



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/30048/2014

THE IMMIGRATION ACTS

Heard at Field House  
On 31 July 2015

Decision & Reasons Promulgated  
On 12 August 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY  
DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR DAMANJEET SHAH SINGH  
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Tarlow, a Home Office Presenting Officer

For the Respondent: Mr Nasim of counsel

DECISION AND REASONS FOR FINDING A MATERIAL ERROR OF LAW

**Introduction**

1. This is an appeal by the Secretary of State for the Home Department.

2. To avoid confusion we refer to the Secretary of State for the Home Department as “the respondent” and Mr Singh as “the appellant”, their designations before the First-tier Tribunal.
3. The appellant is a citizen of India and his date of birth is 9 October 1994. On 18 June 2014 he applied for a Residence Card as a confirmation of a right to reside in the United Kingdom as an extended family member of an EEA National exercising treaty rights in the UK. The respondent refused his application for a residence card on 10 July 2014. The reasons for refusal were that the appellant had not proved that he was a partner of, and in a durable relationship with, a qualifying EEA national as required by Article 8(5) of the Immigration (European Economic Area) Regulations 2006 (‘the Regulations’) and that the appellant had not proved that the EEA national was a qualified person under Regulation 6 of the Regulations.
4. The appellant appealed against that decision to the First-tier Tribunal.

#### **The First-tier Tribunal Judge’s Decision**

5. In a decision promulgated on 27 January 2015 First-tier Tribunal Judge Fowell (‘the judge’) allowed the appeal. By the time of the First-tier Tribunal appeal hearing it was accepted by the respondent that the sponsor was exercising treaty rights at the time of the application for the residence card. The substantive issue for determination before the judge was whether the appellant satisfied the requirement of article 8(5) of the Regulations, namely that he was an extended family member of an EEA national. In this case that would be by virtue of being a partner of, and in a durable relationship with, the sponsor. The judge, having heard evidence from the sponsor and the appellant and having considered the documentary evidence, found that the appellant was an extended family member of the sponsor and allowed the appeal against the refusal to issue a residence card.

## Permission to Appeal

6. The respondent applied to the First-tier Tribunal for permission to appeal against the decision on a single ground, namely that the judge should have remitted the case to the Secretary of State for consideration under Regulation 17(4) of the Regulations instead of allowing the appeal outright. Permission to appeal was granted by Upper Tribunal Judge Deans sitting as a judge of the First-tier Tribunal.

## Discussion

7. At the hearing we heard submissions from Mr Nasim on behalf of the Appellant and Mr Tarlow on behalf of respondent.

## Legal Framework

8. The relevant provisions of the Regulations provide:

### **Regulation 8 (Extended family member)**

(1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).

.....

(5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than the civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.

...

### **Regulation 17 (Issue of residence card)**

...

(4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if –

(a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and

(b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.

(5) Where the Secretary of State receives an application under paragraph (4) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security.

9. Mr Nasim submitted that there was no error of law in the First-tier Tribunal decision. In essence his submissions were that the judge allowed the appeal solely on the basis that Regulation 8(5) of the regulations was met as that was the only matter before the judge, the respondent did not raise Regulation 17(4) at the hearing or in the reasons for refusal letter. In adversarial proceedings it is not open to a party to introduce arguments not canvassed before the judge or in the reasons for refusal letter in support of a claim that the judge made a material error of law. Mr Nasim referred to the fifth paragraph in the reasons for refusal letter arguing that it states clearly that an extensive examination of personal circumstances is undertaken and a decision made as to whether it would be appropriate to issue a residence card. He submitted that it was clear that the decision maker had matters at the forefront of his mind that were not limited to Regulation 8 and that there was nothing in the letter to suggest that the respondent had reserved the position with regard to regulation 17(4). He gave an example of recent Tier 1 cases where refusal letters included a specific reference to the reservation of the respondent's position in matters not dealt with in the letter. There was no error of law because regulation 17(4) was not an issue before the judge.
10. We asked Mr Nasim what he submitted the effect was of the appeal being allowed and how the respondent should implement the determination. Mr Nasim did not contend that the respondent was required to issue a residence card but that a decision should be made on the basis of the findings on Regulation 8. We referred Mr Nasim to the fact that the appeal was against the decision itself, namely, a decision to refuse to issue a residence card. Mr Nasim's submissions were that the refusal letter determines the focus and issues that will be before the First-tier Tribunal.

