IAC-AH-CO-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32947/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Decision and Reasons Promulgated**
On 22nd October 2014	**On 7th November 2014**
Prepared	

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR SHAHMEELSAMAD KHAN
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Logan, Counsel
For the Respondent: Mr G Harrison, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan born on 17th July 1987. The Appellant had applied for a residence card as confirmation of a right of residence in the United Kingdom on the grounds that he was the unmarried partner of a qualified EEA national. That application was refused by the Secretary of State by letter dated 20th July 2013. The Secretary of State considered

that without further convincing evidence about the Appellant's relationship it was not accepted that he was in a durable relationship for the purpose of the EEA Regulations and consequently refused his application under Regulation 8(5). They noted that even if a person is held to be in a "durable" relationship they are only entitled to a residence card as an extended family member if it is considered appropriate to issue the card. The Secretary of State indicated that she did not believe that the Appellant had provided enough evidence to allow discretion to be exercised in the Appellant's favour and therefore would not issue a residence card and as a result the application was refused under Regulation 17(4)(b) of the Immigration (European Economic Area) Regulations 2006.

2. The appeal against the decision of the Secretary of State came before Judge of the First-tier Tribunal Malik on 12th December 2013 and in a determination promulgated on 23rd December 2013 the Appellant's appeal was allowed under the 2006 Regulations.

3. The Secretary of State lodged Grounds of Appeal. Those Grounds of Appeal contended that the correct approach for the Immigration Judge was firstly to consider the terms of Regulation 8 and thereafter the Secretary of State's refusal to exercise the discretion inherent in Regulation 17(4). It was contended that the First-tier Tribunal Judge had not followed the appropriate two-stage test.

4. On 14th January 2014 Designated Judge of the First-tier Tribunal Appleyard granted permission to appeal noting that the Respondent contends that in allowing the appeal the judge had only considered the terms of Regulation 8 and had failed to deal with the Secretary of State's refusal to exercise the discretion inherent in Regulation 17(4).

5. The Appellant appears by his instructed Counsel Ms Logan. The Secretary of State appears by her Home Office Presenting Officer Mr Harrison. I note that this is an appeal by the Secretary of State but for the benefit of convenience to all parties throughout the proceedings and to ensure continuity of reference Mr Khan is referred to herein as the Appellant and the Secretary of State for the Home Department as the Respondent.

The Factual Issues

6. The Appellant claims that he is in a durable relationship with Raimonda Zlabiene. The history of their relationship is set out at paragraph 8 of the First-tier Tribunal Judge's determination in some detail. The Appellant contends that he has entered into an Islamic marriage with Ms Zlabiene who was not yet divorced from her husband and that three months after the divorce they married on 25th September 2012 and made application for a residence card two days later. It appears that Ms Zlabiene has eight children by her former marriage five of whom are of age and of those that are under age two daughters of Ms Zlabiene live with him and her and one son with their father. Ms Zlabiene was found by the First-tier Tribunal Judge to be a credible witness.

The Regulations

7. Regulation 8 of the Immigration (EEA) Regulations 2006 states:-

> *"8. (1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).*
>
> *(2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and—*
>
> *(a) the person is residing in an EEA State in which the EEA national also resides and is dependent upon the EEA national or is a member of his household;*
>
> *(b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or*
>
> *(c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.*
>
> *(3) A person satisfies the condition in this paragraph if the person is a relative of an EEA national or his spouse or his civil partner and, on serious health grounds, strictly requires the personal care of the EEA national his spouse or his civil partner.*
>
> *(4) A person satisfies the condition in this paragraph if the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national were the EEA national a person present and settled in the United Kingdom.*
>
> *(5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.*
>
> *(6) In these Regulations "relevant EEA national" means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4) or the EEA national who is the partner of the extended family member for the purpose of paragraph (5)."*

Regulation 17(4) states:-

> "*The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if—*
>
> *(a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and*
>
> *(b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.*"

The Issue

8. When this matter last came before me I found that there was a material of error law and maintained a finding of the First-tier Tribunal that the Appellant was in a durable relationship. That position is accepted by the Secretary of State. I gave directions that the matter be reheard by way of submissions only limited to argument as to whether the Appellant should or should not be granted an EEA residence card pursuant to Regulation 17(4) of the 2006 Regulations. It is on that basis that this matter reappears before me. The legal representatives are the same as appeared previously before me when I found a material error of law namely Ms Logan appears for the Appellant and Mr Harrison on behalf of the Secretary of State.

9. There are no further documents lodged.

Submissions

10. Mr Harrison advises me that the starting point is my findings on the error of law hearing and that I preserved Judge Malik's findings of fact. He accepts that the Appellant's Sponsor is still working as a security officer for the same firm that she was working previously and consequently that the appellant's spouse is an EEA national exercising treaty rights as at the date of the rehearing.

11. He consequently accepts that the appellant meets the requirements of paragraph 17(4)(a) and that the only matter remaining outstanding is whether or not in all the circumstances it appears to the Secretary of State appropriate to issue the residence card i.e. he acknowledges that this is a matter of discretion. In such circumstances Mr Harrison relies solely on the Notice of Refusal. He notes that the Appellant is an overstayer and that this now alone presents the basis upon which the Secretary of State opposes the appeal. He submits that this is someone who should abide by the Immigration Rules, that has not done so and queries the point as to whether or not in such circumstances the Appellant is someone to whom discretion should be exercised in their favour.

