



IAC-AH-LEM-V1

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

Appeal Number: IA/19626/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 30 July 2015**

**Decision & Reasons Promulgated  
On 24 August 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE HANBURY**

**Between**

**MR STEPHAN LEE PAGE DAIS  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr E Ofori-Koree, a Solicitor

For the Respondent: Mr E Tufan, a Home Office Presenting Officer

**DECISION AND REASONS FOR FINDING NO ERROR OF LAW**

**Introduction**

1. The appellant is a citizen of the United States. He came here under a residence card between 2000 and 2009. During that period the appellant was in the UK under various EEA permits but in 2009 began a relationship with Mr Kamil Andrezej, a Polish national. They began to cohabit in 2010 and in 2011 the appellant began to divorce his previous wife, a Spanish national. At some point, the appellant does not specify when on his chronology, he applied for an EEA residence card but this was refused on

25 October 2011. The appellant applied for a residence card on the basis of a durable relationship with Mr Andrezj on 4 May 2012 but the application was refused on 12 June 2012. The relationship subsequently broke down and the appellant met William Quesnel, a dual American and Italian national. The appellant submitted an EEA residence card application on the basis of his relationship with Mr Quesnel on 18 September 2012 but this application was refused also on 11 April 2013. He met Mr Kostrz on 8 February 2012 and again applied for a residence card on the basis of that relationship on 5 March 2014. That application was refused on 14 April 2014, which was resulted in the appeal before the Immigration Judge.

2. The appellant appealed the Immigration Judge's decision to dismiss the appeal under the EEA Regulations. On 20 January 2015 he sought permission to appeal to the Upper Tribunal following an initial refusal by the First-tier Tribunal. Upper Tribunal Judge Goldstein thought the grounds at least arguable given that the Immigration Judge appeared to make contradictory findings: that the appellant and his partner enjoyed a genuine and subsisting relationship but that the appellant did not satisfy the "durable relationship" test for Regulation 8(5) of the 2006 EEA Regulations.
3. Directions were sent out in advance of the hearing before the Upper Tribunal indicating that no new evidence not before the First-tier Tribunal would be considered unless the requirements of Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 were met. No such application has been made here.
4. The respondent issued a response under Rule 24 of those Rules stating that the decision of the Immigration Judge was appropriate. The appellant had made a "string of applications" to different partners and on the balance of probabilities was unable to show that his relationship was a durable one so as to be an "extended family member" within the meaning of regulation 8 (5) of the EEA Regulations.

### **The Hearing**

5. At the hearing I heard submissions by both representatives. Mr Ofori-Koree submitted that the current application was made on 4 October 2013 but re-submitted on 22 March 2014. It was refused on 14 April 2014. It was on the basis that the appellant had not provided documentation confirming the durable relationship on the basis of his relationship with Maseij Mateuz Kostrz. Mr Ofori-Koree pointed out that the appellant and his partner gave evidence at the hearing on 3 December 2014 and the appellant produced a bundle of documentation running to 273 pages. The appellant had said that he had cohabited with his partner from March 2013 onwards (see paragraph 18 of the decision). Mr Ofori-Koree pointed out the judge had found it "credible" that the parties had been living together as a couple until January 2014 when the appellant had fallen ill. Nevertheless, the Immigration Judge went on to conclude that the parties

were in a durable relationship at paragraph 62 of his decision. It was submitted that they had been in a relationship for 22 months, although it is not clear how this period has been calculated given the findings of the Immigration Judge at paragraph 3. I was invited to conclude that the appellant is an extended family member of his partner but that the Immigration Judge reached contradictory findings. In particular, my attention was drawn to paragraphs 61 – 63 of the decision where the Immigration Judge reached the conclusions that:

- (i) the appellant and his partner were “broadly” credible witnesses; but,
  - (ii) it was impossible to find that there were in a “durable relationship” within the meaning of Regulation 8(5); and
  - (iii) the minimum period of cohabitation that should be satisfied was “... three years rather than two” given the appellant’s immigration history including “misuse of the five-year visa” that he had been given.
6. The reference to a “three-year relationship” was, I was invited to accept, a “frolic of the Immigration Judge’s own”. Given the acceptance of the relationship and that the parties were still together the correct course was to allow the appeal. I pointed out to Mr Ofori-Koree the Secretary of State had a discretion to exercise but Mr Ofori-Koree invited me to conclude that she had exercised that discretion already.
  7. In response Mr Tufan submitted that the relationship was less than two years and that this was a “reasonable rule of thumb”. He relied on the case of **YB (Ivory Coast) [2008] UKAIT 00062**. It was open to the respondent to refuse the application here. It was accepted that the Immigration Judge had made favourable findings of fact and that there was no basis for concluding that there was a “three-year” requirement for cohabitation to exist before an application could be made under Regulation 8(5) of the EEA Regulations. However, overall, the Immigration Judge had been entitled to come to the conclusion he came to. In any event, even if I was satisfied as to the grounds of appeal were made out, the Secretary of State had a discretion to exercise and the Upper Tribunal ought to direct the respondent to exercise her discretion in the light of the findings of fact by the First-tier Tribunal.
  8. Mr Ofori-Koree conceded there was no definition of a “durable relationship” and that the case of **YB** created a “rule of thumb” only but this would not supersede any requirement of the Directive that the Regulations were giving effect to (the Citizens’ Directive (2004 – 38/EC)).
  9. At the end of the hearing I reserved my decision as to whether or not there was any material error of law and, if there was what should be done to rectify this.

