



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/33006/2014

THE IMMIGRATION ACTS

Heard at Field House
On 4th April 2016

Decision & Reasons Promulgated
On 29th April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR NGONA RAPHAEL DIROKPA
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Angbah (LR)
For the Respondent: Ms N Willocks-Briscoe (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge K Henderson, promulgated on 22nd September 2015, following a hearing at Richmond on 24th August 2015. In the determination, the judge allowed the appeal of the Appellant, whereupon 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 the Democratic Republic of Congo, and was born on 8th January 1982. He appealed against the decision of the Respondent refusing him a residence card as the extended family member (in a durable relationship) of an EEA national, namely, Aminata Cauwenbergh, a national of Belgium.

The Judge's Findings

3. The judge held that the first issue was whether the Sponsor EEA national was a worker according to the Regulations and held that she had provided adequate evidence to show that she has been exercising treaty rights as a worker, in the form of wage slips and bank statements (see paragraph 16). When she had not been working she was on maternity leave. She had commenced her new employment from July 2014 to the present date (see paragraph 17). The second issue was whether the couple were in a durable relationship as defined by Regulation 8(5) of the Immigration (EEA) Regulations 2006. There was evidence from a variety of sources to confirm that the couple had been living together in a committed relationship for at least two years (see paragraph 19). Moreover, there was a joint bank statement with the Metro Bank (see paragraph 21). Furthermore, a child had been born to them and the paternity of the child has not been contested by the Respondent Secretary of State (see paragraph 22).
4. The judge went on to hold that, "I conclude taking into account the totality of the evidence this is a genuine and subsisting relationship which can be termed a durable relationship using the terminology required under the EEA Regulations" (paragraph 25).
5. The decision of the judge was that, "I allow the appeal under the Immigration (EEA) Regulations 2006".

Grounds of Application

6. The grounds of application state that the judge was wrong to have allowed the appeal under the EEA Regulations without bearing in mind the Tribunal decision in **Ihemedu (Nigeria) [2011] UKUT 00340**, where it was made clear that regard must be had to Regulation 17(4) which 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.
7. On 23rd February 2016, permission to appeal was granted.

Submissions

8. At the hearing before me on 4th April 2016, Ms Willocks-Briscoe emphasised the Rule in **Ihemedu** and submitted that the judge had not simply allowed the appeal as not

being in accordance with the Rules but had allowed the appeal under the EEA Regulations which she was not entitled to do.

9. For his part, Mr Angbah submitted that he would have no objection to the matter being remitted to the Secretary of State for the exercise of her discretion.

Error of Law

10. 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 re-make the decision.
11. My reasons are that Regulation 17(4) does not allow a judge to allow the appeal, except where the judge has made clear that the decision of the Secretary of State is not in accordance with the law, thereby leaving the matter standing before the Secretary of State for the exercise of her discretion, such that the Secretary of State can take into account all the circumstances of the case, including all relevant immigration matters.

Re-making the Decision

12. I re-make the decision on the basis of the findings of the original judge, and the submissions that I have heard today. I allow this appeal to the extent that the decision is not in accordance with the law, and the exercise of discretion under Regulation 17(4) of the EEA Regulations remains outstanding before the Secretary of State for a decision as to whether or not a residence card is to be issued to the Appellant on the basis of his durable relationship with the EEA national.

Notice of Decision

13. The decision of the First-tier Tribunal involved the making of an error on a point of law such that it falls to be set aside. I set aside the decision of the original judge.
14. I re-make the decision as follows. This appeal is allowed to the extent that, given that the Secretary of State has not yet exercised her discretion the matter as to whether or not a residence card should be issued to the Appellant remains outstanding before the Secretary of State.
15. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

28th April 2016