



IAC-AH-SAR-V1

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

Appeal Number: IA/26755/2014

THE IMMIGRATION ACTS

**Heard at Centre City Tower, Decision & Reasons Promulgated
Birmingham
On 6th October 2015**

On 13th October 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**KENNETH NDIVE MONONO
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person

For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of Judge of the First-tier Tribunal Bradshaw (the judge) promulgated on 8th October 2014.
2. The Appellant is a citizen of Cameroon born 1st April 1981 who, on 15th May 2014, applied for a residence card on the basis that he was in a durable relationship with an EEA national, Jacqueline Enoru, a Belgian citizen.
3. The application was refused on 18th June 2014, and the Respondent issued a Notice of Immigration Decision of that date indicating that the

application had been refused with reference to regulation 8(5) of The Immigration (European Economic Area) Regulations 2006 (the 2006 regulations). In addition, the Respondent issued a reasons for refusal letter dated 18th June 2014, explaining why it was not accepted that the Appellant was in a durable relationship with his partner, to whom I shall refer as the Sponsor.

4. The Appellant appealed, and requested that his appeal be decided on the papers without an oral hearing.
5. The appeal was considered by the judge on the papers as requested. The judge considered an application made by the Appellant on 17th October 2013, which was an application for a residence card as the extended family member of his brother, Joshua Monono, although the judge noted that the Grounds of Appeal submitted by the Appellant made reference to a durable relationship. The judge noted that there appeared to be an inconsistency between the Grounds of Appeal and the basis of the application, but found that the issues raised in the Respondent's reasons for refusal letter dated 6th February 2014 had not been addressed, and therefore the Appellant had not proved he was entitled to a residence card either as the extended family member of his brother, or because he was in a durable relationship with the Sponsor. The appeal was dismissed.
6. The Appellant applied for permission to appeal to the Upper Tribunal. In summary, it was contended that the judge had erred by making a material misdirection of law, and/or making perverse or irrational findings, and/or making a mistake as to a material fact.
7. It was explained that the Appellant had previously applied for a residence card as an extended family member of his brother, which application had been refused, and the Appellant entered an appeal but withdrew this. He thereafter made a further application on the basis of his durable relationship with the Sponsor.
8. It was submitted that the judge had referred to documents contained within the Respondent's bundle, but these documents related to the previous application for a residence card, and had no bearing upon the appeal against the decision that the Appellant was not in a durable relationship with the Sponsor. It was contended that the judge had not considered the Appellant's bundle of documents which had been sent to the Tribunal on 7th August 2014, and which contained evidence about his relationship with the Sponsor.
9. It was submitted that the judge had dismissed the appeal on the basis of the Appellant's relationship with his brother rather than his partner.
10. Permission to appeal was granted on 26th November 2014 by Designated Judge of the First-tier Tribunal McCarthy.

11. Thereafter the Respondent lodged a response dated 12th December 2014 pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008, contending that the decision of the First-tier Tribunal contained no material error of law. It was however accepted that the author of the response did not have access to the Respondent's file, and therefore was only making submissions based upon the contents of the First-tier Tribunal decision.
12. The Tribunal issued directions that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

13. The Appellant's representatives had written to the Tribunal in advance of the hearing advising that they would not be attending but that the Appellant would be attending in person.
14. The Appellant attended the hearing. He confirmed that there was no need for an interpreter. The Appellant confirmed that he would be representing himself, and did not seek an adjournment to obtain legal representation.
15. I explained to the Appellant the procedure that would be adopted, and that I had to decide whether the First-tier Tribunal had made a mistake of law such that the decision had to be set aside. The Appellant confirmed that he had seen the grounds seeking permission to appeal, and the grant of permission. I made the Appellant aware that the Respondent had issued a written response opposing the application.
16. Mr Smart then confirmed that he would not be relying upon the rule 24 response, having noted that the author of the grounds did not have the file when that response was prepared.
17. Mr Smart accepted that the judge had considered the wrong reasons for refusal letter, and had made no reference to the evidence contained within the Appellant's bundle. It was conceded that this amounted to an error of law.

My Conclusions and Reasons

18. Mr Smart was correct to concede that the First-tier Tribunal had erred in law. The judge was not assisted by the fact that the Respondent's bundle before him, did not include the reasons for refusal letter dated 18th June 2014. There were two reasons for refusal letters in that bundle, one dated 23rd April 2013, and the other dated 6th February 2014, both of which related to applications made by the Appellant for a residence card on the basis of his relationship with his brother. There was however reference to a durable relationship, in the Notice of Immigration Decision, which was before the judge, and in the Grounds of Appeal.

19. I am satisfied that the Appellant's bundle had been received by the Tribunal prior to the judge considering the appeal on 11th September 2014. The Appellant's bundle was received at the Hatton Cross Hearing Centre on 11th August 2014.
20. It may be that the bundle was not linked to the file, as the judge makes no reference to the bundle of evidence, and this bundle did contain evidence in relation to a durable relationship, and contained the reasons for refusal letter dated 18th June 2014 which was missing from the Respondent's bundle.
21. If the Appellant's bundle had not been linked to the file, I find that this was a defect or impropriety of a procedural nature which amounts to a material error of law. In making this finding I have taken into account MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC).
22. In conclusion, I find that the judge erred by not considering the appeal which was before him, which was the appeal against the decision dated 18th June 2014, to refuse a residence card as it was not accepted that the Appellant was in a durable relationship with the Sponsor. The judge has erred by considering an earlier application that related to the Appellant's brother which should not have been before him. This has resulted in unfairness to the Appellant.
23. I therefore set aside the decision of the First-tier Tribunal. There are no preserved findings.
24. I decided that it was appropriate to remit the appeal to the First-tier Tribunal having taken into account the Senior President's Practice Statement 7.2 which states;
 - '7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that;
 - (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
 - (b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.'
25. In my view the requirements of paragraph 7.2 are met, in that the Appellant's case has not been considered by the First-tier Tribunal, and judicial fact-finding is required.

26. Unless the Appellant applies for an oral hearing and pays the requisite fee, the appeal will be determined on the papers by a First-tier Tribunal Judge other than Judge Bradshaw.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the First-tier Tribunal.

Anonymity

There was no order for anonymity made in the First-tier Tribunal. There has been no request for anonymity to the Upper Tribunal, and no anonymity order is made.

Signed

Date 6th October 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

No fee award is made by the Upper Tribunal. The fee award will need to be considered again when the First-tier Tribunal has heard this appeal.

Signed

Date 6th October 2015

Deputy Upper Tribunal Judge M A Hall

DIRECTIONS

The Appellant's bundle of documents has not been received by the Respondent. The Appellant is directed to serve any documentation to be relied upon on the Respondent, no later than 28 days after this decision has been sent out.

If either party seeks to rely upon any documentary evidence that has not already been served, such evidence must be served upon the Tribunal and the other party no later than 28 days from the date that these directions are sent out.

Signed

Date 6th October 2015

Deputy Upper Tribunal Judge M A Hall