11. Mr Tarlow submitted that the judge ought to have remitted the matter to the respondent to exercise her discretion with the fact findings in place. Regulation 17(4) provided that the respondent had a discretion as to whether or not to issue a residence card. He relied on the case of Ihemedu (OFMs-meaning) Nigeria [2011] UKUT 340 (IAC) at paragraph 20. The judge ought to have allowed the appeal only on the basis that it was not in accordance with the law.

### **Error of Law**

12. We find that there was a material error of law in the First-tier Tribunal judge's decision. The appeal was against a decision of the respondent to refuse to issue a residence card. It was that decision that was under appeal not the reasons for the decision. The appeal against the decision was allowed. At paragraph 2 of the decision the judge records that *'This is an appeal against the refusal of the Appellant's application for a residence card...'* The judge then went on to set out the reasons for the refusal. Whilst the reasons for the refusal form the basis for the decision the appeal was not against the reasons.
13. This difference may not be material in many appeals but it is clear from Regulation 17(4) that the Secretary of State for the Home Department has a discretion as to whether or not a person is to be granted a residence card, even if found to be an extended family member.
14. The First-tier Tribunal in the Ihemedu case had made a finding that the claimant was entitled to a residence card. The judge in the instant case did not make such a finding but by allowing the appeal against the refusal to issue a residence card the judge effectively denied the respondent the opportunity to exercise her discretion and consider other relevant matters notwithstanding the finding on Regulation 8. At paragraph 20 of Ihemedu the Upper Tribunal held:

'..... In exercising that discretion matters such as whether an applicant has entered the UK lawfully or otherwise are plainly relevant (although not necessarily determinative...). But in this case the Secretary of State had not yet exercised that discretion and so the most the IJ was entitled to do was allow the appeal as being not in

accordance with the law leaving the matter of whether to exercise the reg 17(4) discretion in his favour to the Secretary of State...'

15. Accordingly, the judge here erred by allowing the appeal in full. The proper course was to allow the appeal on the Regulation 8 issue leaving the matter of whether to exercise the Regulation 17(4) discretion in the appellant's favour to the respondent.

## Conclusions

16. There was a material error of law such that the decision of the First-tier Tribunal is set aside to the extent that the appeal was allowed in full. The finding of the judge that the appellant was an extended family member of the sponsor and therefore satisfied the requirement of article 8(5) of the Regulations is maintained.
17. The respondent asked for the matter to be remitted to the Secretary of State for consideration under Regulation 17(4) of the Regulations if the appeal was successful. In Greenwood (Automatic Deportation: Order of Events) [2014] UKUT 00342 (IAC) the Upper Tribunal considered the power of the First-tier Tribunal to 'remit' a matter to the respondent. At paragraph 16 the Upper Tribunal indicated as follows:

16. As I indicated above, there is a third possible error in paragraph 23 of the Tribunal's decision. In the second sentence, the Tribunal says:

"Given the fundamental nature of the respondent's error, we remit the matter back to the respondent for the error to be remedied".

17 Ignoring the pleonasm of "remit back" I think it is in general doubtful whether the First-tier Tribunal has jurisdiction to remit a matter to a decision-maker. It has a power to allow or dismiss an appeal; and if allowing an appeal it has a power to give directions, with which the Secretary of State must comply. It does not formally have the power to quash the decision under appeal, but it is well understood that a decision of the Tribunal to the effect that the decision was not in accordance with the law prevents the decision-maker from relying on it or acting on it, so that it is to that extent of no effect. In those circumstances, if the decision is one which results from an application made by an individual, the position is that the application is outstanding, awaiting a lawful decision. No remittal is necessary. Any circumstances arising from the fact that an application has

not yet been decided (for example under s.3C of the 1971 Act, or s.77 of the 2002 Act) will continue, and will be treated as not having been interrupted by the unlawful decision. If there is any doubt about the matter, the First-tier Tribunal, in allowing the appeal, can direct the decision-maker to treat the applicant accordingly.

18. We conclude that a direction is appropriate rather than remittal as requested. The respondent is directed to consider the appellant's application in accordance with the findings of the First-tier Tribunal judge on Regulation 8(5).
19. We have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence we do not consider it necessary to make an anonymity direction.

### **Notice of Decision**

The appeal is allowed. The decision of the First-tier Tribunal to allow the appeal is set aside. The finding of the judge that the appellant was an extended family member of the sponsor and therefore satisfied the requirement of article 8(5) of the Regulations stands. The respondent is directed to reconsider the application in accordance with the findings of the First-tier Tribunal Judge on Regulation 8(5).

Signed P M Ramshaw

Date 6 August 2015

Deputy Upper Tribunal Judge Ramshaw