



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/30185/2014

THE IMMIGRATION ACTS

**Heard at Birmingham
On 4th June 2015**

**Determination
Promulgated
On 9th June 2015**

Before

**UPPER TRIBUNAL JUDGE SUSAN PITT
DEPUTY UPPER TRIBUNAL JUDGE MANDALIA**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR. HUSSAN LAL

Respondent

Representation:

For the Appellant: Mr. Mills; Senior Home Office Presenting Officer.
For the Respondent: Mr. Muman; Counsel instructed by SKB Law

DECISION AND REASONS

1. This is an appeal against a determination by First-tier Tribunal Judge V A Lowe promulgated on 31 October 2014, in which she allowed an appeal under the Immigration (EEA) Regulations 2006.

2. The appellant is the Secretary of State for the Home Department and the Respondent to this appeal, is Mr. Hussan Lal. However for ease of reference, in the course of this determination we shall adopt the parties' status as it was before the First-tier Tribunal. We shall in this determination, refer to Mr. Lal as the Appellant and the Secretary of State as the Respondent.
3. Permission to appeal was granted by First-tier Tribunal Judge Levin on 16th December 2014. The matter comes before us to consider whether or not the determination by First-tier Tribunal Judge V A Lowe involved the making of a material error of law, and if so, to remake the decision.

Background

4. The appellant originally entered the United Kingdom on a working holidaymaker visa valid from 30 April 2009 until 30 April 2011. He then made a series of applications for an EEA residence card. The fourth and most recent such application was dated 30 May 2014 and relied upon the appellant's relationship with his partner, with whom the appellant claimed he was in a durable relationship.
5. On 16 July 2014 the respondent issued a notice of immigration decision referring to the application for a residence card. The Respondent had considered the application in accordance with Regulation 8(5) of the Immigration (EEA) Regulations 2006 and refused the application on the basis that the respondent had failed to prove that he was in a durable relationship with an EEA national. That refusal was the subject of the appeal before First-tier Tribunal Judge V A Lowe.
6. As to the relationship between the appellant and his partner Ms Paulina Paradowska, First-tier Tribunal Judge V A Lowe made the following finding;

“... I accept that looking at the evidence in the round, they are in a durable relationship which is akin to marriage and that they cohabit in a family unit with Ms Paradowska’s daughter.”; [24]

7. It is to be noted at this stage that the respondent does not challenge this finding. What the respondent does challenge, is the way in which First-tier Tribunal Judge V A Lowe went on to resolve appeal before her, and her decision to allow the appeal under the immigration for the reasons set out in subsequent paragraphs of her determination.

The Ground of appeal

8. The respondent advances one ground. That is, First-tier Tribunal Judge V A Lowe was not entitled to allow the appeal as she has, and that the proper course of events was to allow the appeal but remit the matter to the Secretary of State for her to consider whether the discretion vested in her under Regulation 17(4) of the 2006 Regulations, should be exercised in favour of the appellant.

Discussion

9. Before turning to our consideration of the sole ground of appeal, it is it useful to set out the material paragraphs of the determination of First-tier Tribunal Judge V A Lowe. She stated;

“that leaves the issue of the SSHD’s discretion. The ECI’s state that if there is evidence of a durable relationship, the decision maker must consider whether the decision would deter the EEA sponsor from exercising free movement rights.... In my opinion, the decision brings the realistic possibility that Ms Paradowska’s Free movement rights would be impeded.”; [25]

“In weighing up the competing factors in issuing a residence card, the SSHD this has nothing to gain by refusing to do so. The appellant is in a genuine relationship, is a “stepfather” and is

shortly to become a father. He is very familiar with life in the UK and can speak English, the common language of the couple, and presumably has work skills as a former working holidaymaker. He made his original application when he had leave, and although it has been subject to legal tussles on technical points, he does not have a poor immigration history. His many letters of support indicated that he is seen as a man of good character. **The Tribunal exercises the discretion in his favour as YB indicates is intra vires.**" [26] [our emphasis]

10. In **YB (EEA Reg 17(4) - proper approach) Ivory Coast [2008] UKAIT 00062** the Upper Tribunal set out the three-stage approach that should be adopted by decision-makers in deciding whether to issue a residence card to an extended family member of an EEA national under regulation 17(4) of the 2006 Regulations. The Tribunal stated;

“Reg 17(4) only applies if it is first of all established that the person is an extended family member as defined in Reg 8; if that is not established, the decision maker goes no further...”
11. That is in fact what had happened in this case. The respondent refused the application made by the appellant on the basis that the appellant had failed to prove that he was in a durable relationship with an EEA national. That being so the question as to whether the respondent should exercise any discretion under regulation 17(4), did not arise.
12. The correct approach in cases where the Secretary of State has not yet considered the exercise her discretion is to be found in the decision of the Upper Tribunal in **SSH D -v- Ihemedu [2011] UKUT 00340 (IAC)**. In that case, the Secretary of State refused an application for a residence card because she did not accept that the applicant was related to the extended family member, as claimed. The Upper Tribunal found that the immigration judge below, had erred in finding that the

applicant was entitled to a residence card for the sole reason that he was an extended family member as claimed. The Upper Tribunal held;

“..Regulation 17(4) of the 2006 Regulations confers on the decision-maker discretion as to whether a person found to be an OFM/extended family member is to be granted a residence card. In exercising that discretion matters such as whether an applicant has entered the UK lawfully or otherwise are plainly relevant (although not necessarily determinative: see YB (EEA reg 17(4) - proper approach) Ivory Coast [2008] UKAIT 00062 and Aladeselu and Others (2006 Regs - reg 8) Nigeria [2011] UKUT 00253 (IAC)). But in this case the Secretary of State had not yet exercised that discretion and so the most the IJ was entitled to do was 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....”

13. At the hearing before us, Mr Muman on behalf of the appellant submitted that a careful reading of the determination of the First-tier Tribunal here, does not in fact disclose an error of law. He submitted that the appellant's reading of the determination of First-tier Tribunal Judge V A Lowe was not that she had exercised discretion in favour of the respondent, but that the decision of the First-tier Tribunal was such that the matter would be remitted to the Secretary of State, for her to consider the exercise of discretion in favour of Mr Lal. In effect, Mr Muman appeared to concede that First-tier Tribunal Judge V A Lowe did not have jurisdiction to determine whether, in the circumstances of this case, discretion should be exercised in favour of the appellant.
14. Mr Muman was right to make of that concession based upon the authorities that we have had regard to above. We reject his submission that the determination of the First-tier Tribunal can be read in the way

that he contends. At paragraph 26, First-tier Tribunal Judge V A Lowe expressly states “The Tribunal exercises the discretion in his favour.”.

15. For the reasons we have set out, it is clear to us that the Secretary of State has not yet undertaken the task that the Regulations require of her, in light of the finding by First-tier Tribunal Judge Lowe that the appellant and his partner are in a durable relationship. That was a finding open to the judge. However, it was not open to First-tier Tribunal Judge Lowe to exercise any discretion in favour of the appellant.

Decision:

16. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
17. We set aside the decision and re-make the decision in the appeal, allowing the appeal against the Secretary of State’s decision, as not being in accordance with the law, but leaving the matter as to whether to exercise the Reg 17(4) discretion in favour of Mr Lal, to the Secretary of State.

Signed:
Deputy Upper Tribunal Judge Mandalia

Date: