



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number:

IA/45374/13

**THE IMMIGRATION ACTS**

**Heard at: Field House**

**On: 25<sup>th</sup> June 2014**

**Determination  
Promulgated**

**On: 26<sup>th</sup> June 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**Betania Pyramo Santos  
(no anonymity order made)**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

For the Appellant: Mr Ramduny, M Reale Solicitors

For the Respondent: Mr Kandola, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The Appellant is a national of Brazil date of birth 7<sup>th</sup> October 1971. She appeals against the decision of the First-tier Tribunal (Judge Petherbridge) to dismiss her appeal against the Respondent's decision to refuse to issue her with a residence card confirming her right of residence as a family member of an EEA national exercising treaty rights.
2. The basis of the Appellant's application was that she is the unmarried partner of an Italian national, Mr Erico Jose Zen. The Respondent refused the claim by way of letter dated the 16<sup>th</sup> October 2013. The Respondent did not accept that the Appellant was an extended family member under Regulation

8 of the Immigration (EEA) Regulations 2006 because it was not accepted that the couple were in a genuine and subsisting relationship. The letter goes on to make reference to Regulation 17(4)(b). A number of factors are set out including the fact that the Appellant had overstayed, but central to the reasoning is that it was not accepted that the couple were living together and the Respondent considered “that all the documents of co-habitation provided as evidence of cohabitation provided as evidence for Erico are false and that you have tried to practice deception to gain leave to remain in the UK”.

3. On appeal the First-tier Tribunal accepted that the Appellant and her sponsor were credible and honest witnesses, and found there to be an “overwhelming weight of evidence” that they were in a durable relationship, having lived together in excess of two years. The determination then states [at 56]:

“a curious feature of the Respondent’s decision is that having found that the Appellant and her partner were not in a durable relationship such as to satisfy Regulation 8(5) of the 2006 Regulations, a further decision was made under Regulation 17(4) without any discussion as to how that subsequent decision came to be made”

4. The First-tier Tribunal apparently considered itself in difficulty because of the lack of clear reasoning in the refusal letter in respect of Regulation 17(4) but the determination then goes on to replace the “reasoning” in the refusal letter with the Tribunal’s own, and in doing so dismissing the appeal.
5. The grounds of appeal are slightly confusing in that they appear to assert that this appeal should have been allowed outright given the finding that the couple are in a durable relationship. I am therefore grateful to Judge Ransley who in granting permission to appeal to the Upper Tribunal clarified the central matter in issue: “under Reg 17(5) the Respondent is required to undertake an extensive examination of the appellant’s circumstances and to give reasons justifying the refusal to issue a residence card to an extended family member. It is arguable that the Judge erred in law in deciding [at 68] that ‘the Respondent’s discretion under regulation 17(4) should not have been exercised differently’ given that the Respondent had not given reasons justifying the refusal as required by Reg 17(5)”.
6. Before me Mr Kandola agreed that if I found the Respondent had indeed failed to conduct that extensive examination of the Appellant’s circumstances, then the appeal should be allowed to the extent that the decision of the First-tier Tribunal be set aside and I re-make the decision (with findings of fact preserved) as ‘not in accordance with the law’. It would then be for the Respondent to conduct her investigation and consideration and exercise her discretion under the Regulations, in light of the First-tier Tribunal’s findings.

7. The refusal letter does not conduct an extensive examination of the Appellant's circumstances. Insofar as it purports to do so it is on the basis of a flawed understanding of the facts, since the Respondent's case that this relationship is a sham has been found to be wrong. I therefore find that the decision of the Respondent was not in accordance with the law and the appeal should have been allowed on that basis.

### **Decisions**

8. The decision of the First-tier Tribunal contains an error of law and it is set aside, save that the findings of fact are preserved.
9. I re-make the decision in the appeal as follows: "the appeal is allowed as the decision is not in accordance with the law".

Deputy Upper Tribunal Judge Bruce  
25<sup>th</sup> June 2014