



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

Appeal Number: IA/15842/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 18 September 2015**

**Decision and Reasons  
Promulgated  
On 21 September 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE KAMARA**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**DR MAYOWA ADEWALE OSUNNEYE**  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Respondent: Mr V Ikie, solicitor, Ikie Solicitors LLP

For the Appellant: Mr D Clarke, Home Office Presenting Officer

**DECISION AND DIRECTIONS**

1. This is an appeal against a decision of First-tier Tribunal Judge Monaghan (hereinafter referred to as the FTTJ).
2. Permission to appeal was granted by First-tier Tribunal Judge Lambert on 23 April 2015.
3. The respondent last entered the United Kingdom on 28 December 2013 with leave to enter as a family visitor. He applied for a residence card on 27 January 2014, on the basis that he was an extended family

member of his brother, Dr Adedoyin Babatunde Osunneye (hereinafter referred to as the sponsor), who is an Irish national. That application was refused on 17 March 2014 with reference to regulation 8(2) of the Immigration (European Economic Area) Regulations 2006. The accompanying reasons for refusal letter informed the respondent that he had not provided any evidence of his dependency on his sponsor either in Nigeria or the United Kingdom or that he was a member of the sponsor's household in either country.

4. During the course of the hearing before the First-tier Tribunal the respondent and sponsor gave evidence. The FTTJ accepted that the respondent had been dependent on the sponsor both before and after the latter became an EEA national. The FTTJ allowed the appeal "*under the EEA Rules.*"
5. The grounds seeking permission took issue with the fact that the FTTJ accepted prior dependency notwithstanding the paucity of documentary evidence to that effect. Reference was also made to the respondent's earnings in Nigeria and whether he was dependent on the profit from goods sent by the sponsor in order to meet his essential outgoings. It was also stressed that Regulation 17(4) of the 2006 Regulations provided a discretion to the Secretary of State to issue a residence card to an extended family member and that discretion had yet to be exercised as it was not considered the appellant met the requirements of regulation 8. Therefore, it was argued, that the FTTJ ought to have allowed the appeal on the basis that the Secretary of State's decision was not in accordance with the law. Reference was made to the decision in FD (EEA discretion – basis of appeal) Algeria [2007] UKAIT 49.
6. Permission to appeal was granted on the basis that it was not open to the FTTJ to allow the appeal outright under the Regulations.
7. When this matter came before me, Mr Clarke informed me that he wished to make submissions on the issue of the respondent's prior dependency. After hearing submissions on this point from both representatives, I decided that permission had not been granted on this issue and I declined to grant permission for these points to be argued for the following reasons.
8. The Secretary of State's grounds of application amounted to 12 paragraphs, 9 of which were devoted to the issue of whether the FTTJ had provided inadequate reasoning for her conclusion that the respondent was previously dependent upon the EEA sponsor. FTTJ Lambert's grant of permission states as follows; "*The issue was the Appellant's dependence on the sponsor before arrival in the UK. While the first 9 paragraphs of the grounds appear in effect to amount to no more than disagreement with the judge's findings on the evidence, paragraph 10 is clearly arguable. It was not open to the judge having regard to the provisions of Regulation 17(4) to allow the appeal*

*outright.*” FTTJ Lambert concludes that there is therefore “*an*” arguable error of law disclosed by the application. I find there to be no support for Mr Clarke’s submission that permission to appeal was granted in relation to paragraphs 1-9 of the application.

9. I then heard brief submissions from both representatives, in which there was common ground, in relation to FTTJ’s decision to allow the appeal outright.
10. In Ihemedu (OFMs – meaning) Nigeria [2011] UKUT 00340 (IAC) it was found that Regulation 17(4) made the issue of a residence card to an extended family member a matter of discretion. As in this case, where the Secretary of State has yet to exercise that discretion, a judge allowing the appeal can do no more than find that the decision was not in accordance with the law.
11. In this case, I find that the FTTJ materially erred in allowing the appeal under the “*EEA Rules*,” by which I presume she meant Regulations. I therefore allow the Secretary of State’s appeal on this basis.
12. I proceed to remake the FTTJ’s decision by substituting a decision to allow Dr Osunneye’s appeal on the basis that the Secretary of State’s decision was not in accordance with the law. All the findings of the FTTJ as to dependency are preserved. Therefore it is now a matter for the Secretary of State to exercise her discretion as to whether or not to issue him with a residence card.

### Conclusions

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

I set aside the decision to be re-made.

I substitute a decision allowing the respondent’s appeal on the basis that the Secretary of State’s decision was not in accordance with the law.

No application for anonymity was made and I saw no reason to make such a direction.

Signed

Date: 19 September 2015

Deputy Upper Tribunal Judge Kamara