



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

Appeal Number: IA/47550/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision and Reasons  
Promulgated**

**On 8 December 2015**

**On 14 December 2015**

**Before**

**UPPER TRIBUNAL JUDGE STOREY**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR HATTAB GMATI**

Respondent

**Representation**

For the appellant: Mr I Jarvis, Home Office Presenting Officer

For the respondent: no appearance by or on behalf of the respondent

**DECISION AND REASONS**

1. There was no appearance by or on behalf of the respondent (hereafter the claimant), a citizen of Tunisia, in relation to an appeal brought by the appellant (hereafter the SSHD) against a decision of the First tier Tribunal dated 14 May 2015 allowing his appeal on the basis that he was in a durable relationship with a Polish citizen. I decided to exercise my discretion to proceed with the hearing in the absence of one of the parties.

2. The grounds of appeal were that the First tier Tribunal judge had erred in allowing the appeal outright rather than only allowing it insofar as it remained outstanding for the SSHD to exercise her discretion under regulation 17(4) of the Immigration (European Economic Area) Regulations 2006 as to whether to grant a residence card.
3. I can see no possible retort to this ground. In refusing the claimant a residence card, the respondent had stated that it was not accepted that the couple were in a genuine relationship as husband and wife. It was only at the hearing that it transpired that the couple had not undergone a marriage recognised in English law, the couple having been married in Tunisia by proxy on 20 March 2014. The judge went on to allow the appeal on the alternative basis that the couple were in a durable relationship and thus satisfied her requirements of the EEA Regulations as apply to extended family members. It is settled law that it is not for a judge on an appeal to exercise the regulation 17(4) discretion when it has not as yet been exercised by the SSHD.
4. There is, however, a more fundamental error on the part of the judge. The claimant had never applied as an extended family member. He had applied as a family member. Thus a decision on any application as an extended family member had not yet been made and it went beyond the jurisdiction of the judge to decide this matter.
5. In light of the above I conclude that the judge materially erred in law and his decision is set aside.
6. In re-making the decision it seems to me that there can only be one outcome and that is to dismiss the appeal. The claimant had applied as a spouse and he does not dispute the judge's finding that he was not in English or Polish law a spouse.
7. Even if I am wrong about that, it seems to me that it would still remain that the matter remains outstanding before the SSHD and that, in light of the fact that she had no prior opportunity to consider the state of the evidence regarding whether the couple were in a durable relationship and so qualified under regulation 8, she could not be shut out from examining that matter afresh. In this regard I note that the judge's reasons for finding the couple were in a durable relationship were also, clearly, flawed. Despite noting that relationships of less than 2 years duration could only be considered on an exceptional basis (see [29]), the judge nowhere explained why he considered the couple's relationship to constitute an exception. Even at the date of hearing in May 2015 it was less than two years (it was said to have commenced in August 2013). I note further that despite being duly notified of the date of the Upper Tribunal hearing neither the claimants nor his partner attended and gave no explanation for their absence. Had they attended, then, in the context of my re-making of the decision (a possibility they could not discount), Mr Jarvis would have had an opportunity to test their evidence. They have prevented

any such examination by failing to attend. In such circumstances it would be contrary to the interests of justice for there to be on my part any artificial preservation of the judge's findings regarding the couple's relationship. An EEA right of residence must be based on fulfilment of substantive conditions. Whether they have been fulfilled will be a matter for the SSHD upon any application by the claimant.

8. For the above reasons:

The First tier Tribunal erred in law and its decision is set aside;

The decision I re-make is that the claimant's appeal is dismissed.

Signed

Date:

Judge of the Upper Tribunal