



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/47993/2013

THE IMMIGRATION ACTS

Heard at Field House, London
On 11 June 2014

Determination Promulgated
On 1 July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

IRVINE ODETTE DOSSA

Respondent

Representation:

For the Appellant: Mr P Mills, Home Office Presenting Officer

For the Respondent: Mr A Bajwa, A Bajwa & Co Solicitors

DETERMINATION AND REASONS

1. This determination refers to parties as they were in the First-tier Tribunal.
2. The appellant, a national of Benin, appealed to the First-tier Tribunal against the decision of the respondent to refuse to issue her with a residence card as confirmation of her right of residence in the UK as the extended family member of an EEA national. First-tier Tribunal Judge Mahmood allowed the appeal and the Secretary of State now appeals with permission to this Tribunal.
3. The appellant had entered the UK as a student in January 2004 and obtained subsequent extensions of leave to remain until July 2013 when she applied for a residence card on the basis of her claim to be in a durable relationship with an EEA national. The respondent did not accept on the evidence produced that the appellant

had been living with the EEA national for a period of two years and refused the application under regulation 8 (5) of the Immigration (EEA) Regulations 2006 (the 2006 Regulations) . The Judge heard evidence from the appellant, her partner and three other witnesses. The Judge decided on the basis of the oral and documentary evidence that the couple were in a durable relationship having been in the relationship for at least two years. The Judge decided that the appellant met the requirements of regulation 8(5). The Judge then went on to say that the appellant is entitled to a residence card as confirmation of a right to reside in the UK [49].

4. The respondent does not challenge any of the findings but challenges the Judge’s decision to allow the appeal outright as set out in paragraph 49. The respondent contends that the Judge could not allow the appeal outright as the respondent had not yet exercised her discretion under regulation 17 (4) of the 2006 Regulations. The grounds of appeal contend that the Judge failed to follow the approach set out in FD (EEA discretion: basis of appeal) Algeria [2007] UKAIT 0049.
5. Regulation 17 (4) and (5) of the 2006 Regulations provides for the issue of a residence card to an extended family member of an EEA national as follows;

17 (4) 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.

(5) Where the Secretary of State receives an application under paragraph (4) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security.

6. In FD the Tribunal held;

“12. If the actual decision against which the appellant appeals was one in which the Secretary of State failed to exercise an applicable discretion, the appellant's only remedy is to have his appeal allowed on Abdi (D S) v SSHD [1996] Imm AR 148 principles, in that the decision was not in accordance with the law: SY and others [2006] UKAIT 00024. Where the discretion has been exercised, however, it seems to us that despite the provisions to which we have referred in the previous paragraph, it is open to a person in the appellant's situation to claim that a discretion under the Regulations should have been exercised differently, and that the Tribunal has jurisdiction to substitute its own view of how the discretion should have been exercised. ...”

7. Having decided that the appellant had not established that she was in a durable relationship with the EEA national the respondent did not go on to consider whether to exercise the discretion contained in regulation 17 (4) and (5). Therefore the respondent has not yet exercised her discretion in this case. In those circumstances, as Mr Bajwa rightly accepted at the hearing before me, the Judge erred in allowing the appeal outright at paragraph 49. The correct approach, in accordance with the 2006 Regulations, is to allow the appeal to the extent that it is not in accordance with the law

and that the decision remains outstanding before the respondent for the exercise of her discretion under regulation 17.

8. I therefore set the decision aside and remake it by allowing it to the extent that the decision is not in accordance with the law and the decision remains outstanding before the Secretary of State for the exercise of her discretion under regulation 17.

Conclusion:

The making of the decision of the First-tier Tribunal did involve the making of an error on point of law.

I set aside the decision.

I re-make the decision in the appeal by allowing it to the extent that it remains outstanding before the Secretary of State under regulation 17 of the Immigration (EEA) Regulations 2006.

Signed

Date: 30 June 2014

A Grimes

Deputy Judge of the Upper Tribunal