



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

Appeal Number: IA/22498/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 13th March 2015**

**Decision & Reasons
Promulgated
On 25th March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR FESTUS KULNE AKINWOLEMIWA

Respondent

Representation:

For the Appellant: Ms E Savage, Home Office Presenting Officer

For the Respondent: Ms W Bremang, Counsel instructed by A2 Solicitors

DECISION AND REASONS

1. Mr Akinwolemiwa is a citizen of Nigeria whose date of birth is recorded as 7th August 1970. He entered the United Kingdom on 10th October 2009 as a visitor. On 25th September 2012, on the basis of marriage, application was made on his behalf for a residence card as confirmation of a right to reside in the United Kingdom. On 6th May 2014 a decision was made to refuse the application and so Mr Akinwolemiwa appealed. On 27th October 2014 his appeal was heard by Judge of the First-tier Tribunal Ferguson, who in a statement of reasons allowed the appeal without qualification.

2. By notice dated 20th November 2014 the Secretary of State made application for permission to appeal to the Upper Tribunal on one ground, namely that in reliance on Regulation 17(4) of the EEA Regulations 2006 and having regard to the guidance in the case of **Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340** it was not open to the judge to allow the appeal. That was because the discretion in circumstances such as this lies only with the Secretary of State consistent with Directive 2004/38/EC.
3. Permission to appeal was granted by Judge Shimmin on 12th January 2015. There is no issue in this case. There was an error of law. The judge ought to have remitted the matter to the Secretary of State. The better course would have been for a decision to say that the appeal is allowed to the limited extent that it is remitted to the Secretary of State to exercise her discretion. In the circumstances I set aside the decision of the First-tier Tribunal and remake it such that the matter is to be remitted to the Secretary of State for consideration in the light of the finding made by the judge. I observe, if it assists the Secretary of State in making her decision in the exercise of her discretion, that the only ground upon which the matter was brought before the Upper Tribunal was in respect of the discretion and that none of the findings of fact were challenged.

Notice of Decision

There was a material error of law in the decision of the First-tier Tribunal. The appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal is set aside and remade such that the matter is remitted to the Secretary of State.

Signed

Date

Deputy Upper Tribunal Judge Zucker