintained that they met in 2009 at a friend's birthday party. They became friends. Ms Krivula's marriage broke down in 2018. She and the appellant became closer in January 2019 as they were both were going through separation and divorce. The appellant and Ms Krivula developed a relationship and she moved in with him in May 2019. Ms Krivula obtained a decree absolute on 23 August 2019.

4. The appellant and Ms Krivula maintain that they have been in a durable relationship since May 2019. On that basis, on 31 May 2019 the appellant applied for a residence card showing him to be an EFM of Ms Krivula as defined in Regulation 8(5)of the Immigration (European Economic Area) Regulations 2016 (the EEA Regulations).

5. The respondent refused the application on 29 August 2019. It was found that limited evidence of cohabitation had been provided. Even if cohabitation could be show, that did not mean that the appellant and Ms Krivula were in a relationship. Further, the couple had not been living together for a sustained period, their case at its highest being that they had begun living together as a couple in May 2019, the same month that they applied for a residence card. That could not be said to be a "durable" relationship.

6. In addition, in his application the appellant had relied on two sets of water bills, one issued on 13 September 2018 and the other on 12 March 2019. Both of these bills were addressed to the appellant and Ms Krivula. The respondent found that these documents undermined the application as the couple claimed to have been residing together only since May 2019 so Ms Krivula should not have been named on the water bills from September 2018 and March 2019. The respondent found:

> "This casts doubt on the validity of the documents submitted and suggests that your sponsor's name may have been added to old utility bills for the purpose of this application."

7. The respondent also considered that photographs and chat logs were insufficient evidence of a durable relationship and that they could have been created merely to support the application. The respondent also considered that various witness statements from claimed family and friends were also insufficient to show a durable relationship.

8. The appellant appealed against the respondent's decision and the appeal came before First-tier Tribunal Judge Shore on 5 November 2019. The appellant relied on two bundles of evidence before the First-tier Tribunal, referred to in this decision as AB1 (550 pages) and AB2 (32 pages).

9. In a decision dated 20 November 2019, Judge Shore refused the appeal. The key dispute was whether the appellant and Ms Krivula were in a genuine, durable relationship. Judge Shore did not find that they were, for a number of reasons.

10. In paragraph 61 the judge set out that the relationship could not be shown to be "durable" as the couple had only been cohabiting since May 2019, at best.

11. Further, the judge did not find the claim to be in a genuine relationship was credible, setting out the reasons for that finding in paragraph 63. That conclusion was reached even though the judge accepted that the appellant and Ms Krivula had remained consistent after being cross-examined at some length and had "stood up well to thorough cross-examination"; see paragraph 63.9. The judge found that the water bills undermined the credibility of the appellant's evidence. No attempt had been made to clarify the anomaly in those documents notwithstanding the fact that it had been raised in the respondent's refusal letter. Ms Krivula maintained that the utility bills had been obtained in order to register at a GP practice but no evidence had been produced from the GP showing that to be so. The judge found it inconsistent that the couple did not indicate in their witness statements that they intended to get married but at the hearing maintained that they did plan to get married in 2020. The judge also found the evidence of a witness, Mr Ashfaq, was highly confused as to the living arrangements in the home of the appellant and Ms Krivula and that this undermined the claim to be in a durable relationship.

12. The judge's conclusion, set out in paragraph 64, was that the evidence at its highest showed only that the couple lived at the same address. On the balance of probabilities, the evidence did not show that they were cohabiting. It was not credible even if they did cohabit that they were in a genuine and subsisting relationship that could be found to be a durable relationship for the purposes of Regulation 8(5) of the EEA Regulations.

13. The appellant appealed against the decision of the First-tier Tribunal and permission to appeal was granted by the First-tier Tribunal on 22 April 2020.

14. The appeal came before me on 17 September 2020. In a decision issued on 8 October 2020 I found an error of law in the decision of the First-tier Tribunal and set it aside to be remade.

