Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26441/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
on 3rd July 2013	**on 20th August 2013**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

JANET KEMI LADEINDE
(AKA ARAMIDE OLUKEMI AZEZA)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Leskin of Birnberg Peirce and Partners.
For the Respondent: Mr Tarlow – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Hanes, promulgated on 17th April 2013, in which she allowed the appeal to the limited extent that the decision was not in accordance with the law and that the application remained outstanding awaiting a lawful decision.

2. An automatic deportation order was made against the appellant on 29th October 2008 which was later withdrawn by the Secretary of State. A further decision dated 5th November 2012 was then made in which the appellant's application for a Residence Card was refused on the basis it was not accepted that the appellant

was in a durable relationship. The reasons for this are fully set out in the relevant refusal letter.

3. Judge Hanes found the appellant and her partner are in a durable relationship, based upon previous findings to this effect by Upper Tribunal Judge Coker who the heard an earlier appeal sitting at Field House on 1st January 2012.

4. Permission to appeal was initially refused by another judge of the First-tier Tribunal but granted on a renewed application by Upper Tribunal Judge Goldstein on the basis that if the discretion under Regulation 17(4) of the Immigration (European Economic Area) Regulations 2006 (as amended) had previously been exercised and section 86 (3) (b) of the Nationality Immigration and Asylum Act 2002 empowered the Judge to review the exercise of that discretion, failure to do so was an arguable error of law.

Error of law finding

5. As the Upper Tribunal found in Ukus (discretion: when reviewable) [2012] UKUT 00307(IAC) **t**here are a number of ways in which this distinction can be approached and, in particular, whether the impugned decision has been lawfully made. In paragraph 11 of that determination it is stated:

> "This may be done:
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> (i) by reference to the criteria by which a decision is susceptible to a successful application for judicial review;
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> (ii) by considering whether the decision maker has appreciated the powers vested in him by reaching a decision that properly recognises them, or
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> (iii) put simply, by considering whether the decision maker has done the job required of him regardless of whether, in the appeal, the Judge agrees or disagrees with his decision.

6. A reading of the reasons for refusal letter shows that the respondent clearly recognised (a) that the relevant rules were not the Immigration Rules but the 2006 Regulations (b) that even though primarily rejecting the appellant's claim to be in a durable relationship, acknowledged that if the durable relationship had been proved the appellant was only entitled to a Residence Card as an extended family member if it was considered appropriate to issue the card which involved the exercise of a discretion; (c) identified the factors that were required to be taken into account in reaching the decision which, in this case, included the appellant's personal circumstances, the application on its merits, and the fact the appellant was convicted on 28th March 2006 of possessing/improperly obtaining/another's identity document for which she was sentenced to 15 months imprisonment. The respondent then (d) balanced

those factors one against the other and (e) reached a conclusion that they were not of a sufficiently compelling nature to warrant the exercise of the discretion in favour of the appellant.

7. I find that the refusal letter supports the appellant's contention that the case worker had considered the exercise of a discretion, albeit on the face in the alternative, and that this was a lawful exercise of that discretion. I do not find it proved that the process by which it was made would have been susceptible to Judicial Review. As the decision maker properly noted his function and what he was required to do when fulfilling it, and then proceeded to reach a decision on that basis, I find Judge Hanes made a material error of law in finding that the discretion had not been exercised on the facts and in finding that it was therefore an unlawful decision and in allowing the appeal to the limited extent that the decision was not in accordance with the law on the basis that a lawful decision remained outstanding. The determination is set aside although the finding of the existence of a durable relationship and the appellant's immigration history shall be preserved findings.

8. Although the case was listed for an initial hearing it was possible to grant Mr Tarlow additional time to consider the papers thus allowing the Tribunal to proceed remake the decision.

Submissions for the remaking of the decision

9. Mr Leskin referred the Tribunal to the case of YB (EEA reg 17(4) – proper approach) Ivory Coast [2008] UKAIT 00062, and in particular paragraph 38, in which the Tribunal found:

> 38. However, we are not merely required to be satisfied that the respondent's decision was in accordance with the law, but also to decide for ourselves whether the reg 17(4) discretion should have been exercised differently. The burden rests on the appellant to show that the discretion should be exercised differently by us: see FD (EEA discretion: basis of appeal) [2007] UKAIT 00049 (Since hearing this appeal it has come to our notice that on 10 March 2008 the Court of Appeal ordered that FD's appeal be treated as withdrawn (C5/2007/1767) in the light of the respondent withdrawing its decision in view of her acceptance that she had not considered all of FD's personal circumstances. But the Court's order in no way impugned the guidance for which FD was reported).

10. It was submitted that the proper approach that should have been adopted by Judge Hanes is set out in the head note to the case in which the Tribunal summarise their findings. Mr Leskin further submitted that as it was accepted the appellant was in a durable relationship the only issue was how the discretion should have been exercised and it was necessary, therefore, to consider the process as set out in the second paragraph of the head note.

