



st

Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/42074/2014

### **THE IMMIGRATION ACTS**

At Field House  
On 18<sup>th</sup> August 2015

Decision and Reasons Promulgated  
On 24<sup>th</sup> August 2015

Before

**DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY**

Between

**MRS CELIA TEREZINHA ROACHA**  
(NO ANONYMITY DIRECTION MADE)

Appellant

And

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

#### Representation:

For the Appellant: Herself and her sponsor.

For the Respondent: Ms Julie Isherwood, Home Office Presenting Officer.

### **DECISION AND REASONS**

#### Introduction

1. I will refer to the parties as they were in the First-tier Tribunal though the respondent is appealing in these proceedings.
2. The appellant sought a residence card under European Treaty provisions, transposed domestically by the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations). This was on the basis she was

an extended family member of Mr Carlos Manuel Gonclaves Pimentel, namely, his partner. He is a Portuguese national exercising Treaty rights.

3. The application was refused because the respondent was not satisfied they were in a durable relationship. Regulation 7 of the 2006 Regulations deals with family members, which includes a spouse. Regulation 8 is concerned with extended family members, which, at regulation 8(5), includes partners other than civil partners of an EEA national
4. In the case of partners it is necessary to establish the relationship is durable. For parity with domestic provisions the respondent normally expects the parties to have been together for two years though this is merely a rule of thumb. The respondent was not satisfied they were in a durable relationship.

#### The First-tier Tribunal

5. The appellant's appeal was heard by First tier Judge Amin on 27 April 2015. The appeal was allowed with the decision promulgated on 1<sup>st</sup> May 2015. The judge found the appellant and her sponsor credible and their evidence was supported by the documents. At paragraph 25 the judge concluded they were in a durable relationship and her partner was exercising Treaty rights and allowed the appeal.

#### The Upper Tribunal.

6. In seeking leave to appeal to the Upper Tribunal the respondent relied upon only one issue, namely, the fact the judge allowed the appeal outright rather than referring the matter back to the respondent. This was because the grant of a family permit to an extended family member was in the respondent's discretion. The respondent had not had an opportunity to exercise that discretion by the appeal being allowed outright. Ms Isherwood takes no issue with the finding that the parties are in a durable relationship. Rather, the only objection relates to the fact the judge allowed the appeal outright.

#### Error of law

7. I am satisfied that there is a material error of law in the decision.
8. If regulation 17 of the 2006 regulations is considered it is clear there is a distinction between the status of a family member and that of an extended family members. By regulation 17(1) the respondent *must* (my emphasis) issue a residence card to family member. However, regulation 17(4) provides that the respondent *may* issue a residence card to an extended family member. Clearly this confers discretion. In the latter situation, regulation 17(5) requires the respondent to undertake an extensive examination of the personal circumstances of an applicant.
9. The leave application referred to the decision of Ihemedu (OFM-meaning) Nigeria [2011] UKUT 00340 (IAC). The head note states that Article 3(2) of

Directive 2004/38/EC ("Citizens Directive") treats other family members ("OFMs") as a residual category. Regulation 17(4) makes the issue of a residence card to an OFM/extended family member a matter of discretion. Where the Secretary of State has not yet exercised that discretion the most an immigration judge is entitled to do is to allow the appeal as being not in accordance with the law, leaving the matter of whether to exercise this discretion in the appellant's favour to the Secretary of State.

Decision

10. There was a material error of law in the First-Tier Judge allowing the appeal outright. Having found a durable relationship the judge should have allowed the appeal to the limited extent that the decision was not in accordance with the law and the matter referred to the respondent for consideration.
11. I remake the decision by preserving all of the factual findings of the First-tier Judge and direct the respondent to consider whether a family permit should be issued in all the circumstances, bearing in mind those findings.

Signed

Deputy Upper Tribunal Judge Farrelly