Preliminary Issues

15. It is expedient to set out here that at the error of law hearing on 17 September 2020 the appellant produced a further bundle of evidence (AB3) which was served on 16 September 2020. Bundle AB3 was intended to provide up-date evidence in the event that re-making was required. An error of law was found and announced at the hearing on 17 September 2020. Re-making could not proceed that day, however, because Mr Lindsay, who was also the Senior Home Office Presenting Officer on that hearing, had not been provided with AB3 even though there was evidence

that it had been served on the respondent. He also did not have a copy of AB1 and AB2, the materials that had been before the First-tier Tribunal. The re-making of the appeal was adjourned in order for these bundles to be provided to the respondent's representative at the next hearing.

16. On 2 December 2020 the Upper Tribunal issued a direction (dated 24 November 2020) for the remaking of the appeal. The Tribunal directed that if the appellant wished to submit any further written evidence an application for permission to do so should be made no later than 21 days after the directions. It was also directed that if it was intended that the appellant and his partner give further oral evidence an application to do so should be made no later than 21 days after the directions were sent out. Further, a witness statement capable of standing as evidence-in-chief should be provided.

17. The appellant did not comply with those directions. Instead, at 18:30 on 11 May 2021, well out of time and, in effect, a day before the hearing, he submitted a further bundle of evidence (AB4). At the hearing on 13 May 2021 he sought permission for those materials to be admitted. He also sought permission to adduce further oral evidence from himself and Ms Krivula. He maintained that he had only instructed solicitors on 10 May 2021 and that this explained why the new materials and application to give oral evidence were not provided in line with the time limits in the directions of 2 December 2020. He maintained that the respondent was not prejudiced. Bundle AB4 was small and only updated what had been submitted previously.

18. For the respondent, Mr Lindsay objected to the new materials being admitted where they had not been served in line with directions. The respondent also objected to the appellant and Ms Krivula being permitted to give further oral evidence where permission to do so had not been sought and a witness statement to stand as evidence in chief not provided, both those matters being further breaches of the directions issued on 2 December 2020.

19. Mr Lindsay also noted that the appellant and sponsor were intending to give evidence from the same flat in Harrogate and was concerned that their evidence might not be given independently where there could be no observation of whether one of them could hear the other's evidence. Mr Lindsay also expressed a concern that the appellant had raised a new matter, the marriage, and, relying on s.85 of the Nationality, Immigration and Asylum Act 2002, declined to consent to this issue being admitted to the litigation.

20. Further, Mr Lindsay indicated that he was in difficulty as he had still not been provided with AB1 from the proceedings before the First-tier Tribunal.

21. In response, Mr Bazini maintained that the respondent could be expected to have provided Mr Lindsay with AB1 as that was the sole reason that the re-making of the appeal had been adjourned on 17 September 2020. Some seven months on, a further adjournment on this basis could not be in the

interests of justice or in line with the principles set out in Rule 5 of The Tribunal Procedure (Upper Tribunal) Rules 2008 regarding delay, use of resources and costs.

22. I rose to consider these preliminary issues. My conclusion was that the hearing should proceed, that bundle AB4 should be admitted and that oral evidence from the appellant and Ms Krivula should also be permitted.

23. My reasons for so finding are as follows. The respondent was put on notice at of the error of law hearing on 17 September 2020 that she needed to provide her representative with AB1. The re-making hearing did not go ahead on 17 September 2020 for that sole reason. It is not my judgment that the unaccountable failure to provide Mr Lindsay with AB1 for a second time should lead to a further adjournment. I reached that conclusion aware of the difficulty in which it left Mr Lindsay. Notwithstanding that difficulty, it did not appear to me to be in the interests of justice to adjourn again given the further delay, resources and costs that would arise. At some point there had to be finality and in my judgment that point had been reached.

24. Also, Mr Lindsay had copies of AB2, AB3 and AB4 and the First-tier Tribunal decision which contained details of the previous written and oral evidence. The witness statements from the First-tier Tribunal were in AB2, for example. The details of the disputed water bills were in the respondent's refusal letter and the First-tier Tribunal decision. He was some way from being wholly unsighted as the history of the evidence and the material issues, therefore. The key issue remained the same, the genuine nature of the relationship. Further, it is unexceptional in this jurisdiction for a Senior Presenting Office of Mr Lindsay's experience to deal with a limited bundle served immediately before or even at hearing as was the case here with AB4. He could be (and was) afforded time to consider the materials that he did have. It was my conclusion that Mr Lindsay, notwithstanding his limited instructions, could be expected to represent his client and that the case would be still be dealt with fairly and justly.

