



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

Appeal Number: IA/02740/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 24 September 2013**

**Determination
Promulgated
On 8 October 2013**

Before

UPPER TRIBUNAL JUDGE LATTER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LOUIS-ALEXANDRE GIROUX

Respondent

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr P Turner, instructed by Sunrise Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the respondent against a decision of the First-tier Tribunal allowing Mr Giroux's appeal against the decision refusing him a residence card as an extended family member. In this decision I will refer

to the parties as they were before the First-tier Tribunal, Mr Giroux as the appellant and the Secretary of State as the respondent.

Background

2. The appellant is a citizen of Canada who was born on 24 June 1978. He was involved in a serious motor vehicle accident on 15 July 1996 in which he sustained severe injuries leaving him partially blind and with brain damage. On discharge from hospital he lived with his brother, his sponsor, in Montreal until August 1997 when his brother moved to the UK. His brother is a Belgian citizen and continues to live in the UK exercising treaty rights. After he moved from Canada the appellant lived with his mother who took care of him with his brother providing financial support.
3. The appellant visited the UK in 2011 for respite care with his brother. He returned to Canada but came back to the UK later in the year to attend his brother's wedding on 1 October 2011. He has continued to live in the UK since then. The matter appears to have come to the attention of the authorities when the appellant and his family returned for a trip from abroad and were interviewed by immigration officials at Coquelles on 4 May 2012. The appellant was granted leave to enter the UK on compassionate grounds until the date of his return flight home to Canada on 26 June 2012. This led to the application for a residence card on 20 June 2012.
4. The respondent was not satisfied that a residence card should be issued and the application was refused on 10 January 2013 for the reasons given in the Reasons for Refusal Letter of the same date.
5. The appellant appealed against that decision and his appeal was allowed. The judge considered reg 8(2) and 8(3) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") and concluded as follows:
 - "20. From the medical and independent social worker's evidence I conclude that the appellant, the brother of an EEA national, requires the personal care of the brother and his wife on serious health grounds. In that claim I also conclude from the medical evidence before me that the appellant's mother, his sole relative in Canada, is unable because of her own physical and mental handicap to care for the appellant.
 21. There is also clear evidence in RB [the respondent's appeal bundle] that after the appellant's discharge from hospital the brother provided for the appellant financially and continued to do so by regular transmissions of money from the UK later. The brother and his wife are now the sole carers of the appellant who is mentally handicapped. I find the appellant is the extended family member under Regulation 8 of the 2006 Regulations and as such entitled to a residence card under Regulation 17.

22. In view of my findings under the 2006 Regulations it is not necessary for me to consider Article 8 ECHR issues.”

The Grounds and Submissions

6. In her grounds of appeal the respondent argued that judge erred in law by allowing the appeal outright when she should have allowed the appeal only to the extent that the matter be remitted to the respondent to consider exercising her discretion under reg. 17(4). Permission to appeal was granted by the First-tier Tribunal on 25 July 2013.
7. At the hearing before me Mr Tufan adopted his grounds and relied on the Tribunal determination in Ihemedu (OFMs: meaning) Nigeria [2011] UKUT 000340 (IAC). Mr Turner submitted that there was no purpose in a remittal to the respondent as the outcome was clear as the facts were overwhelmingly compelling. He submitted that any error made by the judge would not be material to the outcome of the appeal and that in any event the respondent had already exercised her discretion. He referred to and relied on the Tribunal decision in Ukus (Discretion: when reviewable) [2012] UKUT 00307 (IAC).

