IAC-HW-AM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20360/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15th January 2016	**On 24th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR OLANIRAN AFEEZ GBADAMOSI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P. Saini of Counsel
For the Respondent: Mr I. Jarvis, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Nigeria born on 28th December 1982. He appealed against a decision of the Respondent dated 15th April 2014 to refuse his application for a residence card as an extended family member of a European Economic Area national exercising treaty rights. His appeal was allowed at first instance by Judge of the First-tier Tribunal Cope sitting at North Shields on 3rd February 2015. The

Respondent appeals with leave against that decision. For the reasons which I set out below at paragraph I have set the decision of the First-tier aside and remade the decision. I therefore refer to the parties as they were known at first instance for the sake of convenience.

2. The Appellant's case was that he was applying for a residence card as the extended family member of Ms Gintare Gavrilcikaite a citizen of Lithuania ("the Sponsor"). The Appellant came to the United Kingdom as a student in 2008 subsequently obtaining an MSc in Renewable Energy and Resource Management from the University of Glamorgan in November 2009. He has since been employed with that university and various other companies. In November 2011 he married Oladunmi Oluwakemi Dada in London. That relationship later broke down and the couple divorced, the decree nisi being pronounced on 21st May 2014. In October 2012 the Appellant began a relationship with the Sponsor and in January 2013 moved into her property to live together from that time. The Sponsor works for the Prêt A Manger sandwich chain as a kitchen leader. The Appellant made his application for a residence card on 10th February 2014 the refusal of which has given rise to the present proceedings. In a covering letter the Appellant's solicitors stated that the Appellant was still married (to Ms Dada) but in the process of obtaining a divorce. The Sponsor's mother spoke little English but had sent gifts to the Appellant from Lithuania. The Appellant and Sponsor had been residing together since January 2013 but the couple did not have any documentary proof of this.

Relevant Law

3. Regulation 8(5) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") provides that extended family members includes those who can show that they are in a durable relationship with an EEA national. The burden of establishing this rests upon the Appellant and the standard of proof is the usual civil standard of balance of probabilities. Regulation 17(4) of the 2006 Regulations provides that the Respondent may issue a residence card to an extended family member if in all the circumstances it appears to the Respondent appropriate to issue the Residence Card.

Explanation for Refusal

4. The Respondent expected the Appellant to be able to demonstrate that he had been living together with the Sponsor for at least two years with an intention to permanently live together. The Appellant had not provided any documentation to suggest he was in a durable relationship. His solicitors had said that the Appellant and the Sponsor had been residing together since January 2013 but accepted there was no documentation to prove this. The Appellant had provided a Lloyds TSB statement dated April/May 2013 addressed to the Sponsor in Hayes and bank statements addressed to the Appellant in Abbey Wood. That showed that they did not live together. The Respondent would expect to see evidence of joint council tax bills, joint utility bills, joint bank accounts and any other relevant documents. Due to the lack of evidence the Respondent could not accept the Appellant was in a durable

relationship for the purposes of the 2006 Regulations and refused the application under Regulation 8(5).

The Decision at First Instance

5. The Judge heard evidence from the Appellant and Sponsor and a cousin of the Appellant which confirmed that the Appellant and Sponsor were in a stable and continuing relationship together. The Judge was satisfied that this was so (paragraph 46 of the determination) as there were no major discrepancies between the witnesses. At paragraph 47 the Judge stated that the Appellant's solicitors had prepared a very extensive bundle of documents for the hearing of this appeal "I have read and taken into consideration all of this documentation". This was a reference to the bundle submitted at first instance which ran to some 726 pages.

6. The Judge placed particular reliance on the telephone records produced for both the Appellant and Sponsor's mobile telephones. These bills covered 2013 and 2014 and showed very regular usually several times a day contact between the Appellant and the Sponsor. This was a strong indicator that they were in a relationship as claimed. There were a considerable number of photographs of the Appellant and Sponsor which it was apparent had been taken on a number of different occasions indicating that the couple had had considerable contact with each other over a period of time. It was more likely than not that the Appellant and Sponsor were in a durable relationship and had been so since October 2012 when their relationship began and January 2013 when they started living together. There were no minimum financial requirements under the 2006 Regulations as to the amount of money the Sponsor should earn which in fact was approximately £5,000 less than would be required under Appendix FM.

