Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/4

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
on 29 August 2014	**on 9 September 2014**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MISS MARY TUMBARE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the appellant: no appearance
For the respondent Mr L Tarlow, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant in this appeal is the Secretary of State and the respondent is a citizen of Zimbabwe born on 15 May 1974. I shall however for the sake of convenience refer to the Secretary of State as the appellant and Ms Tumare as the respondent which other designations that they had before the First-Tier Tribunal.
2. The appellant appealed against the decision of the respondent to refuse to issue her with a right of residence as a family member of an EEA national in accordance with the Immigration (European Economic Area)

Regulations 2006 ("the 2006 Regulations"). First-tier Tribunal Judge Britton allowed the appellant's appeal. Permission to appeal was granted by First-tier Tribunal Judge Clayton who said that it is arguable that the Judge erred in law by placing too much weight on documentary evidence alone in finding that the appellant and her Irish EEA national partner were in a subsisting relationship.

3. Thus the appeal came before me.
4. In a letter dated 27 August 2014 the appellant's representatives Danielle Cohen Solicitors stated that on 12 August 2014 the appellant "outlined her intention not to pursue the appeal in the Upper Tribunal and she no longer wishes to contest the decision of the Secretary of State. The client also stated her intention to discuss the matter further in a scheduled meeting in their office on Thursday, 21 August 2014. However, Ms Tumbare never attended the meeting and she has been unreachable ever since." The Solicitor further stated that they will not attend court on Friday, 29 August 2014 unless they receive instructions from their client before the hearing date.
5. The appellant did not appear for the hearing and as the appellant has not specifically withdraw her appeal, I proceeded to hear submissions from the Senior Presenting Officer.
6. The Judge's findings in his determination promulgated on 16 June 2014 states the following.
7. The appellant has produced Council tax Bill's addressed to both the appellant and her sponsor and a letter addressed to the appellant from MKCC at the same address.
8. The appellant's bundle of documents of 245 pages contains evidence that the appellant's sponsor is a self-employed carpenter. There is evidence from the company accountants in relation to his tax returns and income from his property. The sponsor's bank statements show money paid into the account from work carried out by him. On the evidence Judge was satisfied that the appellant and her sponsor have been living together since 2008.
9. The Judge is satisfied that the appellant's sponsor is exercising EEA rights and the appellant is entitled to a residence permit as his EEA family member.
10. The Judge allowed the appeal.

The grounds of appeal

11. The respondent's grounds of appeal state the following which I summarise. The Judge did not take into account that the appellant having been issued with IAS 15A notice to leave the country did not do so and it was not until 22 May 2013 that she made an application pursuant to the 2006 Regulations notwithstanding her claim that she has been in a relationship with her EEA national since 2008. The Judge found it surprising that the EEA national did not attend the hearing as he claimed to have work commitments. The Judge's findings as to there is a durable relationship between the appellant and entry sponsor is manifestly inadequate. The determination does not in any way you look at the appeal in line with the case of **R (Iran) &Ors v Secretary of State for the home Department [2005] EWCA Civ 982** where it was said that it is

incumbent on the Judge to explain why he reached the decision he did.

12. The Judge relied on documentary evidence alone even though the appellants partner was according to the Judge surprisingly not present. The appellant's immigration history had considerable problems including being an over stayer for many years and not making an application for a residence card for at least five years after the start of her purported durable relationship. The Judge clearly misunderstood the requirements pursuant to regulation 8 (5) of the 2006 Regulations.
13. The Judge fell into error when he found that the appellant is entitled to a residence card as an EEA family member. The case of **YB (EEA reg 17 (4), proper approach) Ivory Coast [2008] UK AIT 00062** to which the Judge made no reference, states that Immigration Rule 295D acts as a rule of thumb in the context of durable relationships.
14. The Judge similarly erred in law when finding that the appellant is entitled to a residence card because **YB** makes it plain that if the Secretary of State has not purported to exercise their discretion in regulation 17 (4), that cannot be exercised by the Judge as a primary decision maker. The most the Judge could have done, had this finding be lawful and allow the appeal on the bases that the decision was not in accordance with the law and send it to the Secretary of State awaiting the lawful decision.
15. At the hearing I heard submissions from the senior presenting officer relied on the grounds of appeal and said that the determination lacks reasoning. He added that living together does not necessarily mean a durable relationship and that this brought The Judge into material error and invited me to allow the appeal.

Decision on error of law

16. The Judge in his findings at paragraph 12 to 17 found that he was satisfied on the evidence that the appellant's sponsor is a qualified person in the United Kingdom. This finding was primarily based on the documentary evidence provided. The appellant sponsor did not attend the hearing on the basis that he had work commitments.
17. The Judge having expressed surprise that the appellant sponsor did not attend the hearing, however accepted the appellant's explanation that he had work commitments. The Judge did not take into account the appellant's adverse immigration history in that she was an over stayer and only applied for a residence card five years after the start of her purported durable relationship.

18. The Judge placed too much reliance on the documentary evidence in his finding that the appellant and her sponsor are in durable relationship. He did not follow the correct approach is set out in **YB** that Immigration Rule 295D acts as a rule of thumb in the context of durable relationships. The reasoning in the determination is manifestly inadequate.
19. Furthermore, at paragraph 6 the Judge stated that the appellant in her application form stated she was married to her sponsor yet the appellant's evidence at the hearing was that she is an unmarried partner.
20. In all the circumstances, I find that the Judge fell into material error and therefore I set aside his determination. Furthermore, at paragraph 6 the

Judge stated that the appellant in her application form stated she was married to her sponsor yet the appellant's evidence at the hearing was that she is an unmarried partner.

Conclusions

21. Accordingly I find an error of law in the determination and allow the Secretary of State's appeal.

Decision

The Secretary of State's appeal is allowed.

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Signed by,
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Mrs S Chana
A Deputy Judge of the Upper Tribunal