25. When reaching these conclusions I was mindful of the clear breach of directions on the part of the appellant in failing to provide AB4 in line with directions and failing to confirm in time that oral evidence was to be adduced and to provide additional witness statements to stand as evidence in chief. Considering the case as a whole, however, and where the new materials and oral evidence was limited and only intended as an update and where representatives in this Tribunal are used to dealing with late evidence, it was my judgment that AB4 should be admitted and the appellant and Mr Krivula permitted to provide an update in their oral evidence where they could also be cross-examined on that evidence by Mr Lindsay.

26. It was also my conclusion that the appellant and Ms Krivula should be permitted to give evidence remotely from their flat in Harrogate. Remote evidence in these circumstances has had to become the norm since March 2020. They were given a formal direction by me on the importance of their

evidence being independent and they were reminded of this by Mr Bazini. It was agreed that Ms Krivula would leave the room whilst the appellant evidence. In the event, everything I observed indicated that she did so. In all the circumstances, it was my view that the hearing could proceed fairly and justly on that basis. In cross-examination, Ms Krivula was asked by Mr Lindsay whether she had heard the appellant's oral evidence. She stated that she could hear voices but that she could not hear exactly what was said albeit she could recognise when Mr Lindsay was questioning the appellant and when the appellant was answering. She said that was inevitable given the nature of the construction of their flat and the thickness of the walls. She confirmed that she had not heard any of the details of what was being said. Her response appeared to me to be frank and credible and it was my view that the manner in which the appellant and Ms Krivula gave their evidence did not undermine the lawfulness of the proceedings.

27. I nevertheless assessed the oral evidence given at the hearing carefully given Mr Lindsay's concerns as to whether it was given independently but I did not discern any attempt by Ms Krivula to copy what had been said by the appellant. They were asked similar questions and gave consistent responses but using very different languages and forms of expression. Nothing indicated that Ms Krivula had heard the appellant's oral evidence and had attempted to duplicate or fabricate her evidence.

28. It was also not my view that the inclusion of the marriage certificate in AB3 amounted to a formal "new matter" on which formal consent was required from the respondent. The question of the couple marrying was before the First-tier Tribunal in 2019 at which time they were cross-examined on their intentions. The respondent was informed of the intention to marry when the couple applied for a certificate of approval and provided with the marriage certificate when the appellant made a further residence card application on the basis of the marriage on 10 March 2020 prior to the error of law hearing on 17 September 2020. The marriage certificate was provided to the respondent again at that hearing in AB3. This remains a case concerning Regulation 8 and a durable relationship and no assessment of whether the couple were in a genuine and subsisting marriage was required.

Findings

29. A significant part of the respondent's case concerned the water bills dated 13 September 2018 and 12 March 2019 which contained the appellant and Ms Krivula's names when it was their evidence that she had only begun to live at the address in May 2019. At page 31 of AB3 the appellant included an email from Essex and Suffolk Water dated 17 June 2020 which stated:

> "Dear Mr Hussain
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> I write further to your telephone contact with us on 11 June 2020.
>
> From reviewing your account I am aware we made an error where we issued bills prior to 14 May 2019 which appeared as if we had added your partner to the account from an earlier date. I am sorry for this error.

> I have sent a letter in the post to confirm our error which you will receive by 1 July 2020. A copy of the letter has also been attached to the email.
>
> Sorry once again for any inconvenience this may have caused."

30. A copy of that letter referred to in the email was included in AB3 at page 1. The letter was dated 17 June 2020 and read as follows:

> "Dear Mr Hussain
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> I write further to your contact with us on 11 June 2020 regarding the name on your account.
>
> Following your contact with us on the 14 May 2019 I am aware we added Ms Krivula to your account as requested.
>
> In error we issued two copy bills dated 13 September 2018 and 12 March 2019 which showed Ms Krivula (sic) name in error.
>
> I can confirm that Ms Krivula was not liable for charges prior to 14 May 2019. Due to an error on our behalf her name showed on bills of an earlier date.
>
> I am sorry for any inconvenience we may have caused by the matter."

