



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

Appeal Number: IA/38920/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 28 September 2015**

**Decision & Reasons  
Promulgated  
On 29 September 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE FROMM**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MOHAMMED AKIL CHERIYAN ABDULLA HAJI  
(NO ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr T Melvin, Home Office Presenting Officer  
For the Respondent: None

**DECISION AND REASONS**

1. The respondent to this appeal is a citizen of India, born on 20 November 1986. The appellant is the Secretary of State for the Home Department, who has appealed with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Wellesley-Cole, allowing the respondent's appeal against a decision of the Secretary of State, dated 19 September 2014, refusing to issue him a residence card acknowledging his right of residence as the extended family member of an EEA national. He had applied on the basis he was in a durable relationship with Ms Paulina Grochowska, a Polish National but the Secretary of State was not satisfied that sufficient evidence had been submitted to establish that they were in a

durable relationship so as to satisfy Regulation 8(5) of the Immigration (European Economic Area) Regulations 2006 (“the EEA Regulations”).

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal. I shall therefore refer to Mr Haji from now on as “the appellant” and the Secretary of State as “the respondent”.
3. I was not asked and see no need to make an anonymity direction.
4. The judge heard oral evidence from the appellant and Ms Grochowska and considered the documents filed in support of the appeal. Having done so she found as fact that the appellant and Ms Grochowska were in a durable relationship and therefore satisfied Regulation 8(5). The final sentences of her decision read as follows:

“15 ... I am of the opinion that this decision was not in accordance with the law and for the above cited reasons therefore the Appeal accordingly succeeds.  
...  
16. The Appeal is accordingly allowed.”
5. The judge made a whole fee award because the appeal had been allowed.
6. The respondent sought permission to appeal from the First-tier Tribunal on the basis the judge’s decision was erroneous in failing to recognise that she could not allow the appeal outright. The respondent had not applied her discretion under Regulation 17(4) of the EEA Regulations, which states that the Secretary of State *may* issue a residence card to an extended family member. The judge should only have allowed the appeal to the limited extent that the decision would go back to the Secretary of State to consider the exercise of discretion.
7. I heard argument on the question of whether the judge’s decision was vitiated by material error of law from Mr Melvin. In summary he relied on the grounds seeking permission to appeal. The appellant was unrepresented and did not attend.

### **Error of law**

8. Although there is some ambiguity in the judge’s final paragraph, she makes no reference at all to the need for the respondent to consider the exercise of discretion and I therefore incline towards the view that she made a material error of law by allowing the appeal outright as opposed to the limited extent that the case remained before the respondent to consider the exercise of discretion. I therefore set aside her decision.

### **Substituted decision**

9. There is no challenge to the judge’s finding that there is a durable relationship and this finding is not affected by her error with regards to the disposal of the appeal. It therefore stands. All that is required is that I substitute a decision allowing the appeal to the limited extent that

Regulation 8(5) has been met but it is a matter for the respondent to consider the exercise of discretion under Regulation 17(4).

## **NOTICE OF DECISION**

The First-tier Tribunal made a material error on a point of law and its decision allowing the appeal is set aside. The following decision is substituted:

The appeal of the appellant is allowed to the limited extent that the requirements of Regulation 8(5) of the EEA Regulations are met. The respondent must now consider the exercise of discretion as to whether to issue a residence card.

No anonymity direction has been made.

**Signed  
2015**

**Date 28 September**

**Judge Froom, sitting as a Deputy Judge of  
the Upper Tribunal**