

Background

3. The Appellant is a national of Senegal born on 20 December 1985. On 15 June 2013 an application for a residence card as confirmation of a right to reside in the United Kingdom was made on his behalf. The application was based on a marriage by proxy between the Appellant and Ms Sabine Musquet, a French national, said to have taken place in their absence in Senegal on 11 June 2012. The application was refused on 26 October 2013 because it was not accepted that the marriage certificate was valid. The Appellant did not exercise his right of appeal in respect of that decision. On 14 January 2014 a further application for a residence card was made, pleading that the Appellant was the unmarried partner of Ms Musquet.
4. The Appellant's application was refused for reasons set out in a 'reasons for refusal' ('RFRL') letter dated 8 March 2014, and a Notice of Immigration Decision was issued on the same date referencing Regulations 6 and 8(5) of the Immigration (European Economic Area) Regulations 2006.
5. The RFRL is a matter of record on file and it is unnecessary to reproduce its contents here. It is germane to note three matters:
 - (i) The Respondent was not satisfied that the Appellant was in a durable relationship with Ms Musquet, noting that the supporting documents by way of bills and various letters addressed to each of them at the same address did not constitute evidence of a durable relationship, it being possible for persons to cohabit without engaging in a relationship. The RFRL notes that the Appellant had been informed of this in the earlier refusal where, in addition to considering the validity of the marriage the Respondent had also considered the Appellant under the category of unmarried partners.
 - (ii) Further, the Respondent was not satisfied that it had been shown that Ms Musquet was exercising Treaty Rights.
 - (iii) The RFRL also makes reference to the fact that where an applicant meets the criteria to show that they are an 'extended family member' of an EEA national "*[a]n extensive examination of personal circumstances is then undertaken and a decision made as to whether it would be appropriate to issue a residence card*". (Necessarily, in circumstances where the Respondent had not been satisfied that the Appellant had

demonstrated that he was an extended family member of an EEA national, such an 'extensive examination' was not undertaken.)

6. The Appellant appealed to the IAC. In his Notice of Appeal he requested that the appeal be decided without an oral hearing 'on the papers'. The Grounds of Appeal incorporated in the Notice of Appeal are general and constitute little more than an assertion of rights without descending to any detail or otherwise addressing the substance of the RFRL. In support of the appeal, the Appellant filed a bundle on 7 May 2014. The bundle essentially comprises the materials submitted in support of the Appellant's application under letter dated 13 January 2014: the First-Tier Tribunal Judge has listed such documents at paragraph 7 of the determination. There are no evidential materials other than those that were already considered by the Respondent. In particular, it is striking that there is no witness statement from either the Appellant or Ms Musquet.
7. The First-tier Tribunal Judge allowed the Appellant's appeal for reasons set out in his determination.
8. The Respondent sought permission to appeal which was granted by First-tier Tribunal Judge Holmes on 15 August 2014 in these terms:

"The grounds complain, justifiably, that the Judge did not allow the appeal on the limited basis that Regulation 8 having been made out, the Respondent should now consider the exercise of her discretion under Regulation 17(4). It is therefore arguable that the judge should not have simply allowed the appeal, because in doing so neither he nor the Respondent had considered how the Regulation 17 discretion should be exercised. The grant of a Residence Card being a two stage process, the second stage has therefore not been undertaken.

Moreover it is well arguable that the Judge's approach to the issues of whether the Appellant had established that he enjoyed a durable relationship to the EEA national sponsor, and that she was a qualified person, was flawed."

Error of Law

9. Even allowing as a premise the First-tier Tribunal Judge's favourable assessment in respect of 'durable relationship', it is common ground before me that there remained the issue of regulation 17(4), and in particular regulation 17(4)(b) – "*in all the circumstances it appears to the Secretary of State appropriate to issue the residence card*". The Respondent refers to the assessment in this regard in the RFRL, (see paragraph 5(iii))

above), where the language reflects regulation 17(5) – “...an extensive examination of the personal circumstances of the applicant...”.

