



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

Appeal Number: IA/03285/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Determination  
Promulgated**

**On 13<sup>th</sup> November 2013**

**On 28<sup>th</sup> November 2013**

**Before  
The Hon. MRS JUSTICE LANG  
UPPER TRIBUNAL JUDGE PITT**

**Between**

**T A  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Lingajothy of Linga & Co. solicitors

For the Respondent: Mr T. Melvin, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The Respondent appeals against the determination of the First-tier Tribunal (Immigration Judge Seifert) promulgated on 5<sup>th</sup> August 2013. The First-tier Tribunal made an anonymity direction because of the medical evidence, which we continue in respect of our determination.
2. The Appellant is a citizen of Sri Lanka, whose date of birth is 21<sup>st</sup> February 1984. He applied for a residence card under the Immigration (European Economic Area) Regulations 2006 ("EEA Regulations 2006") on the basis that he was an extended family member of his aunt, Mrs S S.

3. On 19<sup>th</sup> December 2012, the Respondent refused his application for a residence card under regulation 17(4), on the basis that he was not an extended family member within the meaning of reg. 8, EEA Regulations 2006. The Appellant appealed against that decision.
4. The First-tier Tribunal made careful and full findings of fact, on the evidence before it. It held that the Appellant met the requirements of reg. 8(2), in that he was Mrs S's nephew; he had been dependent upon her, and lived as part of her household in Sri Lanka; and he continued to be dependent on her and live as part of her household in the UK. The Respondent did not challenge this finding.
5. The First-tier Tribunal also held that the Appellant met the requirements of reg. 8(3), in that he was Mrs S's nephew, and on serious mental health grounds, he strictly required her personal care.
6. The Respondent's first ground of appeal was that, in concluding that the Appellant met the requirements of reg. 8(3), the First-tier Tribunal failed to have regard to the case of *TR* [2008] UKAIT 00004.
7. We consider this ground of appeal has no merit. It is apparent from the determination that the First-tier Tribunal correctly set out the test under reg. 8(3). The Respondent's presenting officer drew the Judge's attention to the precise wording and submitted that it was a "high test". The Judge was not required to cite the case of *TR* in her determination. She concluded that the test was met in this case, based on the medical reports and the evidence from Mrs S. Her conclusion does not disclose any error of law.
8. The Respondent's second ground of appeal was that, once the First-tier Tribunal had decided that the Appellant was an extended family member within the meaning of reg.8(2) or (3), the application had to be remitted back to the Respondent to make a decision under reg. 17(4). The First-tier Tribunal purported to allow the appeal against refusal of a residence card under the EEA Regulations 2006, which it did not have power to do, as a final decision under reg. 17(4) had not yet been made by the Respondent.
9. In *Aladeselu v Secretary of State for the Home Department* [2013] EWCA Civ 144, the Court of Appeal said (per Richards LJ at [52]):

"a finding that an applicant comes within regulation 8 does not confer on him any substantive right to residence in the United Kingdom. Whether to grant a residence card is a matter for decision by the Secretary of State in the exercise of a broad discretion under regulation 17(4), subject to the procedural requirements in regulation 17(5). All this is underlined by the observations of the court in *Rahman* as to the nature of the host Member State's obligations under article 3(2) of the Directive... In the present case, .. the Secretary of State has yet to consider the applicants' cases pursuant

to regulation 17(4) and (5). When she does so, she will have to decide whether in all the circumstances it appears appropriate to issue a residence card. Those circumstances will no doubt include the extent of the applicants' financial and emotional dependency on the sponsor (though the First-tier Tribunal's limited finding of fact in respect of financial dependency will be binding)...."

10. Applying *Aladeselu* to this case, the Respondent should now re-consider whether or not to grant a residence card under reg. 17(4), in the light of the First-tier Tribunal's conclusion that he is an extended family member as defined in reg. 8.
11. We do not accept the Appellant's submission that the Respondent has already made a final decision under reg. 17(4). Although the Respondent's letter of 19<sup>th</sup> December 2012 was a refusal to grant a residence card under reg. 17(4), it is clear that the sole basis of the decision was that the Appellant was not an extended family member as defined in reg. 8. The Respondent did not go on to consider whether, if the Appellant was an extended family member, she would exercise her discretion under reg. 17(4) to grant him a residence card.
12. Having carefully considered the First-tier Tribunal's determination, we have concluded that it only ruled in respect of reg. 8. At no stage did it purport to make any ruling in respect of reg. 17(4), or state that the Appellant was now entitled to a residence card. The basis of the Respondent's decision to refuse a residence card was set out fully and accurately. Therefore, the First-tier Tribunal in this case did not exceed its proper remit. Unlike the First-tier Tribunal in the case of *Ihemedu* [2011] UKUT 00340 (IAC) which formally (and erroneously) decided that the appellant was "entitled to a residence card".
13. We do however accept that the First-tier Tribunal made a material error of law in the drafting of its formal "Decision", at the end of its determination, when it stated "Appeal allowed under the Immigration (European Economic Area) Regulations 2006". This did not adequately reflect the determination which had been made, because it was not expressly limited to reg. 8, and did not remit the application to the Respondent for re-consideration. On this limited basis, we allow the Respondent's appeal. Therefore we set aside the decision and re-make it in the same terms as the First-tier Tribunal, save that the section headed "Decision" will be replaced in the following terms:

"The appeal is allowed as the Respondent's refusal to grant a residence card on the basis that the Appellant was not an extended family member within the definition of reg. 8, Immigration (European Economic Area) Regulations 2006 was not made in accordance with the law. The Appellant's application for a residence card be remitted to the Respondent for re-consideration.

14. Finally, in our view, the First-tier Tribunal made no decision in relation to Art. 8 ECHR, and therefore there is no decision against which the Respondent can appeal. The appeal was not allowed under Art 8; it was not referred to in the formal “Decision” at the end of the determination. In paragraph 59, it merely set out its views on what its decision on Art. 8 would have been, if it had reached a different conclusion in relation to reg. 8. We note that the Court of Appeal in *Aladeselu* made no criticism of the Tribunal for making observations on the merits of the appellant’s claim, on factors which could be relevant to the Respondent’s exercise of discretion.

#### DECISION

Appeal allowed. The First-tier Tribunal made an error on a point of law and we re-make the decision, in the same terms as the original determination, save that the formal ‘Decision’ will be in the following terms:

The appeal is allowed as the Respondent’s refusal to grant a residence card on the basis that the Appellant was not an extended family member within the definition of reg. 8, Immigration (European Economic Area) Regulations 2006 was not made in accordance with the law. The Appellant’s application for a residence card be remitted to the Respondent for re-consideration.

MRS JUSTICE LANG  
06 January 2014