



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/52842/2013**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On May 30, 2014

**Determination
Promulgated**

On June 2, 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

**MR GERISHON KATANA KENGA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person

For the Respondent: Mr Saunders (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant, born April 15, 1984, is a citizen of Kenya. On June 19, 2013 he applied for residence card based on his marriage to Marina Constantin on August 25, 2012. The respondent refused his application on November 20, 2013 on the grounds she was not satisfied the appellant was a family

member and because the appellant had failed to show Marina was a qualified person under Regulation 6 of the Immigration (European Economic Area) Regulations 2006 (hereinafter referred to as the 2006 Regulations).

2. On December 12, 2013 the appellant appealed under section 82(1) of the Nationality, Immigration and Asylum Act 2002 and under Regulation 26 of the 2006 Regulations.
3. The matter was listed as a paper case before Judge of the First-tier Tribunal Grimmett (hereinafter referred to as "the FtTJ") on February 20, 2014 and in a determination promulgated on February 25, 2014 she dismissed his appeal under the 2006 Regulations.
4. The appellant appealed that decision on March 4, 2014. Permission to appeal was granted by Judge of the First-tier Tribunal Cruthers on the basis the FtTJ may have erred having regard to all of the grounds combined.
5. The matter was listed before me on the above date and the appellant and Ms Constantin were in attendance.

SUBMISSIONS

6. The appellant relied on his typed grounds of appeal and submitted that the FtTJ had failed to have regard to his letter of December 5, 2013 in which he set out all of his circumstances and in addition she failed to consider the various letters of support that confirmed their relationship. He also submitted that the FtTJ had erred when considering Regulation 6(2) because sub-section (iii) made it clear that if the EEA person had been unemployed for more than six months but could show he/she had been seeking employment and had a genuine chance of being engaged then she was a jobseeker under Regulation 6(1)(a). The FtTj erred because she only considered the position under Regulation 6(2)(ii) and failed to consider the position under Regulation 6(2)(iii).
7. Mr Saunders initially submitted that the FtTJ considered the evidence and made findings open to her at paragraph [7] of her determination regarding the issue of whether the appellant was a family member. However, after hearing the submissions of the appellant and upon further consideration of the appellant's original bundle he accepted that the FtTJ had failed to assess all of the available evidence and her finding that the appellant was not a family member was inadequate based on the evidence. He also accepted that the FtTJ should have considered Ms

Constantin's evidence that she had attempted to gain employment.

ERROR OF LAW FINDING

8. The appellant provided a letter on December 5, 2013 and this letter addressed the respondent's concerns and he also provided five letters from various people confirming the relationship including a letter from Ms Constantin. There was no evidence that the FtTJ had considered any of this evidence.
9. There was also evidence Ms Constantin had been seeking employment and had been offered a job albeit she turned it down due to the distance involved. The FtTJ should have considered this evidence under Regulation 6(2). Regulation 6(2)(iii) is an alternative to Regulation 6(2)(ii).
10. In light of my findings above and taking into account the observations from both the appellant and Mr Saunders I am satisfied there was an error in law.


FACTORS TO CONSIDER FOR REMAKING OF THE DECISION

11. Mr Saunders did not require either the appellant or Ms Constantin to give evidence. In IS (marriages of convenience) Serbia [2008] UKAIT 00031 the Tribunal held that the burden of proving that a marriage is not a "marriage of convenience" for the purposes of the EEA Regulations rests on the appellant but he is not required to discharge it in the absence of evidence of matters supporting a suspicion that the marriage is one of convenience (i.e. there is an evidential burden on the Respondent). In Papajorgji (EEA spouse - marriage of convenience) Greece [2012] UKUT 00038(IAC) the Tribunal held that there is no burden at the outset of an application on a claimant to demonstrate that a marriage to an EEA national is not one of convenience.
12. There was evidence before me that the parties were married in the form of a marriage certificate. There were two letters from the appellant and Ms Constantin. Mr Saunders did not require them to give evidence even though they were present at the hearing. In the original bundle there was evidence from four other witnesses about the extent of their relationship.

13. I was satisfied this was not a marriage of convenience and I accept the written evidence of both the appellant and Ms Constantin about their claim to be married.
14. I find the appellant is a family member for the purposes of the 2006 Regulations.
15. This is an EEA application and as an in-country application it is not caught by s 85(5) of the 2002 Act. I had evidence before me of the appellant's wife's attempts to gain employment. Some of this evidence was also before the FtTJ.
16. I accept the appellant's wife comes within Regulation 6(2)(iii) as she has a genuine chance of employment and has been seeking employment. I understand she has now been offered employment.
17. The appellant's appeal against the respondent's decision to refuse him a residence card is therefore allowed because he satisfied the requirements of Regulation 17 of the 2006 Regulations.

DECISION

18. There was a material error of law. I set aside the FtTJ's decision.
19. I allow the appeal under the 2006 Regulations.

 20. 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 because I have allowed the appeal based on the evidence that was submitted after the respondent's refusal letter.

Signed:

Dated:

Deputy Upper Tribunal Judge Alis

SK Alis