7. Directing himself as to the correct three stage approach to assessing such a case as this the Judge cited **YB (Ivory Coast) [2008] UKAIT 00062**. Firstly decide whether the Appellant was in a durable relationship, secondly have regard to comparable provisions of the Immigration Rules but not in a determinative way and thirdly carry out an extensive examination of the personal circumstances of the Appellant when deciding whether discretion should be exercised and a residence card issued. This last point was taken by the Judge to mean that he had the power to exercise his own discretion (whether or not to issue the card) which might differ from the discretionary approach taken by the Respondent under Regulation 17(4).

8. The Respondent should have conducted an extensive examination of the Appellant's personal circumstances. On the basis of the evidence it was appropriate for a residence card to be issued to the Appellant as the relationship of the Appellant and Sponsor was a durable one. The refusal was only on the basis that the Respondent did not consider that the parties were in a durable relationship, had the Respondent been satisfied that the relationship was durable she would have issued a residence card. The Judge allowed the appeal.

The Onward Appeal

9. The Respondent appealed against this decision arguing that the determination made findings without giving adequate reasons for doing so. No documentary evidence had been produced to show that the Appellant and Sponsor had been cohabiting since January 2013 as claimed. Secondly it was not open to the Judge to consider the exercise of discretion under Regulation 17(4) in the absence of the Respondent first doing so. The Respondent relied on the cases of **FD [2007] UKAIT 49** and **Ihemedu [2011] UKUT 00340**. As the Respondent was not satisfied that the Appellant was an extended family member of the Sponsor she did not proceed to the second stage of deciding whether to exercise discretion in the Appellant's favour by granting him a residence card. In such circumstances the Judge was constrained to allow the appeal on the basis that the Respondent's decision was not in accordance with the law rather than allow it outright.

10. The application for permission to appeal came on the papers before First-tier Tribunal Judge De Haney on 8th June 2015. In refusing permission to appeal he wrote that the Respondent's grounds of appeal were nothing more than a disagreement with the findings of the Judge. The Judge had made detailed findings on the considerable amount of documentary evidence relied upon by the Appellant. The Judge had also dealt with the jurisdictional issues raised and concluded that the circumstances of the appeal were such that he had jurisdiction to allow the appeal outright rather than "remitting" it back to the Respondent.

11. The Respondent renewed her application for permission to appeal to the Upper Tribunal, this time quoting from the headnote of **Ihemedu** that Regulation 17(4) made the issue of a residence card to an extended family member a matter of discretion. Where the Respondent had not exercised that discretion the most an Immigration Judge was entitled to do was to allow the appeal as being not in accordance with the law leaving the matter of whether to exercise discretion in the Appellant's favour or not to the Respondent.

12. The renewed application for permission to appeal came before Upper Tribunal Judge Lane on 4th August 2015. In granting permission to appeal he wrote:

> "It is arguable that the Respondent had not exercised any discretion as regards the issue of a residence card and that the Judge erred in law by allowing the appeal outright. It is also arguable that in an appeal where the evidence produced by the Appellant had not been accepted by the Respondent as proving the existence of a durable relationship, the Judge's reasoning was insufficient."

The Hearing before Me

13. At the hearing before me it was conceded on the part of the Appellant that the Judge was wrong in law to consider that he had the jurisdiction to exercise his discretion in place of the Respondent's. For the Respondent it was argued that it was not fatal to an application for a residence card by an extended family member that he and the

qualifying person had not lived together for two years but in this case the Judge had misunderstood the ratio in **YB**. Immigration Rules were a rule of thumb guide as to what constituted durability but they should not discriminate against United Kingdom nationals. The Judge had fallen into error at paragraph 56 of the determination when saying that the parties had been in a durable relationship since October 2012 when the relationship began. What the Respondent should be able to do when reading an adverse decision was to discover why the Judge had found the parties were living together when that evidence had been challenged. The losing party should know why they had lost.

