



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/23792/2012

THE IMMIGRATION ACTS

Heard at Field House

On 19 June 2013

Determination

Promulgated

On 3 July 2013

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

MS VIKTORIYA GLUSHKO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance by or on behalf of the appellant

For the Respondent: Miss H Horsley

DETERMINATION AND REASONS

1. The appellant is a citizen of Russia born on 16 November 1982. Her appeal against the respondent's refusal to grant her a residence card under Regulation 26 of the Immigration (EEA) Regulations 2006 was dismissed by First-tier Tribunal Judge Jacobs-Jones in a decision promulgated on 27 December 2012.

2. On 15 January 2013 the appellant was granted permission to appeal the judge's decision. The appellant's appeal came before Deputy Upper Tribunal Judge Rimington on 8 March 2013. The appellant did not attend the hearing and there was no representation on her behalf. The Deputy Upper Tribunal Judge proceeded with the hearing in the absence of the appellant and dismissed her appeal.
3. On 18 April 2013 the appellant made an application to set aside the DUTJ's decision on the grounds that she did not receive the hearing notice for 8 March 2013 even though it was sent to her correct address. The first notice she had of the hearing was when she received the determination on 17 April 2013. She attributed the non-delivery to a fault by the Royal Mail.
4. In a Memorandum and Directions issued by Upper Tribunal Judge Dawson on 10 May 2013, he said that although the determination of Judge Rimington discloses no arguable error of law, nevertheless it is just arguable that had the appellant been present at the hearing she might have been able to persuade the judge to come to a different conclusion. He put it no higher than that having regard to the evidential matters Judge Rimington observed the First-tier Tribunal Judge had been entitled to take into account. He said as follows at paragraph 4
 - “4. It is correct that the appellant has fully participated in the proceedings before the First-tier Tribunal and it is likely that she did not receive notice of hearing. Unless within five working days from the date this memorandum is sent out the respondent indicates with argument an objection to my proposed course, the decision of Deputy Upper Tribunal Judge Rimington dated 11 April 2013 will be set aside and a new hearing date will be given for the hearing of her appeal in the Upper Tribunal.”
5. Thus the appeal came before me today, 19 June 2013. The appellant did not attend the hearing and there was no appearance on her behalf. I note that the notice of today's hearing was sent on 17 May to the appellant at 74 The Drive, Isleworth, Middlesex TW7 4AD, which is the same address as before. The notice of hearing has not been returned to the Tribunal. There was no explanation by the appellant for her non-appearance. Accordingly I proceeded with the hearing in the absence of the appellant.
6. I also note that the respondent did not submit any objection to Judge Dawson's proposed course of setting aside the Deputy Upper Tribunal Judge's decision. I do note however that the respondent did submit a Rule 24 reply on 31 January 2013 opposing the appellant's appeal.
7. On 20 June, the day after the hearing, the appellant attended at Field House. She left a note claiming once again that she did not receive the Notice of Hearing issued by the Upper Tribunal on 17 May 2013. She said her post seems to be “otherwise okay” so she did not know what

happened. She called a telephone number and was told that her appeal was heard the day before and that why she rushed down. She asked me not to promulgate my decision but exercise my powers and allocate a new hearing date.

