



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04659/2019**

THE IMMIGRATION ACTS

**Heard at Field House
On 13 October 2021**

**Decision & Reasons Promulgated
On 15 November 2021**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

**CHANDANA ALWIS PALLIYA GURUGE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Abdurahman Jafar, Solicitor, VMD Solicitors

For the Respondent: Mr Steven Walker, Home Office Presenting Officer

DECISION AND REASONS

1. This is a remaking of the decision of Judge of the First-tier Tribunal McIntosh dated 21st July 2020 in which she allowed the appeal of Mr Chandana Alwis Palliya Guruge (“the appellant”) against the decision of the Secretary of State for the Home Department (“the respondent”) dated 22 August 2019 refusing to issue him a residence card as confirmation that he is the unmarried partner of an EEA national exercising Treaty rights in the UK.

2. In an 'error of law' decision promulgated on 27 November 2020 I found that Judge McIntosh failed to give adequate reasons for her findings, contrary to MK (duty to give reasons) Pakistan [2013] UKUT 641 (IAC). The judge failed to adequately explain why she accepted the assertions of the appellant and Ms Andra Marta Bein ("the EEA national") that they were in a durable relationship given that this claim had previously been disbelieved by Judge of the First-tier Tribunal Nolan in a decision promulgated on 10th February 2016. Nor had the judge adequately explained why the documentary evidence before her of cohabitation demonstrated a durable relationship as opposed to a relationship of friendship within a joint living arrangement (a finding previously made by Judge Nolan and the position adopted by the respondent in her decision refusing to issue the residence card). In so doing Judge McIntosh additionally failed to consider the decision of Judge Nolan as her starting point, contrary to the principles established in Devaseelan v SSHD [2002] UKIAT 00702. The judge additionally failed to engage with the principal reasons advanced by the respondent in her reasons for refusal letter for doubting that the appellant and the EEA national were in a durable relationship.
3. Having satisfied myself that Judge McIntosh's decision contained errors of law requiring it to be set aside I indicated that the appeal would remain before the Upper Tribunal and that there would be a de novo hearing to consider the appeal afresh. A remote hearing listed for 29 July 2021 was adjourned because the appellant and Ms Bien did not attend. The hearing to remake the First-tier Tribunal's decision was conducted as a face-to-face hearing at Field House, London, on 13 October 2021.

Background

4. The appellant is a national of Sri Lanka, born on 6th October 1973. He entered this country as a visitor in 2004. In 2013 he applied for a residence card based on his relationship with Ms Bien, a Hungarian national whose date of birth is 15th December 1965. She, it was said, was exercising EEA Treaty rights in the UK. That application, and a number of subsequent applications for a residence card, all based on the appellant being in a durable relationship with Ms Bien, were refused.
5. The appellant exercised a right of appeal following a decision by the respondent dated 25th October 2014. The appeal came before Judge Nolan who heard evidence both from the appellant and from Ms Bien and from several other witnesses. In a decision promulgated on 10th February 2016 Judge Nolan dismissed the appellant's appeal.
6. In short, Judge Nolan did not accept as credible the claimed account of the genesis and evolution of the appellant's relationship with Ms Bien. Judge Nolan did not accept that Ms Bien, who he described as a

mature woman who was just about to embark on a business venture, would so readily give up her existing accommodation and move into the appellant's room in a house shared with itinerant medical students within a month of meeting the appellant, or that she would take near immediate responsibility for paying the whole rent and some of the bills having only met him four times in total. Judge Nolan did not believe that Ms Bien would agree within such a short space of time to marry a man she barely knew and had just met. Nor was it clear to Judge Nolan why the couple had not already married if this had been their wish so far back as February 2013. Judge Nolan accepted that once the appellant made his first application, he would have given his passport to the respondent, but that was not until June 2013 and it was not a requirement for a person to be able to show that they had a valid immigration status in order to give notice to be lawfully married in the UK.

7. Judge Nolan described what would normally happen in respect of an application to the registry to register a marriage, but there was no indication that any such application had been made. Judge Nolan found it more likely that Ms Bien had, and continued to have, only a relationship of friendship with the appellant; he helped out with her business by doing handyman jobs and she wished to help him obtain a permit to remain in the UK. Judge Nolan considered photographs and other evidence, including the evidence from witnesses to the relationship, but he was not persuaded that the relationship was one akin to marriage and he did not accept on balance that the relationship was a durable relationship sufficient to satisfy Regulation 8(5) of the relevant EU Regulations.

