



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: IA/00439/2014

**THE IMMIGRATION ACTS**

Heard at Field House

On 3 December 2014

Decision Promulgated

On 7 January 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

HAMID HUSSAIN

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms N Mallick instructed by Robinson Ravani & Co Solicitors

For the Respondent: Mr C Avery Senior Home Office Presenting Officer

**DECISION AND REASONS**

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this

Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Wellesley -Cole promulgated on 22 September 2014 which allowed the Appellant's appeal under the Immigration (European Economic Area) Regulations 2006 ('the 2006 Regulations.')

### Background

3. The Appellant was born on 6 March 1981 and is a citizen of Pakistan. On 26 July 2013 he applied for an EEA Residence Card as a confirmation of his right to reside in the United Kingdom as the unmarried partner or extended family member of an EEA national.
4. On 2 December 2013 the Secretary of State refused the Appellant's application. The refusal letter gave a number of reasons: it was not accepted that the Appellant was in a durable relationship with her EEA sponsor and therefore Regulation 8(5) was not met; there was insufficient evidence that the EEA sponsor was a qualified person and therefore the requirements of Regulation 6 were not met.

### The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal First-tier Tribunal Judge Wellesley-Cole ("the Judge") found that the Appellant and his partner were in a durable relationship and that the sponsor was a qualified person and allowed the appeal.
6. Grounds of appeal were lodged on the basis that even having found that the Appellant and his partner met the requirements of Regulation 8(5) and (6) as the Appellant was an extended family member all that the Judge could do was remit the matter to the Respondent for the discretion set out in Regulation 17 (4) of the 2006 Regulations to be exercised. On 5 November 2014 First-tier Tribunal Judge V A Osborne gave permission to appeal.

7. At the hearing I heard submissions from Mr Avery on behalf of the Respondent that he relied on the grounds of appeal.
8. On behalf of the Appellant Miss Mallick suggested that the Judges determination could be amended without being set aside

### **Finding on Material Error**

9. Having heard those submissions I reached the conclusion that the Tribunal made a material error of law such that the decision had to be set aside and remade.
10. This was an appeal against a refusal of a residence card by an extended family member. In the refusal decision the Respondent had not accepted that the Appellant met the requirements of the Regulations 8(5) and (6) in that it was not accepted that the parties were in a durable relationship or that the EEA sponsor was a qualified person. The decision letter therefore did not go on to consider the discretion available under Regulation 17 (4) whether to issue such a card as in relation to an extended family member the issuing of the card was not automatic even if it were accepted that the relationship was durable and the EEA sponsor was working.
11. After hearing evidence from the Appellant and his sponsor the Judge made findings that the relationship was durable and the EEA sponsor was working and there has been no challenge to those findings. He allowed the appeal under the EEA Regulations without addressing the issue under Regulation 17 (4). The failure of the First-tier Tribunal to address and determine the issue of the exercise of the discretion under Regulation 17(4) constitutes a clear error of law. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view is the correct test to apply.
12. I therefore found that an error of law has been established and that the Judge's determination to allow the appeal cannot stand and must be set although as there was no challenge to the credibility findings these must stand

## Findings

13. Having preserved the findings that the Appellant and her EEA sponsor are in a durable relationship and that the EEA sponsor is a qualified person I am satisfied on the basis of the provisions of Regulation 17(4) and what is said in the headnote of Ihemedu (OFMs – meaning) Nigeria [2011] UKUT 00340(IAC) that 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 or not to the Secretary of State and that is what I do.

## **CONCLUSION**

**14. I therefore found that an error of law has been established and that the Judge's determination must be set aside and I remake the decision.**

## **DECISION**

**15. The appeal is allowed as being not in accordance with the law leaving the matter of whether to exercise this discretion in the Appellant's favour or not to the Secretary of State**

Signed

Date 5.12.2014

Deputy Upper Tribunal Judge Birrell