8. I am unable to set aside my decision under rule 43 of the Upper Tribunal Procedure Rules 2008 because there is no justifiable reason to do so. It is rather remarkable that the appellant did not receive the notice of hearing in respect of the hearing on 8 March 2013 but received the determination of the DUT which was promulgated on 15 April 2013. It is strange that it is only the notices of hearing that the appellant does not receive. I do not believe her. I would have expected her to make efforts to find out from the Upper Tribunal about the hearing of her appeal in light of what happened in the past. There was no evidence that she did.
9. The appellant arrived in the UK on 27 November 2008 as a student. She was given extensions of leave until 31 May 2012. She said she met Ms Ceslava Doval (a Lithuanian born on 19 August 1966) in November 2009. Ms Doval has two children from her marriage to Mr Marinan Doval. They are Dalia born on 15 October 1992 and Milana born on 8 June 1989. The appellant stated that she lived with Ms Doval briefly in 2009, but moved in with her and her daughter Dalia on 24 May 2012. Ms Doval stated that she has commenced divorce proceedings in 2011 in Lithuania against her husband but they have not concluded. The appellant lodged an application for a residence card as the extended family member of an EEA national on 29 May 2012, on the basis that she is in a durable relationship with Ms Doval.
10. The judge was satisfied that Ms Doval was working for the Imperial Recruitment Agency as a housekeeper for a hotel and therefore she was exercising treaty rights in the UK. The judge however found that there was very little documentary evidence apart from bank statements to show that the parties are cohabiting or that they have been in a relationship since 2009 as claimed. An HSBC Bank statement in the sponsor's name showed that she lived at 74 The Drive in Isleworth on 11 May 2012, and a bank statement dated 11 November 2012 showed her address as 76 The Drive. A certificate of police registration showed the appellant living at 74 The Drive on 20 May 2012 and a Lloyds TSB Bank statement dated 1 November 2012 showing her address as 76 The Drive.
11. The judge considered the appellant's evidence that their house has two entrances and contains different rooms. They both lived at 74 and moved into number 76 when that flat became available. He considered the letter from Dervinder Kooner dated 6 November 2012 stating that he is the landlord for 76 The Drive and stating that the sponsor has been living in No. 76 since 2010. The bank statement however showed that she was living at number 74 until May 2012. The judge therefore placed very little weight on the letter from the claimed landlord.

12. The judge considered whether the appellant was in a durable relationship with Ms Doval. The appellant's evidence was that Ms Doval's relationship with her husband had broken down irretrievably but, she noted that there was conflicting evidence regarding the initiation of divorce proceedings in 2011. The appellant stated that she had no evidence to show proceedings had been commenced in Lithuania, and said she could try to get someone to send over some documents from Lithuania. The sponsor however stated that she had evidence but it was in electronic form and not translated into English. The judge found that if the appellant knew the sponsor as well as she said she did, then she would have known that the sponsor had evidence of her divorce at their home. This was a fundamental piece of evidence that the appellant should have known about.
13. The judge considered evidence from outside parties who claimed that the parties have been in a relationship since long before May 2012. There was a letter dated 28 May 2012 from Elena Volkova in which she stated that she had known the couple since June 2010, but she did not attend the hearing to support her short statement. Likewise Ms Tatjana Naiden did not attend the hearing to elaborate on how she has known the appellant and the sponsor as a couple since the winter of 2010. More importantly however was the absence from the hearing of the sponsor's two daughters Dalia and Milana Doval. Both the appellant and the sponsor stated that her daughters went to Lithuania on 8 December 2012; the sponsor saying that her father died on 27 November 2012 and the daughters could not afford to attend the hearing. The judge found that it was clear that the daughters knew about the hearing but it was unclear why they chose not to attend it.
14. There was however a note from the sponsor's daughters stating that their mother had been in a relationship with the appellant since 2009, and it took them a long time to get used to their relationship. They also stated that it was hard for their mother since the failure of her marriage. Their mother was happy with the appellant and they planned to marry as soon as possible. The daughters stated that the appellant has been living with their mother at their address at 74 The Drive since May 2012, but the sponsor said that she and her daughters and the appellant had been living at 76 The Drive since that date. There was no explanation for the discrepancies.
15. The judge found in the light of the evidence that the appellant was not in a durable relationship with the sponsor within the meaning of the 2006 Regulations. There was sparse evidence to show that the parties have been in a relationship since 2009. On the evidence before her it seemed more likely that the appellant and the sponsor were little more than roommates. Even if she was incorrect in her view that the parties were in a subsisting relationship, she was nevertheless satisfied on the balance of probabilities that the respondent was correct to conclude that as at the date of the application the appellant had not been in a durable relationship

with the sponsor, as they had only been cohabiting for one week before the application for a residence card was lodged, and by the date of the hearing their relationship would only have been of six months' duration. It was her understanding of the case law that a durable relationship should be of a much longer period than six months.