14. In response Counsel for the Appellant argued that the permission to appeal decision did not say why the determination at first instance was unreasoned. The Respondent's grounds had not challenged the findings as such. All the Respondent had said in the refusal letter was that there were two sets of documents provided for two different addresses. That was why the bundle that was produced for the First-tier Tribunal had 726 pages. There was a stark contrast between what was put to the Respondent with the application and what was put to the Judge with the appeal. The Judge placed weight on the telephone records which he discussed in the determination. This was important because there were two years' worth of mobile telephone bills.

15. There was evidence of cohabitation but the gap in the evidence was explained by the Appellant at paragraph 4 of his statement that he had not changed his address for statements and letters whilst the couple were looking for a suitable property for them both to move to. The Sponsor had been given permission for the Appellant to reside with her so the parties had not considered it necessary to put the Appellant on the tenancy agreement as that would be a short term arrangement. There were statements from other tenants who used to reside with the parties. The Judge had tested the evidence of each witness and found it reliable. There was no timescale for length of cohabitation that needed to be shown. The Judge had found that the parties were in a lasting relationship. Both parties had been given the opportunity to address the Judge on the ratio in **YB**. The two year period referred to in the refusal letter was not contained in the underlying EU Directive.

16. In response the Presenting Officer argued that the Judge had misunderstood **YB** in public law terms. There was a requirement for the Judge to make reasoned findings. Cohabitation had been very much in dispute at the hearing. Paragraph 56 of the determination (where the Judge had found on the balance of probabilities that the Appellant and Sponsor were in a durable relationship) was not sufficiently reasoned. Cohabitation was essential. If the Judge had said that was not required that would be discriminatory against UK citizens since they did have to prove that. All there was evidence of was one year's shared cohabitation. The Judge had found that the parties had been living together since 2013 but even the Appellant's own evidence did not support that finding. It was not enough to say that they called each other on the telephone or that there were photographs of them together. The Judge had to look at the substantive point.

17. Finally in closing Counsel submitted that the reason for non-discrimination was so that European Economic Area citizens were not treated less favourably than citizens of a Member State. There was nothing in the directions or the Regulations which required cohabitation. A requirement of cohabitation would discriminate against EU citizens. If an error of law was found the matter should be sent back to the Respondent to be looked at again.

Findings

18. There are two separate issues in this case. The first is whether the Judge gave adequate reasons for his finding that the Appellant and Sponsor were in a durable relationship. The second issue is whether in the light of the Respondent's refusal to issue a residence card as an extended family member under Regulation 8, the Judge was entitled to go ahead and allow the appeal outright.

19. The Respondent had refused the application because of the lack of evidence (particularly documents) showing that the Appellant and Sponsor had lived together. There was a frank admission of this in the covering letter and it is not surprising in the light of that that the Respondent should have approached the Appellant's application with some caution. To make up for the confusion caused by that covering letter the Appellant's solicitors went to the opposite extreme when the matter came before the Judge at first instance by preparing a bundle which was far in excess of what was needed for a proper determination of the case. At 726 pages the bundle was unwieldy and unhelpful containing as it did the danger that there might be some important document in such a large bundle which could easily be overlooked with adverse consequences for the proper disposal of the appeal.

20. The Appellant's case at first instance was not an admission that he and the Sponsor did not live together rather it was an acceptance that there were gaps in the documentation to prove that at all relevant times the Appellant and Sponsor had lived together. That was a matter for the Judge to decide having heard the witnesses and the cross-examination and considered (to the extent that he was able given the unwieldy nature of the bundle) the documentary evidence. I would agree with Judge De Haney's characterisation of the grounds of onward appeal that in relation to the Judge's findings as to durability of relationship, the grounds of onward appeal were a mere disagreement.

