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**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36423/2014**

THE IMMIGRATION ACTS

**Heard at Manchester
On 3 December 2015**

**Decision and Reasons
Promulgated
On 15 December 2015**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NAUMAN SHABBIR

Respondent

Representation:

For the Appellant: Mr Harrison, Senior Home Office Presenting Officer

For the Respondent: Mr Karnik, Counsel

DECISION AND REASONS

1. The appellant ('the SSHD') appeals against a decision of First-tier Tribunal (FTT) to "*allow the appeal under the EEA Regulations*". At the beginning of the hearing Mr Harrison clarified that the SSHD did not seek to challenge any of the findings of fact made by the FTT. The FTT accepted that the appellant is in a durable relationship with his EEA spouse and that she is exercising Treaty rights. Mr Harrison submitted that the proper course in the circumstances of this appeal was for me to find that the FTT erred in law in allowing the appeal

when it should have found the SSHD's decision not to be in accordance with the law.

2. The correct approach in cases where the Secretary of State has not yet considered the exercise her discretion is to be found in the decision of the Upper Tribunal in SSHD v Ihemedu [2011] UKUT 00340 (IAC). In that case, the SSHD refused an application for a residence card because she did not accept that the applicant was related to the extended family member, as claimed. The Upper Tribunal found that the immigration judge below, had erred in finding that the applicant was entitled to a residence card for the sole reason that he was an extended family member as claimed. The Upper Tribunal held:

"..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 matters 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 Aladeselu and Others (2006 Regs - reg 8) Nigeria [2011] UKUT 00253 (IAC)). But in this case the Secretary of State had not yet exercised that discretion and so the most the IJ was entitled to do was 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] Imm AR 16; MO (reg 17(4) EEA Regs) Iraq [2008] UKAIT 00061."

3. Mr Harrison accepted that the SSHD would be satisfied if the appeal against the FTT was allowed to the limited extent of substituting the wording under 'notice of decision' with the following:

"The appeal is allowed to the limited extent that the decision is not in accordance with the law and there is an outstanding application before the SSHD, which requires her to consider exercising the discretion under Regulation 17 of the Immigration (EEA) Regulations 2006 by making a lawful decision in accordance with the findings of fact of the FTT."

4. Mr Karnik at first objected to the above wording. He submitted that this did not reflect the language of the relevant Directive. He clarified that he was seeking to submit that Ihemedu was wrong but accepted that the respondent had not filed a respondent's notice or skeleton argument, and he was raising the issue for the first time at the hearing. In these circumstances I declined to grant him permission to rely upon new matters not raised before the FTT or in a respondent's notice. In those circumstances, Mr Karnik indicated he had nothing to add and was content with the wording set out above.

Decision

5. The decision of the First-tier Tribunal involved the making of a material error of law and I set it aside to the limited extent indicated

above.

6. I remake the decision by allowing the appeal to the limited extent that it is not in accordance with the law and there is an outstanding application before the SSHD, which requires her to consider exercising the discretion under Regulation 17 of the Immigration (EEA) Regulations 2006 by making a lawful decision in accordance with the findings of fact of the FTT.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
3 December 2015