



IAC-AH-KRL-V1

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

Appeal Number: IA/02752/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 15th January 2016**

**Decision & Reasons Promulgated
On 22nd January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**RAGAB ABDELSALAM RAGAB MOHAMED HAFIDA
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Mr M Hoshi of Sabeers Stone Greene Solicitors

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a decision of Judge Herlihy of the First-tier Tribunal (the FtT) promulgated on 24th July 2015.
2. The Respondent before the Upper Tribunal was the Appellant before the FtT and I will refer to him as the Claimant.

3. The Claimant is a male Egyptian citizen born 24th April 1988 who on 25th June 2013 applied for a Residence Card as confirmation of a right to reside in the United Kingdom.
4. The application was made on the basis that the Claimant had married Izabela Kwiatek, a Polish citizen (the Sponsor). It was therefore contended that the Claimant is the family member of an EEA national and entitled to a Residence Card pursuant to regulation 7 of the Immigration (European Economic Area) Regulations 2006 (the 2006 regulations).
5. The application was refused on 6th January 2015, the Secretary of State issuing a Notice of Immigration Decision refusing the application with reference to regulations 7 and 8(5) of the 2006 regulations. The Secretary of State's reasons for refusal are contained in a letter dated 6th January 2015 which may be summarised as follows.
6. The application was refused with reference to regulation 7, because it was not accepted that the Claimant was married to his EEA national spouse because he had not provided a valid marriage certificate. An Islamic marriage certificate was not legally recognised.
7. The Secretary of State went on to consider the application with reference to regulation 8(5) of the 2006 regulations which for ease of reference I set out below;

'A person satisfies the condition in this paragraph if the person is a partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.'
8. The Secretary of State did not accept that the Claimant had provided sufficient documentation to prove that he is in a durable relationship. The Secretary of State explained that on 30th September 2014 a visit was undertaken at the Claimant's home address and evidence from individuals living there, indicated that the Claimant was not in a durable relationship with the Sponsor.
9. The Claimant appealed and the appeal was heard by the FtT on 29th June 2015. The FtT heard evidence from the Claimant and Sponsor. The FtT found that the Claimant had not proved that he and the Sponsor had entered into a valid marriage.
10. The FtT went on however to find that the Claimant and Sponsor are in a durable relationship and therefore satisfied regulation 8(5) of the 2006 regulations. On that basis the FtT allowed the appeal.
11. The Secretary of State applied for permission to appeal and relied upon Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340 (IAC). In summary it was contended that because the FtT had found the Claimant to be an extended family member under regulation 8(5), this meant that the issue of a Residence Card to an extended family member was a matter of

discretion, pursuant to regulation 17(4) of the 2006 regulations. Because the Secretary of State had not yet exercised that discretion, the FtT should have allowed the appeal to the extent that the Secretary of State's decision was not in accordance with the law, and thereafter the Secretary of State would have to consider whether discretion should be exercised.

12. Permission to appeal was granted on 4th November 2015. Following the grant of permission the Claimant did not submit a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008.
13. Directions were issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision should be set aside.

Submissions

14. At the hearing on 15th January 2016 Mr Bramble relied upon the grounds contained within the application for permission to appeal.
15. Mr Hoshi relied upon a skeleton argument dated 13th January 2016 and argued that the decision of the FtT did not prevent the FtT from exercising discretion.

My Conclusions and Reasons

16. The FtT erred in law as contended by the Secretary of State. The appeal was allowed on the basis that regulation 8(5) of the 2006 regulations was satisfied. The FtT did not accept that the Claimant and Sponsor had undergone a valid marriage ceremony. Therefore the FtT found that the Claimant is an extended family member of the Sponsor.
17. The error made by the FtT was to allow the appeal outright, and to fail to take into account the guidance given in Ihemedu, and I set out below the third paragraph to the head note of that decision;

“(iii) Regulation 17(4) makes the issue of a Residence Card to an OFM/extended family member a matter of discretion. Where the Secretary of State has not yet exercised that discretion the most an Immigration Judge is entitled to do is to allow the appeal as being not in accordance with the law leaving the matter of whether to exercise this discretion in the Appellant's favour or not to the Secretary of State.”
18. In this case the Secretary of State had not exercised discretion, therefore the FtT should have allowed the appeal insofar as the decision of the Secretary of State was not in accordance with the law, leaving the Secretary of State to consider the issue of discretion pursuant to regulation 17(4) of the 2006 regulations.
19. I therefore set aside the decision of the FtT but preserve the finding that the Claimant and Sponsor are in a durable relationship and satisfy regulation 8(5) of the 2006 regulations.

20. I re-make the decision allowing the appeal to the limited extent that the Secretary of State's decision is not in accordance with the law.

Notice of Decision

The decision of the FtT contained an error of law and was set aside. I substitute a fresh decision.

The Claimant's appeal is allowed to the limited extent that the decision of the Secretary of State to refuse to issue a Residence Card is not in accordance with the law. It is now a matter for the Secretary of State to consider exercising discretion in accordance with regulation 17(4) of the 2006 regulations.

Anonymity

No anonymity order was made by the First-tier Tribunal. There has been no request for anonymity made to the Upper Tribunal and no anonymity order is made.

Signed

Date 15th January 2016

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

The decision of the Secretary of State has been found to be not in accordance with the law. This caused the Claimant to appeal and incur an appeal fee. Although the Claimant's appeal has only been allowed to a limited extent, I find that it is appropriate to make a whole fee award of any fee which has been paid or may be payable.

Signed

Date 15th January 2016

Deputy Upper Tribunal Judge M A Hall