



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

Appeal Number: IA/40619/2014

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 30th October 2015

Promulgated

On 18th November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR DANIEL ZABALA PAEZ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr James Davies (LR)

For the Respondent: Mr P Nath (HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge K St. John Wiseman, promulgated on 9th February 2015, following a hearing at Richmond on 27th January 2015. In the determination, the Judge allowed the appeal of Mr Daniel Zabala Paez. The Respondent Secretary of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Venezuela, who was born on 8th January 1975. He appealed against the decision of the Respondent Secretary of State dated 4th October 2014, refusing his application for a residence card as confirmation of his right to reside in the UK as a partner of an EEA national exercising treaty rights, under Regulation 8(5) of the Immigration (EEA) Regulations 2006. His partner for more than three years was said to be Maria Gabriela Concha Fumero, who was a Spanish citizen born on 19th January 1979.

The Judge's Findings

3. The Judge observed that the point before him was a narrow one. He is related to the fact that the support of bundle of documents in this case appeared not to have been received and that, "it was on that basis that the application was refused for lack of supporting evidence" (see paragraph 25). The Judge found that, "it is overwhelmingly likely that the documents were with the Home Office but in some way became separated from the papers the caseworker was using to make the initial decision ..." (paragraph 27). The Judge decided that, "the documents certainly provided significant evidence that the parties had been living together in Spain or that there appears to be somewhat less in relation to their current cohabitation ..." (paragraph 28).
4. The appeal was allowed on the basis that the parties were living in a durable relationship.

Grounds of Application

5. The grounds of application state that the Judge erred in law in failure to apply Regulation 8(5) in the appropriate manner, because under the provision, the issue of a residence card was a matter for the Secretary of State's discretion under Regulation 17(4). If the Judge had held (see paragraph 32) that, "in all the circumstances the Appellant is entitled to the documentation he seeks", then this was an error of law because it had the effect of fettering the Home Office's discretion to decide this matter in the light of documentation that was plainly with the Home Office but had been overlooked.
6. On 25th June 2015, permission to appeal was granted.
7. On 6th August 2015, a Rule 24 response was entered. This was to reflect that the Appellant's representatives did not disagree with the Grounds of Appeal that the proper construction of the appropriate Regulations was that the matter remained with the Secretary of State for her determination, rather than for a determination at the first instance by the First-tier Tribunal Judge.

Submissions

8. At the hearing before me on 30th October 2015, Mr Nath, appearing on behalf of the Respondent Secretary of State submitted that the point was a simple and discrete one in that, in what was a rather short

determination, the Judge decided a question that properly speaking, ought to have been decided by the Secretary of State, had all the papers been looked at, given that they had been overlooked.

9. In reply, Mr Davies, very sensibly and properly drew my attention to a letter that had been written by him on 14th August 2015. This letter, which is a Rule 24 response, states that there is no challenge to the Respondent's assertion that the Appellant is not "entitled to the document he seeks", but is rather entitled to have his application for the document considered by the Secretary of State.
10. This is the effect of paragraph 16(5) of the Immigration (EEA) Regulations 2006, where the relevant word is that the Secretary of State "may" issue a registration certificate to an extended family member.
11. Secondly, however, Mr Davies submitted that, given that the Respondent Secretary of State had an extended family member's policy, it stood to amuse him that, unless there were countervailing factors such as criminality on the part of the Appellant, the application really stood to be allowed by the Respondent Secretary of State, and that I should record this as a basic consideration once the matter goes back to the Secretary of State.
12. For his part, Mr Nath submitted that nothing could be a foregone conclusion because under Regulation 17(5) the issue of a residence card was a matter solely for the Secretary of State's discretion, and that decision had not been made.

Error of Law

13. I am satisfied that the making of the decision by the Judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision.
14. The error of law arises from the fact that the Judge could not arrogate to himself the right to make the decision that a residence card be granted to the Appellant, if the matter had not been properly considered on the evidence by the Secretary of State in the first place, since this was a matter solely for the discretion of the Secretary of State in the first instance.

Remaking the Decision

15. In remaking the decision, I have had regard to the evidence before the Judge, the findings by the Judge, and the submissions that I have heard today. I allow this appeal to the extent that the matter is remitted back to the Respondent Secretary of State for her decision under Regulation 17 in a way that takes account of all the relevant considerations and disregards all the irrelevant considerations.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law such that I set aside the decision of the original Judge. I remake the decision as follows. This matter is returned back to the Respondent Secretary of State for her decision in the first instance because a discretion appears not to have been properly exercised the first time around, since critical documents were overlooked, which ought to have been taken into account, before a lawful decision can be made.

No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

16th November 2015