



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

Appeal Number: IA/23636/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 16 June 2015  
Prepared 16 June 2015**

**Decision & Reasons  
Promulgated  
On 24 June 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DAVEY**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**and**

**MR ACHU PHILIP ADAH  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

Respondent

**Representation:**

For the Appellant: Miss Brocklesby-Weller, Senior Home Office Presenting Officer

For the Respondent: Mr Frederico Singarajah, Counsel instructed by Paul John & Co Solicitors

**DECISION AND REASONS**

1. In this decision the Appellant is referred to as the Secretary of State and the Respondent is referred to as the Claimant.

2. The Claimant, a national of Nigeria, date of birth 15 June 1984, had applied for a residence permit on 3 April 2014 which was refused with reference to Regulation 8(1) of the Immigration (EEA) Regulations 2006 (the 2006 Regulations) on the basis that he had not as a fact established that he was a dependant under Regulation 8. His appeal against the decision of 14 May 2014 came before First-tier Tribunal Judge Cohen (the judge) who, on 16 February 2015, promulgated his decision whereby he allowed the appeal outright with reference to the requirements of Regulation 8 of the 2006 Regulations.
3. It does not appear from the decision of the judge that it had been agreed by the parties that he should determine the matter outright. It is also significant that the Presenting Officer, Mr D Harvey, is an experienced and senior Presenting Officer. Accordingly it seems to me that if that had been such a concession either the judge exercising his usual care would have recorded the same or Mr Harvey would have noted it within his memorandum of the Proceedings or, indeed, it would have been noted by Mr Singer, Counsel for the Claimant.
4. There was no challenge to the judge's clear findings that the Claimant is properly a qualified person under the Regulations. The error, it is said by the Secretary of State, was that the judge had then gone on to determine the appeal outright whereas the correct course would have been to have allowed the appeal to the extent that it was remains for the Secretary of State to decide in accordance with the law. Reliance was essentially placed upon the case of *Ihemedu (OFMs - meaning) Nigeria* [2002] UKUT 340 (IAC). Mr Singarajah has helpfully sought to argue by reference to Regulation 8 and Regulation 17 of the 2006 Regulations, that in effect the Secretary of State had by the decision of 14 May 2014 only raised the issue of the nature of the Claimant's qualification under the Regulations. He said it was to be inferred or implicit that the Secretary of State must have looked at all the other circumstances and concluded that it was appropriate to issue the residence card or that in failing to do so at the outset, the Secretary of State had erred in law in failing to exercise the

discretion and, as such, that was a justiciable decision which meant that the judge's decision should stand.

5. Mr Singarajah took me to the case of MO [2008] UKAIT 61 in which a Deputy President of the Tribunal, with reference to rather different circumstances as such, concluded that in the circumstances to be taken into account the Secretary of State had not yet undertaken the task the Regulations required and the decision refusing that Claimant a residence card was one which was not in accordance with the law and in that case they substituted a determination allowing the appeal with the effect that the Claimant's application remains outstanding before the Secretary of State awaiting a lawful decision. I find MO does not assist Mr Singarajah's case but he was right to draw it to my attention. Similarly the analogous reference that he makes to the case of Adjei [2015] UKUT 261 (IAC) again does not assist. With reference to YB (EEA reg17(4)- proper approach) [2008] UKAIT 00062 it again appears to me to be an authority which stands for the general proposition that if a person meets the requirements of Article 8, for example, so as to engage with Regulation 17(4)(a) of the 2006 Regulations, there still remains the matter to be determined in accordance with the law as to whether there are circumstances which militate against the grant of a residence card in respect of which it should otherwise be given. The judge's findings of fact stand.
6. In the circumstances I find the correct approach was that the judge should have allowed the appeal to the extent that he found the Claimant had fully met the qualification requirements under Regulation 8 and returned it to the Secretary of State to deal with the further issue under Regulation 17(4)(b) of the Regulations. To this extent therefore Ihemedu is helpful where there is a discretion but which has not been exercised. I am satisfied that the judge made a material error of law. The Original Tribunal decision cannot stand.
7. I note the remark made by Judge De Haney in granting permission to appeal and it may be, but I do not presume to indicate, there really were

not any circumstances to warrant pursuing this appeal in practical terms even though, strictly in law, it is evidently justified. The exercise of that discretion with regard to the relevant circumstances is at this stage a matter for the Secretary of State and if that is not properly exercised then there will be a further right of appeal.

### **Anonymity Order**

No anonymity direction is made. No order was sought nor is one appropriate.

### **NOTICE OF DECISION**

The appeal is allowed to the extent that the matter is returned to the Secretary of State to determine in accordance with the law.

Signed

Date 22 June 2014

Deputy Upper Tribunal Judge Davey