



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal number: IA/17223/2014**

THE IMMIGRATION ACTS

**Heard at Field House
On 9 February 2015**

**Determination
Promulgated
On 10 February 2015**

Before

UPPER TRIBUNAL JUDGE WARR

Between

SECRETARY OF STATE

Appellant

and

THOMAS KOFI KUSI

Respondent

Representation:

For the Appellant: Mr N Bramble, Home Office Presenting Officer

For the Respondent: Mr B Owusu (BWF Solicitors)

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State but I shall refer to the original appellant, a citizen of Ghana born on 5 December 1968, as the appellant herein.

2. The appellant entered the United Kingdom on 28 November 2012 from Italy on an European Economic Area family permit. His brother Francis is the sponsor. The brother holds an Italian passport. The appellant applied for leave to remain as an extended family member under the Immigration (European

Economic Area) Regulations 2006. The respondent refused the application on 31st March 2014 on the basis of insufficient evidence of dependency.

3. The appellant appealed and his appeal came before First-tier Judge Holder on 23rd October 2014. The judge heard oral evidence from the appellant and his brother and was satisfied that the appellant was a relative of an EEA national exercising Treaty rights in the United Kingdom, that the appellant had lived with his brother in Italy and was dependent upon him and continues to be dependent upon him in the United Kingdom and resided with him. The judge concluded that the appellant met the requirements of reg. 8(2)(a) and (c) of the regulations. He allowed the appeal.

4. The Secretary of State appealed on the basis that the judge should not have allowed the appeal outright but remitted it to the Secretary of State following Ihemedu (Nigeria) [2011] UKUT 00340 (IAC). Permission was granted by First-tier Judge Holmes.

5. Mr Bramble relied on YB (Ivory Coast) [2008] UKAIT 00062 and Aladesalu (Nigeria) [2011] UKUT 00253 (IAC) as well as Ihemedu to support his proposition that the First-tier Judge had erred in allowing the appeal outright. He referred in particular to the following passage from Aladesalu:

“The regulation 17(4) issue

29. Establishing that one is an OFM/ extended family member is not, however, the end of the matter. The appeals are against decisions refusing to issue each of the appellants with a residence card. Unlike the position that obtains for Article 2.2 family members - or CFMs - who are entitled to a residence card by operation of regulation 17(1) (“the Secretary of State must issue.....”), the position set out in the 2006 Regulations for extended family members affords the respondent a discretion. Reflecting Article 3.2 of the Citizens Directive, regulation 17(4) states that the Secretary of State “may” issue a residence card to an extended family member if the EEA spouse is a qualified person or an EEA national with a permanent right of residence and “(6) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card”. As the Tribunal noted in YB (EEA reg 17(4)-proper approach) Ivory Coast [2008] UKAIT 00062, the discretion afforded by regulation 17(4) is not unfettered, there being not only the obligation to consider all the circumstances but also the requirement set out in regulation 17(5) to undertake (in response to an application) “an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal.....”; see also recital 6 of the Directive.

30. The initial difficulty that confronts the Tribunal in these appeals is that the respondent has not as yet exercised the regulation 17(4) discretion or carried out the regulation 17(5) examination. That is because in the refusal letter the respondent did not accept they qualified as extended family members under regulation 8. The Immigration Judge followed suit.

31. In such circumstances it is clear that the hands of the Tribunal are tied. Whilst we can consider whether a discretionary power should have been

exercised differently, we cannot seek to do that if there has as yet been no exercise of that power. It follows that the appeal can only be allowed to the extent that it remains outstanding before the Secretary of State.”

6. Mr Owosu accepted that the appeal should be allowed to the extent that the appeals of the appellants were allowed in Aladesalu: “The decision we remake is to allow the appellants’ appeals to the extent that they remains outstanding before the Secretary of State to decide whether to exercise the regulation 17(4) discretion in their favour.” He asked me not to disturb the fees order that the First-tier Tribunal had made in favour of the appellant.

7. By agreement accordingly I find that the First-tier Tribunal did err in law as submitted by Mr Bramble and I remake the decision as follows:

I allow the appellant’s appeal to the extent that it remains outstanding before the Secretary of State to decide whether to exercise the regulation 17(4) discretion in his favour.

I do not disturb the fee award made in the appellant’s favour in the circumstances.

Signed

Upper Tribunal Judge Warr

9 February 2015