



Self-Typed

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

Appeal Number: IA/47482/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 27 August 2015**

**Decision & Reasons Promulgated  
On 2 September 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

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

Appellant

**and**

**MR WAQAS ARSHAD  
(ANONYMITY DIRECTION NOT MADE)**

Respondent/Claimant

**Representation:**

For the Appellant: Mr P. Duffy, Specialist Appeals Team

For the Respondent: Miss Shaheen Haji, Counsel instructed by M.J. Immigration

**DECISION AND REASONS**

1. The Secretary of State (“SSHD”) appeals to the Upper Tribunal (“UT”) from the decision of the First-tier Tribunal (Judge Pirotta sitting at Birmingham on 5 March 2015) allowing on Article 8 grounds the claimant’s appeal against the decision by the SSHD to refuse to issue him with a residence card as confirmation of his right to reside in the United Kingdom as the extended family member of an EEA national exercising treaty rights here. With the agreement of Mr Duffy, the claimant cross-appeals against the dismissal of his appeal under the EEA Regulations. The First-tier Tribunal

("FTT") did not make an anonymity order, and I do not consider that such an order is warranted for these proceedings in the Upper Tribunal.

2. The claimant is a national of Pakistan, whose date of birth is 5 August 1989. On 11 November 2014 the SSHD refused his application for a residence card. She referred to Regulation 8(5). He had not shown that he was in a durable relationship, or that his sponsor was exercising treaty rights.

### **The Decision of the First-tier Tribunal**

3. The judge dismissed the appeal under Regulation 8(5), but allowed the appeal on Article 8 grounds. Her reasoning was that they had not lived together for at least two years, and there was no evidence of the sponsor being in recent employment: paragraphs [20] and [21]. But they had shown they had established a family life together, with their daughter and the sponsor's daughter from a previous marriage. At paragraph [23] the Judge held:

"The Sponsor *is* (my emphasis) exercising treaty rights."

### **The Application for Permission to Appeal**

4. The SSHD applied for permission to appeal to the UT, arguing that the decision was internally inconsistent and the judge's approach to Article 8 was highly flawed.

### **The Grant of Permission to Appeal**

5. On 1 July 2015 Judge Pooler granted the SSHD permission to appeal, holding that the Judge had arguably made inconsistent findings on whether the sponsor was exercising treaty rights and that there were arguable flaws in the judge's Article 8 assessment.

### **Reasons for finding an error of law.**

6. Mr Duffy and Miss Haji agreed at the outset that the entire decision was vitiated by a material error of law, such that it should be set aside in its entirety and remade by me. Not only did the judge make inconsistent findings about whether or not the sponsor was exercising treaty rights, but there is an apparent inconsistency between her rejecting the claim of a durable relationship under Regulation 8(5) while at the same time finding that the parties were in a committed relationship when addressing Article 8 ECHR. It is not a requirement of Regulation 8(5) that the parties should have cohabited for at least two years, and the judge was wrong to treat the claimant as needing to accrue two years' cohabitation as an essential precondition of qualifying as an extended family member ("OFM").
7. The judge did not have the benefit of **Amirtemour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC)** which clarifies the limited circumstances in which the Tribunal has jurisdiction to entertain an

Article 8 claim in an EEA appeal. At [75] the Presidential panel held that, where no notice under section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, a claimant cannot in an appeal under the EEA Regulations bring a Human Rights challenge to removal.

8. The law always speaks, so the judge was wrong to consider Article 8. It was clearly not engaged, as the claimant was not facing removal. An Article 8 claim had not been advanced by Miss Haji (who appeared below) and the claimant had not in any event been served with a section 120 notice, which is an essential precondition for raising Article 8 in an EEA appeal.

### **The Remaking of the Decision**

9. I received uncontested evidence from the claimant and his wife about their current circumstances. Mr Duffy did not dispute that they have now been living together for over two years, and that they are in a durable relationship. He also accepted that the sponsor is exercising treaty rights, as evidenced by the production of recent payslips. She gave credible evidence that she had gone back to work on 1 April 2015 after being on maternity leave.
10. Accordingly I find that the claimant has established that he is an OFM under Regulation 8(5). He thereby meets the gateway requirement for the exercise of the discretion to issue him with a residence card under Regulation 17(4).

### **Conclusion**

11. The decision of the FTT contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant's appeal is allowed on the ground that the refusal to recognise him as an OFM under Regulation 8(5) was not in accordance with the law, and the claimant's application for a residence card as an OFM is remitted to the SSHD for the exercise of her discretion under Regulation 17(4).

### **Anonymity**

No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Monson