



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

Appeal Number: IA/10613/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 29 April 2015**

**Determination
Promulgated
On 5 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

Appellant

**NELLY UCHENNA ELUWA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Miss A Brocklesby-Weller, Senior Presenting Officer
For the Respondent: Miss N Nnamani, Counsel, instructed by Samuel Louis Solicitors

DECISION AND REASONS

1. In this decision the Appellant is the Secretary of State and the Respondent is the Claimant. The Claimant, a national of Nigeria, born on 12 June 1975, applied for a residence card under the provisions contained within the

Immigration (European Economic Area) Regulations 2006 on the basis of being an extended family member.

2. The Secretary of State refused that application on 13 February 2014 on the basis that it had not been established there was a valid marriage and it had not been established that there was a genuine and subsisting relationship, a durable relationship as otherwise referred to, under the Regulations. The Secretary of State did not in the alternative, in addition to those reasons, go on to consider the provisions under Regulation 17(4) of the EEA Regulations in terms of whether the person had established that they were an extended family member and therefore a qualified person to exercise in all the circumstances a discretion to issue the residence card.
3. It is fairly said that the Secretary of State could have looked at it on that basis and had sufficient time to do so.
4. First-tier Tribunal Judge J J Maxwell (the judge) in a decision promulgated in or about 13 January 2015, he concluded that the appeal did not succeed on the basis of a recognised marriage but went on to conclude that on the facts there was a durable relationship between the Claimant and her partner in the UK.
5. What the judge then did having made perfectly adequate and sufficient findings was to go on to exercise the discretion that it was in effect appropriate, to issue the residence card. It is true to say that the judge's decision as expressed was that the appeal is 'dismissed allowed', which plainly is some problem with a formatted decision. It seems clear and the parties' representatives are clear, that the judge's intention must have been to allow the appeal and by nature of the order the judge made, he decided to exercise the discretion which would have been for the Secretary of State to exercise under Regulation 17(4)(b) of the 2006 Rules.

6. Permission to appeal that decision was given by First-tier Tribunal Judge Cruthers on 18 February 2015.
7. Before me the argument was confined simply to the question:- Was the judge making an error of law in proceeding to allow the appeal and essentially take away or exercise the discretion which lay with the Secretary of State under Regulation 17(4) of the 2006 Regulations?
8. Miss Brocklesby-Weller relied upon the case of *Ihemdu* (OFMs - meaning) *Nigeria* [2011] UKUT 340 (IAC). The case, with which the Immigration Judge should have been familiar, stands for the proposition that where the Secretary of State has not exercised a discretion under Regulation 17(4) then it is not for a judge to do so. Rather the judge should allow the appeal to the extent the Secretary of State's decision was not in accordance with the law and the matter of whether to exercise the discretion under Regulation 17(4) in the Claimant's favour remitted to the Secretary of State.
9. The case of *Ihemdu* is of some interest because what happened before the Upper Tribunal was that the parties agreed that the judge in the Upper Tribunal should exercise that discretion which would otherwise have been applied by the Secretary of State. In this case there was no such concession before the First-tier Tribunal Judge and it is clear from a plain reading of the Reasons for Refusal Letter that the Secretary of State never purported to exercise that discretion. As a matter of general law, therefore, where no discretion has been exercised, there is no justiciable decision.
10. That position is actually fortified by the provisions of Regulation 17(4)(b) which states: "and (b)... in all the circumstances it appears to the Secretary of State appropriate to issue the residence card". So the Secretary of State may issue a card to an extended family member who is not an EEA national on an application if those requirements are met. In

the circumstances, whilst there is much of attraction in Miss Nnamani's argument that really the Secretary of State should have addressed the matter, had the opportunity to do so and there was no failing by the judge in doing so, has the attraction of efficacy but runs into the particular unavoidable difficulty that the discretion and the primary decision maker is the Secretary of State's. In those circumstances it is clear that there is no challenge whatsoever to the findings the judge made concerning the status of the Claimant and in particular her falling within the necessary provisions to be an extended family member.

11. The findings of fact, therefore, are wholly clear and I am satisfied that the appropriate course which the judge should have taken is that the appeal should have been allowed to the extent it was remitted to the Secretary of State to make a decision upon the issues arising under Regulation 17(4) of the Regulation.
12. The Original Tribunal erred in law in making the decision in the way it did and the following decision is substituted.
13. The appeal of the Claimant is allowed to the extent that it is remitted to the Secretary of State to be determined in accordance with the provisions of Regulation 17(4) of the 2006 Regulations on the basis of the facts and matters found by the judge and any further representations made for and on behalf of the claimant.
14. No anonymity order was made and none is required.

Signed

Date

Deputy Upper Tribunal Judge Davey

