



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

Appeal Number: IA/01827/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 29 January 2015**

**Determination
Promulgated
On 3 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GIBB

Between

**MR MEMUSI LESHINKA NAIGOYEK
(NO ANONYMITY ORDER)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms P Iqbal, Solicitor of Wainwright & Cummins
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a national of Kenya, appealed against a decision refusing to issue him with a residence card under the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations). Although he had earlier been married to an Irish citizen the application and appeal

were concerned with the appellant's unmarried partnership with a German citizen. The application was refused on the basis that the appellant had not established that the relationship was durable, as required by the 2006 Regulations.

2. Following a hearing at Hatton Cross in June 2014 the appeal was dismissed by First-tier Tribunal Judge Hunter, in a determination promulgated on 8 July 2014. Permission to appeal was initially refused, but on renewed application to the Upper Tribunal permission to appeal was granted by Upper Tribunal Judge Allen. The first ground challenging the judge's approach had been concerned with the reasoning process leading to the judge's conclusion that the appellant and his claimed partner were in fact friends, rather than partners. The second ground concerned the judge's failure to consider Article 8. The Upper Tribunal Judge granting permission indicated that he saw no arguable merit in the first ground, but that the second was arguable.
3. At the error of law hearing on 18 December 2014 I indicated to the parties that it was my view, having read the papers and spoken to Upper Tribunal Judge Allen, that both grounds could be argued. The first ground had not been refused. In any event a consideration in isolation of Article 8 would be an academic exercise. Having given that indication I then agreed, at the request of Mr Melvin, who was representing the Secretary of State, to adjourn the hearing. This was on the basis that Mr Melvin had arrived prepared only to argue the second ground.
4. On 29 January 2015 I heard submissions from both sides as to whether a material error of law had been shown on the first ground. It was agreed between the parties that this ground could be considered first, with any submissions in relation to the second ground being made, if necessary, dependent on the success or otherwise of the first ground.

Error of Law

5. Having listened to the submissions by both sides I decided, on an analysis of paragraphs 48 to 57 of the judge's determination, that there was a material error of law established, for the following reasons.
6. The judge accepted a number of significant points. First of all it was accepted that there was a relationship as friends between the appellant and his claimed partner. It was also accepted that there was significant financial support from her to him; and it was also accepted that the couple were living together from April 2014 onwards. The difference therefore between those findings and the finding of durable relationship was not a large one.
7. I have considered the submissions made by both sides about the contested December 2010 date. My view of that is that the December 2010 date that appears from paragraph 48 of the determination is an error

as to the start of the relationship; but I accept what Mr Avery's submission that it is not an error that is of any significance. This is the case because I cannot see a clear connection between that error and the actual adverse findings in paragraphs 54 to 57 of the determination.

8. Looking at those findings, however, they rest on two adverse points. The first point is that there was no mention of the relationship at the 2013 appeal; and the second point is that the letters of support were rejected for the reasons given at paragraph 54 of the decision. I have looked at both of those points and it seems to me that both rest on factual errors as to the evidence and also fail to take into account the appellant's health at the time that he appeared as an unrepresented appellant.
9. On the first point about the 2013 appeal it seems to me that there was an incorrect assumption made by the judge about the nature of the consideration of Article 8 in that appeal. From the determination of the 2013 appeal it is clear that there was a preliminary discussion where the judge made clear to the appellant, who, as I say, was unrepresented, that there was not going to be any consideration of Article 8. This was partly on the basis that no removal decision had been taken. It therefore appears that the consideration of Article 8 that occurred in the written determination was one that the judge embarked on after the hearing; and the assumption made therefore that was central to Judge Hunter's adverse findings rested on an incorrect assumption that there had been evidence about Article 8 at that hearing.
10. Turning to the second point, which refers to the letters, these were in essence rejected because of the evidence about the inability of the appellant to manage the stairs at the address. The difficulty here that does appear to me to be a mistake in relation to the evidence is that the evidence on that point concerned his ability to manage the stairs alone rather than his ability to manage the stairs at all. Once that is appreciated the logic of the adverse reasoning is undermined.
11. The letters are rejected at paragraph 56 as not being credible for reasons that the judge had set out and that must refer back to paragraph 54; but paragraph 54 does not mention the other five letters of support. This raises another point which is that there was significant evidence relevant to the durable relationship issue, that was either not considered or, if it was considered, no reasons were given for rejecting it. My view as a result is that there were mistakes of fact as to the evidence and a combination of inadequate reasoning and a failure to consider relevant evidence in the reasoning process leading to the adverse finding that the couple were in fact nothing more than friends. This leads to the conclusion that the adverse finding on durable relationship is not one that can be sustained, resting on these legal errors, and I therefore set it aside.
12. Having indicated to the parties at the hearing my error of law decision in relation to the first ground, and that I was minded to set aside the finding

on durable relationship, I invited submissions from the parties as to the process of remaking the decision. After an opportunity to take instructions Ms Iqbal, for the appellant, agreed to withdraw the Article 8 ground. It was also agreed that certain findings could be preserved from the judge's decision. These were the findings of significant financial support, and also the finding that the couple were living together from April 2014 onwards. On this basis the matter proceeded to an immediate remaking hearing on the durable relationship issue. Evidence was called from the appellant, his claimed partner, and a friend of the couple.

