Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/47006/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 May 2014	**On 6th June 2014**
Extempore Judgment	

Before

UPPER TRIBUNAL JUDGE COKER

Between

MS RHEALYN GARCIA LAZARO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss L Appiah, Counsel instructed by Bloomsbury Immigration Specialists
For the Respondent: Ms A Everett, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the appeal of Ms Lazaro who was granted permission to appeal against the decision of the First-tier Judge on the grounds that the judge appears to have found it determinative that the parties had not cohabited for a two year period and accepted the respondent's policy in this respect

when there is no specific requirement in the Regulations themselves about a durable relationship necessitating a two year period of cohabitation.

2. The application by Ms Lazaro for a residence card was refused by the Secretary of State on 23 October 2013 and in that refusal letter the Secretary of State says:

> "To assess whether your relationship is durable we would expect you to demonstrate that you have been living together with your EEA national sponsor for at least two years. Equally it is reasonable to expect that you both intend to live together …",

and then goes on to say:

> "This department will not normally accept that there is a durable relationship where these criteria are not met though each case is considered on its merits. There will be occasions where the criteria are not met but we accept that Regulation 8(5) has been met."

There is then reference to the evidence that has been provided and the Secretary of State then says: "However, as mentioned above this office will not accept that there is a durable relationship when any previous marriage has not broken down."

3. The First-tier Tribunal Judge in paragraph 10 refers to very limited evidence and says that the only conclusion which he can reach is that the appeal must fail. He then goes on to say:

> "The respondent has made clear in the decision letter that her practice is not to accept that parties are in a durable relationship unless and until they can establish that they have been living together for at least two years. It is a matter of admission that the parties only started living together in September 2012 and that in itself is sufficient to dispose of the appeal."

If he had stopped there it is clear that that would have been an error of law because there is no direct correlation between the criteria for durable relationship as set out in the Immigration Rules and the content of a durable relationship in the Regulations.

4. The judge went on to say:

> "In the refusal letter the respondent acknowledged that there could be cases where a durable relationship could be established by a period of less than two years' cohabitation but the difficulty in this case is that in the absence of detailed witness statements from the appellant and Mr Gomes I am not in a position to make any findings in fact as to the relationship. I acknowledge there are various documents headed 'statement of truth' from individuals who say that

> they have known the parties for some time but what I regard to be of particular concern is that there is simply no documentation at all from Mr Gomes to confirm that he regards himself as being in a durable relationship with the appellant and for that reason the only conclusion to which I can come is that this appeal falls to be dismissed."

5. Miss Appiah submits that permeating that decision by the First-tier Tribunal Judge is the respondent's view that unless the couple have been living together for two years then it is not a durable relationship. Ms Everett on the other hand says that the documents are insufficient to enable either the Secretary of State or the judge to have come to any other conclusion and that the summary in the second part of paragraph 10 is sufficient to dispose of the appeal and there is no error of law. The judge had clearly considered the matters as to whether or not it fell within an exception. The letter submitting the application for the residence card states that documents submitted included photographs, greeting cards, a joint bank statement, a Premier Inn booking, a joint camping booking and a sponsorship undertaking from Mr Gomes for Ms Lazaro. Although there is no specific witness statement those documents do indicate that they are living together, particularly a sponsorship undertaking indicates that Mr Gomes is supportive and considers the couple to be living together in a durable relationship. He had not signed a sponsorship undertaking which covers him for a number of years. He would not do that if he thought that he was not going to be living with her for the foreseeable future.

6. On the other hand those listed documents are not actually in the bundle of papers. It was a paper application before the First-tier Tribunal and the directions that were sent out with that notice stated:

> "Any written evidence and submissions must be received in this office, i.e. the Tribunal by 2 January 2014. If you have no further evidence or submissions no action from you is required."

7. But it seems to me that from the letter of application sent to the Secretary of State listing various documents which then leads to a refusal which then leads to an appeal it is reasonable for an appellant to assume that all the documents that had been submitted would be included in the papers that were put forward by the respondent to that appeal.

8. I am satisfied that the Secretary of State incorrectly imported into her consideration of a durable relationship a two year period as required by the Immigration Rules and also failed to consider the evidence that was before her in connection with whether irrespective of the two years the couple were in a durable relationship. That was then compounded in the appeal by the acceptance by the First-tier Judge that durable relationship had to be defined through the prism of the Immigration Rules. Although he did look at the other evidence that was in front of him I am satisfied that the combination of failing to consider the letter that was submitted with the application for the residence card and the acceptance of the

definition of durable relationship put forward by the Secretary of State the First-tier Tribunal Judge has erred in law such that the decision should be set aside to be remade.

9. I am satisfied that no relevant findings of fact have been made because of errors in considering documentation that had been submitted by the appellant but through no fault of his, was not before the judge. In accordance with the President's Practice Direction this matter should be remitted to the First-tier Tribunal for a full hearing on the facts with no findings retained, to be heard by any First-tier Judge other than Judge Morrison.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision and remit it to the First-tier Tribunal to be re-heard, no findings preserved.

Signed Date 5th June 2014

Upper Tribunal Judge Coker