## **Discussion**

10. The appellant claims to be in a durable relationship with Mr Kostrz, claiming that the relationship began in February 2013. The parties had cohabited from then on until December 2014 when the hearing took place, which was a period of one year ten months. It was claimed the relationship had become a “durable” one.
11. The respondent maintained that the appellant was unable to show on a balance of probabilities that he was a family member of an EEA national within Regulation 8(5) of the EEA Regulations. The Immigration Judge’s conclusion that the appellant had “not yet established” such a durable relationship was one that he was entitled to come to, albeit that he had been wrong to refer to a “three-year period” of cohabitation. That assertion did not have any foundation.
12. I find that the law is helpfully summarised in the case of **YB (Ivory Coast)**. The above case states that the Secretary of State has a discretion to exclude relationships with “other family members” or “extended family members” provided she adopts a three-stage approach.
  - (i) First, the Secretary of State has to ask whether the person qualifies as an extended family member within Regulation 8 (“durable relationship”).
  - (ii) Secondly, the Secretary of State is entitled to consider the “comparable provisions” in the Immigration Rules. The rule in question is Rule 295D(vi) which provides for a two-year period of cohabitation in order to satisfy the criteria set out in that rule. They include: that the parties have been living together in a relationship “akin to marriage which has lasted for two years or more”. The EEA Regulations define those who are family members and those who are not but the Immigration Rules did provide a helpful rule of thumb in the same situation covered by EEA Regulations.
  - (iii) Thirdly, the respondent had to look at the personal circumstances of the appellant, balancing the relevant factors counting for and against the grant of a residence card.
13. Article 8 of the European Convention on Human Rights (ECHR) was only part of the extensive examination that ought to be carried out in each case.
14. I have to ask myself whether the Immigration Judge made a fatal error by referring a “minimum period of cohabitation ... of three years” in paragraph 63 of his determination and whether this undermines the whole decision.
15. The Immigration Judge considered the appellant’s long immigration history including his multiple relationships with different partners of different sexes. He also considered the requirements of the Rules and the need to establish a durable relationship with an EEA national. He looked in

particular at what the word “durable” really meant, which is that the relationship had to have endured. The Secretary of State does not appear to have referred the Immigration Judge to the case of **YB** but that case does lend force to the rule of thumb that, in reaching her decision, the Secretary of State was entitled to take into account whether the relationship had endured for a sufficiently long time to be called “durable”. Those rules of thumb were incorporated into the EEA Regulations. Although the EEA Regulations could not define “durable relationship” because it emanated from European Community law, but the approach adopted by the Secretary of State was endorsed in the case of **YB**. An extensive examination of the personal circumstances of the person applying under the Regulations was required. In **YB** the period of twelve months’ cohabitation was insufficient to satisfy the requirements of the Rules.

16. I find that the Immigration Judge made clear findings on the key issues:

- (1) He found that the parties had cohabited and continued to cohabit at the date of the hearing.
- (2) He found the appellant had a large number of failed relationships with different sexes.
- (3) He noted that there were a large number of documents although they tended to confirm the residence of the appellant rather than the cohabitation of the partner with the appellant.
- (4) The Immigration Judge noted in paragraph 53 of his decision that the appellant had largely been in the UK as a result of the derived rights of residence from his various relationships and in particular his marriage to a Spanish lady which had now come to an end.
- (5) The appellant’s EEA application history was described as “truly extraordinary” in paragraph 58. Clearly, the Immigration Judge was sceptical that such a short period of relationship, given the appellant’s past, was on the balance of probabilities, likely to endure. It seems to have impacted on his assessment of the current relationship. It had been suggested by Mr Pandit that the appellant had been “manipulating” “the EEA Regulations” but the Immigration Judge fell short of accepting that submission.
- (6) The Immigration Judge found that the appellant and his partner lived together and, indeed, they had begun to cohabit within only a few days of knowing one another. He found their evidence “broadly credible” but found that it was insufficient to support a “durable relationship”.

## **Conclusion**

17. The Immigration Judge was plainly wrong to suggest that a period of cohabitation of three years was required before Regulation 8 (5) of the

EEA Regulations could be satisfied. However, since the appellant clearly did not satisfy the two-year rule of thumb this was not a finding that affected the overall outcome. I considered whether the erroneous suggestion that a three-year period of cohabitation is required undermines the whole decision but concluded that it does not. The Immigration Judge might have expressed himself better, but he looked at the length of the relationship, the nature of that relationship and the appellant's immigration history but concluded overall that he was not in a durable relationship with the partner (see paragraph 64 - 65).

18. Overall, the Immigration Judge was entitled to reach the conclusion that he did. I find that he applied the EEA Regulations to the facts as he found them to be. Therefore the Immigration Judge's decision to dismiss the appeal against the respondent's decision to refuse a residence card was one he was entitled to come to.

### **Notice of Decision**

The appeal is dismissed. The decision of the First-tier Tribunal did not contain a material error of law. Accordingly, the respondent's decision to reject the appellant's application for a residence card stands.

The court below made no anonymity direction and there is no challenge to that decision.

Signed

Date

Deputy Upper Tribunal Judge Hanbury

### **TO THE RESPONDENT** **FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge Hanbury