



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

Appeal Number: IA/41707/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 7 October 2015**

**Decision and Reasons
Promulgated
On 10 November 2015**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS OLUBUNMI ELIZABETH AKINSANYA

(No anonymity order made)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer

For the Respondent: Mr I Ikchukwu, Almond Legals

DECISION AND REASONS

1) Judge of the First-tier Tribunal O'Garro allowed this appeal under the Immigration (European Economic Area) Regulations 2006. The Secretary of State now appeals against this decision. Mrs Olubunmi Elizabeth Akinsanya, who was the appellant before the First-tier Tribunal, is hereinafter referred to as "the applicant".

- 2) The appeal was brought against a decision of the Secretary of State refusing to issue a residence card to the applicant as the spouse of a French national. The Secretary of State was not satisfied that the marriage between the applicant and her spouse was valid in law. The couple had entered into a Nigerian customary marriage by proxy. Before the First-tier Tribunal the applicant was unable to show that her marriage would be recognised under French law. She would therefore not be regarded as her partner's spouse for the purpose of applying the EEA Regulations. The Judge of the First-tier Tribunal went on to consider, as had the Secretary of State, whether the applicant was in a durable relationship with her partner. The judge found the applicant and her partner to be credible witnesses. Although at the time of the hearing before the First-tier Tribunal in May 2015 they had not been cohabiting for as long as two years, they had provided documentary evidence showing they had been living at the same address since January 2014. This evidence included bank statements from a joint account, an electoral registration document, a joint insurance document and utility bills. Evidence was also produced showing that the applicant and her partner were receiving infertility treatment.
- 3) In the application for permission to appeal the Secretary of State submitted that the Judge of the First-tier Tribunal erred in allowing the appeal outright. The judge had found the applicant to be in a durable relationship with a partner and therefore qualified as an extended or other family member. However, in terms of regulation 17(4) of the EEA Regulations, the Secretary of State had a discretion as to whether to issue a residence card. This discretion had not been exercised in relation to this applicant. The appeal should therefore have been allowed to the limited extent that the Secretary of State's decision was not in accordance with the law and remitted to the Secretary of State for the discretion to be exercised. Authority for this was to be found in the case of *Ihemedu* (OFMs - meaning) Nigeria [2011] UKUT 00341. Permission was granted on this basis.
- 4) Prior to the hearing before the Upper Tribunal a letter dated 27 August 2015 was sent by the applicant's representatives acknowledging that the Secretary of State had a discretion under regulation 17(4). The Tribunal might therefore consider it appropriate to remit the matter to the Secretary of State for this discretion to be exercised on the basis of the finding by the Judge of the First-tier Tribunal that the parties were in a durable relationship.
- 5) At the hearing before me both parties were agreed that the appeal should be allowed to this limited extent. I will therefore set aside the decision of the First-tier Tribunal, while preserving the findings of fact, and substitute a decision remitting the matter to the Secretary of State for her discretion to be exercised under regulation 17(4) in relation to the issuing of a residence card to an extended family member.

- 6) I note that the Judge of the First-tier Tribunal was clearly aware of the case of *YB* (EEA reg 17(4) – proper approach) *Ivory Coast* [2008] UKAIT 00062. One of the points arising from this decision is that appeals of this nature should not be allowed outright. In fact, at paragraph 40 of the decision, the judge said no more by way of a conclusion than that the applicant and her partner were in a durable relationship that met the requirements of Regulation 8(5) of the EEA Regulations. It would seem that the judge thought this would be sufficient to make it clear that the discretion of the Secretary of State was still to be exercised. Notwithstanding this, however, permission to appeal was granted and, for the avoidance of doubt and with the consent of the parties, I consider that the proper course is to substitute a decision allowing the appeal to the limited extent set out above for the decision of the First-tier Tribunal.
- 7) In addition, I note that the decision by the Secretary of State was taken on 6 October 2014, prior to the 2015 amendment to the EEA Regulations restricting the grounds of appeal. Accordingly the amendment has no application to this appeal.

Conclusions

- 8) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
- 9) I set aside the decision while preserving the findings made.
- 10) I re-make the decision in the appeal by allowing it to the limited extent of recognising that the applicant is in a durable relationship with her partner and therefore falls within the definition of an extended or other family member in terms of Regulation 8(5); the matter is remitted to the Secretary of State for her discretion to be exercised as to whether to issue a residence card under Regulation 17(4).

Anonymity

- 11) The First-tier Tribunal did not make an order for anonymity. I have not been asked to make such an order and I see no reason of substance for doing so.

Fee Award

Note: This is not part of the determination

- 12) The First-tier Tribunal made a fee award in favour of the applicant. As the decision of the Upper Tribunal allows the appeal, albeit not outright, the fee award will not fall automatically. I was not addressed by the parties on whether the fee award should be altered and accordingly I see no reason to make any change to the fee award made by the First-tier Tribunal.

Signed

Date

Upper Tribunal Judge Deans