



UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: IA/38314/2014

THE IMMIGRATION ACTS

Heard at: Field House
on 11 February 2016

Decision and Reasons Promulgated on
on 29 March 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ROSHAN FAYAS MOHAMED THALHA
NO ANONYMITY DIRECTION MADE

Respondent

Representation

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

For the Respondent: Mr Z Khan, Universal Solicitors

DECISION AND REASONS

1. I shall refer to the appellant as “the secretary of state” and to the respondent as “the claimant.”
2. The secretary of state appeals with permission against the decision of the First-tier Tribunal Judge promulgated on 28 August 2015 allowing the claimant's appeal under the Immigration (EEA Regulations) 2006 (“the 2006 Regulations”).

3. The claimant applied for a residence card under the 2006 Regulations as an extended family member of his cousin, a German national exercising Treaty rights here.
4. The Judge found that the claimant satisfied the conditions in Regulation 8(2) of the 2006 Regulations and allowed the appeal outright.
5. On 29 December 2015, First-tier Tribunal Judge O'Garro granted the secretary of state permission to appeal to the Upper Tribunal on the basis that the Judge made an arguable error of law by allowing the appeal outright, having regard to the decision of the Upper Tribunal in Ihmedu (OFMs – meaning) Nigeria [2011] UKUT 00340 (IAC).
6. Mr Bramble submitted that the secretary of state has not applied her discretion to this case under Regulation 17(4) of the 2006 Regulations. Accordingly, the correct course is to allow the appeal to the limited extent that it is “otherwise not in accordance with the law” and to remit the matter back to the secretary of state in order that she may be allowed to consider an exercise of discretion. Mr Khan did not oppose this outcome.
7. As submitted by Mr Bramble, Regulation 17(4) of the 2006 Regulations 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 the relevant EEA national in relation to the extended family member is a qualified person (which the claimant's cousin is); and in all the circumstances it appears to the secretary of state appropriate to issue a residence card.
8. Accordingly, Regulation 17(4) provides a discretion to the secretary of state relating to the issue of a residence card in these circumstances.
9. In the claimant's case, the secretary of state has not considered the exercise of such discretion having dismissed her application. Accordingly, the secretary of state is in the first instance required to consider the exercise of discretion before the Tribunal is itself entitled to consider the exercise of discretion: FD (EEA Discretion – Basis of Appeal) Algeria [2007] UKAIT 49.

Notice of Decision

I allow the appeal of the secretary of state to the extent that I set aside the decision of the First-tier Tribunal and substitute a decision allowing the appeal of the claimant against the decision of the secretary of state under Regulation 8(5) of the 2006 Regulations, to the extent that his application for an EEA residence card remains outstanding before the secretary of state.

No anonymity direction is made.

Signed

Date 4 March 2016

Deputy Upper Tribunal Judge Mailer