



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

Appeal Numbers: IA/05451/2014
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THE IMMIGRATION ACTS

Heard at Field House

On 4 September 2014

Prepared 4 September 2014

Determination

Promulgated

On 18 September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MS VERONICA OMONIKE WILKEY
MR OLUWASEGUN ELIJAH WILKEY**

Respondents

Representation:

For the Appellant: Mr J Parkinson, Senior Presenting Officer

For the Respondents: Mr S Unigwe, Counsel instructed by Charles Hill & Co
Solicitors

DETERMINATION AND REASONS

1. In this determination the Appellant is referred to as the Secretary of State and the Respondents are referred to as the first and second Claimants.

2. The Claimants, nationals of Nigeria, dates of birth respectively 23 July 1959 and 15 March 1988, appealed against the Secretary of States' decisions to refuse to issue residence cards dated 16 January 2014.
3. The basis of the refusal of the first Claimant was that she had failed to prove that she was in a durable relationship with an EEA national. The refusal of the second Claimant was that he had failed to demonstrate that he was related to his EEA family member (the Sponsor, Mr Richards) as claimed and also dependent upon him. The refusals were therefore with reference to Regulations 7 and 8 of the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations).
4. Their appeals came before First-tier Tribunal Judge Lal, who on 1 August 2014 allowed the Claimants' appeals in respect of the first Claimant on the basis that she was in a genuine and subsisting and durable relationship within the meaning of the 2006 Regulations under Regulation 8. The judge accepted the evidence of the first claimant and the Sponsor as to the nature of their relationship and its extent. The judge went on to allow the first Claimant's appeal on the basis of entitlement to a residence card under Regulation 8(5) of the 2006 Regulations.
5. The second Claimant identified in the title to the determination is the son of the first Claimant. The judge made no findings that the second Claimant is not related for the purposes of the Regulations to the Sponsor.
6. There was, as has been confirmed to me, in the written evidence provided to the judge no evidence of dependency as between the second Claimant and the first Claimant or the second Claimant and the Sponsor. The only apparent connection in the evidence was that the second Claimant lived with the first Claimant and the Sponsor. The second Claimant at the material times before the judge was aged 24/25 years.

7. Considering the judge's Record of Proceedings, it is apparent to me that no evidence was called from the second Claimant concerning his dependency and/or relationship and nor did either Mr Richards or the Sponsor or the first Claimant identify any elements of the dependency other than on the part of the first Claimant claim that her son was her dependant.
8. It is a matter of considerable regret that the determination of the judge simply failed to give either any relevant finding on the issue of relationship or dependency and the judge failed to provide any reasons as to why the appeal of the second Claimant was allowed. The failure to do so was a clear error of law and it was irrational to allow an appeal when there was simply was none of the relevant evidence to meet the requirements of the Regulations, put before the judge.
9. The grounds of application permitted by First-tier Tribunal Judge Macdonald, a Designated Judge of the First-tier Tribunal, dated 20 August 2014 reflect the grounds advanced by the Secretary of State in particular that the judge should not have allowed the appeal of the first Claimant but rather should have, with the findings clearly made, referred the matter back to the Secretary of State for the exercise of discretion under Regulation 17(4) of the 2006 Regulations. It is clear that under that Regulation the Secretary of State has a discretion whether to issue a residence card for those identified as extended family members as the judge had found in the case of the first Claimant.
10. It is not, as was argued on behalf of the first Claimant, the case that it is simply open to the Secretary of State to ignore the Tribunal's findings of fact when the matter is returned for further consideration on the exercise of discretion. So one is not, as might appear to be argued, in a continuous position of the risk of cases succeeding in the Tribunal and then failing thereafter when remitted for consideration by the Secretary of State in accordance with the law and the findings made.

11. It is also clear because there was no evidence identified by Mr Unigwe to support the judge's decision. There was no notice on behalf of the Claimants seeking to challenge or cross-appeal against the application permitted for the Secretary of State. Mr Unigwe did not show there were material omissions and findings that should have been made or evidence that had been ignored by the judge. Indeed even in the skeleton argument provided by Mr Unigwe for the hearing today there are no identified omissions or any cross-claim of a lack of rationality in the decision in the light of evidence that had been provided to the judge.
12. I am therefore satisfied that the Original Tribunal in dealing with the first Claimant made an error of law in seeking to determine that leave should be granted to an extended family member. I do not accept that it was the Tribunal's responsibility to make that primary decision. What has happened no more or less is that the Secretary of State's view of the relationship as between the Sponsor and the first Claimant has been rejected by the judge for the reasons the judge gave. In those circumstances the Secretary of State must look at this matter on the basis of the judge's finding on the first Claimant's relationship with the Sponsor. There is no basis to reopen the question of the validity of her marriage to the Sponsor insofar as Regulation 7 applied.
13. In relation to the second Claimant the original Tribunal's decision is in error of law for a failure to provide adequate reasons. On the face of it there was an error of law based on misunderstandings or mistakes of fact for there were no facts found, in relation to the second Claimant, to be a proper basis for the judge's decision.
14. In these circumstances therefore the original Tribunal's decision in relation to the first claimant cannot stand. The following decision is substituted. The appeal by the Secretary of State in respect of the first claimant is allowed to the extent that the matter is to be remitted to the Secretary of

State to consider the exercise of discretion under Regulation 17(4) of the 2006 Regulations.

15. The original Tribunal's decision in respect of the second Claimant can not stand. The decision will have to be remade in the Upper Tribunal. Having heard submissions by the parties' representatives I was satisfied that the appropriate course was for me to remake this decision on the basis of the evidence before me. It is of note that directions have been sent out in connection with the hearing today and no further evidence was adduced in relation to second Claimant's position. I have taken into account the material statements before the judge and the Record of Proceedings.
16. In these circumstances therefore I find that the only course given the lack of evidence is that the appeal of the second Claimant fails because on the evidence he does not demonstrate that he meets the requirements of an extended family member under the 2006 Regulations. This decision does not prevent a further application being made in connection with or on behalf of the second Claimant
17. The judge made no anonymity order in relation to either of the claimants and given the age of the second Claimant I do not find it necessary or appropriate to make an anonymity order in remaking the decision on the second Claimant or in relation to the first Claimant.
18. The judge in dealing with the first and second Claimants made whole fee awards. Given the second claimant's appeal failing the position is that no appeal award is appropriate. In respect of the claim of the first claimant it seems to me that the first claimant having succeeded on the principle of showing a durable relationship, to which the Secretary of State had objected, that the appeal served its purpose and whatever else may be said about the determination it seems to me that it would be unfair to remove the fee award which had been made in favour of the first claimant.

19. The Secretary of State's appeal in respect of the First Claimant succeeds to the extent that the matter is remitted to her to consider the exercise of the discretion under the 2006 Regulations.

20. The appeal of the Secretary of State in respect of the second Claimant is allowed. The following decision is substituted. The appeal of the second Claimant is dismissed

Signed

Date 9 September 2014

Deputy Upper Tribunal Judge Davey