



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/24541/2014

THE IMMIGRATION ACTS

Heard at Field House  
On 26 February 2016

Decision & Reasons Promulgated  
On 4 March 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

And

Appellant

MR. MOHAMMED NEFISSI  
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms A. Fijiwala, Home Office Presenting Officer  
For the Respondent: Miss. K. Cann, Counsel instructed by Good Advice UK

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Herlihy promulgated on 14 August 2015 which allowed Mr. Nefissi's appeal against the Secretary of State's refusal to issue him with an EU residence card as the extended family member of Ms Zuzana Seligova, a citizen of Slovakia, in accordance with the Immigration (EEA) Regulations 2006 (the "Regulations").

2. For the purposes of this decision, I refer to Mr. Nefissi as the Appellant and to the Secretary of State as the Respondent, reflecting their positions as they were before the First-tier Tribunal.
3. The grounds of appeal submit that Judge Herlihy erred in law by allowing the Appellant's appeal outright. The Respondent had not exercised her discretion under regulation 17(4) of the Regulations to grant a residence card. As the Appellant had been found to be an extended family member under regulation 8(5), it was submitted that the judge should have remitted the case to the Respondent for consideration under regulation 17(4), instead of allowing the appeal outright. Reliance was placed on the case of Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340.
4. Ihemedu states in the headnote, paragraph (iii):
 

"Regulation 17(4) makes the issue of a residence card to an OFM/extended family member a matter of discretion. Where the Secretary of State has not yet exercised that discretion the most an Immigration Judge is entitled to do is to allow the appeal as being not in accordance with the law leaving the matter of whether to exercise this discretion in the appellant's favour or not to the Secretary of State."
5. It was submitted by Miss. Cann that the decision did not contain an error of law. The judge had not stated that the Appellant should be issued with a residence card under regulation 17(4), but had allowed the appeal on the basis that regulation 8(5) had been met.

#### Error of law

6. The Appellant applied for a residence card. He appealed against the Respondent's decision to refuse to issue a residence card on the basis that he was not an extended family member. Although the reasons for refusal letter does not mention regulation 17(4) but focuses on the Appellant's failure to meet regulation 8(5), the Respondent's decision of the same date is clear that, as the Respondent does not accept that the Appellant falls within regulation 8(5), his application for a residence card under regulation 17(4) is refused. This is the decision under appeal.
7. In her skeleton before me Miss. Cann accepts that the Appellant appealed against the decision to "refuse to issue a residence card as an extended family member" [2]. Although she later states that the decision of the Respondent was "that the [Appellant] and his EEA partner were not in a "durable relationship" [7], this is not the full decision under appeal. The Appellant did not apply to the Respondent for a decision recognising that he and his partner were in a durable relationship. He applied for a residence card.
8. Therefore, the judge's decision to allow the appeal outright is to allow the appeal against the Respondent's decision to refuse to issue a residence card. Although the judge does not expressly state that the Appellant is entitled to a residence card under regulation 17(4), she allows the appeal against the decision to refuse to issue one, the effect of which is the same. It is clear that the judge is aware of what the appeal is

against. In paragraph 1.1 she states that the Appellant “appeals against the decision of the Respondent dated the 28<sup>th</sup> May 2014 to refuse to issue a residence card as the extended family member of an EEA national”. Therefore, when she allows the appeal in paragraph 7.3, stating “the appeal is allowed”, she is allowing the appeal against the decision to refuse to issue a residence card which, following Ihemedu, she is not entitled to do.

9. Once the judge had found that the Appellant was an extended family member for the purposes of Regulation 8(5), given that the Respondent had not considered whether to exercise discretion to issue the Appellant with a residence card under regulation 17(4), she should have remitted the matter to the Secretary of State. It is an error of law to have allowed the appeal outright.

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error on a point of law.

The reasoning of the First-tier Tribunal is preserved up to and including paragraph [6.6].

Paragraph [7] of the decision is set aside. The decision is remade as follows. The appeal is allowed to the extent that the refusal is not in accordance with the law. The matter is remitted to the Secretary of State to consider whether she will exercise discretion to issue a residence card in accordance with regulation 17(4) of the Immigration (EEA) Regulations 2006.

I do not make an anonymity direction.

Signed

Date 28 February 2016

Deputy Upper Tribunal Judge Chamberlain