Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42052/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 15th December 2014	**On 16th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

Mr Edison Prozllomi
(Anonymity Direction Not Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms V Laughton, instructed by J D Spicer Zeb Solicitors.
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of Albania born on 11th June 1987 and he appeals against the decision of the Secretary of State dated 7th August 2013 to refuse to issue him residence card as an extended family member of Joanna Malgorzata Batko, a Polish national under the Immigration (European Economic Area) Regulations 2006.

2. In a determination dated 18th July 2014 Judge of the First Tier Tribunal Maxwell refused the appellant's appeal.

Application for Permission to Appeal

3. The application for permission to appeal made by the appellant asserted that the only reason the Judge gave for finding that the appellant and his partner were not in a durable relationship was that they had not lived together for 2 years. This was not treated solely as the starting point. It was the start and the end of the judge's consideration. The evaluation was set out only at [10]. Permission to appeal was granted on renewal of the application to the Upper Tribunal by Upper Tribunal Judge Grubb.

4. At the hearing before Ms Laughton relied on her skeleton argument which essentially advanced that the First Tier Tribunal Judge had elevated the starting point of the Regulations to a rule and had ignored **YB (EEA reg 17(4) – proper approach) Ivory Coast** [2008] UKAIT 00062

5. Mr Melvin resisted the ground with reference to a failure to consider Article 8 and submitted that **JM Liberia** [2006] EWCA Civ 1402 could not be relied upon. He submitted that the appellant was an illegal entrant prior to being joined by the sponsor.

Conclusions

6. The First Tier Tribunal Judge accepted that the appellant and sponsor were in a genuine relationship and this is recorded at [6] of the determination. However thereafter he failed to consider relevant factors in the assessment of whether they were in a durable relationship for the purposes of Regulation 8 of the EEA Regulations, that is an assessment of whether the appellant was in a durable relationship with his sponsor and could be considered as an extended family member. The Judge stated [10]

> *'I find no good reason why the fact that the relationship has yet to endure the two years ought properly to be disregarded. I find no compelling evidence which proves on the balance of probabilities that the relationship, and for the avoidance of doubt, I accept there is a relationship between the appellant and his partner, has been proven to be a durable relationship within the meaning of Regulation 8'*.

7. There is no definition of durable relationship. The European casework instructions set out that the parties should have been living together in a relationship akin to marriage which has subsisted for two years or more but **YB (EEA ref 17(4) – proper approach) Ivory Coast** [2008] UKAIT 00062 establishes the approach to be taken and holds that the '*fact that a person meets or does not meet the requirements of the relevant immigration rules cannot be treated as determinative of the question of whether a residence car should or should not be issued'* and in accordance with the Directive, there should be an

extensive examination of the personal circumstances of the appellant. Further a caveat was identified that to seek to reduce such an examination to whether comparable national law criteria are met would run contrary to a general principle of Community law namely that of proportionality. There should also be an extensive examination of the personal circumstances. 'Neither principle is necessarily met simply by a mechanical checking of the comparable national law criteria'. **YB** held that the concept of a durable relationship is a term of EU law and as such it does not impose a fixed time period and further does not even need to entail co-habitation.

8. Despite the evidence put before the judge he simply stated that there was no compelling reason for him to depart from the EEA regulations established under UK law and elevated the 'two year' rule to a rule without more contrary to **YB**. The judge did not engage with the evidence in this respect. The policy and EEA Regulations must be taken into account but it was incumbent upon the Judge to make an examination of all the circumstances and this is not disclosed by the decision.

9. The judge also failed to address Article 8 although for the reasons given above I have set aside the decision.

10. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007).

11. Mr Melvin conceded at the hearing that the appellant and his sponsor had been engaged in a durable relationship of two years and two months by the date of the hearing before me. He opined that the presence of the appellant was that of illegality in the UK as the appellant entered on the back of a lorry. It was submitted by Ms Laughton that the refusal of the residence card would frustrate the continuing exercise of treaty rights by the sponsor. Further that someone is the UK illegally is not grounds for refusing to grant a residence card. This has some force being in mind the principle of non-interference with an EEA national's treaty rights, however that is a matter for the Secretary of State to consider.

12. Specifically I refer to **Aladeselu and Others (2006 Regs – reg 8) Nigeria** [2011] UKUT 00253 (IAC) headnote of which states:

> "*1. For the purposes of establishing whether a person qualifies as an Other Family Member (OFM)/extended family member under regulation 8 of the Immigration (European Economic Area) Regulations 2006, the requirement that they accompany or join the Union citizen/EEA national exercising Treaty rights must be read as encompassing both those who have arrived before and those who have arrived after the Union citizen/EEA national sponsor.* "

2. The 2006 Regulations do not impose a requirement that an OFM/extended family member must be present in the United Kingdom lawfully.

3. But in the context of the exercise of regulation 17(4) discretion as to whether to issue a residence card, matters relating to how and when an OFM/extended family member arrives in a host Member State are not irrelevant."

13. However further to **Ihemedu (OFMs – meaning) Nigeria** [2011] UKUT 00340(IAC) and as in this case the Secretary of State had not yet exercised that discretion, I allow the appeal as being not in accordance with the law leaving the matter of whether to exercise the reg 17(4) discretion in his favour to the Secretary of State: see Yau Yak Wah [1982] Imm AR 16; MO (reg 17(4) EEA Regs) Iraq [2008] UKAIT 00061.

Decision

Appeal allowed to the extent determined above.

Signed Date 15th December 2014

Deputy Upper Tribunal Judge Rimington