



IAC-FH-AR-V1

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

Appeal Number: IA/15300/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 4 June 2015
Prepared 6 June 2015**

**Decision & Reasons Promulgated
On 22 July 2015**

Before

**DEPUTY UPPER TRIBUNAL JUDGE DAVEY
DEPUTY UPPER TRIBUNAL JUDGE PROFESSOR N M HILL QC**

Between

**NU
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Rutherford, Counsel instructed by Cartwright King

For the Respondent: Mr T Melvin, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Pakistan, date of birth 3 May 1979, appealed against the Respondent's decision to refuse a residence card with reference to Regulation 8(5) of the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations).
2. The refusal was on the basis that the Appellant had failed to show on a balance of probabilities that he was in a durable relationship with an EEA national (Lithuanian citizen) GJ.

3. His appeal came before First-tier Tribunal Judge P J M Hollingworth (the judge) who on 27 October 2014 dismissed his appeal under both the 2006 Regulations 2006 and under Article 8 of the ECHR.
4. On 23 January 2015 I found that the judge had made an error of law and for the reasons set out in a decision of that date decided that the original Tribunal decision could not stand and the matter would have to be remade. It therefore arises that the judge set out a particularly significant contradiction arising in the evidence of the Appellant and his claimed partner over when and how they met, where it took place and to a degree the presence or otherwise of the EEA national's parents in the tale of the events. It does not appear following the directions I gave that any further evidence relating to the durable relationship between the Appellant and his partner, the EEA national, has been produced particularly from either of the EEA national's parents who are present and living in the United Kingdom whether as to their knowledge of the relationship as claimed or the extent to which they have contact with the EEA national and her children. There is a child by a former relationship which is in the process of divorce and a child born to the Appellant and the EEA national.
5. Those parents did not attend the hearing and we were told that was because they were at work. No statement had been taken from them in connection with their recollection of the events or their involvement in their grandchildren's development.
6. There is nothing from any friends by way of statements or letters of support concerning their knowledge of the relationship and its character. Instead, there is a letter of a Mr GO and Mrs BG of [-], Peterborough, although the spelling of Mr O's name changes in the short document, and states

"I can confirm that we know Mr NU and GJ and their two children. We have known them for the past year and they are our good neighbours. I can confirm they both live together at [-], Peterborough since January 2013.
Yours faithfully."
7. There is a letter in manuscript from BS of [-], Peterborough, which states:

"To whom it may concern.
I can confirm I have known Mr NU, Mrs GJ. They are both hardworking people and are of good carture [sic], and they both live at [-], Peterborough [-].
Please if you want any more information about them then please phone me on
Signed
Mr BS, RICS"

And a copy of his driving licence is provided with a photograph and confirming his date of birth as 3 May 1948 in England.

8. Since Miss J has been in the United Kingdom since about 2006/2007 it is perhaps surprising that there are no friends of hers who speak to knowledge of her or her relationship with the Appellant. Similarly there is none from friends of the Appellant. The evidence particularly relied upon by the Appellant we summarise as follows.
9. First, there is the birth certificate of the child M in which the Appellant is identified as the father of the child and Miss J as the mother. Secondly, there is the documentation which shows the Appellant's bank statements relating to the [Peterborough] address and similarly such banking documentation in the EEA national's Miss J's name. There are utility bills and phone bills again which show their respective names as customers of the relevant company. There are joint tenancy agreements in the names of the Appellant and Miss J for [Peterborough address] for the years from January 2013 and January 2014. There are employment details concerning Miss J's pay and HMRC documents, again for Miss J. There is a letter written jointly to the Appellant and Miss J dated 27 November 2013 confirming that Miss J's daughter, M, date of birth 2 January 2007, had been attending [A] Primary School since March 2013. There is a letter from HMRC dated 31 October 2013 addressed to the Appellant and Miss J concerning a child tax credit award for 2013 - 2014 to Miss J.
10. There is no material challenge to the issue that Miss J is a qualified person who has been exercising treaty rights. It is clear that there was a break in employment when she was on maternity leave but no issue is taken with that.
11. Also provided are photographs of the Appellant and Miss J with the children, a statement from Miss J dated 7 April 2015 in which she confirms their continuing relationship and in particular she seeks to explain the confusion of her evidence before First-tier Tribunal Judge Hollingworth on the basis of her being nervous and flustered, being unprepared for the questions of the kind that were raised. A statement of the Appellant of 7 April 2015 confirms his durable relationship with Miss J and confirms his understanding that Miss J was confused and upset at the hearing before the judge and confirming his involvement along with Miss J in the care of M.
12. Additional documents provided show amongst other things a joint application for housing to Peterborough City Council. In addition there was documentation from Anglian Water which was a joint bill in the names of the Appellant and Miss J together with payment details and documentation from the Halifax Building Society addressed to the Appellant, council tax bills for [Peterborough address] addressed to Miss J together with some mobile phone bills relating to the Appellant.

