Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04474/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Centre	**Decision & Reasons Promulgated**
On 6th October 2017	**On 31st October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

JAGTAR SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H Samra (Solicitor)
For the Respondent: Mrs H Aboni (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge O'Hagan, promulgated on 9th January 2017, following a hearing at Birmingham, Sheldon Court, on 21st December 2016. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of India, who was born on 16th January 1989. He appealed against the decision of the Respondent dated 16th July 2015, refusing him leave to remain in the UK as the partner of a Romanian national.

3. It was a feature of this appeal that the Appellant and the Respondent had indicated that they wanted the appeal to be dealt with on the basis of information recorded in the papers without a hearing.

The Judge's Findings

4. The judge observed that, "the crux of the matter is that the Appellant applied under the Rules relating to partners of British nationals rather than under the different provisions for partners of EEA nationals" (paragraph 3).

5. The judge went on to observe that as the Appellant's partner was not a British national, but a national of Romania, "the correct law is, therefore, the Immigration (European Economic Area) Regulations 2006" (paragraph 4). It was unclear whether the Appellant was married to his Romanian national partner.

6. This was a case where there had been "the Respondent's failure to identify that the Appellant made the wrong application" (paragraph 5). The judge concluded that the Appellant "needs to apply for a residence card as the married or unmarried partner of an EEA national ..." (paragraph 6).

7. The appeal was dismissed.

Grounds of Application

8. The essence of the grounds of application are that the judge failed to recognise that there was no mandatory requirement under the EEA provisions to use the EEA FM correct application form, as was being suggested by the judge, so that the judge accordingly should have considered the correct law under the EEA Regulations as the Appellant had a partner who was an EEA national. The judge failed to have regard to the Article 8 assessment.

9. On 15th August 2017, permission to appeal was granted. This was accompanied by the observation that, "whilst the judge was bound to consider the decision actually made by the Respondent, it is arguable that the case should have been remitted to the Respondent for the correct Rules to be considered" which were the Rules relating to partners of EEA nationals. This was even though the Appellant had applied on the form that related to partners of British nationals, because there was no mandatory requirement that a particular kind of form should be used when there was an application on behalf of partners of EEA nationals.

Submissions

10. At the hearing before me Mr Samra, appearing on behalf of the Appellant, submitted that this was a case where the Appellant had actually paid £872 in fees for an application for partners of British nationals, whereas had he applied on the basis of a partner of an EEA national, he would at the time have paid only £55. Accordingly, he had nothing to gain but everything to lose by not using the correct form, as suggested by the judge. However, the reality was that if one looked at the EEA (FM): Guidance Notes, these make it clear that,

> "It is not mandatory to use the EEA (FM) application form but it will assist us in dealing with your application more efficiently if you do. Even if you choose not to use this form, you must pay the specified fee, submit the relevant supporting documents and, 'if you are a non EEA national' give your biometric information".

Mr Samra submitted that, for whatever reasons, the Appellant's previous solicitors used an incorrect form, but there was no mandatory requirement that an EEA form should be used. The documentary evidence was clear that the Appellant and his EEA national partner were living together and the matter should now accordingly be remitted back to the primary decision-maker to evaluate the matter on that basis.

11. For her part, Mrs Aboni relied upon her Rule 24 response. She submitted that there was no material error. The Appellant had submitted an application outside the Immigration Rules and the application was considered under Appendix FM. There was insufficient evidence to show that the relationship between the Appellant and his Romanian partner satisfied the Rules. Therefore, the judge was correct (at paragraph 4) to state that, "it is not clear whether the Appellant is married to his partner ...". It was for the Appellant to make out his case. He had not been able to make it out in the appeal before the judge. The judge had been correct to decide as he did.

12. In reply, Mr Samra submitted that, if one is to have regard to paragraph 4, then one must look at it in its entirety, and here the judge makes it clear that, "the correct law is, therefore, the Immigration (European Economic Area) Regulations 2006". If that was the case, submitted Mr Samra, then the judge ought to have considered the appeal on the basis of the EEA Regulations. These only require there to be a "durable relationship" and do not specify a particular period of time that a person has lived with their partner.

13. The evidence was clear that the parties satisfied the law. More importantly, there was no requirement that the Appellant use a specified form. The form used should have enabled the primary decision-maker to look at the application on the basis of EEA law. Similarly, the appeal, even if heard on the papers, ought to have been considered by the judge under EEA law, and not under Appendix FM.

Error of Law

14. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.

15. It is clear that, "it is not mandatory to use the EEA (FM) application form" as stated in the EEA (FM): Guidance Notes. Of course, the use of the correct form "will assist us in dealing with your application more efficiently if you do", according to the Guidance Notes of the Home Office, and this is precisely what has happened here, namely, that the application has not been considered more efficiently, or indeed accurately, as was necessary in the circumstances of this case.

16. However, the use of the incorrect form should still have enabled the primary decision-maker to apply EEA law and to look to see whether there was a "durable relationship" between the Appellant and his Romanian national partner. The evidence before the primary decision-maker was that the parties were living together.

17. In the same way, the failure of the primary decision-maker to so do, should not have obviated the need on the part of the judge on appeal, to also apply EEA law, and a failure to do so was also a misdirection.

18. In the circumstances, since the initial application has not been properly considered, this matter ought to be remitted back to the Home Office to make a decision, on the basis of the application as originally submitted, under the EEA law Regulations. This appeal is allowed to that extent.

Notice of Decision

19. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is allowed to the extent that the Home Office is directed to consider the Appellant's application on the basis of the Immigration (European Economic Area) Regulations 2006 and not on the basis that the Appellant's partner is a British national.

20. No anonymity direction is made.

21. This appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 30th October 2017