



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/34942/2014

THE IMMIGRATION ACTS

Heard at Field House
On 30 September 2015

Determination Promulgated
On 30 September 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MISS OPHELIA-BERTHA WEIDENHAMER
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Walker, a Home Office Presenting Officer

For the Respondent: Mr I N Kwocha of K&S Law Solicitors

DECISION AND REASONS FOR FINDING A MATERIAL ERROR OF LAW

Introduction

1. In this appeal the Secretary of State for the Home Department appeals against a decision of the First-tier Tribunal allowing the appeal of Miss Weiderhamer ('the claimant') who appealed against a decision taken on 19 August 2014 refusing her

application for a residence card as a confirmation of a right to reside in the United Kingdom as an extended family member of European Economic Area ('EEA') National exercising treaty rights in the UK.

Background Facts

2. The claimant is a citizen of St Lucia who was born on 15 November 1979. On 24 June 2014 she applied for a Residence Card. The Secretary of State refused her application on 19 August 2014. The reason for refusal was that the Secretary of State was not satisfied that the appellant was a partner of, and in a durable relationship with, a qualifying EEA national as required by Article 8(5) of the Immigration (European Economic Area) Regulations 2006 ('the EEA Regulations').
3. The claimant appealed against that decision to the First-tier Tribunal.

The First-tier Tribunal Judge's Decision

4. In a decision promulgated on 7 May 2015 First-tier Tribunal Judge Herbert OBE allowed the appeal. The substantive issue for determination was whether the appellant satisfied the requirement of article 8(5) of the Regulations, namely that she was an extended family member of an EEA national. In this case that would be by virtue of being a partner of, and in a durable relationship with, the sponsor. The judge, having heard evidence from the sponsor and the claimant and having considered the documentary evidence, found that the claimant was in a durable relationship and therefore an extended family member of the sponsor and allowed the appeal against the refusal to issue a residence card.

Permission to Appeal

5. The Secretary of State applied to the First-tier Tribunal for permission to appeal against the decision on a single ground, namely that the judge should have

remitted the case to the Secretary of State for consideration under Regulation 17(4) of the EEA Regulations instead of allowing the appeal outright. Permission to appeal was granted by First-tier Tribunal Judge Pirotta.

Discussion

6. At the hearing I heard submissions from Mr Walker on behalf of the Secretary of State and Mr Kwocha on behalf of the claimant.

Legal Framework

7. The relevant provisions of the EEA Regulations provide:

Regulation 8 (Extended family member)

(1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).

.....

(5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than the civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.

...

Regulation 17 (Issue of residence card)

...

(4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if –

(a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and

(b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.

(5) Where the Secretary of State receives an application under paragraph (4) he shall undertake an extensive examination of the personal circumstances of the applicant and

if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security.

8. Mr Walker relied on the grounds of appeal and submitted that the judge ought to have remitted the matter to the respondent to exercise her discretion with the fact findings in place. The grounds of appeal set out that Regulation 17(4) provide that the Secretary of State has a discretion as to whether or not to issue a residence card. He relied on the case of Ihemedu (OFMs-meaning) Nigeria [2011] UKUT 340 (IAC) at paragraph 20. The judge ought to have allowed the appeal only on the basis that it was not in accordance with the law.
9. Mr Kwocha made submissions regarding the durable relationship findings. He accepted that the Secretary of State had a discretion as to whether or not to issue a residence permit even if the clamant was in a durable relationship.

Error of Law

10. I find that there was a material error of law in the First-tier Tribunal decision. The appeal was against a decision of the respondent to refuse to issue a residence card. It was that decision that was under appeal not merely the reasons for the decision, i.e. that the Secretary of State was not satisfied that the claimant and sponsor were in a durable relationship. At paragraph 2 of the decision the judge records that *'The appellant appeals against the decision taken on 19 August 2014 to refuse to issue a residence card...'* The judge allowed the appeal.
11. This difference may not be material in many appeals but it is clear from Regulation 17(4) that the Secretary of State has a discretion as to whether or not a person is to be granted a residence card, even if found to be an extended family member.

12. The First-tier Tribunal in the Ihemedu case had made a finding that the claimant was entitled to a residence card. The judge in the instant case did not make such a finding but by allowing the appeal against the refusal to issue a residence card the judge effectively denied the respondent the opportunity to exercise her discretion and consider other relevant matters notwithstanding the finding on Regulation 8. At paragraph 20 of Ihemedu the Upper Tribunal held:
'..... In exercising that discretion matters such as whether an applicant has entered the UK lawfully or otherwise are plainly relevant (although not necessarily determinative...). But in this case the Secretary of State had not yet exercised that discretion and so the most the IJ was entitled to do was allow the appeal as being not in accordance with the law leaving the matter of whether to exercise the reg 17(4) discretion in his favour to the Secretary of State...'
13. Accordingly, the judge erred by allowing the appeal outright. The proper course was to allow the appeal on the Regulation 8 issue leaving the matter of whether to exercise the Regulation 17(4) discretion in the claimant's favour to the Secretary of State.

Conclusions

14. There was a material error of law such that the decision of the First-tier Tribunal is set aside to the extent that the appeal was allowed in full. The finding of the judge that the appellant was an extended family member of the sponsor and therefore satisfied the requirement of article 8(5) of the Regulations is maintained.
15. Mr Walker asked for the matter to be remitted to the Secretary of State for consideration under Regulation 17(4) of the Regulations if the appeal was successful. In Greenwood (Automatic Deportation: Order of Events) [2014] UKUT 00342 (IAC) the Upper Tribunal considered the power of the First-tier Tribunal to 'remit' a matter to the respondent. At paragraph 16 the Upper Tribunal indicated as follows:
 16. As I indicated above, there is a third possible error in paragraph 23 of the Tribunal's decision. In the second sentence, the Tribunal says:

"Given the fundamental nature of the respondent's error, we remit the matter back to the respondent for the error to be remedied".

17 Ignoring the pleonasm of "remit back" I think it is in general doubtful whether the First-tier Tribunal has jurisdiction to remit a matter to a decision-maker. It has a power to allow or dismiss an appeal; and if allowing an appeal it has a power to give directions, with which the Secretary of State must comply. It does not formally have the power to quash the decision under appeal, but it is well understood that a decision of the Tribunal to the effect that the decision was not in accordance with the law prevents the decision-maker from relying on it or acting on it, so that it is to that extent of no effect. In those circumstances, if the decision is one which results from an application made by an individual, the position is that the application is outstanding, awaiting a lawful decision. No remittal is necessary. Any circumstances arising from the fact that an application has not yet been decided (for example under s.3C of the 1971 Act, or s.77 of the 2002 Act) will continue, and will be treated as not having been interrupted by the unlawful decision. If there is any doubt about the matter, the First-tier Tribunal, in allowing the appeal, can direct the decision-maker to treat the applicant accordingly.

16. I conclude that a direction is appropriate rather than remittal as requested. The Secretary of State is directed to consider the claimant's application in accordance with the findings of the First-tier Tribunal judge on Regulation 8(5).
17. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Notice of Decision

The appeal is allowed. The decision of the First-tier Tribunal to allow the appeal outright is set aside. The finding of the judge that the claimant was an extended family member of the sponsor and therefore satisfied the requirement of article 8(5) of the

Regulations stands. The Secretary of State is directed to reconsider the application in accordance with the findings of the First-tier Tribunal on Regulation 8(5).

Signed P M Ramshaw

Date 30 September 2015

Deputy Upper Tribunal Judge Ramshaw