Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14495/2014

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision and Reasons Promulgated**
On 3 July 2015	**On 29 July 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR RAAKESH SHARMA

Respondent

Representation:

For the Appellant: Mr S Kandola, Senior Home Office Presenting Officer
For the Respondent: Mr N Mohammad, Counsel.

DETERMINATION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order

pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.

2. The appellant (hereafter the Secretary of State) appeals against the decision of the First-tier Tribunal (Judge Majid) allowing the respondent's appeal against a decision taken on 7 March 2014 to refuse the respondent's application for a residence card as confirmation of his right to reside in the UK as an unmarried partner under the Immigration (European Economic Area) Regulations 2006 ("the Regulations").

Introduction

3. The EEA sponsor is Ms Dovile Stumbraite, a citizen of Lithuania born on 24 March 1982. The respondent is a citizen of India born on 24 May 1983. He claims that he has lived with the sponsor since 2011 and they are in a durable relationship.

4. The Secretary of State accepted the respondent's identity and nationality but decided that the evidence of cohabitation was inadequate.

The Appeal

5. The respondent appealed to the First-tier Tribunal and attended an oral hearing at Taylor House on 24 October 2014. He was represented by Mr Mohammad. The First-tier Tribunal found that the respondent was in a genuine and vibrant marriage with the EEA sponsor and that the marriage should be recognised under the Regulations. The respondent also merited the benefit of the "Articles of the ECHR".

The Appeal to the Upper Tribunal

6. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law in its approach to the Regulations because the respondent had failed to substantiate that he was in a durable relationship with the EEA sponsor. The findings were wholly inadequate. The judge failed to have regard to section 117B of the 2002 Act and failed to identify any compelling or exceptional circumstances.

7. Permission to appeal was granted by First-tier Tribunal Judge Frankish on 12 January 2015 on the basis that it was arguable that the article 8 assessment comprised an error in fact and law and the finding of a genuine marriage was summarised in just four sentences with no analysis of the appellant's objections.

8. Thus, the appeal came before me

Discussion

9. Mr Kandola submitted that it is now clear that the judge misdirected himself in law by referring to a marriage rather than a durable relationship. This was not just a matter of form – the judge refers to the requirements of the Immigration Rules at paragraph 15 and then makes repeated references to a marriage. There is no reference to the evidential requirements for a durable relationship. There is a blatant and glaring error of law. A fresh hearing is required.

10. Mr Mohammad conceded that the judge erred in writing the decision on the basis that the respondent and EEA sponsor were married but the respondent meets all of the requirements for a durable relationship in any event. It was a failure of form rather than substance. The judge examined the facts and tested the evidence. He misdirected himself factually but was entitled to find that the relationship was sound and genuine. The evidence supported the relationship. The supporting evidence was tested and founded a genuine relationship. Otherwise, Mr Mohammad was amenable to the suggestion that the matter should be remitted for a fresh hearing.

11. I find that the judge has made a material error of fact in concluding that the parties have been married since 2011. That error means that the judge could not have addressed his mind correctly to the requirements of the Regulations and amounts to a material error of law. The brief reference in paragraph 16 of the decision to the articles of the ECHR is wholly inadequate to form a basis for allowing the appeal under the Human Rights Act 1998. In any event, the decision as a whole is infected by the material error of fact.

12. Thus, the First-tier Tribunal's decision to allow the respondent's appeal under the Regulations and Article 8 involved the making of an error of law and its decision cannot stand.

Decision

13. Both representatives invited me to order a rehearing in the First-tier Tribunal if I set aside the judge's decision. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I consider that an appropriate course of action. I find that the errors of law infect the decision as a whole and therefore the re-hearing will be de novo with all issues to be considered again by the First-tier Tribunal.

14. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined de novo by a judge other than the previous First-tier judge.

Signed *David Archer* Date 28 July 2015

Judge Archer

Deputy Judge of the Upper Tribunal