



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

Appeal Number: IA/09624/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 16 March 2015**

**Decision & Reasons Promulgated
On 26 May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE J M HOLMES

Between

**DLAMEL ARIDJ
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss E Pipi, Counsel, Kamberley Solicitors

For the Respondent: Miss A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Algeria born on 8 July 1973. He appears to have stated in an application he made to the Respondent in December 2013 that he most recently entered the UK in about the year 2000. He did so illegally, but for the purposes of the application that he has made, and the decision upon it, that forms the context of this appeal that matters not; Metock Case C-127/08.
2. On 15 April 2009 the Appellant applied for a residence card, relying upon his relationship with Delya Yasmina Mazari, a citizen of France, and the Respondent duly issued him with a residence card in September of that

year for five years. There has been no attempt to revoke that residence card and no attempt by the Respondent to suggest there has been a material change in circumstances since it was issued to him; Ewulo [2012] UKUT 238.

3. On 15 November 2013 the Appellant made an application for a residence card as confirmation of the fact that he had a permanent right of residence in the UK. That application was refused on 5 February 2014 on the basis the Respondent was not satisfied that the Appellant's sponsor was a qualified person under Regulation 6, because she was not satisfied that the sponsor had exercised treaty rights for a continuous period of five years.
4. The Appellant duly sought to appeal that decision and the hearing of his appeal came before Judge Flynn on 29 September 2014. In a Determination promulgated on 5 November 2014 the appeal was dismissed although a number of findings of fact were made upon the disputed factual issues in the Appellant's favour. The Appellant sought permission to appeal to the Upper Tribunal against that decision and permission was granted by Judge Hollingworth on 17 December 2014. The Respondent filed a Rule 24 response on 22 January 2015 and so the matter comes before me.
5. It is clear now, and it is agreed by both parties, that Judge Flynn approached the appeal on the basis that he needed to decide whether the Appellant was an extended family member of the sponsor under Regulation 8(5), rather than a family member under Regulation 7(1). Thus Judge Flynn focused upon an Islamic marriage that had taken place at the Lewisham Islamic Centre on 30 October 2007, and the issue of whether or not the Appellant and the sponsor had a durable relationship. It is clear now that Judge Flynn overlooked the Appellant's reliance upon a marriage effected in France on 11 December 2008. (If such a marriage were valid under French law, then it would be recognised as such under English law.) I am satisfied that the basis of the application for the residence card in November 2013 was that French marriage. I derive that from page 31 of the application form which refers to the existence of two different marriages certificate, and the schedule to that application form where the documents enclosed with it were identified. At item 7 the Islamic marriage certificate from 2007 is identified and at item 8 the French marriage certificate from 2008 is identified. It is not therefore necessary to rely entirely upon Mr Pipi's assertion that this was the way in which he put the Appellant's case to Judge Flynn, although given the content of the witness statements provided by both the Appellant and the sponsor, I am also satisfied that he must have done so.
6. It is quite clear now in my judgement that the application that was made in 2013 was therefore first to be considered on the basis that the Appellant was a family member of the sponsor, and only if he failed in that assertion would the Respondent or the Tribunal need to turn to consider whether, despite that failure, he still fell to be treated as an extended family member of the sponsor on the basis of the durable relationship he alleged he was in with her. The reasons given by the Respondent for the

refusal of the application take no point on the marriage, or whether the couple were in a durable relationship; they focus exclusively upon the evidence provided to show that the sponsor was a qualified person.

7. It is therefore clear in my judgement that the judge overlooked the French marriage certificate and approached the matter on the wrong footing. Thus he fell into a material error of law, and his decision must be set aside and remade. Having said that, it is agreed between the parties that the findings of fact that the judge did make cover all of the issues of fact that were live before him, and that his findings are sufficient to allow me to determine the appeal quite shortly by way of this extempore judgement. Both parties are in agreement with that course.
8. In paragraphs 30 and 31 of the determination the judge made the findings that he was satisfied that the sponsor was a qualified person between early 2007 and January 2013. That is a period of in excess of five years. She was therefore by January 2013 entitled to a permanent right of residence in the UK whether or not she had actually applied for a residence card to record, or confirm, that status. The Respondent has never challenged the validity of the French marriage undertaken in 2008 either in the decision letter of 5 February 2014 or in the course of the hearing before Judge Flynn. There was for example no cross-examination of the Appellant or the sponsor by Counsel who then appeared on behalf of the Respondent to cast doubt on the validity of that marriage certificate.
9. On that basis the Appellant therefore met the requirements of Regulation 17(1) because he had established on the basis of the French marriage that he was the family member of an EEA national with a permanent right of residence. He had a valid passport and he had produced that to the Respondent, and he was able to prove with the French marriage certificate that he was her spouse. I note in passing that Judge Flynn accepted that the couple had been in a durable relationship from at least the date in October 2007 when they had started to cohabit and had undertaken the Islamic marriage in London. They also appear to have had children as a consequence of that union together. Thus it was the judge accepted that the couple were in a durable relationship in paragraph 34 of his determination.
10. Accordingly having set aside the decision for the reasons given above, I remake the decision on the appeal so as to allow the appeal under Regulation 17(1). All the other findings of fact necessary to reach that conclusion were made by the judge and were not the subject of challenge before me by either party.

Notice of decision

The appeal is allowed.

No anonymity direction is made.

Signed

Date 17.3.15

Deputy Upper Tribunal Judge J M Holmes

To the Respondent

Fee award

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of any fee which has been paid or may be payable by the Appellant.

Signed

Date 17.3.15

Deputy Upper Tribunal Judge J M Holmes