IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10173/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 October 2015	**On 9 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR UCHECHUKWU INNOCENT OKORO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms S Sreeraman, Home Office Presenting Officer
For the Respondent: Mr A Bajwa, Solicitor, Bajwa & Co Solicitors

DECISION AND REASONS

1. It will be convenient to refer to the parties as they were before the First-tier Tribunal. The appellant is a citizen of Nigeria. On 22 January 2014, the Secretary of State made a decision to refuse to issue him with a residence card, following his claim to be entitled to such a document as a family member, or alternatively an extended family member, of an EEA national exercising treaty rights in the United Kingdom. He relied upon his relationship with his wife, a citizen of Hungary.

2. The appellant's appeal against the adverse decision was allowed by First-tier Tribunal Judge Bart-Stewart ("the judge") in a decision promulgated on 15 April 2015. In summary, the judge found that the appellant could not show that he was a family member, falling within Regulation 7 of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") but went on to find that he and his wife were in a durable relationship, so that he fell within Regulation 8(5) of the 2006 Regulations. In this context, she took into account substantial cross-examination of the appellant and his wife and the consistency of their accounts and found that any discrepancies were minor and of little consequence. The decision concludes with these words: "I allow this appeal".

3. In grounds prepared on behalf of the Secretary of State, it was contended that the judge erred in two respects. First, in purporting to allow the appeal outright. If the conclusion that the appellant and his wife were in a durable relationship were sustainable, it was for the Secretary of State to exercise discretion under Regulation 17(4) of the 2006 Regulations, and then to decide whether or not to issue a residence card. This was made clear in Ihemedu [2011] UKUT 00340 (IAC). Secondly, in failing to resolve inconsistencies identified in the Secretary of State's letter giving reasons for the adverse decision, including an inability on the part of the appellant and his wife to communicate with each other using a common language. Reliance was placed upon guidance given in Budhathoki [2014] UKUT 00341.

4. Permission to appeal was granted on 23 July 2015 and directions were sent to the parties at the end of that month, requiring them to prepare for the hearing on the basis that, if the decision were set aside, any further evidence that might be needed could be considered at the hearing.

5. There was no Rule 24 response from the appellant.

Submissions on Error of Law

6. Ms Sreeraman began with the second ground. The judge failed to resolve material conflicts in the evidence. There was an apparent absence of a common language, to enable the appellant and his sponsor to communicate with each other. The importance of this aspect was set out in the letter giving reasons for refusing to issue a residence card. At paragraph 15 of the decision, the judge noted the appellant's wife's evidence that she did not speak much English but had been able to manage using a Google translation application. She no longer used Google by the time of the hearing but her vocabulary was still not large. The judge had not properly taken into account this evidence in making her findings at paragraphs 22 to 24 that a durable relationship existed. When the language issues were taken into account, in addition to discrepancies noted by the judge at paragraph 19 as having emerged during the hearing, an error of law was shown.

7. Turning to the first ground, the judge erred in allowing the appeal outright. It fell to the Secretary of State to exercise discretion under Regulation 17(4) and a range of factors would be taken into account in the exercise of that discretion.

8. Mr Bajwa said that, so far as the second ground was concerned, the background and factual matrix were important. The appellant and his wife were interviewed and a transcript presumably existed somewhere. The Secretary of State based her case on discrepancies between the answers they gave. The appellant's witness statement answered this point, particularly at paragraph 10, where he explained that he and his wife were able to communicate although their accents were very different. His wife's witness statement was in similar terms. A clear challenge was made to this part of the Secretary of State's case. In any event, the Secretary of State had simply elaborated her basic point regarding discrepancies even though a transcript had not been forthcoming. The judge decided to proceed, as she was entitled to, and it was clear that the issue of discrepancies was fully explored, in examination and cross-examination of the witnesses. The Secretary of State was represented at the hearing. At paragraph 15 of the decision, the judge noted the wife's evidence regarding the use of Google but the past tense was important in that context. It was clear that the appellant's wife's English had improved. This was also suggested by her evidence that she no longer used Google when communicating with her husband. The issue was addressed.

9. Mr Bajwa said that he accepted the strength of the first ground. The proper outcome was, perhaps, that the matter should have been sent to the Secretary of State for her to exercise discretion under Regulation 17(4).

10. In a brief reply, Ms Sreeraman said that the Secretary of State's challenge was fully set out in the decision letter. The point was clearly made that there was no common language when the relationship began. The appellant's wife had said that she took two English lessons after the marriage, some four months later. The relationship was called into question. Ms Sreeraman accepted, nonetheless, that the date of assessment was the date of the hearing and that the judge was entitled to give weight to the evidence which emerged on that occasion.

