Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/50275/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19th April 2016	**On 29th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

AHMED MOHEB ABEDELHAY ABDELAZIZ ELLAWATY
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Aghayere
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. This Egyptian Appellant born on 2nd September 1984 and so 41 years old now, appeals a decision of 15 September 2015 of First-tier Tribunal Judge Parkes dismissing his appeal against a refusal to issue a residence card on the basis of his claimed durable relationship with an EEA national. Judge Parkes found that the relationship was not established as genuine and subsisting.

2. Permission was granted on the basis that it was arguable:

   (a) "the judge has misdirected himself in not considering whether the parties are in a durable relationship in light of an existing child."

Background

3. The case was first listed on 23rd July 2015 when it was adjourned to provide further time for preparation after which the Appellant's then representatives UK Law withdrew on the basis that the Appellant had withdrawn instructions and the current representatives Lawland Solicitors were instructed. The matter came for hearing before Judge Parkes on 7th September. Judge Parkes took the findings of Judge Khan made in August 2014 as his starting point, in accordance with the case law of Devaseelan.

4. This previous application had been made on the basis of a proxy Egyptian marriage to the same EEA national in 2013, and resulted in a dismissed appeal promulgated on 8th August 2014. Judge M A Khan recorded that the Appellant had attended before him and told him that his wife was in hospital with their child who was ill, and so unable to attend to support his appeal. The case was put back in the list to provide an opportunity for supporting evidence to be obtained. The Appellant invited the court usher to speak to his wife and she told the court usher that she had not been to hospital but at home all morning. On resuming the hearing the Appellant asked for more time, telling the court that his wife was now on her way to court, and would be arriving no later than 3.00pm. The judge agreed to put the case further back in his list. When his list otherwise ended, it being after 3 o'clock and the wife having not appeared, the case began. The Appellant gave oral evidence. By the end of the case the wife had still not appeared.

5. On the issue of a durable relationship Judge Khan found that the oral evidence of the Appellant, to the point that the couple had met in July 2012, and started living together in October 2012, had a child together born on 10th August 2013 as shown on a birth certificate naming the Appellant as the child's father, had married on an unknown date in 2013 at the Egyptian Embassy, his wife was currently on maternity leave with the couple managing financially with the assistance of friends and the Appellant's brother in the UK and child benefit, supported by documents received following the hearing including; his and his claimed partner's pay slips, documents concerning the ceremony at the Egyptian Consulate, bank statements, BT bills to both at various addresses was inadequate to meet the burden. The judge concluded that at their highest the documents showed that the Appellant and his EEA national spouse had at some time lived together previously, but was insufficient to show that they were then in a durable relationship, particularly bearing in mind the failure of the Sponsor to attend the court and the conflicting information given by the Appellant as to her whereabouts on the morning and day of hearing. Judge Khan concluded that the evidence of a valid marriage was inadequate being a proxy marriage entered into at the Egyptian Embassy in London, to the point that there was insufficient evidence to establish its validity in Egyptian law or under the French EEA national sponsors' law.

6. In respect of the validity of the marriage Judge Parkes noted the evidence submitted to Judge Khan in August 2014. That decision was not appealed and Judge Parkes correctly identified that it was determinative of the issue

of durable relationship as at that date, unless good reasons were provided for departing from it. Judge Parkes records no additional evidence was brought forward, for example to show that French law recognised the marriage as per the case of Kareem, and found that the position had not changed since the earlier hearing, and that the Appellant continued to fail to demonstrate that he was a spouse of an EEA national.

7. In respect of whether there was durable relationship Judge Parkes noted that the Appellant's partner was not at court, although the Appellant, the Sponsor and the child had travelled up for the hearing in July 2015 when the matter was adjourned. The Judge took account of the Appellant's explanation that his partner was not at the hearing because her brother had been involved in an accident and she had had to go to France about a week before the hearing. There was no evidence to support that position beyond the bear assertion. The judge noted new evidence before him at paragraph 16 and 17, including BT bills in joint names which stopped in February 2015, wage slips for the Sponsor for 31st October and 7th November 2014, which indicated that payment was made by way of BACS, although no bank statements were provided. The sponsor's employment contract was dated 22nd October 2014 and there was a copy of a letter from the claimed employers dated 2nd September 2015 confirming she is a full time employee. In addition there were two photographs, one of which shows the Appellant, Sponsor and their child.

