



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/02941/2014

THE IMMIGRATION ACTS

Heard at Field House, London  
On 12 March 2015

Decision and Reasons Promulgated  
On 26 March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ELTON KABANZI

Respondent

**Representation:**

For the Appellant: Mr M Shilliday, Home Office Presenting Officer

For the Respondent: Ms B Asanovic, instructed by M&K Solicitors

**DETERMINATION AND REASONS**

1. Whilst this is an appeal by the Secretary of State for the Home Department for convenience I will refer to the parties in the determination as they appeared before the First-tier Tribunal.
2. The appellant, a national of Zimbabwe, appealed to the First-tier Tribunal against the decision of the Secretary of State of 20 December 2013 to refuse his application for a residence card as confirmation of a right to reside in the UK under the Immigration (European Economic Area) Regulations 2006 (the EEA Regulations) as the extended family member of Gintare Bertulyte, a national of Lithuania. First-tier Tribunal Judge Hanley allowed the appeal to the limited extent that it was referred back to the respondent to carry out an extensive examination of the appellant's personal circumstances under regulation 17 (5) of the EEA Regulations.
3. The Reasons for Refusal letter states that the respondent was not satisfied that the appellant and the EEA national are in a durable relationship as they had not provided sufficient documentation to evidence that relationship and the respondent therefore

concluded that the appellant had failed to demonstrate that he is an extended family member as defined in regulation 8 (5) of the EEA Regulations.

4. The First-tier Tribunal Judge heard evidence from the appellant, his partner and three other witnesses including the appellant's partner's brother and found that the appellant and his partner 'clearly know each other and know a reasonable amount about each other's lives' [25]. He found that the evidence of the appellant and his partner was consistent in a number of respects and very discrepant in relation other matters, for example how they spent the previous Christmas and why the appellant is not named on the tenancy agreement. He found that there was little documentation in joint names but some addressed to them separately at the same address.

5. The Judge concluded;

"35. To my mind the appellant and Ms Bertulyte have raised the possibility that they may be cohabiting in a common-law durable relationship. There is a reasonable age difference. They claim cohabitation began when she was only 17, having just arrived in the UK, which I find slightly improbable. But on the other hand, there were 3 witnesses prepared to come to Court and confirm the relationship, including Ms Bertulyte's own brother. The discrepancies in connection with Christmas may be more of a reflection of the number of Christmases they have spent together.

...

36. On the evidence which I heard, weighing it all in the round, I find that there is a possibility that the couple are in a common-law durable relationship, but I am not satisfied to the civil standard that they are in such a relationship."

6. The Judge concludes that the respondent only considered the documentation that had been submitted and has not interviewed the couple and that there had not therefore been an extensive examination of the personal circumstances of the appellant as required by regulation 17(5). He referred the case back to the Secretary of State and said that the appellant and his partner '*now have an opportunity to more comprehensively document and explain their personal circumstances*' [38].

7. The grounds of appeal to the Upper Tribunal contend that the First-tier Tribunal Judge made a material misdirection of law in that regulation 17(5) does not apply in circumstances such as those in this case where the Secretary of State did not find the appellant to be in a durable relationship. It is contended that, as the First-tier Tribunal Judge did not find the appellant to be in a durable relationship either, the appeal should have been dismissed.

### The Law

8. The relevant provisions of the EEA Regulations for the purposes of this appeal are as follows;

#### **""Extended family member""**

8. (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 a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.

...

#### **Issue of residence card**

17.

...

(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. ...”

#### Submissions

9. At the hearing Mr Shilliday submitted that the only issue before the Judge was that determined by him at paragraph 37, ie whether the appellant and his partner are in a ‘durable relationship’ within regulation 8(5). He submitted that this was the issue addressed by the Secretary of State in the Reasons for Refusal letter. He submitted that the Secretary of State had conducted an extensive examination based on the evidence produced. He submitted that the burden is on the appellant and that he has not discharged it. He submitted that the appellant can make a new application if he has now evidence and that it is pointless to send it back to the Secretary of State.
10. Ms Asanovic relied on her skeleton argument and submitted that regulation 17(5) clearly imposes a procedural duty on the Secretary of State in relation to the decision-making process such that when an application is received for a residence card for an extended family member there is a mandatory duty on the Secretary of State to ‘undertake an extensive examination of the personal circumstances of the applicant’. She submitted that in this case only documentary evidence was considered whereas the Secretary of State routinely uses home visits and interviews whilst conducting an extensive examination. She submitted that it was within the powers of the First-tier Tribunal Judge to determine that the decision was not in accordance with the law as he did here.
11. Mr Shilliday responded by submitting that it was the First-tier Tribunal Judge’s job in this case to decide if the appellant was in a durable relationship. He accepted that the Judge has power to decide that a decision is not in accordance with the law in an appeal under the EEA Regulations. However he submitted that the Secretary of State had carried out an extensive examination of the facts and that it is not incumbent upon the Secretary of State to call every applicant in for an interview where she is not satisfied on the basis of the evidence provided.