The respondent's decision under appeal

8. The appellant made a further application on 13th April 2018 for a residence card as a durable partner and the respondent made a fresh decision refusing to grant the residence card on the basis that the appellant and Ms Bien were not in a durable relationship.
9. I summarise the reasons given in the refusal letter. The respondent had concerns at the timing of the initial application for a residence card. The respondent accepted that there had been cohabitation at the dates of the various applications. Indeed it does not appear from any of the evidence before me that the respondent had ever disputed that the appellant and Ms Bien were cohabiting. The respondent however expressed concerns at the lack of evidence in relation to shared commitments or responsibilities by the appellant and Ms Bien in respect of each other. The respondent considered that there was a joint living arrangement between the appellant and Ms Bien and made extensive reference to Judge Nolan's findings, particular in respect of the failure to give notice to the registrar to get married and the genuineness of the evolution of the relationship. The respondent also relied on Judge Nolan's findings that the appellant and the EU

national were only friends. The respondent additionally noted the continued absence of any evidence that the appellant had registered an intention to get married with the registrar, even after regaining possession of his passport.

10. I note that on 2 December 2019 – after the date of the respondent’s decision, Ms Bien was granted Indefinite Leave to Remain (“ILR”) under the EU Settlement Scheme.

The evidence before the Upper Tribunal

11. At the hearing to remake the appeal decision the appellant relied on the 76-page bundle that had been before the First-tier Tribunal. This included, *inter alia*, witness statements from the appellant and Ms Bien both dated 15 January 2020, Council Tax bills jointly addressed to the appellant and Ms Bien in respect of 3 Hampton Road, Ilford and covering for the years 2019/20, 2018/19, 2017/2018, TV licence documents dated 31 May 2019 and 13 June 2018 in the EU national’s name relating to the same property, a letter dated 3 April 2018 from the manager of ‘Let’s Move Associates Ltd’ and a tenancy agreement in the joint names of the appellant and Ms Bien dated 29 May 2017, water utility bill documents dated 6 December 2017, 6 June 2018, 26 July 2018, 4 December 2018 and 3 June 2019 jointly addressed to the appellant and Ms Bien, gas and electricity utility documents addressed to the appellant some of which were dated 15 October 2019, 9 May 2019, 7 April 2019, 7 February 2019, 18 October 2018, 4 September 2018, 29 May 2018, and photographs of the appellant and Ms Bien together.
12. The appellant additionally relied on a judicial review bundle prepared in November 2018. This contains, *inter alia*, council tax bills relating to Flat 4, Upper second floor, 388 High Road, Ilford, covering 2015/2016 in the joint names of the appellant and Ms Bien, tenancy agreements dated 1 July 2014 and 1 July 2015 in respect of the same property identifying the appellant and Ms Bien as the tenants, a council tax document in respect of the same property dated 13 March 2015 and addressed to both the appellant and Ms Bien, further water utility bill documents issued in 2017 relating to 3 Hampton Road and addressed to both the appellant and Ms Bien, wage slips relating to Ms Bien covering the period 7 July 2017 to 13 March 2018 addressed to her at 3 Hampton Road, wage slips relating to Ms Bien issued in 2014 and 2015 and addressed to her at 388 High Road, Ilford, HMRC documents relating to the tax year 2012/2013 addressed to Ms Bien at 388 High Road, HSBC and Barclays bank account documents in the EU national’s name addressed to her at 388 High Road, Ilford.
13. A further bundle of documents, received by the Tribunal on 12 October 2021, was filed by the appellant. This included, *inter alia*, more up-to-date utility bills in the joint names of the appellant and Ms Bien, a TV licence in Ms Bien’s name dated 9 June 2021, financial

documents addressed to Ms Bien at 3 Hampton Road, and some colour photographs of the appellant and Ms Bien together with various friends at various different locations.

14. Both the appellant and Ms Bien adopted their statements and were cross-examination. I asked a number of questions to clarify the evidence before me and to further ascertain the nature of their relationship. I maintained a record of the oral evidence and submissions made at the hearing. Both parties are aware of the evidence, both written and oral, that was before me. This evidence is, in any event, a matter of record. I shall refer to the written and oral evidence presented at the hearing and the submissions made at the hearing only in so far as it is necessary for me to lawfully determine this appeal. In reaching my decision I have carefully read and considered all the documents presented to me even if they are not specifically identified later in this decision. I remind myself that the burden of proving that the appellant is in a durable relationship with Ms Bien rests on him, and the standard is the balance of probabilities.

