



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

Appeal Number: IA/17686/2014

THE IMMIGRATION ACTS

Heard at Field House

On 6th March 2015

**Determination
Promulgated**

On 10th March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE LINDSLEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR DHAYALAN KANAGARATNAM

Respondent

Representation:

For the Appellant: Mr S Kandola, Home Office Presenting Officer

For the Respondent: Mr D Bazini, Counsel, instructed by KTS Legal Ltd

DETERMINATION AND REASONS

Introduction

1. This is an appeal by the Secretary of State but I will refer to the parties as they were before the First-tier Tribunal.
2. The appellant is a citizen of Sri Lanka born on 8th March 1985. He arrived in the UK on 25th September 2009 as a student. He had leave in this capacity until 6th September 2013. On 6th September 2013 he applied for an EU residence card as the unmarried partner of Ms Kristina

Harlamova, a citizen of Latvia born on 22nd April 1990 in accordance with Regulations 8(5) and 17(4) of the Immigration (EEA) Regulations 2006 (henceforth the EEA Regulations).

3. This application was refused without a right of appeal. The appellant applied again on 2nd February 2014 and was refused on 31st March 2014 with a right of appeal. His appeal against the decision was allowed by First-tier Tribunal Judge Russell in a determination promulgated on the 28th November 2014.
4. Permission to appeal was granted by Judge of the First-tier Tribunal Mark Davies on 13th January 2015 on the basis that it was arguable that the First-tier judge had erred in law in allowing the appeal outright rather than simply to the extent of finding the decision was not in accordance with the law and remitting the matter for a decision on the issuing of a residence card to the Secretary of State.
5. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions

6. Mr Kandola relied upon the grounds of appeal. These contend that it was not permissible for Judge Russell to have allowed the appeal outright as the Secretary of State had not considered whether to exercise discretion under Regulation 17(4) of the EEA Regulations to grant a residence card. In such circumstances the appeal should only have been allowed to the extent that the decision was not in accordance with the law, see Ihemedu (OFMs – meaning) Nigeria [2011] UKUT 00340.
7. Mr Bazini agreed that there was an error of law as contended by the Secretary of State. However he argued that the way in which these matters is dealt with by the Secretary of State causes unnecessary delays. Consideration should be given to exercising discretion in the alternative in the initial refusal letter so that the whole matter could be dealt with by the First-tier Tribunal.

Conclusions

8. As the Secretary of State had not considered whether to exercise discretion to issue the appellant with a residence card as an extended family member the correct legal approach, once the First-tier Tribunal had found there was a durable relationship between the appellant and his partner, was to remit the matter to the Secretary of State for a decision as to whether she would exercise discretion in the appellant's favour to issue the residence card given the finding he was in a durable relationship with Ms Harlamova. This is the approach to Regulation 17(4) of the EEA Regulations as is set out in Ihemedu in the head note.
9. Judge Russell therefore erred in law in allowing the appeal outright.

10. It would be desirable in the future if the Secretary of State could consider in the alternative whether she would exercise discretion to issue a residence card if the applicant qualified as an extended family member as part of the first decision in the case so all issues could be dealt with on appeal to the First-tier Tribunal at one hearing.

Decision

11. The decision of the First-tier Tribunal involved the making of an error on a point of law.
12. The reasoning of the First-tier Tribunal is preserved up to and including paragraph 17 of the determination but the final decision of the First-tier Tribunal is set aside.
13. The final decision is remade to read as follows. The appeal is allowed to the extent that the refusal is found to be not in accordance with the law and the matter is remitted to the Secretary of State to consider whether she will exercise discretion to issue a residence card in accordance with Regulation 17(4) of the EEA Regulations.

Deputy Upper Tribunal Judge Lindsley

6th March 2015

TO THE RESPONDENT: FEE AWARD

As I have allowed the appeal and because a fee has been paid I have considered making a fee award. I have decided to make no fee award as I was not requested to make one and this was also the decision of Judge Russell in the First-tier Tribunal who determined the substantive issue in the appeal.

Deputy Upper Tribunal Judge Lindsley

6th March 2015