



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

Appeal Number: IA/39408/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 11 August 2015**

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

Before

**UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE L MURRAY**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR ALVIND KUMAR HURKOO
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Miss A Fijiwala, Home Office Presenting Officer

For the Respondent: In person

DECISION AND REASONS

1. The Secretary of State was granted permission to appeal against the decision of First-tier Tribunal Judge Pears, promulgated on 15 April 2015, allowing the Claimant's appeal against her decision to refuse him a residence card under Regulation 17 with reference to Regulation 15 of the Immigration (European Economic Area) Regulations 2006 (as amended). The Claimant was refused a residence card as an extended family member on the basis that it was not accepted that he was in a durable relationship with an EEA national.

2. The First-tier Tribunal Judge accepted that the Claimant was in a durable relationship with an EEA national. The Secretary of State does not challenge that finding.
3. Permission was granted by First-tier Tribunal Judge Heynes on the basis that the issue of a residence card to an extended family member is subject to the discretion of the Secretary of State. Where an applicant, or the Claimant in this case, is found to be in a durable relationship but that discretion has not been exercised, the proper course is to allow the appeal on the basis that the decision is not in accordance with the law and remit the application to the Secretary of State.
4. Regulation 17 (4) of the Immigration (EEA) Regulations 2006 provides that the Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if – (a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and (b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.
5. First-tier Tribunal Judge Pears found at paragraph 15 of the decision that the Claimant was in a durable relationship with an EEA national which had existed for considerably more than 2 years and that he met the requirements of regulation 8 (5) of the EEA Regulations. Having regard to the decision of the First-tier Tribunal that the Claimant is indeed in a durable relationship, which is undisputed, there was no error in finding that he meets the requirements of regulation 8 (5). The Judge allowed the appeal outright. It is clear both from regulation 17 (4) and from the cases of **MR & Ors (EEA extended family members) Bangladesh [2010] UKUT 449** and **Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340(IAC)** that regulation 17 (4) makes the issue of a residence card to an extended family member a matter of discretion.
6. Where the Secretary of State has not yet exercised that discretion the proper course is to set the decision aside and remake it, allowing the appeal to the extent that the claimant's application for a residence card as an extended family member remains outstanding before the Secretary of State for a lawful decision.

Notice of decision

We therefore set aside the decision of the First-tier Tribunal and remake the decision. This appeal is allowed to the extent that the question whether a residence card should be issued to the claimant is outstanding before the Secretary of State for a lawful decision thereon.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge L Murray