



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

Appeal Number: IA/39970/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 30 September 2015**

**Decision and Reasons  
Promulgated  
On 15 October 2015**

**Before**

**DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR SHAHBAZ IQBAL**

Respondent

**Representation:**

For the Appellant: Ms Julie Isherwood, Senior Home Office Presenting Officer  
For the Respondent: In Person

**DETERMINATION AND REASONS**

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.
2. The appellant (hereafter the Secretary of State) appeals against the decision of the First-tier Tribunal (Judge Kelly) allowing the respondent's appeal against a decision taken on 24 September 2014 to refuse to issue

a residence card under the Immigration (European Economic Area) Regulations 2005 (“the Regulations”).

### **Introduction**

3. The respondent is a citizen of Pakistan born on 1 March 1982. The respondent claimed that he had been living with Ms Sabeena Anwar, a citizen of Italy born on 22 June 1985 (“the EEA sponsor”) since February 2013.
4. The Secretary of State accepted the respondent’s identity and nationality but concluded that the respondent was still married and therefore his relationship with the EEA sponsor was in doubt and could not be considered durable and subsisting. There was also insufficient documentary evidence to demonstrate a durable relationship. There was a previous refusal on 12 April 2013.

### **The Appeal**

5. The respondent appealed to the First-tier Tribunal and attended an oral hearing at Hatton Cross on 24 April 2015. He was not represented. The First-tier Tribunal found that the EEA sponsor was a self-employed qualified person under the Regulations and that the relationship was a durable one under regulation 8(5). The couple had a baby. The appeal was allowed outright under the Regulations.

### **The Appeal to the Upper Tribunal**

6. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law by allowing the appeal outright when the Secretary of State had not considered regulation 17(4) discretion. The respondent was an extended family member and the appeal should be remitted back to the Secretary of State to exercise discretion.
7. Permission to appeal was granted by First-tier Tribunal Judge Simpson on 8 July 2015 on the basis that the decision was silent as to regulation 17(4) and the judge was not entitled to exercise the discretion of the Secretary of State.
8. Thus, the appeal came before me

### **Discussion**

9. Ms Isherwood submitted that there was no challenge to the findings in relation to durable relationship. However, regulation 17(4) requires the Secretary of State to make a decision first. The decision must be remitted back to the Secretary of State.
10. The respondent submitted that he was a family member by the date of the oral hearing because the wedding took place on 27 February 2015. All of

the documents that proved he was a family member were submitted before the hearing. He also brought a birth certificate for the baby with his name on it.

11. Ms Isherwood replied that the application was made before the parties were married. However, the evidence of the marriage was now before the Secretary of State and it was unlikely that a decision would now be made under regulation 17(4). Ms Isherwood had seen documents and photographs in relation to the marriage.
12. I note that the judge found that the relationship was genuine and referred at paragraph 19 of the decision to the uncontested evidence of the marriage. However, there is no finding of fact in relation to the marriage and the appeal was allowed outright on the basis that the respondent was an extended family member. That is a material error of law for the reasons given by the Secretary of State and because by the date of the oral hearing the respondent was a family member rather than an extended family member.
13. Thus, the First-tier Tribunal's decision to allow the respondent's appeal under the Regulations involved the making of an error of law and its decision cannot stand. The EEA sponsor was exercising treaty rights in the UK as at the date of hearing and the respondent was married to the EEA sponsor as at the date of hearing. The respondent is the father of the EEA sponsor's baby. Those facts are not contested. I therefore remake the decision on the basis that the respondent is a family member of the EEA sponsor under regulation 7(1)(a) and regulation 17(4) no longer applies to this appeal.

### **Decision**

14. Consequently, I set aside the decision of the First-tier Tribunal. I remake the decision by allowing the respondent's appeal under regulation 17(1) of the Regulations. I remit the decision to the Secretary of State to make a lawful decision on the basis that the respondent is a family member of the EEA sponsor and the EEA sponsor is a qualified person.

Signed



Date 15 October 2015

Judge Archer  
Deputy Judge of the Upper Tribunal