Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/35646/2013**

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On June 24, 2014	**On July 23, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

MR HARPINDER SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Hashmi (Legal Representative)
For the Respondent: Ms Johnstone (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant, born January 9, 1979, is a citizen of India. The appellant claimed to have entered the United Kingdom on January 19, 2010. He submitted an application to remain in the United Kingdom but this was rejected on September 3, 2012. He was then served with an overstayer notice on November 2,

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2012. In response the appellant lodged his current application on November 5, 2012 seeking a residence card as an extended family member. He claimed to be the un-married partner of an EEA national who was exercising treaty rights in the United Kingdom. The respondent refused this application on July 13, 2013.

2. On August 28, 2013 the appellant appealed under Regulation 26 of the Immigration (European Economic Area) Regulations 2006.

3. The matter came before Judge of the First-tier Tribunal VA Osborne (hereinafter referred to as "the FtTJ") on March 26, 2014 and in a determination promulgated on April 11, 2014 she found the appellant did not satisfy the EEA Regulations because she was neither satisfied he was living in a relationship akin to a marriage nor that the sponsor was a qualifying person. She went on to dismiss his appeal under article 8 on the basis the appellant did not meet the requirements of Appendix FM and paragraph 276ADE of the Immigration Rules and she further found there were no exceptional circumstances that persuaded her to consider the appellant's family life/private claims outside of the Immigration Rules.

4. The appellant appealed that decision on April 22, 2014. Permission to appeal was granted on May 15, 2014 by Judge of the First-tier Tribunal N Osborne on the basis he accepted it was arguable there was sufficient evidence that the Sponsor was a qualifying person. He also found it arguable that having found they were living together at the date of hearing the length of the separation was of less importance and he maybe should have considered the appeal under article 8 ECHR.

5. There was no Rule 24 response from the respondent.

6. The matter was listed before me on the above date and both the appellant and sponsor were in attendance.

SUBMISSIONS

7. Miss Hashmi submitted there were two grounds of appeal-

    a. Firstly, there was ample evidence the sponsor had been exercising treaty rights. She had been employed between September 2009 and March 2012 and had supplied evidence to support her claim. She had been in receipt of job seekers allowance between March 2012 and April 2013 at which time she had found further employment and she maintained that her employment continued. In order to be

a qualifying person the sponsor had to satisfy Regulation 6 of the 2006 Regulations. She submitted the sponsor satisfied this Regulation because she had a history of working (Regulation 6(1)(b)), she had been a job seeker (Regulation 6(1)(a) and during the period she was unemployed she remained a worker under Regulation 6(1)(b) because she had been employed for more than twelve months before she became unemployed.

b. Secondly, the FtTJ erred by not considering Article 8. The appellant was a father figure towards the sponsor's two children and they had been together since 2011. The FtTJ's concern related to their period of separation and she accepted they were now together. There was a good arguable case for dealing with the case outside of the Immigration Rules.

8. Mr Johnstone submitted the appellant was an extended family member because the parties were not married. He had to satisfy the FtTJ that they satisfied Regulation 8(5) of the 2006 Regulations. The FtTJ considered the evidence and concluded at paragraph [33] that the appellant did not meet the Regulation. The FtTJ was not satisfied they had been together in a relationship akin to marriage. Regardless of whether the FtTJ had erred on whether the sponsor was a qualifying person the application had to be refused under the 2006 Regulations. Even today Miss Hashmi had not challenged this finding in the context of the 2006 Regulations. As regards the second ground of appeal Ms Johnstone submitted that if the appellant could not demonstrate they were in a relationship akin to marriage then there could be no good arguable case for considering this case outside the Rules.

9. I reserved my decision.

ERROR OF LAW DECISION

10. The FtTJ was invited to grant the appellant a residence card. The appellant and sponsor are not married and accordingly the sponsor must satisfy Regulation 8(5) of the 2006 Regulations. This states-

> "A person satisfies the condition in this paragraph if the person is the 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. "

11. In YB (EEA reg 17(4) - proper approach) Ivory Coast [2008] UKAIT 00062 the Tribunal held that in deciding whether to issue

a residence card to an extended family member of an EEA national under Regulation 17(4) the decision-maker should adopt a three-stage approach so as to:

a. First determine whether the person concerned qualifies as an extended family member under Regulation 8.

b. Next have regard, as rules of thumb only, to the criteria set out in comparable provisions of the Immigration Rules. To do so ensures the like treatment of extended family members of EEA and British nationals and so ensures compliance with the general principle of Community law prohibiting discrimination on the grounds of nationality. The fact that a person meets or does not meet the requirements of the relevant immigration rules cannot be treated as determinative of the question of whether a residence card should or should not be issued; and

c. Ensure there has been an extensive examination of the personal circumstances of the applicant/appellant. It may be that in many cases such an examination will have been made in the course of assessing the applicant's position vis a vis the immigration rules. But in principle the third stage is distinct, since the duty imposed by the Directive to undertake "an extensive examination of the personal circumstances..." necessitates a balancing of the relevant factors counting for and against the issuing of such a card."

