Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10491/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 January 2015	**On 03 March 2015**
Judgment given orally at hearing	

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HALIT HUTJA

Respondent

Representation:

For the Appellant: Mr I Jarvis, Home Office Presenting Officer
For the Respondent: Mr P Bonavero, Counsel, instructed by Kilby Jones Solicitors

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Secretary of State. However, for convenience I refer to the parties as they were before the First-tier Tribunal. Thus, the appellant is citizen of Albania born on 21 October 1992. He made an application for a residence card as an extended family

member under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"), that is to say as a person in a durable relationship with an EEA national. The EEA national in question is Magdelena Naworska, a citizen of Poland.

2. The application was refused in a decision dated 10 February 2014. The basis of the refusal, in essence, was that it had not been established that the appellant and the sponsor are in a durable relationship and no evidence of cohabitation had been provided prior to 2013.

3. First-tier Tribunal Judge Morgan, after a hearing on 8 October 2014, allowed the appellant's appeal against that decision. He made a number of findings of fact which, in summary, are as follows: that the appellant and the sponsor were credible and consistent, that is to say their evidence was consistent with the documentary evidence. He found that they had started living together as a couple in the United Kingdom in March 2013. He also found that they intended to marry and have children and the marriage would take place as soon as the appellant was granted a residence card. He found that the couple are in a durable relationship.

4. The respondent challenges the conclusions of the First-tier Judge on the basis that he failed to have regard to a decision of the Upper Tribunal, namely YB (EEA reg 17(4) – proper approach) Ivory Coast [2008] UKAIT 00062. The effect of that decision, it is said, is that regard must be had, as a rule of thumb, to the criteria set out in comparable provisions of the Immigration Rules in terms of duration of a relationship under the EEA Regulations.

5. The Secretary of State's position is that the appellant needed to establish that they had been in a durable relationship as a couple for a period of two years. That was not the position at the time of the hearing before the First-tier Tribunal.

6. I should say that Judge Morgan did not allow the appeal outright. He took into account that there is discretion under regulation 17(4) of the EEA Regulations whereby it is for the Secretary of State to examine all the circumstances and make a decision about the issue of a residence card and Judge Morgan’s decision in that respect is consistent with authority.

7. Before me today, Mr Jarvis on behalf of the respondent took what is no doubt a pragmatic approach, in that he indicated that the respondent had taken into account the period of time since the cohabitation had started, found by Judge Morgan as being March 2013, a period of close to two years as at the present. He said that whilst it is maintained that the judge did not have proper regard to the decision in YB as he should have done, it is nevertheless the case that the error of law is not in the circumstances a material one, that is, not an error of law that requires the decision to be set aside. It was also indicated that there was still the consideration of the discretion under regulation 17(4) in the respondent's mind in terms of approach to the appeal today.

8. Mr Bonavero, naturally had little to say in the circumstances, and I did not particularly encourage submissions from him on the merits. Suffice to say, he indicated that had the matter proceeded to substantive submissions he would have resisted the Secretary of State's appeal. He outlined the basis on which the matter would have been advanced on behalf of the appellant.

9. It seems to me in the circumstances that it is not necessary to give a reasoned ruling in terms of whether the decision in YB does apply in circumstances such as these, given the concession on behalf of the respondent that if there is an error of law, it is not material to the outcome of the appeal. It was not suggested that the decision requires to be set aside. However, proceeding on the footing that I am required to decide whether the decision of the First-tier Tribunal did involve the making of an error on a point of law, in view of the fact that the respondent's appeal against the decision of the First-tier Tribunal was, to all intents and purposes, not pursued, I conclude that there is no error of law in the First-tier Tribunal's decision.

10. Thus, the decision of the First-tier Tribunal allowing the appeal, to the extent that it was allowed, is to stand.

Upper Tribunal Judge Kopieczek 25/02/15