



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

Appeal Number: IA/10535/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 8 May 2015
Oral decision**

**Decision & Reasons Promulgated
On 13 May 2015**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**VIVIAN NYANTA
(ANONYMITY DIRECTION NOT MADE)**

Claimant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance or representation

For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The respondent appeals with permission against the determination of First-tier Tribunal Judge Clapham promulgated on 8 December 2014 in which having found the claimant had not shown that she was lawfully married to her partner, nonetheless found that the appellant and her partner were in a durable relationship for the purposes of the Immigration (European Economic Area) Regulations 2006. The judge then at paragraph 48 held: "in the circumstances however I am prepared to allow the appeal not on the basis of a spousal relationship but on the basis of

the alternative submissions that were made. I was not asked to make any fee award or any anonymity order.” The judge then allowed the appeal but made no directions as to what was to follow.

2. The respondent appealed against this decision on the basis that in light of the decision in **Ihemedu [2011] UKUT 340** that as this finding would require the Secretary of State to exercise her discretion under Regulation 17(4) of the EEA Regulations, that the appropriate course of action for the judge was to have been to allow the appeal as not being in accordance with the law and leaving the matter of whether discretion was to be exercised in the appellant’s favour to the Secretary of State. Permission to appeal to the Upper Tribunal was granted on that basis by First-tier Tribunal Judge V Osborne on 28 January 2015.
3. When the matter came before me I noted that there had been an application for this matter to be adjourned, that application having been made on 6 May 2015. It is said that as the claimant is suffering from post-natal depression and is unable to attend the hearing. That application was refused by the Upper Tribunal it being noted that no medical evidence had been produced to support that contention and that it was unclear why the claimant’s attendance was required in order for the Tribunal to determine whether the decision of the First-tier Tribunal had involved the making of an error of law.
4. There was no appearance by the appellant or for that matter her solicitors. No proper explanation is made for this and it must have been clear to the solicitors that in the absence of a positive indication from the Upper Tribunal that there would be no adjournment of the case, that they should have attended and I am satisfied in all the circumstances it would be appropriate to proceed to determine the application.
5. I heard brief submissions from Mr Whitwell on behalf of the Secretary of State who relied on the grounds of appeal. I am satisfied that in this case it is clear that in allowing the appeal on the basis on which it was allowed, that is a finding that the appellant and her partner were in a durable relationship, that the judge ought then to have found the decision of the Secretary of State was not in accordance with the law and allowed the appeal on that basis and subsequently making a direction in order to give effect to that appeal that the Secretary of State should reconsider the matter. I am satisfied that that error is material and that in the circumstances the decision or that part of the decision of Judge Clapham should be set aside.
6. In re-making the decision I consider that the appropriate course of action in this case is to allow the appeal on the basis that the Secretary of State’s decision was not in accordance with the law. It follows therefore that the application remains before the Secretary of State awaiting a proper lawful decision and it is for the Secretary of State to make a fresh decision taking into account the findings of Judge Clapham which have not been challenged.

7. Accordingly therefore, for the reasons given, I am satisfied the decision of the First-tier Tribunal did involve the making of an error of law. I set it aside and I re-make it by allowing the appellant's appeal on the basis that the decision of the Secretary of State was not in accordance with the law. I direct the Secretary of State to make a fresh decision on this matter, taking into account the findings of the First-tier Tribunal which are preserved. The respondent will also need to take into account the fact that the claimant now has a child who may well be an EU national.

SUMMARY OF CONCLUSIONS

8. The decision of the First-tier tribunal involved the making of an error of law and I set it aside.
9. I remake the decision by allowing the appeal on the basis that it was not in accordance with the law. The application therefore remains pending before the respondent and awaits a fresh, lawful decision, taking into account the findings of fact reached by the First-tier Tribunal.

Signed

Date: 8 May 2015

Upper Tribunal Judge Rintoul