10. I note the observations in **Ihemedu (OFMs – meaning) Nigeria [2011] UKUT 00340 (IAC)**: see headnote at (iii): “Regulation 17(4) makes the issue of a residence card to an OFM/extended family member a matter of discretion. 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”. See further at paragraph 12:

*“Regulation 17(4) of the 2006 Regulations confers on the decision-maker discretion as to whether a person found to be an OFM/extended family member is to be granted a residence card. In exercising that discretion matters such as whether an applicant has entered the UK lawfully or otherwise are plainly relevant (although not necessarily determinative: see **YB (EEA reg 17(4) – proper approach) Ivory Coast [2008] UKAIT 00062 and Aladeselu and Others (2006 Regs – reg 8) Nigeria [2011] UKUT 00253 (IAC)**). But in this case the Secretary of State had not yet exercised that discretion and so the most the IJ was entitled to do was allow the appeal as being not in accordance with the law leaving the matter of whether to exercise the reg 17(4) discretion in his favour to the Secretary of State: see **Yau Yak Wah [1982] Imm AR 16; MO (reg 17(4) EEA Regs) Iraq [2008] UKAIT 00061**.”*

11. Ms Glass accepted that the Judge had not turned his attention to regulation 17(4) and to that extent his decision to allow the appeal outright was in error.
12. Ms Glass, however, was not prepared to make any such concession in respect of the issue of durable relationship.
13. In this regard the Judge said this at paragraphs 10 and 11:

“The Respondents [sic.] state that although documentation has been provided to show that the couple are cohabiting it does not necessarily mean that they are in a relationship akin to marriage. In stating this however the Respondents appear to have totally overlooked the fact that the couple had earlier submitted an application for the Appellant to be accepted as being the French national's spouse on 15th June 2013. The Respondents quite properly refused this application because they were not satisfied that the marriage certificate was valid and they refused this application on 28th October 2013. However, the Respondents should have taken this application into consideration of the second application. The fact that the Appellants [sic.] have previously applied

for a residence card on the basis of their “marriage” should have been an indication that they would not only cohabiting as claimed, and apparently accepted by the Respondents given the documentary evidence provided, but also that they were in a relationship akin to that of marriage; even if the Respondents did not accept the validity of that “marriage”.

On the basis of the evidence before me it is clear that the Appellant and his EEA national partner are living together in a durable relationship.”

14. I accept the substance of the Respondent’s challenge to the reasoning of the First-tier Tribunal Judge. The fact that an earlier application had been made as a spouse does not in itself demonstrate that the Appellant and Ms Musquet are in a relationship akin to marriage. More particularly, the Judge is in error in stating that the Respondent had “*totally overlooked*” the fact of the earlier application. The earlier application is referenced in the current RFRL. Indeed, a passage from the earlier refusal letter dated 26 October 2013 is quoted and relied upon as part of the Respondent’s reasons in respect of the type of materials that might reasonably be expected to be produced as evidence of a relationship beyond mere residing together, such as might be the case for persons sharing a flat. In my judgement the conclusion reached by the First-tier Tribunal Judge was not open to him on the available evidence, even allowing for a cumulative consideration of the fact of the earlier application and the evidence suggesting a common address.
15. In the circumstances I find that the decision of the First-tier Tribunal Judge was flawed for material error of law and I set it aside.
16. The decision in the appeal accordingly needs to be remade.

Re-making the Decision

17. Although the Appellant had previously requested that his appeal be dealt with ‘on the papers’, he was in attendance today accompanied by Ms Musquet. For the reasons already alluded to above, were it the case that the appeal were to be re-determined today on the basis of the papers, it seems to me inevitable that it would be dismissed because of a failure to discharge the burden of proof on a balance of probabilities in respect of the nature and durability of the relationship enjoyed between the Appellant and Ms Musquet. The Appellant’s attendance raises the possibility of hearing oral evidence. However, still to date no witness statements have been filed; further both representatives

indicated that there would likely be difficulties in dealing with an oral hearing today.

18. I bear in mind that there has not yet been an oral hearing in the appeal, and in all of the circumstances it seems to me that the most appropriate resolution is to remit the appeal to the First-tier Tribunal, to be determined following an oral hearing before any Judge other than Judge De Haney, with all issues at large. I issue a brief Direction consequently.
19. Notwithstanding the Direction and the caveat in respect of adverse inferences possibly being drawn in the absence of attendance at the hearing, the Appellant is at liberty to request that his appeal again be determined 'on the papers'. However, he should take note that the nature of the issues in the appeal are such that the Tribunal is likely to be assisted in reaching a decision by being able to hear the Appellant and Ms Musquet give evidence and make themselves available for questioning by a representative of the Respondent.

Decision

20. The decision of the First-tier Tribunal Judge contained a material error of law and is set aside.
21. The decision in the appeal is to be remade following an oral hearing in the First-tier Tribunal before any Judge other than First-tier Tribunal Judge De Haney.

Consequent Direction

The Appellant is to file and serve at least seven days prior to the rehearing date all such further evidence as he wishes to rely upon. In particular he is to serve witness statements from both himself and Ms Musquet. In the absence of such statements, and in the absence of any appearance by the Appellant and Ms Musquet, the Appellant should be aware that adverse inferences may be drawn.

Deputy Judge of the Upper Tribunal I. A. Lewis 25 September 2014