



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

Appeal Number: IA/25115/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 22nd February 2016**

**Decision & Reasons Promulgated
On 3rd March 2016**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

**MONEEBA ROUF
(No anonymity order made)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms. A. Brocklesby-Weller, Home Office Presenting Officer
For the Respondent: No representation.

DECISION AND REASONS

History of Appeal

1. The Respondent, who was born on 21 September 1991, is a national of Pakistan. She entered the United Kingdom as a Tier 4 (General) Student Migrant with leave to remain until 17 July 2014. However, on 6 December 2013 she was served with an IS151A after being encountered breaching the restrictions on her right to take up employment.

2. On 28 April 2014 the Respondent applied for leave on the basis of her rights under Article 8 of the European Convention on Human Rights. Then on 8 May 2014 she applied for an EEA residence card as the spouse of a national of Portugal. This application was refused on 6 June 2014 on the basis that she had not provided a valid marriage certificate and that there was insufficient evidence to establish that she was in a durable relationship.
3. The Respondent appealed against this decision on 12 June 2014 and her appeal was allowed on a limited basis by First-tier Tribunal Judge Moore on 4 August 2015. The Appellant appealed on 13 August 2015 and First-tier Tribunal Judge Reid granted her permission to appeal on 7 January 2016.

Error of Law Hearing

4. The Respondent was not represented at the error of law hearing and did not appear at the hearing herself. I note that notice of the hearing was sent to the Respondent on 29 January 2016 and she has not sought an adjournment or written to say that she could not attend the hearing. Therefore, I am satisfied that she has been notified of the hearing and consider that it is in the interests of justice to proceed in her absence pursuant to regulation 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008..
5. The Home Office Presenting Officer informed me that the Respondent has applied for asylum in the United Kingdom. She also said that she relied on the Respondent's grounds of appeal, which submitted that it was not necessary to consider regulation 17(4) of the Immigration (European Economic Area) Regulations 2006 if it had been found that the Respondent was not an extended family member of an EEA national.

Findings

6. At paragraph 19 of his decision, First-tier Tribunal Judge Moore found that at no stage had the Secretary of State for the Home Department considered her discretion under regulation 17(4) of the 2006 Regulations and "that in those circumstances and in accordance with case law [*Ihemedu (OFMs- meaning) Nigeria* [2011] UKUT 00340 (IAC) the proper approach is to allow the appeal to the limited extent that it is remitted back to the [Secretary of State] to make a lawful decision".
7. However, regulation 17(4) states 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".
8. I find that the wording of regulation 17(4) clearly indicates that the Secretary of State is only required to exercise her discretion under regulation 17(4)(b) and

consider whether it was appropriate to issue the Respondent with a residence card, if she had firstly found that the Respondent was an extended family member of an EEA national. In paragraph 14 his decision the First-tier Tribunal Judge reminded himself that in order to qualify as an extended family member for the purposes of regulation 8, the Respondent had to establish that she was in a durable relationship with an EEA national. Then in paragraph 15 of his decision he found that there was no credible and reliable evidence before him demonstrating that there was any such durable relationship and in paragraph 16 he found that he was not satisfied that the Respondent met the requirements of regulation 8(5). Therefore, there was no such preliminary finding which would require a consideration under regulation 17(4).

9. I also note that in paragraph 12 of *Ihemedu (OFMs – meaning) Nigeria* [2011] UKUT 00340 (IAC) the Upper Tribunal found that regulation 17(4) of the 2006 Regulations confers on the decision-maker discretion as to whether a person found to be an OFM/extended family member is to be granted a residence card.
10. For these reasons I am satisfied that there were material errors of law in the First-tier Tribunal Judge's decision to remit the case and that his decision should be set aside.
11. The Respondent has not challenged any of the findings of fact reached by the First-tier Tribunal Judge in relation to the substance of the appeal. Neither has she cross-appealed against his finding in paragraph 13 of his decision that the Respondent was not entitled to a residence card as a family member of an EEA national or his finding in paragraphs 14 and 16 that she was not entitled to a residence card as an extended family member. Therefore, these findings stand and, acting as a first-tier tribunal judge, I confirm on the basis of the findings of fact of First-tier Tribunal Judge Moore that the Respondent is not entitled to an EEA residence card.

Decision

1. First-tier Tribunal Judge Moore's decision to remit the case back to the Appellant to make a lawful decision did include material errors of law and I set this aside.
2. There was no cross-appeal against the findings by the First-tier Tribunal Judge that the Respondent was not entitled to an EEA residence card and I uphold this decision and dismiss the appeal by the Respondent against the decision made by the Secretary of State for the Home Department on 6 June 2014.

Nadine Finch

Upper Tribunal Judge Finch

Date: 22 February 2016