8. The judge took account that the explanation for the failure to provide additional documentation was that the Appellant and his wife concentrated on their child and, as the Appellant is not allowed to work, nothing more could be afforded, and so no other documentation had been generated. The judge took account that the Appellant and his Sponsor and child attended the hearing on 23rd July. The judge noted the absence of easily obtainable supportive evidence of the explanation offered for the Sponsor's, and that there was no application for an adjournment for the Sponsor to attend, all of which he found surprising in the context of the history of the previous appeal.

9. All-in-all the judge found that the position of the Appellant's evidence showed no significant improvement from that before Judge Khan and concluded that the Appellant still failed to discharge the burden of proof to establish that he was currently in a relationship with an EEA national, let alone that it was a durable relationship. The judge concluded that there was no family life established so as to engage Article 8 although in the event as this was an EEA claim the matter did not arise as the Appellant had not made any separate human rights claim.

The challenge to Judge Parkes's decision

10. Mr Aghayere for the Appellant relied on the grant of permission arguing that the fact of the existence of the child, particularly in light of the finding that the partner and child had attended the earlier adjourned hearing

should have carried more weight, and that given that the Appellant had obtained a stay on his removal in order to remain in the country and be present at his appeal hearing because Judge Latter, who had dealt with his judicial review of the removal directions, had indicated that it was appropriate that he should be in-country so as to ensure that a thorough consideration of the best interests of the child could be undertaken by the judge, it was surprising that the judge had not dealt in more detail with the child's best interests. It was trite law that the best interests of the child are to be with both of his parents and in those circumstances there was evidence that the Appellant was in a durable relationship sufficient to meet the requirements of the EEA Regulations.

11. With all due respect to Mr Aghayere there is no merit in that submission. The judge took into account all of the evidence that was before him. The reality is that it was scant. The fact that the Appellant and his partner are named as the parents on a child's birth certificate issued on 10th August 2013, and the Sponsor's and child's attendance at the adjourned hearing in July 2015 was weighed as part of the overall evidence by the judge. None of the evidence before the judge was determinative of the existence of a continuing or durable relationship. The judgement of Judge Latter in respect of the stay of removal takes the case no further, merely indicating to the Appellant that he is being afforded an opportunity to remain in the United Kingdom in order to be able to more easily obtain the evidence to support his appeal. In the event the evidence of the Appellant was found insufficient to establish his claim.

12. The complaint that the judge failed to expressly assess best interests and set out the impact of removal on the child is similarly without merit. There was no evidence before the judge upon which to make any such assessment, it is for the Appellant to establish the factual matrix of any impact upon which he seeks to rely.

13. The Appellant has failed to establish any error of law in the First-tier Tribunal's decision dismissing the Appellant's appeal on EEA Regulation grounds.

14. I pause briefly to deal with the issue in respect of Article 8. This is an EEA case where there had been no Article 8 application and so the matter was not before the judge. However judge Parkes found that there was no family life so as to engage Article 8, to the point that even if, as the Appellant's representative submits, Article 8 ought to have been considered, the judge's finding can only result in the ground being dismissed.

Notice of Decision

15. The decision of the First-tier Tribunal Judge reveals no error of law and the decision dismissing the Appellant's appeal stands.

16. No anonymity order has been requested or directed and I see no reason to make one now.

Signed Date

Deputy Upper Tribunal Judge Davidge

TO THE RESPONDENT
FEE AWARD

I have dismissed the Appellant's appeal so that the issue of fees does not arise.

Signed Date

Deputy Upper Tribunal Judge Davidge