21. Another Judge might have been persuaded differently that the absence of documentary evidence was such (particularly if the explanation for that absence was not accepted) that the parties could not demonstrate that they were in a durable relationship. I would agree with the Respondent's submissions that the mere existence of voluminous telephone records would not of themselves establish that the parties were in a durable relationship. There might be many reasons why two parties telephoned each other regularly but such calls would tend to confirm that the parties were not living together since if they were they could speak to each other rather more directly. Similarly the photographs cannot prove cohabitation. What is normally persuasive is some form of paper trail establishing cohabitation whether it

would be shared utility bills or bank statements etc. sent to the same address for both parties. That documentation was not obviously to hand. The question would be whether such an absence was thereby fatal to the appeal. Could the Judge rely on oral evidence that the parties were living together in the absence of documents? I remind myself that the Judge had the benefit of seeing the witnesses give evidence which I have not had. The witnesses were cross-examined. The Judge was aware that he had to find that the relationship had been in existence for a substantial period of time to be able to conclude that it was a durable relationship within Regulation 8 (see paragraph 31 of the determination).

22. Further the Judge reminded himself that the decision in this case was on the balance of probabilities and it was a matter for him whether he accepted the explanation he was given for the absence of documentation. If the position had been that the absence of documentation of itself invalidated the appeal then he would have been in error in allowing it. I do not consider that the Judge's reasoning for finding a durable relationship was inadequate. What is clear from the Judge's analysis of the evidence, paragraphs 45 to 56, is that the Judge was looking at the evidence in the round. The evidence established the existence of the relationship even if it did not necessarily establish the existence of cohabitation. I find no error of law therefore in the Judge's finding that the parties were in a durable relationship.

23. This means I move to the second issue which is whether the Judge was entitled to allow the appeal outright. Paragraph 1 of the headnote to **YB** states that neither the Citizens' Directive (2004/38/EC) nor Regulation 17(4) of the 2006 Regulations confers on another family member or extended family member of an EEA national exercising treaty rights a right to a residence card (my emphasis). Regulation 17(4) was consistent with the Citizens' Directive in making the grant of a residence card to an extended family member discretionary. This reasoning was amplified in more detail at paragraph 22 of **YB** where the Upper Tribunal had looked at the directive specifically Article 3(2) which in the words of the Upper Tribunal

> "... clearly permits Member States to decide the cases of other family members in accordance with national law and there is nothing in community law which prevents the United Kingdom from providing in Regulation 17(4)(b) that the issue of a residence card for such persons is a matter for discretion".

At paragraph 23 the Upper Tribunal indicated that national law must not seek to define terms which were community law terms such as durable relationship.

24. The Judge fell into error in considering that he was entitled to exercise his discretion in a case where the Respondent had discretion but had not exercised it. The point was conceded by Counsel for the Appellant, in my view rightly so. Having found that the parties were in a durable relationship the Judge should at that point have found the Respondent's decision to be not in accordance with the law such that it remained outstanding before the Respondent to take a valid decision. The Judge did not do that and thereby made a material error of law. Accordingly I set aside the Judge's decision and remake it by allowing the Respondent's appeal to the limited extent that the decision remains outstanding before the Respondent. However in

arriving at her further decision in this matter and exercising her discretion under Regulation 17(4) the Respondent must take into account the findings of the Judge at first instance that the relationship between the Appellant and the Sponsor is a durable one.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I have remade the decision by allowing the Appellant's appeal against the Respondent's decision to refuse to issue a residence card to the extent that the decision remains outstanding before the Respondent to take a valid decision.

Appellant's appeal allowed (but to the limited extent stated).

I make no anonymity order as there no public policy reason for so doing.

Signed this 11th day of February 2016

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

The Judge made a fee award of £140 because he allowed the Appellant's appeal. It is clear from the determination and the very large bundle that was submitted after the Respondent's decision that the appeal was allowed on the basis of evidence not before the Respondent at the time of the decision. In those circumstances and also given the fact that I have set aside the First-tier Tribunal's decision, I set aside the fee award so that no fee is payable.

Signed this 11th day of February 2016

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Deputy Upper Tribunal Judge Woodcraft