11. I briefly discussed the proper course with the representatives, in the light of their agreement that the first ground was made out. So far as the second ground was concerned, the failure to resolve evidential conflict was relied upon by the respondent but, on the other hand, the judge's finding that a durable relationship existed was clearly based on the substantial consistency in the evidence given by the appellant and his wife, following extensive cross-examination. If that finding of fact were preserved, as a sustainable finding, then remaking the decision would be a simple matter of setting aside the First-tier Tribunal's decision and then allowing the appeal, on the basis that the appellant would then await the

exercise of discretion by the Secretary of State under Regulation 17(4) of the 2006 Regulations.

12. Mr Bajwa suggested that this would be the proper course, taking into account the extensive cross-examination. Ms Sreeraman said that the Secretary of State's stance was that the decision should be set aside in its entirety. The judge had recorded at paragraph 6 of the decision that a transcript of the marriage interview existed. She had not seen it, transcripts not being routinely provided. In remaking the decision, that transcript would have weight and ought properly to be taken into account.

13. I observed, as the judge had, that a direction was made in the First-tier Tribunal in October 2014, requiring the Secretary of State to produce a copy of the transcript. That direction was not complied with and the hearing of the appeal was then adjourned until March 2015. The Secretary of State had been given an ample opportunity to make this evidence available. Indeed, Mr Bajwa had sought to further adjourn the case but his application did not succeed and the appeal was heard in the First-tier Tribunal on 13 March 2015.

Findings and Conclusions

14. The parties are agreed that the judge erred in law in allowing the appeal outright. In the light of her finding of fact that a durable relationship existed between the appellant and his wife, the proper course was to allow the appeal against the decision to refuse to issue a residence card, with the Secretary of State then exercising discretion under Regulation 17(4), taking into account a range of factors falling to be considered at that stage.

15. The more difficult question concerns the second ground of the Secretary of State's case. Did the judge err in law in failing to resolve material conflicts and discrepancies? After careful consideration, I conclude that this ground is not made out. The decision letter contained a summary of the discrepancies relied upon by the Secretary of State, as showing that no genuine relationship existed. One feature, as noted earlier, was the absence of an apparent language in common, to enable the appellant and his sponsor to communicate with each other. Other discrepancies, summarised in the decision letter, emerged from the answers given by the parties to questions in the marriage interview. The transcript of that interview was not produced, notwithstanding a direction made by the First-tier Tribunal in October 2014 and an adjournment of several months.

16. In these circumstances, I accept Mr Bajwa's submission that the judge was properly entitled to decide the case on the basis of the evidence before her. The appellant and his wife made witness statements in which they addressed the absence of a language in common, explaining that they were able to communicate, notwithstanding different accents, by making use of Google and by means of gestures. Mr Bajwa is right to draw attention to the judge's summary of the wife's evidence, at the end of

paragraph 15 of the decision. The use of the past tense and her evidence that she no longer uses Google suggest that her English has improved over time. The date of assessment for the judge was the date of hearing and a salient feature of the evidence which emerged was the substantial consistency between the accounts given by the appellant and his wife, regarding the establishment and development of their relationship, his wife's journey to Hungary, their employment and what the couple did together, from time to time and on different occasions. The extent of the consistency is striking. The judge was entitled to give weight to this evidence and it formed a sound basis for her finding of fact that a durable relationship existed. Although she expressed it as a finding that the burden of proof had been discharged, the conclusion she reached at paragraphs 21 to 24 is clear and unambiguous.

17. A careful reading of the decision shows that the judge had the Secretary of State's case clearly in mind. Some difficulty was caused by the absence of the transcript but that was the result of a failure to comply with a clear direction. The judge did not err in deciding to proceed with the case and she took into account all the evidence available. I find that the judge's conclusion that a durable relationship existed is sustainable and ought not to be set aside.

Remaking the Decision

18. It follows that remaking the decision is a simple exercise. I set aside the decision of the First-tier Tribunal in the light of the judge's legal error in allowing the appeal outright. Her core finding of fact that the appellant and his wife were in a durable relationship is preserved as it is not tainted by that error and no other legal error has been shown in relation to it. The appeal against the adverse decision then falls to be allowed on the basis that it is now for the Secretary of State to exercise discretion under Regulation 17(4) of the 2006 Regulations. The appellant awaits a decision on his application for a residence card.

Notice of Decision

19. Appeal allowed: the decision to refuse to issue a residence card is not in accordance with the law; the appellant awaits a decision once the Secretary of State has exercised discretion under Regulation 17(4) of the 2006 Regulations.

Anonymity

20. There has been no application for anonymity at any stage in these proceedings and I make no direction on this occasion.

Fee Award

21. In allowing the appeal, the judge made a fee award. I have reached the same overall conclusion that the appeal should be allowed but it is readily apparent that this favourable outcome has been reached in the light of the

evidence which emerged at the First-tier Tribunal hearing and the outcome was certainly not a foregone conclusion. The appellant's case that he fell within Regulation 7 of the 2006 Regulations was not made out. In these circumstances, I make a fee award in respect of half the fee that has been paid in these proceedings.

Signed Date

Deputy Upper Tribunal Judge R C Campbell