Consideration of the Issues

8. The respondent has not sought to challenge the judge's finding that the appellant was able to meet the requirements of reg. 8 of the 2006 Regulations and therefore met the definition of an extended family member. The judge was clearly satisfied that the appellant came within reg. 8(3) as the relative of an EEA national who, on serious health grounds, strictly required the personal care of that national. Mr Tufan submitted that the respondent had not exercised discretion under reg. 17(4) and that the judge had erred in law by allowing the appeal simply on the basis that the appellant was an extended family member.
9. In Ihemedu, UTJ Storey said:

“12. There are also aspects of the IJ’s reasoning in relation to the claimant's claimed dependency in the UK and/or membership of the EEA’s principle household in the UK which are also questionable, but it is unnecessary to address those. The fact, however, that the IJ went on at para 17 to find that the claimant was entitled to a residence card for the sole reason that he was an extended family member (see above para 2) is another plain error. 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. In exercising that discretion such as whether an applicant has entered the UK lawfully or otherwise are plainly relevant (although not necessarily determinative: see YB (EEA reg. 17(4): proper approach) Ivory Coast [2008] UKAIT 00062 and Aladesulu and Others [2006] reg. 8 (Nigeria) [2011] UKUT 00253 (IAC)). But in this case the Secretary of State had not exercised that discretion and so the most the IJ was entitled to do was to allow the appeal as being not in

accordance with the law, leaving the matter of whether to exercise the reg. 17(4) discretion in his favour to the Secretary of State: see Yau Yak Wah [1982] ImmAR 16; MO (Reg. 17(4) EEA regs (Iraq) [2008] UKAIT 00061. Given the fundamental nature of the two errors of law identified above I hereby set aside his decision.”

10. There is nothing in the determination in Ukus to support an argument that where discretion has not been exercised, it is open to the judge to consider whether the discretion should be exercised differently. To the contrary, Ukus supports the proposition that where the decision-maker has failed to exercise a discretion, the result will be to allow the appeal to the extent of deciding that the respondent needs to make a fresh decision: see [22] and [23].

11. Mr Turner submitted that in fact in the present case the respondent had exercised the discretion under reg. 17(4). I note that the decision reads as follows:

“You have applied for a residence card as the extended family member of an EEA national. Your application has been considered in accordance with Regulation 8 of the Immigration (European Economic Area) Regulations 2006 but there are insufficient grounds for issuing you with a residence card. It is also felt not appropriate to issue a residence card with consideration of Regulation 17(4).”

12. The final sentence set out above is not entirely clear on whether a discretion has been exercised but any doubt is resolved by the Reasons for Refusal Letter of 10 January 2013. The respondent set out her reasons for finding that the appellant was unable to meet the requirements of reg. 8(2) and (3) and then says at page 4:

“Consequently the Secretary of State does not accept that you are (a person) who falls within Regulation 8(2) or (3). Your application is not, therefore an application for a residence card by an extended family member falling to be determined under Regulation 17(4) of those Regulations and is consequently refused.”

13. It is therefore clear that the respondent has not exercised her discretion under reg. 17(4) and I am satisfied that the judge erred in law by proceeding on the basis that, as the appellant could meet the requirements of reg. 8, he was entitled to a residence card under reg. 17(4). It was also argued that this was a case where the outcome of the exercise of the respondent's discretion was clear in the light of the judge's findings of fact. I am not satisfied that this the case: the respondent is entitled to take into account factors not arising when considering whether the provisions of reg. 8(2) and (3) are met.

14. I am therefore satisfied that the judge erred in law and the order which should have been made was to allow the appeal to the extent that the matter was remitted to the respondent to consider the exercise of discretion under reg. 17(4). I fully accept that this further delay is a very

unhappy state of affairs for the appellant and his family. There has been no challenge to the judge's findings of primary fact on the issues relating to reg. 8 and they will doubtless be taken into account by the respondent when considering the exercise of discretion under reg. 17(4). I also hope that the decision under reg. 17(4) will be made by the respondent as speedily as possible in the light of the anxiety that the delay is causing to the appellant.

Decision

15. The First-tier Tribunal erred in law. I set aside the decision and substitute a decision allowing the appeal on the basis that the respondent's decision was not in accordance with the law, it now being for the respondent to decide whether to exercise discretion under reg. 17(4).

Signed

Date: 7 October 2013

Upper Tribunal Judge Latter