Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/06293/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 14th August 2014	**On 22nd August 2014**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

PROMISE CHIKEZIE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Okoro, Counsel instructed by Curling Moore Solicitors
For the Respondent: Mrs R Pettersen, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Manchester made following a hearing at North Shields on 25th April 2014.

Background

2. The Appellant is a citizen of Nigeria born on 3rd April 1977. On 8th October 2013 he applied for a residence card as confirmation of a right of residence in the UK but was refused by letter of 10th January 2014 on the grounds that the Secretary of State was not satisfied that the EEA national Sponsor was exercising treaty rights nor that he was in a durable relationship with her. The Secretary of State recorded that the Appellant arrived in the UK on 21st March 2010 with a student visit visa valid for two months, and on a previous visa application in 2009 he had given as his spouse the name of Nkechi Chikezie. The Secretary of State said that she had taken into account his personal circumstances and looked at the application on its own merits but considered that he had claimed to be in a durable relationship with the Sponsor solely to facilitate his remaining in the UK.

3. The judge found in the Appellant's favour both in respect of whether the Sponsor was exercising treaty rights and in relation to the durability of the relationship.

4. The judge wrote as follows:

> "Thirdly, there is the issue whether in any event the discretion to issue the residence card should be exercised in the Appellant's favour and in this respect I have been guided by the principles established in the decision of the Tribunal in the case of YB (EEA reg 17(4) – proper approach) Ivory Coast. In this respect, it is clear that the Respondent did not in the refusal letter consider the exercise of the discretion since it was decided that it had not been established that the application was an extended family member within the Regulations which is of course a condition precedent.
>
> I find that it is appropriate therefore in view of my findings to move on to consider the exercise of the discretion."

5. The judge recorded that the Appellant had been an overstayer after the expiry of his visit visa in 2010 and there were no difficulties to him travelling abroad to make an application for an EEA family permit. He said that he had not shown that discretion should be exercised in his favour and dismissed the appeal.

The Grounds of Application

6. The Appellant sought permission to appeal on the grounds that the judge had erred. He had found that the Appellant's partner was a qualified person and that he was in a durable relationship with her and she was therefore wrong to dismiss the appeal. The issue of overstaying was never raised and neither the Appellant nor his representatives were given any opportunity to address the Tribunal. There was no requirement under

Regulation 17(4) that the applicant must have valid leave to remain in the UK in order to qualify for the grant of a residence card.

7. Permission to appeal was granted by Judge Lever on 20th June 2014. Judge Lever said that it was not clear whether the judge had available to him the European Casework Instruction giving guidance to the Respondent on the exercise of discretion. Reference to overstaying is not placed as a major feature and finance does not feature. It was arguably an error of law for him to have exercised discretion in the first instance and to have done so without providing either side the opportunity to deal with the matter.

8. In the reply served on 3rd July 2014 the Respondent acknowledges that it may have been the correct or better course of action for the judge to remit the appeal back to the Secretary of State to consider Regulation 17(4) before considering it for himself.

The Hearing

9. Mrs Pettersen accepted that the judge had erred in law. Regulation 17(4) had not been considered in the reasons for refusal letter. Given the findings of the judge he ought to have allowed the appeal and remitted it back to the Secretary of State so that she could exercise her discretion and decide whether it was appropriate to issue a residence card in this case.

10. Mr Okoro sought to argue that the appeal should be allowed outright because, in reliance on the passages in the reasons for refusal letter, the Secretary of State had already exercised her discretion.

Conclusions

11. The judge erred in law. Having made findings on the two issues raised by the Respondent for refusing to issue a residence card he ought to have allowed the appeal, particularly when he dismissed it on grounds not raised by the Respondent and not addressed by either party to the appeal.

12. Although Mr Okoro sought strenuously to persuade me that the Secretary of State had already considered the exercise of her discretion under Regulation 17(4) it is plain that she has not. There is no reference to Regulation 17(4) in the reasons for refusal letter. The references to having taken into account the Appellant's personal circumstances are solely in the context of the Secretary of State's belief that he was not in a durable relationship.

13. Regulation 17(4) states as follows:

> "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 –

(a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under Regulation 15 and

(b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card."

14. In this case the Secretary of State has not made a decision as to whether it is appropriate to issue the residence card. That is a matter for her in the first instance.

Decision

15. The original judge erred in law and his decision is set aside. It is re-made as follows. The Appellant's appeal is allowed and remitted to the Secretary of State in order for her to make a decision under Regulation 17(4).

Signed Date

Upper Tribunal Judge Taylor