31. Also, Ms Krivula's evidence before the First-tier Tribunal was that the water bills had been obtained in order to assist in registering with a GP. Bundle AB3 at page 27 contained a letter dated 5 May 2020 from the couple's GP in London. The letter stated that Ms Krivula had registered in September 2019 and that "the proof of address used to register with this practice has been destroyed due to confidentiality."

32. My conclusion was that, albeit at first view the water bills might appear to be of concern, the evidence as a whole indicated that no adverse inference could be drawn from them. The appellant and Ms Krivula have been consistent throughout in written and oral evidence and after cross-examination as to the chronology of their relationship and to her moving in with the appellant only in May 2019. In AB3 they provided documents from the water company explaining the anomaly of Ms Krivula's name being included on the bills for dates when she was not actually living at the address. The explanation came from an independent source and the email and letter from the water company were not challenged by the respondent. The appellant also provided the letter from the GP which indicated that he had gone further and attempted to find evidence that the water bills had been used to register Ms Krivula with the practice but that his attempt had not been successful for reasons of confidentiality. I found that these parts of the evidence were sufficient to show that the water bills did not undermine the claim that the couple had lived together from May 2019 onwards in a genuine relationship.

33. The main issue arising since the hearing before the First-tier Tribunal was that the couple had married and, since the error of law hearing on 17 September 2020, had moved to Harrogate. The consistent evidence provided by the appellant and Ms Krivula on this point was that they had moved to Harrogate as the appellant was now running his own business

and the premises that he needed to do so were much cheaper in Harrogate. The couple also gave consistent evidence on the appellant still owning the London flat but intending to sell it after some renovations had taken place. They gave very similar, even if not identical, details for their address in London.

34. When asked why they had not provided copies of their decree absolute, both the appellant and Ms Krivula indicated that they had already done so in order to obtain the respondent's certificate of approval to marry and had also provided those documents in support of an application for a residence card on the basis of marriage made in 2020. They had understood that the respondent therefore had copies of the decrees absolute already and had not realised that they needed to provide them again in these proceedings. The appellant also stated that where the respondent had rejected evidence from family and friends and phone messages as capable of carrying weight in the refusal letter there had seemed little point in bringing updated evidence from the same sources for the appeal.

35. It was my judgment that, as before the First-tier Tribunal, the appellant and Ms Krivula were highly consistent in their evidence on all the matters they were asked to address. Their evidence appeared to me to be reliable as a result. I found it credible that they would assume that it was accepted that they had divorced legally where they had been allowed to remarry and the respondent had already been provided with copies of the decrees absolute in order for the marriage to be allowed. I found it credible that they would not seek to bring further evidence from family and friends where earlier documents of that kind were rejected as of no evidential value.

36. I accept that there are concerns about the history of this relationship. The application for a residence card was made very shortly after the couple claimed to have begun to cohabit and only shortly after their marriages had broken down. The cohabitation and application for a residence card occurred at a time when the appellant could no longer rely on his marriage to a British national to obtain further leave. I also noted the highly unusual evidence of the witness before the First-tier Tribunal, Mr Ashfaq. I have considered all of the evidence before me carefully where those concerns are present. It is my conclusion that the evidence given by the appellant and Ms Krivula, both oral and written is substantial and highly consistent. Their evidence that they met in 2009 and had been friends for some years appeared to me to be a factor capable of explaining how their relationship developed so quickly in 2019, additionally so when the evidence also indicated that they found themselves in similar, difficult circumstances at that time as both of their marriages had broken down. As before, it is not disputed that they were cross-examined extensively in the First-tier Tribunal and that their evidence remained consistent. They have provided documents over a period of years showing that important documents are sent to them at the same addresses. The recent evidence showed them both registered on the tenancy in Harrogate and both responsible for council tax at that address. I found that the evidence that

the appellant and Ms Krivula had moved to a new city together indicated that they were a genuine couple and have been so since May 2019.

37. My conclusion, therefore, is that the appellant has shown that he is in a genuine, durable relationship with Ms Krivula and meets the requirements of Regulation 8 (5) of the EEA Regulations. It remains for the respondent to conduct the "extensive examination of the personal circumstances of the applicant" required Regulation 17(5).

Notice of Decision

38. The appeal is allowed under the EEA Regulations 2016.

Signed: S Pitt Date: 15 June 2021
Upper Tribunal Judge Pitt