13. In addition there is a translation of an email said to be from the Appellant to a Miss M which is translated as an application to terminate by agreement a marriage between Miss J and Mr RJ to bring to an end a marriage registered on 4 November 2005, but it appears to be an unsigned document and simply a form of terms proposed for divorce based on the irretrievable breakdown of the marriage. It does not appear to contain any terms in relation to custody or control of M.
14. Mr Melvin submitted that the previous history of applications made on the basis of a relationship with another Lithuanian national in 2011 and 2012 suggested to the respondent that those were not genuine applications and the fact they were not appealed against was significant. The Appellant asserts that the first failed for insufficient evidence being provided and the second application was not pursued because by then his partnership with Miss K had broken down and they were no longer together.
15. It was submitted that that previous history of applications raised doubts about the reliability of the Appellant and him being prepared to follow any steps in order to remain in the UK.
16. Mr Melvin submitted that in effect documents produced where they resided at the same address or indeed the reference from the neighbours, the fact was that there was nothing to show that they were in a durable relationship so much as sharing accommodation. Mr Melvin submitted that there were no independent witnesses or statements which confirmed that the Appellant and Miss J are anything other than two adults sharing accommodation. Indeed he argued that the absence of evidence, for example from the family of J, for I infer that from the Appellant with whose family Miss J is in contact indicated that there should be substantial doubts as to any weight to the claimed relationship and the evidence fell short of being sufficient to establish the durable relationship. Mr Melvin accepts that the child is registered in the name of the Appellant and Miss J.
17. We note the photographs and whilst of course things can be posed, and therefore there must be some qualification on the weight to be given to them, but they seem to us natural and to that extent we give them some weight.
18. We take into account that the burden of proof always remains with the Appellant to show that he is in a durable relationship and it is not for the Respondent to prove that it is not. Accordingly, whilst it is certainly open to UKBA to make home visits, which they regularly do in other cases, particularly where there is an assertion of parties living together, we draw no adverse inferences against either the Appellant or indeed the Respondent that no such visits have taken place. We have also taken into account that the original statements of the Appellant and Miss J are extraordinarily brief and barely touch upon the issues. We do not know why those statements were so brief and contained so little explanation of events and it is fair to say even the latest statements are terse.

19. For reasons previously given we do not think that Article 8 falls to be considered. The Appellant sought a residence permit, not leave to remain on some other completely different basis relating to Article 8 of the ECHR. Similarly if steps are being taken to remove the Appellant he is on notice that a further decision would be made which would attract a right of appeal.
20. Accordingly we do not think it is necessary in these circumstances to address either Sections 117A or 117B nor to traverse the issues of Section 55 of the BCIA 2009 bearing in mind we have so little evidence relating to the children's best interests.
21. We find having weighed up the evidence that looked at in the round, despite the deficiencies that have been pointed out and/or we have identified, the Appellant has done enough to show on a balance of probabilities that he and Miss J are in a durable relationship. Accordingly we consider the appropriate course to allow the appeal for the matter needs to be considered with reference to Regulation 17(4) of the 2006 Regulations by the Secretary of State. No exercise of discretion has been considered and there has been no justiciable decision on that basis. In the light of the case of Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 340 as also illustrated in the case of Ukus [2012] UKUT 307, the exercise of discretion is a matter for the Respondent.

Notice of Decision

22. The Original Tribunal's decision is set aside. The following decision is substituted. The appeal is allowed to the extent that the matter is returned to the Secretary of State for further consideration with reference to Regulation 17(4) of the 2006 Regulations.

Anonymity

23. Given the age of the Appellant and Miss J's children an anonymity order is appropriate and necessary.

DIRECTION REGARDING ANONYMITY - RULE 14 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 17 July 2015

Deputy Upper Tribunal Judge Davey