



**The Upper Tribunal
(Immigration and Asylum Chamber)
Number: OA/03895/2014**

Appeal

**At Field House
On 3rd July 2015**

**Decision and Reasons
Promulgated On 6th July
2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

**MR TD
(ANONYMITY DIRECTION MADE)**

Appellant

And

THE ENTRY CLEARANCE OFFICER FOR LABANON AT BEIRUT

Respondent

Representation:

For the Appellant: Mr R, Sponsor.

For the Respondent: Ms Julie Isherwood, Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. The proceedings before the first tier tribunal were anonymised. No application has been made to change this and so this should be maintained.
2. I will refer to the parties as they were in the First-tier Tribunal though the respondent is appealing in these proceedings.
3. The appellant sought a family permit under European Treaty provisions so as to gain entry clearance to join his partner, Mr R. The basis of the application was that Mr R, an Italian national, was exercising Treaty

rights in the United Kingdom and that they were in a same-sex relationship. They were not married nor had they entered into a civil partnership.

4. The application was refused because the entry clearance officer was not satisfied that they were in a durable relationship. The Immigration (EEA) Regulations 2006 (the 2006 regulations) are the domestic application of the Treaty provisions. Regulation 7 deals with family members, which includes a person spouse or civil partner. Regulation 8 is concerned with extended family members, which at regulation 8(5) includes partners other than civil partners of an EEA national
5. It is necessary to establish the relationship is durable. For parity with domestic provisions the respondent normally expects the parties to have been together for two years though this is merely a rule of thumb. The entry clearance officer was not satisfied they were in a durable relationship. It was suggested that the appellant make a fee paid application under paragraph 294 of the immigration rules. This deals with leave to enter with a view to entering into a marriage or civil partnership.
6. The appellant's appeal was heard by First tier Judge Black on 27 January 2015. The appeal was allowed with the decision promulgated on 30 January 2015. The judge found that the appellant's sponsor was exercising Treaty rights. The sponsor was found to be a credible and reliable witness to the truth. The judge accepted that the couple had been in a relationship for four years and they intended to enter into a civil partnership as soon as they were able to do so. The decision records that the sponsor sends funds to the appellant who, although in employment, is meeting family commitments. The appellant had delayed making his application because his mother was experiencing ill health. Whilst the appellant and sponsor had never cohabited, the judge found ample evidence of the relationship through regular contact .At paragraph 20 the judge concluded they were in a durable relationship, allowed the appeal and made a whole fee award.

The Upper Tribunal

7. In seeking leave to appeal to the Upper Tribunal the respondent relied upon only one issue, namely, the fact the judge allowed the appeal outright, rather than referring the matter back to the respondent. This was because the grant of a family permit to an extended family member was in the respondent's discretion. The respondent had not had an opportunity to exercise that discretion by the appeal being allowed outright.
8. The sponsor has attended and displayed a good command of English. He appeared to appreciate the point being made by the respondent and emphasised his wish to marry soon.

9. Ms Isherwood takes no issue with the finding that the parties are in a durable relationship. Rather, the only objection relates to the fact the judge allowed the appeal outright.

Error of law

10. I am satisfied that there is a material error of law in the decision.
11. The leave application refers to regulation 17 which deals with the issue of residence card. However, the application is for a family permit under regulation 12. This is concerned with admission to the United Kingdom. Both provisions maintain the distinction between family and extended family members .
12. If regulation 12 of the 2006 regulations is considered it is clear there is a distinction between the status of a family member and that of an extended family members. By regulation 12(1) an entry clearance officer must issue a family permit to family member. However, regulation 12(2) provides that an entry clearance officer may issue a family permit to an extended family member. Clearly this confers discretion on the entry clearance officer. Regulation 12(2)(b) requires the entry clearance officer to consider if in all the circumstances it is appropriate to issue the permit. Regulation 12(3) requires the entry clearance officer to undertake an extensive examination of the personal circumstances of the applicant.
13. The leave application referred to the decision of Ihemedu (OFM-meaning) Nigeria [2011] UKUT 00340(IAC). The head note states that Article 3(2) of Directive 2004/38/EC ("Citizens Directive") treats other family members ("OFMs") as a residual category .Regulation 17(4) makes the issue of a residence card to an OFM/extended family member a matter of discretion. Where the Secretary of State has not yet exercised that discretion the most an immigration judge is entitled to do is to allow the appeal as being not in accordance with the law, leaving the matter of whether to exercise this discretion in the appellant's favour to the Secretary of State.
14. My conclusion is that there was a material error of law in the judge allowing the appeal outright. Having found a durable relationship the judge should have allowed the appeal to the limited extent that the decision was not in accordance with the law and the matter referred to the entry clearance officer for consideration.

Decision.

15. The decision of the First-tier Tribunal is set aside as it contains a material error of law.
16. The entry clearance officer's appeal is allowed to a limited extent. I find the original decision of the entry clearance officer was not in

accordance with the law but the First tier Judge was not entitled to allow the appeal outright.

17. I preserve all of the factual findings of the First tier Judge and direct the entry clearance officer to consider whether a family permit should be issued in all the circumstance, bearing in mind the findings of the First tier Tribunal.

Signed

Deputy Upper Tribunal Judge Farrelly

Fee Order

18. The First-tier Tribunal made a full fee order because the appeal was being allowed. That no longer is the position.

Signed

Dated:

Deputy Upper Tribunal Judge Farrelly