



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

Appeal Number: IA/16395/2015

THE IMMIGRATION ACTS

Heard at Field House

Decisions and Reasons

On 18 January 2016

**Promulgated
On 27 January 2016**

Before

UPPER TRIBUNAL JUDGE STOREY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR IMRAN SHAHZAD

Respondent

Representation

For the appellant: Mr P Duffy, Home Office Presenting Officer

For the respondent: Ms R Head of Counsel, instructed by Lawrence Lupin Solicitors

DECISION AND REASONS

1. The respondent (hereafter the claimant) is a citizen of Pakistan. On 23 April 2015 the appellant (hereafter Secretary of State or SSHD) refused his application for a residence card on the basis of a durable relationship with an EEA national, a Miss L Pavlejuova who is a Czech national. In the grounds of appeal the claimant raised several grounds, including asylum grounds. On 20 October 2015 First-tier Tribunal Judge Greasley dismissed the appeal on all

grounds save for the EEA ground. His decision to allow the appeal on EEA grounds was stated as being that “I allow the appeal in relation to regulation 8(5) of the Immigration (EEA) Regulations 2006”. That decision flowed from his finding at [46] of the determination that the couple had satisfied him that they were in an ongoing relationship and had given credible evidence of having begun a relationship in December 2013 and continued it through cohabitation.

2. The SSHD’s ground of appeal to the Upper Tribunal was confined to one point: that the judge had erred in allowing the appeal outright as there had been no exercise by the SSHD of the discretion afforded to her by regulation 17(4) of the 2006 Regulations and it was not open to the judge to exercise it for himself.

3. Miss Head sought to argue that the failure of the SSHD to exercise her discretion under regulation 17(4) did not matter in the claimant’s case because there had been no issue taken with the fact that the claimant’s partner had been in the UK exercising Treaty rights.

4. Despite Miss Head’s submissions, I am entirely satisfied that the judge materially erred in law and that his decision is to be set aside. The situation in the appeal before the judge was entirely straightforward: the SSHD in her decision letter had not given any consideration to regulation 17(4) because it was her position at that stage that the claimant had not shown he fell within the material scope of regulation 8, because he had not established that the couple were in a durable relationship. The Presenting Officer had made no concession regarding regulation 17(4). In that situation, it was simply not open to the judge to seek to exercise the discretion afforded to the SSHD by regulation 17. In the absence of any decision under regulation 17 there was no decision capable of being made as to whether the claimant was entitled to a residence card. The appeal was wholly governed by the head note in Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340.

5. In light of the above, the decision I re-make is to allow the appeal insofar as it remains outstanding before the Secretary of State for her to consider whether to issue a residence card under regulation 17(4) on the basis that “... in all the circumstances it appears [to her] appropriate ...”

6. For the above reasons:

The First-tier Tribunal erred in law and its decision is set aside.

The decision I re-make is to allow the appeal on EEA grounds insofar as it remains outstanding for the Secretary of State as to whether to issue a residence card under regulation 17(4) of the 2006 Regulations.

Signed
Judge of the Upper Tribunal

Date: 18 January 2016