Re-making

13. In order to understand the issues a brief overview of the factual scenario is required. Most aspects of the statements by the appellant and the sponsor were not in dispute. The outline of the key points is as follows. The appellant married an Irish citizen in Kenya in 2000, and subsequently moved to Germany where he lived with her. It was at this time that he first met the sponsor. The appellant and his then wife moved to the UK in 2003. He was given a series of residence cards as her spouse. In 2009, on a trip to Kenya, the appellant's relationship with the sponsor started, and shortly afterwards the appellant separated from his wife. Although this was not the case when the appeal was initially heard the appellant and his wife are now divorced. A document from the Family Court at Pontypridd was produced showing decree absolute on 8 December 2014.
14. The appellant's circumstances were changed dramatically by a stroke that he suffered in October 2010. He was hospitalised for a number of weeks, and this was followed by rehabilitative care. He continues to suffer the affects of the stroke, as was evident at the hearing, particularly in relation to his mobility. After various applications for permanent residence based on his residence as the family member of his ex-wife, and an appeal in 2013, the current application for a residence card was made in September 2013. The appellant and the sponsor were not able to live together until April 2014 because of difficulties connected with the appellant's stroke and its aftermath, but the sponsor remained closely involved in supporting and caring for the appellant throughout.
15. The appellant and the sponsor were cross-examined about how they had spent Christmas and New Year, and also about their interests and other matters. The friend had also been present at New Year's Eve, and gave evidence about her view of the nature of the relationship.
16. At the end of the oral evidence both representatives made submissions. Mr Avery, for the respondent, accepted that the oral evidence had been broadly consistent, although not entirely. He relied on the refusal letter, although he acknowledged that the reasoning in it was limited on the central contested issue.

Findings on Durable Relationship

17. Having considered all of the evidence as a whole my finding is that it is more likely than not that the nature of the relationship between the appellant and the sponsor is as they have claimed. Nothing in the evidence appears to me to justify the conclusion that they are nothing more than friends. The only points relied on in the refusal letter were that the couple were not living together, and that the appellant was still married to his wife. Both of these points have been addressed and explained at length in the statements. There is also the preserved finding that the couple were living together from April 2014 onwards. By the time of the hearing before me the appellant and his first wife were divorced.
18. It is also the case that the author of the refusal letter had to consider the matter on the basis of documentary evidence alone. The statements provide a considerable amount of detail, giving a full explanation of the circumstances in which the relationship started. There was no dispute about any of the medical evidence showing the nature of the stroke that the appellant suffered, and the serious consequences of it that he continues to live with. Nothing in the oral evidence pointed in any way to any conclusion other than that this was a genuine loving relationship. The factual picture, particularly the extensive practical and financial support that the sponsor has given the appellant since his stroke, and their cohabitation, all suggest that they are a couple. The reactions of all three witnesses gave every indication of a loving relationship. The nature of their relationship was supported by various letters from friends. Nothing that emerged in the oral evidence about the couple's activities over Christmas and New Year gave any indication that they were not a genuine couple in a durable relationship.
19. My finding, therefore, is that the appellant has established that he is in a durable relationship with the sponsor.
20. As an unmarried partner of an EEA national the appellant falls within the category of an extended family member rather than a family member. As a result there is no automatic entitlement to a residence card. The Secretary of State has a discretion as to whether such a card should be issued. This discretion is to be exercised under Regulation 17(4) of the 2006 Regulations. On the basis of the documentary evidence before me there do not appear to be any adverse matters relevant to the exercise of that discretion, but nevertheless the discretion has not been exercised, because the refusal letter stopped at the point of not accepting that there was sufficient evidence to establish the durable relationship.
21. On this basis it was agreed at the hearing that a remaking of the decision should be limited to the outcome of the decision not being in accordance with the law, in order to allow for the Secretary of State to exercise the discretion under Regulation 17(4).

22. It was not suggested by either side that there was any need for anonymity in this appeal, and I make no such direction. The outcome of the appeal rested on evidence not submitted with the application, and as a result, despite the outcome, I see no reason to make a fee award.
23. Having decided that the adverse findings on durable relationship rested on material errors of law I set that aspect of the judge's decision aside. In remaking the decision I allow the appeal to the limited extent that the decision was not in accordance with the law.
24. It was agreed that there was no need for me to consider Article 8.

Notice of Decision

25. In remaking the decision the appeal is allowed to the extent that the decision was not in accordance with the law and the application remains outstanding awaiting the exercise of discretion under Regulation 17 of the 2006 Regulations.

Signed

Date

Deputy Upper Tribunal Judge Gibb

TO THE RESPONDENT
FEE AWARD

Despite having allowed the appeal I have decided, for the reasons given above, not to make any fee award.

Signed

Date

Deputy Upper Tribunal Judge Gibb