



**Upper Tribunal
Immigration and Asylum Chamber**

Appeal Number: IA/44530/2014

THE IMMIGRATION ACTS

**Heard at Field House
On: 26 February 2016**

**Decision & Reasons Promulgated
On: 8 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

BETWEEN

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**MR NASIR BASHEER
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer

For the Respondent: Mr A Jafar, counsel instructed by Lee Valley Solicitors

DETERMINATION AND REASONS

1. This is an appeal against the decision, promulgated on 2 September 2015 of FTTJ Birk (hereinafter referred to as the FTTJ). Permission to appeal was granted by FTTJ Frankish on 14 January 2016.

Background

2. On 6 August 2014, Mr Basheer, the respondent to this appeal sought an EEA Residence Card as confirmation of a right to reside in the United Kingdom as the extended family member of an EA national. Specifically,

he applied on the basis that his brother, Quaisar (a Pakistani national) is married to Salsbeet (a French national).

3. The respondent resided in the United Kingdom, since 2005, with either leave to enter or remain as a student/under Tier 4. That leave expired on 7 August 2014.
4. According to the marriage certificate enclosed with the EEA application, Qaisar married the said EEA national on 27 March 2009 in Pakistan.
5. The respondent's application was refused owing to the absence of a translation of the marriage certificate as well as what was described as insufficient evidence that he was dependent upon the EEA national either before entering the United Kingdom or since entering this country.
6. At the hearing before the FTTJ, the respondent's evidence was that his uncle supported him at the time he came to the United Kingdom in 2005 and that the EEA sponsor supported him currently. He said that he did not live with the EEA sponsor in the United Kingdom. The respondent also mentioned that he previously worked in Pakistan and was dependent upon others in Pakistan, including the EEA sponsor.
7. The oral evidence of the EEA was that the respondent's brother and sister supported him in Pakistan and that she was doing so currently.
8. The respondent's brother told the FTTJ that his wife (the EEA sponsor) had been supporting the respondent only during 2004 and after his visa ran out in August 2014.
9. The Secretary of State advised the FTTJ that reliance was no longer placed on the issue of translation of the marriage certificate.
10. The FTTJ considered that money transfer receipts dating from 2004 and 2005 from the EEA sponsor to the respondent amounted to reliable evidence that the appellant was dependent upon her before coming to the United Kingdom and she also accepted that he was currently dependent upon her. The FTTJ thus concluded; "*I find that the Appellant meets the Immigration rules under the EEA Regulations...*" and she proceeded to allow the appeal under the said Regulations.
11. The grounds of application raise one matter, that of the FTTJ's decision to allow the appeal outright rather than as not being in accordance with the law. Reference was made to the decision in Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340 (IAC) and it was stated that the Secretary of State had yet to exercise her discretion in this case under Regulation 17(4). Thus, as the respondent had been found to be an extended/other family member, it was argued that the FTTJ ought to have remitted the case to the Secretary of State for further consideration.
12. FTTJ Frankish granted permission, noting that Ihemedu had not been referred to in the decision and reasons.

13. Those representing the respondent did not lodge a Rule 24 response.

The hearing

14. At the hearing before me, Mr Avery argued that there were two aspects to this appeal, firstly an applicant needed to establish that he was an extended family member and secondly, there was the issue of whether he should be issued with a Residence Card.
15. Mr Avery submitted that the FTTJ found that the Regulation 8 requirements were satisfied and proceeded to allow the appeal without saying anything about Regulation 17. She was wrong to allow it under the Regulations when the Secretary of State had not exercised her discretion, applying Ihemedu.
16. Mr Jafar accepted that Mr Avery had "*hit the nail on the head*" but argued that the FTTJ did not step into the Secretary of State's shoes by stating that the respondent was entitled to a Residence Card. He argued that the FTTJ followed what was said in Ihemedu and gave no directions for the issue of a Residence Card.
17. In reply, Mr Avery submitted that the problem was that the FTTJ had allowed the appeal under the EEA Regulations. There was no other way of interpreting that and the case should have been sent back to the Secretary of State for the exercise of her discretion.

Decision on error of law

18. I found that the FTTJ erred, materially, in relation to her decision to allow the appeal under the EEA Regulations, which I will address below.
19. In Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340 (IAC) it was found that Regulation 17(4) made the issue of a residence card to an extended family member a matter of discretion. As in this case, where the Secretary of State has yet to exercise that discretion, a judge allowing the appeal can do no more than find that the decision was not in accordance with the law.
20. At [15] the FTTJ says that the Secretary of State's decision was not in accordance with the law. Yet elsewhere she also comments that the respondent "*is entitled to the issue of a Residence Card.*" She then proceeded to allow the appeal under the Regulations and in this she materially erred. I therefore allow the Secretary of State's appeal on this basis alone.
21. With the agreement of the parties, I remake the FTTJ's decision by substituting a decision to allow the appeal on the basis that the Secretary of State's decision was not in accordance with the law. The FTTJ's findings on dependency went unchallenged by the Secretary of State and therefore are not disturbed. Therefore it is now a matter for the Secretary of State to exercise her discretion as to whether or not to issue the respondent with a

residence card.

Conclusions

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

I set aside the decision to be re-made.

I substitute a decision allowing the appeal on the basis that the Secretary of State's decision was not in accordance with the law.

No application for anonymity was made and I saw no reason to make such a direction.

Signed:

Date: 28 February 2016

Deputy Upper Tribunal Judge Kamara