16. The judge considered the appellant's argument that the respondent's decision breaches both the sponsor's treaty rights and their right to family life under Article 8 of the ECHR. The judge doubted that the sponsor would be deterred from working and living in the UK, as she intoned that she would remain in the UK regardless of the outcome of the appeal, and she would not return to Lithuania because of her husband. The judge found that whilst there was no evidence as to the status of the divorce proceedings, she noted that the sponsor had in fact returned to Lithuania on more than one occasion. The sponsor said that she was also afraid that her husband would attack her children when they were in Lithuania, but she gave evidence to state that they were in that country from 8 December 2012. There was insufficient evidence for the judge to find that the appellant could not join the sponsor in Lithuania if need be, and no supporting evidence was lodged to confirm the appellant's fears that she and the sponsor would be mistreated as a lesbian couple in Russia.
17. The judge stated that she would not determine whether the decision to refuse the appellant's application for a residence card interferes with their rights under the ECHR, as she noted that the respondent did not issue her with a notice of removal from the UK with the decision. It was therefore open to the appellant to submit a further application for a residence card when she had sufficient evidence to show that she was in a durable relationship with an EEA national.
18. The grant of permission stated that it is clear that the judge had concerns about some of the evidence she had before her and she did give reasons for her findings but it is clear that she placed a great deal of weight on the perceived lack of evidence about the status of the sponsor's marriage. Copies of divorce papers were attached to the grounds seeking permission. If the divorce papers were delivered to the hearing centre as claimed, as arranged with the judge, the fact that they were not received or not considered raised questions about the judge's findings. So far as Article 8 is concerned, it was stated in the grant of permission that Article 8 was raised in the grounds of appeal against the decision of the respondent and it is arguable that the judge ought to have considered it properly.
19. Miss Horsley relied on the respondent's Rule 24 response. She said there was nothing wrong with the First-tier Judge's decision and that the grounds amount to no more than a disagreement with the decision. The judge's finding that the appellant and the sponsor are not in a durable relationship is sustainable. In the circumstances it is difficult to see how an appeal under Article 8 can be sustained.

20. I have seen the translation of the judgment in respect of Ms Doval's claim for a divorce from her husband Marjanas Doval. Ms Doval based her claim on her husband's guilt and he submitted his response to the claim. It was considered by the court that by setting a preliminary hearing the parties could reach a mutual agreement; specific measures could be taken for the parties to reconcile an appropriate and comprehensive preparation of the case could be completed for the court hearing. The judge decided to refer the case to a court located in Vilnius for a preliminary hearing on 30 August 2012. The sponsor has not submitted any further evidence as to the outcome of the hearing on 30 August and whether she is now divorced from her husband. The judgment is dated 12 July 2012. The First-tier Judge heard the appellant's appeal on 12 December 2012. I would have expected the sponsor/appellant to submit further evidence in relation to this issue. There is none. Whilst there is evidence that the sponsor has initiated divorce proceedings against her husband, I find that this evidence does not affect the judge's findings at paragraph 16, which was that the appellant should have known about this evidence and she did not know about it.
21. Whilst I find that the judge erred in law in not properly considering the appellant's appeal under Article 8, I find that the error is not material. The judge's finding that the appellant and the sponsor are not in a durable relationship is well-reasoned and sound. There was conflict in their evidence as to where they both lived and indeed whether they were living together. The judge found that they were little more than roommates. Even if they are not roommates and are in a relationship, the judge's finding that there was no supporting evidence that the appellant and the sponsor would be mistreated as a lesbian couple in Russia has not been challenged. In any event the judge did not believe that the sponsor was in fear of her life in Lithuania as a result of her husband. As the judge found the children were in Lithuania from 8 December 2012 and there was no evidence that the husband had attacked them. It is not apparent from the judgment given by the Lithuanian court that they knew of the sponsor's fears when they ruled that specific measures could be taken for the parties to reconcile. If the husband was capable of attacking the children I find that this would certainly have featured in the judgment given by the court.
22. I agree with Ms Horsley that the judge's finding that the appellant and the sponsor are not in a durable relationship is sustainable. In the circumstances it is difficult to see how an appeal under Article 8 can be sustained.
23. I find that the judge did not make a material error of law in her decision.
24. The judge's decision dismissing the appellant's appeal shall stand.

Signed

Date

Upper Tribunal Judge Eshun