12. The FtTJ had a 170-page bundle of documents in front of her and she also took oral evidence from both the appellant and the sponsor. The appellant had also provided a witness statement in which he stated he had been in a relationship with the sponsor since 2010 and had been with her and her two children (5 and 7 years of age) since 2010. The sponsor also adopted her statement.

13. In assessing whether the sponsor and appellant satisfy Regulation 8(2)(b) I have referred to the FtTJ's determination and I set out the following findings:-

a. The FtTJ accepted she could take into account all evidence up to and including the date of hearing.

b. The sponsor's council tax bills for 2012/13 and 2013/14 were in the sponsor's sole name at the address they previously claimed to live at and showed she was receiving a 25% discount as a single occupier for parts of those periods.

c. The appellant claimed they separated for two weeks but was vague about the dates whereas the sponsor stated they had lived apart for five months. Both claimed that since their reconciliation they had lived together.

d. The FtTJ accepted they were living together as at the date of hearing but he was unclear as to the length of separation.

e. Based on this information he was not satisfied they were living in a relationship akin to marriage.

14. The FtTJ was unconvinced by the evidence that had been placed before her that the parties were living in a relationship akin to marriage. Strictly speaking the exact wording of the test is whether the parties were in a durable relationship but no issue was taken either in the grounds of appeal or at the hearing before me about this.

15. The FtTJ had to be satisfied the appellant and sponsor had been in a subsisting relationship for two years or more (see Guidance Notes for persons applying for a residence card) and whilst the FtTJ accepted the parties were together at the date of hearing she was clearly not satisfied that this met the Regulations and in paragraphs [27] and [33] she considered a number of matters that she said raised concerns.

16. In particular, she had conflicting evidence about the period they were apart, she had evidence suggesting that only one person was living at their previous address and she raised questions about bank statements that impacted on where they may have lived.

17. The burden of proof is on the appellant to satisfy the respondent and the FtTJ that the Regulations are met. It is clear that the appellant did not do this. If the test had merely required the parties to be together at the date of the application or hearing then this appeal may have had a different outcome. The appellant's application failed because he failed to demonstrate to the FtTJ's satisfaction that the relationship was durable.

18. The FtTJ has given reasons for rejecting the appellant's application based on what was before her. This was a decision she was entitled to take and consequently the appellant's appeal cannot succeed under the 2006 Regulations.

19. I have also considered the other challenge to the FtTJ's decision under the 2006 Regulations. There is evidence the appellant

was either working to some degree or had an income at various times. There is evidence that she was registered with the job centre and had been employed for at least a year albeit the amount of wages paid to her is not totally clear. I accept there is probably sufficient evidence to show the sponsor is a qualified worker. Regulation 6 of the 2006 Regulations would therefore be met.

20. However, for the reasons set out above I reject the submission there has been an error in relation to the FtTJ's conclusion on the residence card application.

21. I turn now to the second ground of appeal. The difficulty the appellant has on this is firstly, there is no removal direction and secondly, the FtTJ rejected his claim about the strength of their relationship.

22. As this application was made after July 9, 2012 any article 8 claim must be considered within the Rules. The appellant cannot satisfy Appendix FM as they do not meet the financial requirements in any event and they would also struggle, based on the above, to satisfy GEN 1.2(iv) of Appendix FM that states the appellant must be "a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application." There was no submission to the FtTJ that he came within EX.1 of Appendix FM.

23. I am asked to find the FtTJ erred by not considering the family life claim under article 8 but little evidence of family life was adduced. The FtTJ rejected the extent of the relationship and there was little evidence placed before the FtTJ about the children. He is not their father. In order to consider family life outside of the Rules there must be a good arguable case. No such case has been presented. Recently in MMM (AP) v The Secretary of State for the Home Department [2013] COSH 43. The court confirmed the appellant has to show there is a good arguable case in order to have his case considered outside of the Rules and the case re-affirmed the findings in R (on the application of Onkarsingh Nagre) 2013 EWHC 720. Based on the evidence presented, the FtTJ was entitled to reach the conclusion she did.

24. The FtTJ found the appellant could not establish private life under paragraph 276ADE HC 395. No challenge has been made to this. The appellant did not place before the Tribunal any evidence that would support an argument that private life should be considered outside of the Rules.

25. The FtTJ made that finding and nothing that has been argued before me today suggests any error.

26. Clearly, an application for a residence card can always be renewed and it may well be that the concerns raised by the FtTJ can be properly addressed with a fresh application. That is of course a matter for the appellant and his legal advisors.

DECISION

27. There was no material error of law. The original decision shall stand and the appeal is dismissed.

28. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I make no fee award I dismissed the appeal.

Signed: Dated:

Deputy Upper Tribunal Judge Alis