



IAC-FH-CK-V1

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

Appeal Number: IA/35480/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 11th August 2015**

**Decision & Reasons Promulgated
On 2nd December 2015**

Before

**UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE BAGRAL**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LIAQAT ALI KHAN

(anonymity direction not made)

Respondent

Representation:

For the Appellant: Mr R Hopkin, Senior Home Office Presenting Officer

For the Respondent: Mr R Singer, Counsel

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal promulgated on 9th April 2015 allowing the appeal of the Respondent (hereinafter “the claimant”) against the Secretary of State’s refusal to grant him a residence card.
2. The claimant is a national of Pakistan born on 1st May 1972. He applied for a residence card on the basis that he was in a durable relationship with an EEA national exercising Treaty rights in the United Kingdom. The application was refused by the Secretary of State as she considered that

insufficient evidence had been provided to establish that the claimant was in a durable relationship. The judge heard evidence from the claimant and his partner and found that their evidence was overwhelmingly convincing and he accepted that the claimant was in a durable relationship with his partner, who was a qualified person pursuant to the EEA Regulations.

3. The appeal in the circumstances was allowed outright by the judge. We agree that the judge erred in doing so. We cannot help wondering if the experienced judge who decided the appeal would have erred if the Secretary of State had given him the assistance that he was entitled to expect but she was not represented before the First-tier Tribunal.
4. We agree and accept that the judge was constrained by law to allowing the appeal on the basis that the Secretary of State's decision was not in accordance with the law. It was not suggested before us that the power to allow the appeal on this basis has been limited by amendments to the Regulations and/or the Nationality Immigration and Asylum Act 2002.
5. It is on that very narrow and limited basis that we set aside the decision of the judge and we substitute a decision allowing the appeal to the extent that the decision is not in accordance with the law. It is for the Secretary of State to decide what action to take given the First-tier Tribunal's findings.
6. At the hearing Mr Singer has drawn to our attention in the claimant's Rule 24 response that there is an application for costs for today's hearing under Rule 10 paragraph 3(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008. It was his point that the claimant tried to agree this disposal before the hearing.
7. We have heard submissions from both representatives with regards to this application. Mr Hopkin, who appears on behalf of the Secretary of State, asked for further time to consider that application and respond to it. We considered that the Secretary of State should be granted such time and as a rider to our decision we issued directions orally at the hearing.
8. The Secretary of State's times for compliance was extended slightly by agreement between the parties.
9. We have seen written submissions from Mr Hopkin. It is not clear to us that the claimant's Reply which should have been before Mr Hopkin was ever received by the Secretary of State.
10. There is written evidence before us that it was returned unopened to the claimant after the hearing. We acknowledge that the claimant and his partner have been believed in other matters but it makes no sense to us that the Secretary of State would return a notice unopened. We are not going to be able to resolve this issue without expending disproportionate time and cost. We find that someone has made a mistake. It might be that the claimant sent it to the wrong address but we just do not know. Whilst the claimant might reasonably be expected to have wanted to

compromise the appeal we can think of no sensible reason why the Secretary of State would have wanted to frustrate his attempts at all and especially not when the disposal was agreed quickly before us.

11. In order to assist the claimant we would have to make a wasted costs order. We have no other power to order costs between the parties. We understand Mr Singer's concern that the claimant has been put to unnecessary expense. His application is for an order to protect his client and not to punish the Secretary of State.
12. Clearly there is no basis for a finding that the Secretary of State has behaved improperly. There is no malice here. At worst the Secretary of State has been negligent or unreasonable. We do not regard failing to respond to an offer before the hearing as inherently "negligent" or "unreasonable". Negligence is not alleged and we doubt that failing to respond to an offer can be seen as negligent. We are not sure that there is any duty to respond in a way that differs materially from the duty to be reasonable. It might have been unreasonable if the Secretary of State had compounded the error of ignoring the notice (something that has not been proved) by, for example, declining to respond to a follow-up letter but that is not alleged here.
13. We find it regrettable that the case was not resolved until the hearing but, even if the Secretary of State had received the notice, we are not satisfied that she had shown the degree of indifference or worse that would be necessary to support a finding of unreasonable conduct.

Decision

14. We make no order for costs.
15. We allow the Secretary of State's appeal. We set aside the decision of the First-tier Tribunal and substitute a decision allowing the claimant's appeal to the extent that we rule that the Secretary of State did not make a lawful decision and so the application remains outstanding.



Signed

Date

Deputy Upper Tribunal Judge Bagral