



IAC-AH-SAR-V1

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

Appeal Number: IA/48183/2014

THE IMMIGRATION ACTS

**Heard at Centre City Tower, Decision & Reasons Promulgated
Birmingham
On 20th November 2015**

On 3rd December 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**PRISCILA DANSOA FRIMPONG
(NO ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer

For the Respondent: Mr M Mohzam of Burton & Burton Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of Judge of the First-tier Tribunal E M M Smith, promulgated on 27th March 2015, to allow the appeal of Ms Frimpong against the Secretary of State's refusal to grant to her, under the Immigration (European Economic Area) Regulations 2006, a residence card as the partner of the Sponsor, George Owusu Afram, who is a Dutch national,

2. Ms Frimpong's application had been refused as it was not accepted that she was in a durable relationship with the Sponsor. The judge at first instance heard from Ms Frimpong and from the Sponsor and two other witnesses. He found that the couple were in a durable relationship and he allowed the appeal outright.
3. In the application for permission to appeal, which now stands as the Grounds of Appeal, the Secretary of State argued that the judge had materially erred in law by allowing the appeal outright as the Secretary of State had not yet exercised her discretion under Regulation 17(4) of the 2006 Regulations. It was said that having found that the couple were in a durable relationship under Regulation 8(5) the judge should have remitted the case to the Secretary of State for consideration under Regulation 17(4). Reliance was placed on the reported decision in **Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340 (IAC)**.
4. At the hearing Mr Mohzam, on behalf of the Respondent, handed in a skeleton argument in which it was argued that the judge's decision should stand on the basis that the Secretary of State had in effect already exercised her discretion. Mr Mills said that it appeared to him that the Secretary of State's appeal was irresistible. He said the point in issue had been clear since the decision in **Ihemedu** was handed down. Unless there was a clear exercise of discretion by the Secretary of State a case such as this had to be remitted for the discretion to be exercised. The refusal itself was simply on the basis that the Secretary of State did not accept that the couple were in fact in a durable relationship. In response Mr Mohzam relied upon the points made in his skeleton argument. He said that the Secretary of State should have considered all matters at the same time. Finally in response Mr Mills said that the point had been argued before but had not been accepted by the Upper Tribunal. The discretion under Regulation 17(4) was only reached once it was found that the Appellant could qualify under Regulation 8 and that was the position at the hearing.
5. Having heard those submissions I announced at the hearing my decision that there was a material error of law in the judge's decision to allow the appeal outright. There was no challenge to the factual findings with regard to the relationship and the judge's conclusion that as at the date of the hearing before him Ms Frimpong and the Sponsor were in a durable relationship therefore stands.
6. In the refusal letter the Secretary of State did not accept that the Respondent qualified as an "extended family member" and she did not purport to exercise any discretion under Regulation 17(4). Head note (iii) of **Ihemedu** is very clear on the point in issue. It is there stated:

"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 the discretion in the Appellant's favour or not to the Secretary of State".

7. Support for that view also comes from the decision of the Upper Tribunal in **Ukus (discretion: when reviewable) [2012] UKUT 00307 (IAC)** in which it is made clear that if a decision maker has not exercised discretion vested in him the Tribunal's jurisdiction is limited to a decision that the failure renders the decision "not in accordance with the law" under Section 86(3)(a) of the Nationality, Immigration and Asylum Act 2002.
8. I accordingly find that the judge did err in purporting to find that the Respondent should be granted a residence card. I therefore set aside his decision in that regard and remake the decision in terms that it having been found that the Respondent did qualify as an extended family member and the discretion under paragraph 17(4) of the Regulations not having been exercised the decision under appeal was not in accordance with the law and the application therefore remains outstanding for a decision by the Secretary of State.

Notice of Decision

9. The decision of the First-tier Tribunal contained an error on a point of law and I set aside that decision insofar as it purported to allow the appeal outright.
10. I have remade the decision and for the reasons set out above, I find that the decision under appeal was not in accordance with the law. The application accordingly remains outstanding before the Secretary of State for exercise of her discretion under Regulation 17(4) of the Immigration (European Economic Area) Regulations 2006 as amended.
11. The Judge of the First-tier Tribunal made no fee award and that decision stands.
12. No application was made for an anonymity order and no such order is made.

Signed

Date 26 November 2015

Deputy Upper Tribunal Judge French