11. There was also a challenge to the Secretary of State's decision on the basis that in refusing to exercise her discretion in the appellant's favour she had relied upon the criminal conviction of 28th March 2006. It was argued that as on 16th May 2012 UKBA had stated that no further action was being taken to deport the appellant on public policy/public security grounds, reliance on such factors when considering Regulation 17(4) was wrong.

12. In relation to the second element of the test, the need to have regard as a rule of thumb only, to the criteria set out in comparable provisions of the Immigration Rule, it was claimed by reference to the current Immigration Rules and in particular Appendix FM, and the suitability/eligibility factors, that on the evidence the appellant would meet the suitability criteria although in assessing terms of eligibility these were elements that had to be considered as part of the YB assessment. The Tribunal's attention was drawn to paragraph 23 of the case in which it was found:

> "However, there are important caveats which must attach to any renvoi to national law for reg 17(4) purposes. One is implicit in what we stated earlier: clearly such renvoi must focus on whether extended family members can meet certain substantive requirements; it must not seek to define terms which are Community law terms (such as "durable relationship"). Second, whilst the principle of non-discrimination justifies renvoi to the immigration rules, it must be borne in mind that such rules do not provide a precise comparison. The rules which are most similar, those dealing with dependent relatives and unmarried partners, refer to persons applying for settlement, whereas a residence card is issued only for five years or "the envisaged period of residence in the United Kingdom of the qualified person" (reg 8(6)). Thirdly renvoi must be to national law provisions that relate to in-country applications. In this case, for example, one should look at para 295D, not para 295A. The reason for this is because provision is only made for the issue of a residence card in-country. A fourth caveat is implicit in what we have already stated in the preceding paragraph: renvoi must be done in conformity with general principles of Community law. A further and interrelated caveat is this. We cannot see that such reference can be assimilated to an examination of whether the comparable national law criteria are met. To seek to reduce it solely to such criteria would run contrary to a general principle of Community law, namely that of proportionality. It would also overlook that the power given by the Directive to decide such cases "in accordance with national legislation" is paired with another Directive principle or requirement that there be "an extensive examination of the personal circumstances". Neither principle is necessarily met simply by a mechanical checking of the comparable national law criteria. It may be in many cases that the assessment of an applicant's position under the relevant immigration rules covers much of the ground required to achieve an "extensive examination". But that will not necessarily be the case, if for example, the decision-maker has decided that the applicant fails under just one of the requirements of the relevant immigration rules and goes no further. The comparable immigration rules can only provide guidance, therefore, on what requirements an applicant under reg 17(4) should normally be expected to meet."

13. It is said that the appellant's partner is an EEA national from Germany exercising Treaty rights in the United Kingdom. Mr Leskin submitted that many of the requirements of Appendix FM can be met although 1.10 could not as they were not living together. It was submitted that YB is authority for the proposition that it was necessary to undertake a comparison and that this provision should extend to include people not living together; especially those who are in a durable relationship.

14. In relation to the eligibility criteria under the Rules Mr Leskin accepted that it was necessary for an individual not to be in breach of the Rules in the United Kingdom and that the appellant was. He submitted, however, that she could benefit from the first exemption as there are insurmountable obstacles to her partner continuing to live outside the United Kingdom relating to his own domestic circumstances. Adequate maintenance and accommodation is also available.

15. It was therefore argued that the appellant would be able to meet the requirements of the Immigration Rules if the same applicable to her. It was argued that the appellant should be allowed to remain and that the discretion should have been exercised in her favour. The fact the respondent made the decision not to remove the appellant by way of deportation as a result of her criminal behaviour but then used that against her in relation to the issue of a Residence Card is said to be illogical and legally flawed.

16. Mr Tarlow relied on the reasons for refusal letter dated 5th May 2012 and argued that when exercising her discretionary powers the Secretary of State is allowed to consider the behaviour and criminal convictions of the appellant. In paragraph 25 of Judge Coker's determination there is also reference to the fact documents had been submitted that she did not accept were genuine. The appellant overstayed and made a long residence claim using false documents which was relevant to the way in which the Secretary of State considered the discretionary power. The Secretary of State was entitled to take into account unspent criminal convictions and there was nothing wrong in law in the way in which she conducted the assessment. The fact the Secretary of State was not going to deport the appellant did not mean that she had to give her a Residence Card.

Discussion

17. In Ukus (discretion: when reviewable) [2012] UKUT 00307(IAC) the Tribunal held that there are thus four possible situations where the Tribunal is considering an appeal arising from the exercise of a discretionary power: (i) the decision maker has failed to make a lawful decision in the purported exercise of the discretionary power vested in him and a lawful decision is required. In this situation the Judge is required, on **SSHD v Abdi** [1996] Imm AR 148 lines, to allow the appeal to the extent of deciding the respondent needs to make a fresh

decision - it makes no difference whether the discretion is one the exercise of which the Tribunal has power to review; (ii) the decision maker has lawfully exercised his discretion and the Tribunal has no jurisdiction to intervene i.e because the discretion was a discretion exercised outside of the Rules for example under a policy; (iii) the decision maker has lawfully exercised his discretion and the Tribunal upholds the exercise of his discretion; or (iv) the decision maker has lawfully exercised his discretion and the Tribunal reaches its decision exercising its discretion differently.