12. Miss Logan points out that the Regulation 17(4)(b) makes no reference as to whether the Appellant is or is not an overstayer but points out that at the time that the First-tier Tribunal Judge gave due consideration to this appeal there was an exhaustive examination of the circumstances and all three witnesses were cross-examined and found to be credible. It was accepted that the Appellant and Sponsor have maintained a household of two adults and two children for some four years. Further she submits that Judge Malik found that it was important to take into account the fact that the Appellant had looked after the Sponsor when she was ill, that the Sponsor is working and paying all of the Appellant's living expenses and that there is no suggestion that the Appellant has sought public funds. She further points out that he has been in the UK now for some nine years. She acknowledges that it would be possible for the Appellant to return to his home country and reapply but that the Tribunal has to remember that he is the Sponsor's husband and father to her two children and that it would be inappropriate to expect him to do so. She asked me to remake the appeal allowing it in favour of the Appellant.

Findings

13. The position in this appeal is clear. When the Secretary of State first refused the appeal she was not satisfied that the Appellant was in a durable relationship and went on to find that

> "We do not believe that you have provided enough evidence to allow us to exercise discretion in your favour."

14. There has now been a finding that the Appellant is in a durable relationship and there has been exhaustive examination of the circumstances and cross-examination of three witnesses all of whom were found to be credible. In such a scenario Mr Harrison acknowledges that the only basis upon which the Secretary of State can now rely is the fact that the Appellant was served with an IS151A in January 2008 as his leave to remain as a student had expired and whilst he applied on that date for leave to remain again as a student that was refused and consequently the Appellant is an overstayer.

15. However that fact is addressed in *YB (EEA reg 17(4) – proper approach) Ivory Coast [2008] UKAIT 00062*.

> *"1. Neither the Citizens Directive (2004/38/EC) nor regulation 17(4) of the Immigration (European Economic Area) Regulations 2006 confers on an "other family member" or "extended family member" of an EEA national exercising Treaty rights a right to a residence card; consistent with the Directive, reg 17(4) makes it discretionary.*

2. *In deciding whether to issue a residence card to an extended family member of an EEA national under reg 17(4) the decision-maker should adopt a three-stage approach so as to:*

   (a) first determine whether the person concerned qualifies as an extended family member under reg 8 (in this case, to determine whether the appellant was "in a durable relationship").

   (b) next have regard, as rules of thumb only, to the criteria set out in comparable provisions of the Immigration Rules. To do so ensures the like treatment of extended family members of EEA and British nationals and so ensures compliance with the general principle of Community law prohibiting discrimination on the grounds of nationality. The foregoing means that for reg 17(4) purposes the comparable immigration rules cannot be used to define who are extended family members, but only to furnish rules of thumb as to what requirements they should normally be expected to meet. The fact that a person meets or does not meet the requirements of the relevant immigration rules cannot be treated as determinative of the question of whether a residence card should or should not be issued.

   (c) ensure there has been an extensive examination of the personal circumstances of the applicant/appellant. It may be that in many cases such an examination will have been made in the course of assessing the applicant's position vis a vis the immigration rules. But in principle the third stage is distinct, since the duty imposed by the Directive to undertake "an extensive examination of the personal circumstances..." necessitates a balancing of the relevant factors counting for and against the issuing of such a card. It would be contrary to Community law principles to base refusal solely on the fact that a person is an overstayer who falls foul, for example of para 295D(i): see by analogy Case C-459/99 MRAX v Belgian State [2002] ECR I-6591).

3. *Assessment of a person's individual circumstances done by reference to Article 8 of the ECHR, can form part (even a large part) of the requisite "extensive examination", since: what matters is that there is a balanced consideration in the round. But it must be related to the exercise of reg 17(4) discretion: see MO (reg 17(4) EEA Regs) Iraq [2008] UKAIT 00061.*

4. *Regulation 17 is subject to the "public policy" proviso in reg 20(1): see reg 17(8). If (but only if) the respondent invokes reg 20(1) can that constitute a proper basis for refusing to issue a residence card, irrespective of the position under reg 17(4).”*

16. It is important to note from the guidance given generally above that so far as this matter is concerned *YB* is authority for saying that it would be contrary to community law principles to base a refusal solely on the fact that a person is an overstayer. The example referred to at paragraph 295D(i) relates to the old Immigration Rules and applications by unmarried partners outside the Rules but the fact remains that that is only an example. On the basis the only resistance put up now by the Secretary of State is that the Appellant is an overstayer and bearing in mind that there have been credible findings of fact made by the First-tier Tribunal Judge, who had the benefit of hearing evidence-in-chief in cross-examination and whose finding has not been challenged I conclude that this is a case where following the guidance of paragraph 2 of *YB*, firstly the Appellant qualifies as an extended family member under Regulation 8 being in a durable relationship. Secondly it is accepted by the Secretary of State that the relationship is durable and there has in fact been a finding by an Immigration Judge which is not challenged. That merely leaves stage 3 namely the duty to undertake an extensive examination of the personal circumstances necessitating a balancing of the relevant factors counting for and against the issue of such a card. Such an exercise has been carried out and in addition to that the only opposition put forward now by the Secretary of State is that the Appellant is an overstayer. Case law is against the Secretary of State's submission on this point.

17. For all the above reasons I am satisfied that the Appellant meets the requirements of Regulation 17(4) of the 2006 Regulations and that it is appropriate in all the circumstances for the Secretary of State to issue the residence card. The position originally was in this matter that the Appellant's appeal was allowed. I consequently reinstate the decision of the First-tier Tribunal and dismiss the appeal of the Secretary of State.

Notice of Decision

18. The decision of the First-tier Tribunal is reinstated and the appeal of the Secretary of State is dismissed.

19. The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris **6th November 2014**