



Self-Typed

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

Appeal Number: IA/34835/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 4 August 2015**

**Determination Promulgated
On 18 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR LAHAI KOROMA
(ANONYMITY DIRECTION NOT MADE)**

Respondent/Claimant

Representation:

For the Appellant: Mr P. Duffy, Specialist Appeals Team

For the Respondent: Mr B. Quee, Solicitor, Quee & Mayaaja Solicitors

DECISION AND REASONS

1. The Secretary of State ("SSHD") appeals to the Upper Tribunal ("UT") from the decision of the First-tier Tribunal (Judge Steer sitting at Hatton Cross on 23 December 2014) allowing outright the claimant's appeal against the decision by the SSHD to refuse to issue him with a residence card as confirmation of his right to reside in the United Kingdom as the extended family member of an EEA national exercising treaty rights here. The First-tier Tribunal ("FTT") did not make an anonymity order, and I do not consider that such an order is warranted for these proceedings in the Upper Tribunal.

2. The claimant is a national of Sierra Leone, whose date of birth is 15 April 1985. His sponsor is his sister-in-law who married his brother in the UK on 12 February 2012. The claimant entered the UK on 26 October 2013, and applied for a residence card as a dependent relative shortly thereafter. It is not clear on what basis the claimant gained entry to the UK. There is reference in the papers to the claimant undertaking an ACCA course, and so he may have entered the UK as a student. His application for a residence card was refused, and his appeal against the refusal was dismissed by Judge Fisher on 23 December 2013. She was not persuaded that the claimant had been dependent on his sister-in-law or brother before he came to the UK.
3. The claimant made a fresh application in June 2014. The SSHD gave brief reasons for refusing the claimant's application in September 2014.. She referred to Regulation 8(2). He had not shown that he was dependent on his EEA national sponsor in Sierra Leone immediately prior to entering the UK, or that his sister-in-law was in the UK in 2012; or that he had been residing with or had been dependent on his sponsor since arriving in the UK.

The Decision of the First-tier Tribunal

4. The judge allowed the appeal under Regulation 8(2). Given the documentary evidence which had been produced to him, which was not before Judge Fisher, and given the consistency of the evidence of the claimant and his two witnesses, he found that the claimant had been dependent on his sister-in-law, who was an EEA national exercising treaty rights as a self-employed person, from 2010 when she had started a relationship with her brother; and that he was now both a member of her household and dependent upon her.

The Application for Permission to Appeal

5. The SSHD applied for permission to appeal to the Upper Tribunal, arguing that the judge had erred in law in allowing the appeal outright as she had not yet considered whether to exercise her discretion under Regulation 17(4) to issue him with a residence card.

The Grant of Permission to Appeal

6. On 10 March 2015 Judge Lever granted the SSHD permission to appeal on the above ground.

Reasons for Finding an Error of Law

7. As an extended family member (referred to by the shorthand "OFM" in some of the leading UT authorities) under Regulation 8(2), the claimant did not, and does not, have an automatic entitlement to a residence card.
8. Regulation 17(4) provides that the SSHD *may* issue a residence card to an extended family member if two conditions are satisfied. The second

condition is that, “in all the circumstances it appears to the Secretary of State appropriate to issue the residence card”. In order to exercise discretion under Regulation 17(4) the SSHD is required by Regulation 17(5) to “undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal”.

9. The SSHD refused the application on the sole ground that the claimant had not shown himself to be an OFM, and so he was not eligible to be issued with a residence card as an OFM. The SSHD did not purport to exercise the discretion under Regulation 17(4) to issue a residence card, if she deemed it appropriate, to a person who had demonstrated to her satisfaction that he was an OFM.
10. So the judge could not allow the appeal outright. The most that he was entitled to do was to allow the appeal on the ground that the decision was not in accordance with the law, “leaving the matter of whether to exercise this discretion in the appellant’s favour or not to the Secretary of State”: see **Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340**.

The Remaking of the Decision

11. There is no challenge by the SSHD to the judge’s primary findings of fact. So the claimant has established that he is an OFM under Regulation 8(2). He thereby meets the gateway requirement for the exercise of the discretion to issue him with a residence card under Regulation 17(4). Only the SSHD can exercise this discretion. It is not necessary or appropriate for me to direct that the judge’s findings of fact should be preserved, as Mr Smee invited me to do. The starting point for the exercise of the discretion by the SSHD will be that the Claimant is *eligible* to be issued with a residence card. The SSHD has an unfettered discretion as to whether it is appropriate to issue him with a residence card.

Conclusion

12. The decision of the FTT contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant’s appeal is allowed on the ground that the refusal to recognise him as an OFM under Regulation 8(2) was not in accordance with the law, and the claimant’s application for a residence card as an OFM is remitted to the SSHD for the exercise of her discretion under Regulation 17(4).

Anonymity

No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Monson