18. I accept the submission in relation to the Tribunal's jurisdiction to consider the exercise of the discretion. In section 84 of the 2002 Act grounds of challenge to an immigration decision not only include at s.84(i)(e) that "the decision is otherwise not in accordance with the law" but also at s.84(i)(f) that "the person taking the decision should have exercised differently a discretion conferred by immigration rules…."

19. I find no merit in the argument the Secretary of State was prohibited from taking into account the appellant's criminal conviction when considering whether discretion to allow her to remain in the United Kingdom should be exercised in her favour.

20. In Rahman [2012] CJEU Case-83/11 the Court of Justice for the European Union (CJEU) considered whether, having met the defining criteria for an Extended Family Member (EFM), the applicant thereafter had an automatic right to enter and reside with the Union citizen in the host state. The CJEU held that Article 3 does not automatically entitle an EFM, who meets the defining criteria, to join and reside with a Union citizen in a host Member State. That right is reserved for ordinary family members, as defined by Article 2 and transposed into UK law by Regulation 7 of the 2006 Regulations. All that Article 3 requires of a Member State is that it should make it possible for an EFM to obtain a decision upon his application that is founded upon an extensive examination of his personal circumstances and, in the event of refusal, to justify the decision with reasons. It follows that the host country has a wide discretion with regard to the selection of factors that are taken into account. However, the host Member State must ensure that its legislation contains criteria for the exercise of that discretion which are consistent with the normal meaning of the term 'facilitate' and of the words relating to dependence used in Article 3(2), and which do not deprive that provision of its effectiveness.

21. The United Kingdom's domestic legislation does not deprive the relevant provisions of effectiveness and clearly within the criteria to be considered there is considerable scope granted to a Member State relating to which aspects of an applicant's personality/character/connections are deemed relevant. In this appeal the appellant has been convicted of a criminal offence for which she was sentenced to 15 months imprisonment. No authority was provided to support the submission that because the Secretary of State decided not to use the

conviction as the basis for deporting the appellant on public security/public policy grounds she is prevented from taking the conviction and the appellant's behaviour that lead to the conviction into account when deciding whether she is a suitable person to receive a Residence Card. The conviction is evidence of a deliberate act(s) of dishonesty for which the appellant was convicted and sentenced by the criminal courts. I find it is not irrational to say that it could be take into account as clearly is it is very relevant factor. It is in fact bizarre to say that it should not and should be ignored. There is also a second example of the appellant seeking to employ deception as identified by Mr Tarlow in his submissions by reference to Upper Tribunal Judge Coker's determination promulgated on 15th February 2012. Judge Coker notes in the determination discrepancies in the evidence given regarding an alleged engagement party. She noted in paragraph 21 that although it was claimed that between 1999 and 2005 the appellant had stayed with her brother and a friend at 1 South Dene, and that many documents produced pre-dating 2005 were addressed to her at 1 South Dene, the appellant was unable to say what area of London South Dene was in, other than to give the postcode and say it was in the North West. Judge Coker also noted in paragraph 24 that a large number of documents produced as having been submitted by the appellant she denied having seen or having submitted and that some of those documents were not genuine as a number of them had telephone numbers on them which did not exist as at the date of the letters.

22. Judge Coker was not satisfied the appellant had been in the United Kingdom for as long as she claimed and found that she had manipulated the truth to suit her own ends and conveniently forgotten or denied evidence that was adverse to her claim. The appellant's claim that she was unaware the documents had been fraudulently manufactured for the purposes of the claim was rejected. It was also found her lack of knowledge relating to 1 South Dene was an important piece of evidence, as it was inconceivable that she would have been staying in the house over such a lengthy period of years without knowing which area of London she was living in. The appellant's claim to have been in the United Kingdom since 1990/1 was rejected and it was found she had been here since November 2004.

23. It is clear therefore that in addition to the criminal conviction there is an unchallenged judicial finding that the appellant employed deception in an attempt to succeed with her application to remain on the basis of the long residence rule. This is a further relevant aspect of her personality which the Secretary of State was entitled to take into account when assessing whether she was willing to exercise her discretion in the appellant's favour.

24. I have considered the points in the appellant's favour outlined in great detail by Mr Leskin, but when all the facts of this appeal are carefully considered it is my primary finding that the Secretary of State has lawfully exercised her discretion and the Tribunal upholds the exercise of her discretion.

Decision

25. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

26. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order as no application was made for anonymity and the facts do not establish the need for such an order.

Signed…….
Upper Tribunal Judge Hanson

Dated the 15th August 2013