Findings of fact and reasons

15. In his submissions Mr Walker accepted, having regard to the documentary evidence and having heard the appellant and Ms Bien give their oral evidence, that the appellant and Ms Bien were in a genuine durable relationship. Mr Walker explained that three points jumped out in the oral evidence that led to his concession. When asked to describe what the appellant and Ms Bien did on the previous Saturday, they both gave consistent accounts of who got out of bed first and who made breakfast. This was strong evidence that they were actually sharing the same bed and therefore in a durable relationship. The appellant and Ms Bien also gave consistent evidence in respect of the medical problems afflicting Ms Bien's mother, and this was confirmed by Hungarian documents that mentioned Alzheimer's. Mr Walker noted that, even on the respondent's previous position, the appellant and Ms Bien had been living together since 2013, and that there were a large number of documents attesting to the nature of the relationship.
16. The respondent has conceded that the appellant and Ms Bien are in a genuine durable relationship. Whilst I am not obliged to accept the respondent's concession, which effectively disposed of the appeal in the appellant's favour, it is a position to which I should attach significant weight. Mr Walker is the agent of the respondent and is empowered to present the respondent's position on any particular case. Mr Walker has been involved in this appeal since the 'error of law' decision and his position has allowed him to assess all of the documentary evidence. He has additionally cross-examined both the appellant and Ms Bien at length, and he observed their answers in respect of my clarificatory questions. Mr Walker has reached a decision that is clearly rationally open to him on the face of the

evidence. I therefore consider it appropriate to attach very significant weight to the position adopted by Mr Walker.

17. Given the respondent's concession that the relationship between the appellant and Ms Bien is durable, I need only give brief reasons for accepting the respondent's concession. In so doing I approach the First-tier Tribunal judge's findings of fact as my starting point in line with Devaseelan. Mr Jafar makes the valid point that the decision of Judge Nolan could not be appealed because of the decision in Sala (EFMs: Right of Appeal) [2016] UKUT 00411 (IAC). This decision was overturned by the Court of Appeal in Khan v SSHD [2017] EWCA Civ 1755. Whilst I do not accept all of Mr Jafar's criticisms of Judge Nolan's decision, I do note that Judge Nolan may have mischaracterised the evidence from the witnesses who attended the First-tier Tribunal hearing in 2016.
18. It is nevertheless unnecessary for me to consider whether the Devaseelan approach should be modified, because, even adopting a strict approach to the earlier decision, I am satisfied that the new evidence entitles me to depart from the previous finding. As Mr Walker pointed out, the evidence from both the appellant and Ms Bien relating to what they did the Saturday before the hearing, an issue that I raised at the hearing, disclosed a body of mostly consistent evidence strongly indicative of a genuine relationship akin to marriage. This ranged from who got out of bed first, to what they had to eat for various meals, and what they did throughout the day. As Mr Walker pointed out, there were some minor inconsistencies (such as whether they watched an action film in the evening), but these were not such as to undermine the core evidence that was consistently given. I note that both the appellant and Ms Bien also gave consistent evidence in respect of a number of other matters including the identities of those living in the same house of multiple occupancy. Both Mr Walker and Mr Jafar saw a text message and a WhatsApp message on Ms Bien's mobile phone between the appellant and her that further supported their claim to be in a durable relationship. Their claimed relationship must also be considered in the context of the voluminous evidence of cohabitation over a number of years, extending beyond the hearing in the First-tier Tribunal in 2016. Whilst it is not impossible for the appellant and Ms Bien to have lived together as friends for that length of time, it is more likely, having regard to the evidence before me as a whole, that they are in a more intimate relationship.
19. Both Judge Nolan and the respondent in her Reasons for Refusal Letter relied on the failure by the appellant and Ms Bien to get married. The appellant and Ms Bien both claimed they went to Redbridge Council to register for marriage but were turned away because it was not accepted that the appellant had a valid passport. This was in turn based on a rather confusing entry in the appellant's passport, which he produced at the hearing, suggesting, with

reference to a previously issued passport, that it was extended up to 12 December 2018. Mr Walker could not comment on why Redbridge Council did not accept the passport as being valid, as it appeared to have validity until 31 December 2023. Mr Walker did not however consider this to be a factor undermining the appellant's claim to be in a genuine relationship. Mr Walker's position at the hearing constituted the new position adopted by the respondent. There is no reason for me to reject the respondent's position and I do note the confusing nature of the entries in the appellant's passport, which may well have caused a Local Authority to question its validity. I have nevertheless concluded, having regard to the evidence before me, considered holistically, in the context of the respondent's concession, that the appellant has discharged the burden of proving he and Ms Bien are in a genuine durable relationship.

Notice of Decision

The appellant's appeal is allowed

No anonymity direction is made

D.Blum
Signed

14 October 2021
Date

Upper Tribunal Judge Blum