Error of Law

12. I have carefully considered Ms Asanovic's submissions. She says that the First-tier Tribunal Judge was entitled to allow the appeal on the basis that the decision was not in accordance with the law as the respondent had failed to conduct an 'extensive examination' as required by regulation 17 (5). Mr Shilliday accepted that it was open to the First-tier Tribunal Judge to find that a decision was not in accordance with the law but in essence he submitted that this decision was in accordance with the law.
13. In my view there are two aspects underpinning the submissions in this appeal. The first is whether the respondent was in fact required to undertake an extensive examination under regulation 17(5) in this case and the second is whether, if she was so required, she actually did so.
14. In relation to the first aspect it seems to me that regulation 17 (5) must be read with regulation 17(4) to which it refers. I note that the First-tier Tribunal Judge omitted regulation 17(4) from his section setting out the relevant law and in fact failed to refer to regulation 17(4) in the determination. Regulation 17(4) gives the Secretary of State discretion to issue a residence card to an extended family member who is not an EEA national if the relevant EEA national is a qualified person or has permanent residence. The issues the Secretary of State must therefore determine on receipt of such an application are whether the applicant is in fact an extended family member under regulation 8 and whether the relevant EEA national is a qualified person or has permanent residence. If these questions are answered in the negative then the Secretary of State need not go on to exercise her discretion under regulation 17(4) (b).
15. In my view a similar principle applies in relation to regulation 17(5) in that the Secretary of State is required to carry out an extensive examination where she receives an application from an 'extended family member'. Where the applicant has not shown that s/he is an extended family member then the Secretary of State has no duty to undertake an extensive examination of the applicant's personal circumstances under regulation 17 (5).
16. However in the event that I am wrong in the analysis above and the Secretary of State does have a duty to undertake an extensive examination of the personal circumstances of everyone who applies for a residence card under regulation 17 (4) I am satisfied that the Secretary of State did undertake such an examination in this case.
17. The appellant made an application on 12 July 2013 for a residence card as confirmation of his right to reside in the UK as an extended family member of an EEA national. The appellant submitted a number of documents and photographs in support of his application. These documents are listed in the Reasons for Refusal letter. In considering whether the appellant is in a durable relationship the respondent considered whether the appellant had demonstrated that he had been living with the EEA national for at least 2 years. The respondent noted that the appellant had provided evidence to show that he was residing with the EEA national from August 2011 until February 2012 (this being the period for which there was evidence relating to both parties at the same address) but concluded that this was not sufficient evidence to show that he is currently in a durable relationship.
18. Ms Asanovic submitted that it was not enough for the Secretary of State to consider the documentation submitted with the application and that she was also required, by

regulation 17(5) to take further action by carrying out a home visit, conducting interviews or by questioning neighbours. She submitted that the failure of the Secretary of State to undertake these actions enabled the First-tier Tribunal Judge to find that the Secretary of State had failed to undertake the procedural duty set out in regulation 17(5).

19. I do not accept that regulation 17(5) places such a duty on the Secretary of State. When conducting an extensive examination of an appellant's personal circumstances the Secretary of State is reliant on the material submitted with the application. It is the appellant who is claiming to be an extended family member and he bears the burden of proving that. The Secretary of State undertook an extensive examination of the appellant's personal circumstances by considering the documents submitted and by giving reasons justifying the refusal in the Reasons for Refusal letter. I do not accept that it is incumbent in the Secretary of State to conduct home visits and/or interviews in the case of any extended family member who fails to provide sufficient evidence to show that they meet the Regulations.
20. I therefore find that the First-tier Tribunal Judge made a material misdirection of law in concluding at paragraph 23 of the determination that the respondent had failed to undertake an extensive examination of the appellant's personal circumstances in accordance with regulation 17(5). Accordingly I set aside the decision of the First-tier Tribunal Judge. There has been no challenge to the findings of fact made by the First-tier Tribunal Judge. I therefore preserve those findings and I go on to remake the decision.

#### Remaking the decision

21. The First-tier Tribunal Judge set out the findings of fact based on the oral and documentary evidence before him. Having considered all of that evidence and made relevant findings he concluded at paragraph 37 that the appellant had not discharged the burden of proof upon him to establish on the balance of probabilities that he meets the requirements of regulation 8(5) of the EEA Regulations.
22. On the basis of this finding I therefore substitute for the First-tier Tribunal Judge's decision a decision that the appellant has not demonstrated that he is an extended family member under regulation 8(5) and he is therefore not entitled to a residence card under regulation 17(4) of the EEA Regulations.

#### Conclusion:

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

I set aside that decision.

I remake the decision in the appeal by dismissing it under the EEA Regulations.

Signed

Date: 25 March 2015

A Grimes

**Deputy Judge of the Upper Tribunal**