



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/11918/2014

THE IMMIGRATION ACTS

Heard at Field House
On 26 August 2015

Decision & Reasons Promulgated
On 28 August 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR HIJRAT JABARKHEL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr P Sutton, Counsel, instructed by Kothala and Co

DECISION AND REASONS

Introduction

1. For the purposes of this decision, I shall refer to the Appellant as the Secretary of State and the Respondent as the claimant.
2. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge M J Gillespie (Judge Gillespie), promulgated on 6 May 2015, in which he allowed the claimant's appeal. That appeal was against the Secretary of State's

decision, dated 23 February 2014, refusing to issue a residence card under the Immigration (European Economic Area) Regulations 2006 (the Regulations). The claimant had claimed to be the durable partner of an EEA national, Ms Iwona Kurnik, a citizen of Poland. The Secretary of State concluded that the claimant had failed to show that he was in a durable relationship and/or that Ms Kurnik was a qualified person. Therefore the application was refused with reference to Regulation 8 of the Regulations.

Judge Gillespie's decision

3. Judge Gillespie found as a fact that the claimant was in a durable relationship with Ms Kurnik, and also that Ms Kurnik was working in this country, thereby making her a qualified person under Regulation 6 of the Regulations (see paragraphs 6-14 of the decision).
4. Judge Gillespie then went on to allow the appeal outright, rather than only to the extent that the Secretary of State's decision was not otherwise in accordance with the law.
5. The Secretary of State sought permission to appeal on the narrow ground that Judge Gillespie erred in allowing the appeal outright. The findings of fact relating to the relationship and Ms Kurnik's status were not challenged.
6. Permission to appeal was granted by First-tier Tribunal Judge Frankish on 13 July 2015.

The hearing before me

7. Mr Sutton very realistically acknowledged that Judge Gillespie's decision to allow the appeal outright was "probably" wrong in light of the case law on Regulation 17(4) of the Regulations.
8. For his part, Mr Melvin reaffirmed that none of the findings on the Regulation 8 issue were being challenged. He relied on the grounds.

Decision on error of law

9. I find that Judge Gillespie clearly erred in law by allowing the claimant's appeal outright, and that the error was material.
10. Having found that the claimant was in fact an extended family member of Ms Kurnik, in accordance with Regulation 8 of the Regulations, and that Ms Kurnik was herself a qualified person, the only lawful option open to Judge Gillespie was to allow the appeal only to the limited extent that that Secretary of State's decision was "not otherwise in accordance with the law". This is because the Secretary of State had not exercised her discretion under Regulation 17(4) when making that decision (she having of course concluded that the claimant could not satisfy Regulation 8 in the first instance).

11. The correct approach in cases such as the present has been clearly stated by the AIT, as it then was, and Upper Tribunal (see in particular YB (EEA reg 17(4) - proper approach) Ivory Coast [2008] UKAIT 00062 and more recently, Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340(IAC)).
12. The error of law is material and Mr Sutton did not seek to suggest otherwise.
13. In light of the above, the Secretary of State's appeal to the Upper Tribunal succeeds and I set aside the decision of Judge Gillespie.

Re-make decision

14. The re-making of the decision is a straightforward process. The findings of fact made by Judge Gillespie have not been challenged and they stand. I therefore find that the claimant is in a durable relationship with Ms Kurnik, and thus satisfies Regulation 8(5) of the Regulations. I also find that Ms Kurnik was and is a worker. She is therefore a qualified person within Regulation 6. The Secretary of State was wrong to have concluded otherwise.
15. The Secretary of State has yet to exercise her discretion under Regulation 17(4). This she must now do, having full regard to my findings of fact. I would add that at no stage (as far as I can see) has any other misconduct or adverse comment been raised in respect of the claimant.
16. The claimant's appeal is therefore allowed to the limited extent that the Secretary of State's decision was not otherwise in accordance with the law.

Anonymity

17. No direction was sought and none is appropriate.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I re-make the decision by allowing the appeal to the limited extent that the Secretary of State's decision was not otherwise in accordance with the law, and the claimant's application for a residence card remains outstanding before her, awaiting a lawful decision.

Signed

Date: 27 August 2015

H B Norton-Taylor
Deputy Judge of the Upper Tribunal

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 reduced fee award of £40.00. This is because I note from the file that the appeal to the First-tier Tribunal had been adjourned previously on the basis that evidence from the claimant had not been served in a timely manner, and was not in a presentable state. So, although the claimant has succeeded in his appeal, he (and his advisors) had clearly not presented the Secretary of State with all relevant information with the application itself.

Signed

Date: 27 August 2015

Judge H B Norton-Taylor
Deputy Judge of the Upper Tribunal