



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/04211/2015

THE IMMIGRATION ACTS

Heard at: Field House
On: 24 February 2016

Decision and Reasons Promulgated
On: 17 March 2016

Before

**THE HONOURABLE LORD BURNS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
DEPUTY UPPER TRIBUNAL JUDGE MAILER**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR SAMUEL EUCLIO NYANOR
(NO ANONYMITY ORDER IS MADE)**

Respondent

Representation

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer

For the Respondent: Mr E Akohene, Legal Representative, Afrifa and Partners Solicitors

DECISION AND REASONS

1. We shall refer to the appellant as “the secretary of state” and to the respondent as “the claimant.”

2. The secretary of state appeals with permission from the decision of First-tier Tribunal Judge who, in a decision promulgated on 6 August 2015, allowed the claimant's appeal against the secretary of state's decision to refuse to issue him a residence card pursuant to Regulation 7 of the Immigration (EEA) Regulations 2006 – 'the 2006 Regulations'. Although the appeal of the claimant's wife was also allowed by the First-tier Tribunal, Mr Duffy informed us that it is only the First-tier Tribunal's decision allowing the claimant's appeal that is challenged.
3. It is contended that the First-tier Tribunal Judge materially erred in allowing the claimant's appeal outright. The Judge found that the claimant's relationship with his sponsor, a Polish national, was "a genuine, subsisting and durable relationship." Moreover, "this is neither a marriage nor a relationship of convenience" [27]. The claimant was thus found to be an extended/other family member under Regulation 8(5) of the 2006 Regulations").
4. Mr Duffy contends that in the circumstances the case should have been remitted to the secretary of state for consideration under Regulation 17(4) instead of his appeal being allowed 'outright'.
5. The Judge's finding that the claimant is in a durable relationship and is therefore an extended family member under the 2006 Regulations is not disputed; nor the finding at [20] that the claimant's sponsor is an EEA national who has been exercising Treaty rights.
6. Mr Duffy submitted however that the Judge did not have any regard to the requirements under Regulation 17(4) of the 2006 Regulations. This provides that the secretary of state "may" issue a residence card to an extended family member not falling within Regulation 7(3) who is not an EEA national on application, if the EEA national in relation to the extended family member is a qualified person, and in all the circumstances it appears to the secretary of state appropriate to issue a residence card.
7. The secretary of state has noted in her grounds that the claimant was found to be an extended family member under Regulation 8(5) of the 2006 Regulations. Accordingly, Regulation 17(4) provides a discretion to the secretary of state relating to the issue of a residence card.
8. The secretary of state has accordingly not yet considered the exercise of such discretion, having made a decision dismissing the claimant's application.
9. The secretary of state is in the first instance required to consider the exercise of discretion before the Tribunal is itself entitled to consider such exercise: FD (EEA Discretion – Basis of Appeal) Algeria [2007] UKAIT 49 and Ihemedu (OFMs – meaning) Nigeria [2011] UKUT 00340 (IAC).
10. Mr Akohene conceded that the secretary of state's appeal should accordingly be allowed to the limited extent referred to. We find that this concession was properly

made. We find that the decision of the first-tier Tribunal involved the making of an error on a point of law.

Notice of Decision

We allow the appeal of the secretary of state to the extent that we set aside the decision of the First-tier Tribunal and substitute a decision allowing the appeal of the claimant against the decision of the secretary of state under Regulation 8(5) of the 2006 Regulations, to the extent that his application for an EEA residence card remains outstanding before the secretary of state.

No anonymity direction is made.

Signed

Date 4 March 2016

Deputy Upper Tribunal Judge Mailer